PART X

SURVIVORS' CLAIMS

G. SECTION 411(c)(5)

Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), was added to the Act by the Black Lung Benefits Reform Act of 1977, but was deleted by the Black Lung Benefits Amendments of 1981. Its provisions do not apply to claims filed on or after 180 days after January 1, 1982. 30 U.S.C. §921(c)(5). Section 411(c)(5) provides a rebuttable presumption of entitlement to benefits to eligible survivors of miners who were employed for twenty-five years or more in coal mines before June 30, 1971, and who died on or before March 1, 1978. It was designed to ease the burden of establishing entitlement caused by the unavailability of medical evidence to certain survivors. *See* S. Rep. No. 95-209, 95th Congress, 1st Sess. 18, *reprinted in* ***The Legislative History of the] Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977***, at 621 (Comm. Print 1979).

The discussion of this section of the Act and its implementing regulations is provided in the following titled sections:

1. THE PROVISIONS OF THE ACT AT SECTION 411(c)(5)

2. THE IMPLEMENTING REGULATIONS OF SECTION 411(c)(5) - SECTIONS 727.204 AND 718.306

3. LIABILITY FOR BENEFITS UNDER SECTION 411(c)(5)

1. THE PROVISIONS OF THE ACT AT SECTION 411(c)(5)

Under Section 411(c)(5), the eligible survivors of a miner are entitled to a rebuttable presumption of entitlement if two conditions are met. First, the miner must have completed a period of at least twenty-five years of qualifying[1] coal mine employment ending on or before June 30, 1971, *see* ***Fugate v. Falcon Coal Co.***, 12 BLR 1-59 (1988)(en banc recon.), the date on which federal dust standards went into effect. Second, the miner must have died on or before March 1, 1978, the effective date of the Reform Act.

The presumption may be established by a showing that the miner was partially or totally disabled due to pneumoconiosis prior to death. Rebuttal can be established by a showing that: 1) the miner did not suffer from pneumoconiosis, 2) the miner was not partially or totally disabled, *or* 3) if the miner was partially or totally disabled, the disability was not due to pneumoconiosis. ***Amax Coal Co. v. Burns***, 855 F.2d 499 (7th Cir. 1988); ***Begley v. Consolidation Coal Co.***, 826 F.2d 1512, 10 BLR 2-265 (6th Cir. 1986); ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988); ***Dipyatic v. Bethlehem Mines Corp.***, 7 BLR 1-758 (1985); ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981).

[1]No distinction is made between underground and surface mining for determining the length of the miner's employment. *See* ***Battaglia v. Peabody Coal Co.***, 3 BLR 1-729 (1981), *vacated and remanded on other gr'ds*, 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982).

2. THE IMPLEMENTING REGULATIONS OF SECTION 411(c)(5) - SECTIONS 727.204 AND 718.306

Sections 727.204 and 718.306 are the regulations implementing Section 411(c)(5) of the Act. 20 C.F.R. §§727.204, 718.306. Section 727.204 is applied to claims reviewed under Section 435 of the Act, 30 U.S.C. §945, and to claims filed prior to March 31, 1980. Section 718.306 is applied to claims filed on or after March 31, 1980. These regulations are substantively identical to Section 411(c)(5) and to each other.

Sections 727.204(b) and 718.306(b) define "partial disability" as a *reduced ability* to engage in the miner's "usual coal mine work" or "comparable and gainful work." *See* Part II.G., I. of the Desk Book for definitions of these terms.

Sections 727.204(c) and 718.306(c) provide only two express methods of rebuttal, *i.e*., that the miner did not experience a reduced ability to work at the time of death, or that the miner did not suffer from pneumoconiosis. In ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981), and ***Freeman v. Old Ben Coal Co.***, 3 BLR 1-599 (1981), *aff'd sub nom.* ***Freeman v. Director, OWCP***, 687 F.2d 214, 4 BLR 2-137 (7th Cir. 1982), the Board held that Section 411(c)(5) also provides for a third method of rebuttal, *i.e.*, that any disability that existed at the time of death was due to a cause other than pneumoconiosis.

Sections 727.204(d) and 718.306(d) provide limits on the type of evidence that can be used to establish rebuttal. None of the following items, *by itself*, is sufficient to establish rebuttal.

