

PART X
SURVIVORS' CLAIMS

D. SECTION 411(c)(2)

Section 411(c)(2) of the Act provides that if a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis. 30 U.S.C. §921(c)(2). Section 411(c)(2) was deleted by the Black Lung Benefits Amendments of 1981, and the presumption is not applicable to survivors' claims filed on or after January 1, 1982. 30 U.S.C. §921(c)(2); 20 C.F.R. §718.303(c). Section 411(c)(2) is implemented by Sections 410.462 and 718.303 of the regulations, 20 C.F.R. §§410.462, 718.303.

Section 410.462(b) provides that death will be found due to a respirable disease when death is medically ascribed to a chronic dust disease, or to another chronic disease of the lung. 20 C.F.R. §410.462(b). The burden is on claimant to establish the chronic nature of the miner's disease in order to establish invocation of the presumption. **Tackett v. Benefits Review Board**, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986); **Hunter v. Director, OWCP**, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986), *aff'g* 8 BLR 1-120 (1985).

Under Section 410.462(b), in cases where there is no single, dispositive, medically ascribed cause of death, the Section 411(c)(2) statutory presumption may be invoked if the evidence establishes that 1) the deceased miner suffered from pneumoconiosis or a respirable disease, 2) death may have been due to multiple causes and 3) that it is not medically feasible to distinguish which disease caused death or specifically how much each disease contributed to the cause of death. 20 C.F.R. §410.462(b). The burden is on claimant to establish these three elements. **Smakula v. Weinberger**, 572 F.2d 127 (3d Cir. 1978); **Wallace v. Mathews**, 554 F.2d 299 (6th Cir. 1977); **Seacrist v. Weinberger**, 538 F.2d 1054 (4th Cir. 1976); **Bosser v. United States Steel Corp.**, 7 BLR 1-478 (1984); **Copley v. Olga Coal Co.**, 6 BLR 1-181 (1983); **Zavora v. United States Steel Corp.**, 2 BLR 1-1202 (1980); **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103 (1979). Under **Tackett**, *supra*, and the Fourth Circuit's decision in **Hunter**, *supra*, the burden is on claimant to also establish 4) that the miner's disease suggests a reasonable possibility of death due to pneumoconiosis, rather than placing a burden on the party opposing entitlement to rebut the presumption by establishing that there is no reasonable possibility that death was due to pneumoconiosis.

The Board has held that the presumption under Section 410.462(b) may be rebutted by establishing that there is no reasonable possibility that death was due to pneumoconiosis, that the miner did not have pneumoconiosis or that the miner's death was not causally related to coal mine employment. **Hunter v. Director, OWCP**, 8 BLR 1-120 (1985); **Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143 (1981). As stated above, however, under **Tackett**, *supra*, and the Fourth Circuit's decision in **Hunter**, *supra*, the party opposing entitlement in these jurisdictions does not have the burden to rebut the presumption by establishing that there is no reasonable possibility that death was due to pneumoconiosis as the affirmative burden to establish that the miner's disease suggested a reasonable possibility of death due to pneumoconiosis is on claimant.

Section 718.303 provides that death shall be found to be due to a respirable disease in any case where the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death. 20 C.F.R. §718.303(a)(1). The presumption may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death. 20 C.F.R. §718.303(b). **Beard v. Director, OWCP**, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table); **Bury v. Director, OWCP**, 9 BLR 1-79 (1986).

The Board has held that the cases of **Tackett v. Benefits Review Board**, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986) and **Hunter v. Director, OWCP**, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986) construe the Section 411(c)(2) presumption as implemented under 20 C.F.R. Part 410, Subpart D by Section 410.462, and do not control a case adjudicated under Section 718.303, the implementing regulation of Section 411(c)(2) of the Act under 20 C.F.R. Part 718. **Beard**, *supra*. Claimant must demonstrate under Section 718.303(a) that the deceased miner engaged in ten or more years of coal mine employment and died from a respirable disease but does not have to establish a reasonable possibility that death was due to pneumoconiosis as required by **Hunter** and **Tackett**. Construction of Section 410.462 is inapplicable to claims filed under 20 C.F.R. Part 718. **Beard**, *supra*.

[Case Listings and Digests are presented in four categories below.

These categories are:

- 1. GENERAL**
- 2. MULTIPLE CAUSES OF DEATH**
- 3. PNEUMOCONIOSIS OR A RESPIRABLE DISEASE**
- 4. MEDICAL INFEASIBILITY OF DISTINGUISHING WHICH DISEASE CAUSED DEATH**
- 5. REBUTTAL OF SECTION 411(c)(2)**

[Each category lists digests in chronological order]

1. GENERAL

CASE LISTINGS

DIGESTS

The Board held that, although lay evidence is to be considered under Section 718.303(a), the administrative law judge's failure to do so in this case is harmless in view of the administrative law judge's affirmable determination that the weight of the medical evidence does not support a finding that the miner's death was due to a respirable disease. **Beard v. Director, OWCP**, 10 BLR 1-82 (