> 1. Evidence that a deceased miner was employed in a coal mine at the time of death;
>
> 2. Evidence pertaining to a deceased miner's level of earnings prior to death;
>
> 3. A chest x-ray interpreted as negative for the existence of pneumoconiosis;
>
> 4. A death certificate which makes no mention of pneumoconiosis.

20 C.F.R. §§727.204(d); 718.306(d). Although any one of these types of evidence is not sufficient to establish rebuttal, they do have "some probative value" and may be considered by the administrative law judge. ***Freeman***, 687 F.2d at 217. In addition, the

administrative law judge must consider all relevant evidence in determining rebuttal and is in no way limited to these types of evidence. *See* ***Duda v. North American Coal Co.***, 6 BLR 1-1203 (1984). The Sixth Circuit has held that although one of the types of evidence listed in Section 727.204(d), standing by itself, is not sufficient to rebut the presumption, "a conjunction of two or more of the four 204(d) types of evidence does tend to indicate the absence of reduced work ability and can suffice to defeat the presumption. Nevertheless, the administrative law judge remains free to weigh the conflicting evidence and discount the probative effect of the rebuttal evidence." ***The Earl Patton Coal Co. v. Patton***, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); *see also* ***Begley****, supra*; ***Short v. Westmoreland Coal Co.***, 10 BLR 1-127 (1987).

3. LIABILITY FOR BENEFITS UNDER SECTION 411(c)(5)

The Board has held that retroactive application of the Reform Act, which added the new Section 411(c)(5) presumption, to claims filed and heard before March 1, 1978, is not a violation of due process as long as the parties are given notice that the Reform Act is being considered, and are given an opportunity to comment on its effects and to submit new evidence. ***Trujillo v. Kaiser Steel Corp.***, 3 BLR 1-497 (1981). Further, the Board rejected the argument that Section 411(c)(5) liability applies only to the Secretary of Labor and is inapplicable to operators, noting that Section 422, 30 U.S.C. §932, appears to mandate specifically operator liability under Section 411(c)(5) by making various provisions of the Longshore Act applicable to operators "with respect to death or total disability due to pneumoconiosis arising out of coal mine employment in such mine, or with respect to entitlements established in paragraph (5) of Section 411(c)." ***Marinelli v. North American Coal Corp.***, 3 BLR 1-658 (1981); ***Trujillo****, supra*.

Employers have attempted to escape liability for Section 411(c)(5) benefits in cases where the deceased miner completed twenty-five years of coal mine employment prior to 1969. Citing ***Truitt v. North American Coal Co.***, 2 BLR 1-199 (1979), *appeal dismissed sub nom.* ***Director v. North American Coal Corp.***, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980), employers argued that these miners should be presumed disabled at the completion of twenty-five years and, therefore, those claims should be treated as one involving no post-1969 coal mine employment. Such treatment would absolve the employer from liability under Section 422(c) of the Act, 30 U.S.C. §932(c). The Board rejected the applicability of ***Truitt*** to the Section 411(c)(5) presumption, noting the distinction between the *rebuttable* nature of the 411(c)(5) presumption and the *irrebuttable* nature of the 411(c)(3) presumption, relied upon in ***Truitt***. ***Marinelli****, supra;* ***Trujillo****, supra*.

Thus, the fact that the twenty-five year requirement is satisfied prior to 1969 will not relieve an operator of liability unless the miner's last coal mine employment was prior to January 1, 1970. If there is at least one day of coal mine employment after December 31, 1969, it is employer's burden to establish that the miner's presumed partial or total disability did not arise at least in part out of that exposure.

The Board has also held that the June 30, 1971, cutoff date provided by Section 411(c)(5) has no relationship to determining the responsible operator. The purpose of that cutoff date is merely to limit those who qualify for the presumption to the survivors of miners who were exposed for at least twenty-five years to the severe dust conditions that existed prior to the imposition of dust standards on June 30, 1971. Thus, while Section 725.493, 20 C.F.R. §725.493, [*see* Part II.L. of the Desk Book] provides that the operator with whom the miner had the most recent periods of cumulative employment of not less than one year shall be the responsible operator, it is not necessary that the

miner complete at least one year of employment with the employer as of June 30, 1971, in order for the employer to be the responsible operator. ***Trujillo**, supra*.

CASE LISTINGS

[finding of Section 411(c)(5) invocation reversed where finding of twenty-five years of coal mine employment not supported by record] ***Elliott v. Bethlehem Mines Corp.***, 3 BLR 1-1 (1980).

[adjudicator properly found rebuttal not established based on testimony of mine foreman that at the time of death, miner was at least partially disabled] ***Gaudiano v. United States Steel Corp.***, 3 BLR 1-643 (1981).

[lay testimony highly probative on issue of reduced work activity, ***Sturms v. Badger Coal Co.***, 4 BLR 1-208 (1981), but cannot, by itself, establish existence of pneumoconiosis or cause of miner's disability; rebuttal established where evidence as whole, including negative x-rays and death certificate not stating pneumoconiosis, shows any disability from which miner suffered was due to lung cancer] ***McKinnon v. Amax Coal Co.***, 4 BLR 1-95 (1981).

[adjudicator's finding of no rebuttal affirmed where offer of no pneumoconiosis rejected by crediting of three physicians' diagnoses of anthracosis] ***Sturms v. Badger Coal Co.***, 4 BLR 1-208 (1981).

[introduction of evidence falling into three categories in Section 727.204(d) did not assure rebuttal of Section 411(c)(5) presumption as within adjudicator's discretion to credit lay, medical testimony presented by claimant to find no rebuttal; "bursting bubble" theory rejected as applied to Section 411(c)(5) presumption] ***Gaudiano v. United States Steel Corp.***, 4 BLR 1-313 (1981).

[adjudicator erred in applying "most arduous work" rather than "usual and customary work" standard to determine whether miner was totally or partially disabled at the time of death] ***Freeman v. Old Ben Coal Co.***, 3 BLR 1-599 (1981), *aff'd sub nom.* ***Freeman v. Director, OWCP***, 687 F.2d 214, 4 BLR 2-137 (7th Cir. 1982).

[as miner died after March 1, 1978, Section 411(c)(5) presumption unavailable] ***McGrevin v. Midway Coal Co.***, 4 BLR 1-428 (1982).

[establishing two criteria in Section 727.204(d) not automatic rebuttal of Section 411(c)(5) presumption; here miner was working at time of death and his earnings had not been reduced] ***U.S. Steel Corp. v. Oravetz***, 686 F.2d 197, 4 BLR 2-130 (3d Cir. 1982).

[claimant's burden to prove requisite twenty-five years of coal mine employment] ***Dobrosky v. Director, OWCP***, 4 BLR 1-680 (1982); ***Rennie v. United States Steel Corp.***, 1 BLR 1-859 (1978).

[Section 727.204(d) rebuttal categories insufficient individually but two or more may be sufficient for rebuttal] ***Bishop v. Director, OWCP***, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982); ***Battaglia v. Peabody Coal Co.***, 690 F.2d 106, 5 BLR 2-1 (7th Cir. 1982); ***Freeman v. Old Ben Coal Co.***, 687 F.2d 214, 4 BLR 2-137 (7th Cir. 1982).

[adjudicator erred finding two of four types of rebuttal evidence under Section 727.204(d) insufficient as matter of law] ***Bishop v. Peabody Coal Co.***, 3 BLR 1-788 (1981), *aff'd*, 690 F.2d 131, 5 BLR 2-13 (7th Cir. 1982).

[rebuttal found based on lay testimony that miner did not have disabling respiratory disease and uncontradicted medical evidence he suffered from and ultimately died of cancer rather than pneumoconiosis] ***Phelps v. Peabody Coal Co.***, 5 BLR 1-630 (1983).

[fact that miner suffered from thyroid cancer that was more serious of his illnesses did not prove miner was not partially disabled by pneumoconiosis where no medical evidence supported conclusion of such non-disability; employer's contention that Section 411(c)(5) may only be applied where there is no medical evidence of record rejected] ***Pruitt v. Jewell Ridge Coal Co.***, 5 BLR 1-793 (1983).

[Section 411(c)(5) award reversed as only rational conclusion to be drawn from record as whole was that miner did not have pneumoconiosis, including death certificate prepared by treating physician, negative x-rays, hospital records of "clear" lungs, and physician's review of evidence that questioned death certificate diagnosis of pneumoconiosis] ***Williams v. Black Diamond Coal Mining Corp.***, 6 BLR 1-188 (1983).

[award of benefits finding rebuttal as matter of law reversed based on treating physician's failure to note pneumoconiosis, consulting physician's uncontradicted opinion of no pneumoconiosis and overwhelmingly negative x-ray results. ***Lawrence v. Alabama By-Products Corp.***, 6 BLR 1-917 (1984).

[twenty-five years actual coal mine employment prior to June 30, 1971 necessary to invoke Section 411(c)(5) presumption] ***Hardman v. Director, OWCP***, 6 BLR 1-993 (1984).

[adjudicator crediting of prosector's report over conflicting report based on medical records, autopsy where physician did not review autopsy slides affirmed to find no rebuttal established] ***Cantrell v. United States Steel Corp.***, 6 BLR 1-1003 (1984).

[adjudicator's determination that employer failed to establish rebuttal under Section 411(c)(5) affirmed as fact that miner's *death* not due to pneumoconiosis not recognized as means of rebuttal] ***Wood v. United States Steel Corp.***, 6 BLR 1-1117 (1984).

[adjudicator properly found rebuttal of Section 411(c)(5) presumption under Section 727.204(d) as miner was employed at time of death *and* evidence of excellent attendance by miner] 20 C.F.R. §727.205(a); ***Duda v. North American Coal Co.***, 6 BLR 1-1203 (1984).

[adjudicator failed to discuss report of [non-examining] physician concluding miner may have suffered from pneumoconiosis but was not partially or totally disabled prior to death; error to characterize Section 411(c)(5) presumption as "grant of benefits"] ***Harkey v. Alabama By-Products Corp.***, 7 BLR 1-26 (1984).

[adjudicator's finding that medical opinion that "there is no objective evidence to indicate [the miner]...had any significant pulmonary or respiratory impairment or disability" insufficient as mere restatement of scant medical evidence in record to rebut Section 411(c)(5) presumption affirmed] ***Marra v. Consolidation Coal Co.***, 7 BLR 1-216 (1984).

[Section 411(c)(5) inapplicable to claim filed by miner prior to his death] ***LeFebure v. Barnes & Tucker Co.***, 7 BLR 1-224 (1984).

[adjudicator's finding Section 411(c)(5) presumption not established affirmed because three of twenty-five years and one month of coal mine employment spent in military service] ***Kosack v. Director, OWCP***, 7 BLR 1-248 (1984).

[adjudicator erred relying on lay testimony of miner's shortness of breath and "slowing down" to find presumption not rebutted in light of overwhelming medical evidence miner had heart disease; sole medical opinion on causation: miner's disability not due to pneumoconiosis and, on that basis, Board held rebuttal established as a matter of law] ***Coval v. Pike Coal Co.***, 7 BLR 1-272 (1984).

[widow's testimony of miner's undocumented employment may establish requisite years of coal mine employment at Section 411(c)(5)] ***Coval v. Pike Coal Co.***, 7 BLR 1-272 (1984); ***LeFebure v. Barnes & Tucker Co.***, 7 BLR 1-224 (1984).

[rebuttal established as a matter of law based on uncontradicted medical evidence that miner did not have pneumoconiosis] ***Berti v. Peabody Coal Co.***, 7 BLR 1-416 (1984).

[Section 411(c)(5) not applicable to miners who died after March 1, 1978] ***Stetz v. Fauzio Brothers Co.***, 7 BLR 1-451 (1984); ***Hill v. Drummond Coal Co.***, 6 BLR 1-1143 (1984).

[adjudicator properly refused to invoke Section 411(c)(5) presumption where claimant's testimony properly discredited and less than twenty-five years of coal mine employment prior to June 30, 1971 established] ***Schmidt v. Amax Coal Co.***, 7 BLR 1-489 (1984).
[Sixth Circuit affirmed award under Section 411(c)(5), holding that miner at least partially disabled due to pneumoconiosis and that employer responsible for payment since it failed to prove miner's pneumoconiosis did not arise, at least in part, out of coal mine employment] ***North American Coal Co. v. Campbell***, 748 F.2d 1124, 7 BLR 2-89 (6th Cir. 1984), *aff'g* 6 BLR 1-244 (1983).

[Sixth Circuit reversed award of benefits, holding that Section 411(c)(5) presumption rebutted because decedent's medical records and death certificate, not mentioning pneumoconiosis, constituted substantial evidence miner did not have pneumoconiosis] ***Director, OWCP v. Congleton***, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984).

[Seventh Circuit held that Act directs grant of benefits under Section 411(c)(5) where no affirmative proof in record to establish miner was not disabled due to pneumoconiosis] ***Old Ben Coal Co. v. Director, OWCP***, [***Prewitt***], 755 F.2d 588, 7 BLR 2-139 (7th Cir. 1985)(Cummings, CJ., concurring).

[adjudicator properly found rebuttal based on evidence of no pneumoconiosis by assigning greater weight to autopsy prosector over opinions based only on review of prosector's findings] ***Fetterman v. Director, OWCP***, 7 BLR 1-688 (1985).

[adjudicator properly found miner able to perform usual customary work as dispatcher by crediting testimony of miner's foreman and industrial relations coordinator over claimant's and opinions of two physicians reviewing extensive medical records over autopsy prosector] ***Dipyatic v. Bethlehem Mines Corp.***, 7 BLR 1-758 (1985).

[adjudicator properly found miner not partially or totally disabled by pneumoconiosis at time of death based on physician's review of autopsy slides; he need not credit autopsy prosector's opinion] ***Cadwallader v. Director, OWCP***, 7 BLR 1-879 (1985).

[adjudicator properly found rebuttal based on supervisor's testimony that miner performed work satisfactorily, rarely missed work, and worked overtime] ***Feathers v. Consolidation Coal Co.***, 8 BLR 1-25 (1985).

[Seventh Circuit held under Section 411(c)(5) that burden of proof shifts to employer on rebuttal; distinguished ***Freeman***, holding that presence of more than one type Section 727.204(d) evidence did not establish rebuttal *as matter of law*] ***Amax Coal Co. v. Director, OWCP***[***Chavis***], 772 F.2d 304, 8 BLR 2-46 (7th Cir. 1985).

[Seventh Circuit affirms adjudicator's finding of rebuttal; physicians agreed miner's severe breathing difficulties due to complications arising out of cancer] ***Hardisty v. Director, OWCP***, 7 BLR 1-322 (1984); *aff'd*, 776 F.2d 129, 8 BLR 2-72 (7th Cir. 1985).

[finding of no respiratory or pulmonary disability pursuant to 20 C.F.R. §727.203(b)(2) precludes entitlement under Section 411(c)(5)] ***Rugh v. Kaiser Steel Corp.***, 8 BLR 1-403 (1985).

[Fourth Circuit held that adjudicator reasonably concluded that foreman's testimony that miner worked regularly until his death and often worked overtime, exhibiting no difficulty breathing, coupled with marginally probative medical evidence, sufficient to rebut Section 411(c)(5) presumption, establishing that miner's work ability not reduced] ***Vogel v. Consolidation Coal Co.***, No. 85-1718 (4th Cir. Feb. 27, 1986)(unpub.).

[in reversing adjudicator's finding employer had failed to rebut Section 411(c)(5) presumption under Section 727.204, Board relied on fact that miner had worked full shift prior to suffering myocardial infarction on date of death, miner's surface foreman position essentially "non exertional", miner had worked regular work weeks and some overtime in this position, miner had not missed much work and had fully performed his duties as foreman supported rebuttal as the absence of partial disability] ***Bizzarri v. Consolidation Coal Co.***, 7 BLR 1-343 (1984), *rev'd on other gr'ds*, 775 F.2d 751, 8 BLR 2-65 (6th Cir. 1985).

DIGESTS

Evidence that claimant was employed *by* employer is not the same as being employed *in* a coal mine for purposes of Section 727.204(d)(1). ***Degenhardt v. Arch Mineral Corp.***, 6 BLR 1-612 (1983), *aff'd sub nom.* ***Arch Mineral Corp. v. Director, OWCP***, 798 F.2d 215, 9 BLR 2-99 (7th Cir. 1986).

The concurrence of two sufficient disabling medical causes, one within the ambit of the Act, and the other not, will in no way prevent a miner's survivor from claiming benefits under the Act. ***Arch Mineral Corp. v. Director, OWCP***, [***Degenhardt***], 798 F.2d 215, 222, 9 BLR 2-99, 2-108 (7th Cir. 1986).

The Seventh Circuit held that it was reasonable for the administrative law judge to find that the miner's working up until the day of hospitalization (for bladder cancer) and the absence of a reference to pneumoconiosis from the death certificate did not rebut the presumption of Section 411(c)(5). ***Arch Mineral Corp. v. Director, OWCP***, [***Degenhardt***], 798 F.2d 215, 222, 9 BLR 2-99, 2-108 (7th Cir. 1986).

The Seventh Circuit held that the medical opinion of a physician who "suspected" that the miner smoked and opined that the pulmonary disability "could" have been caused by smoking--in light of little evidence to confirm doctor's suspicions--did not reflect a reasoned medical judgment to rebut Section 411(c)(5) presumption. ***Arch Mineral***

Corp. v. Director, OWCP, [***Degenhardt***], 798 F.2d 215, 222, 9 BLR 2-99, 2-108 (7th Cir. 1986).
Under Section 411(c)(5), proof of the requisite period of employment and the requisite date of death alone support the presumption that the miner suffered from pneumoconiosis. The burden of persuasion then shifts to employer. ***Arch Mineral Corp. v. Director, OWCP***, [***Degenhardt***], 798 F.2d 215, 222, 9 BLR 2-99, 2-108 (7th Cir. 1986).

Court held that it was reasonable for administrative law judge to find that the miner's working up to the day of hospitalization (for bladder cancer) and the absence of pneumoconiosis from the death certificate did not rebut the presumption of Section 411(c)(5). *See* 20 C.F.R. §727.204(d); ***Arch Mineral Corp. v. Director, OWCP***, [***Degenhardt***], 798 F.2d 215, 222, 9 BLR 2-99, 2-108 (7th Cir. 1986).

While Section 727.204(d) lists four types of evidence which, if taken individually, are insufficient to establish rebuttal of the presumption under Section 727.204(a), more than one of the listed types of evidence may constitute, within the discretion of the fact finder, sufficient rebuttal evidence. ***Short v. Westmoreland Coal Co.***, 10 BLR 1-127 (1987).

The survivor's *prima facie* case of entitlement to benefits under Section 411(c)(5) need not include proof that the miner suffered from pneumoconiosis. ***The Earl Patton Coal Co. v. Patton***, 848 F.2d 668, 11 BLR 2-97 (6th Cir. 1988); ***Arch Mineral Corp. v. Director, OWCP***, [***Degenhardt***], 798 F.2d 215, 9 BLR 2-99 (7th Cir. 1986).

The Seventh Circuit affirmed the administrative law judge's finding that rebuttal of the Section 411(c)(5) presumption was not established as that finding was supported by substantial evidence. ***Smith v. Director, OWCP***, 843 F.2d 1053, 11 BLR 2-125 (7th Cir. 1988).

The decision as to what weight to assign evidence is within the province of the administrative law judge, and, in determining whether rebuttal under Section 411(c)(5) has been established, he may draw inferences from medical evidence that does not mention pneumoconiosis or impairment concerning the absence of such conditions. ***Gober v. Reading Anthracite Co.***, 12 BLR 1-67 (1988).

The Seventh Circuit held that, given the extensive and detailed medical reports of the miner's physical condition, none of which mentions any lung disease, the administrative law judge's inference that none existed was both medically proper and reasonable. The court rejected claimant's contention that the Section 411(c)(5) presumption can never be rebutted absent a specific statement by a physician ruling out pneumoconiosis. The court held that the administrative law judge's inference did not shift the burden of persuasion to the deceased miner's survivors; it merely allowed employer to rebut the presumption with a record suggesting that were lung disease present, it would have been detected and reported. ***Amax Coal Co. v. Burns***, 855 F.2d 499 (7th Cir. 1988).

In calculating the twenty-five years of coal mine employment required by Section 411(c)(5), the administrative law judge may include employment performed on June 30, 1971. ***Fugate v. Falcon Coal Co.***, 12 BLR 1-59 (1988)(en banc recon.).

The Eighth Circuit held that the fact that none of the physicians' reports in the record mentioned coal workers' pneumoconiosis was clearly evidence the administrative law judge should have considered in determining whether the presumption was rebutted. ***Consolidation Coal Co. v. McGrath***, 866 F.2d 1004, 12 BLR 2-152 (8th Cir. 1989)[Court noted that all of the physicians who submitted reports either specifically found no objective evidence of coal workers' pneumoconiosis or indicated that the miner's problems were not related to his coal mine employment].

Where employer was confronted with the difficult burden of establishing rebuttal under Section 411(c)(5) of the Act, and in light of the fact that employer did not challenge that the miner's work with asbestos insulation pipe coverings was covered coal mine employment, the Board affirmed the administrative law judge's determination that the miner's lung cancer, if caused by his asbestos exposure during coal mine employment, in this case, constituted pneumoconiosis under the Act. ***Pershina v. Consolidation Coal Co.***, 14 BLR 1-55 (1990)(en banc).

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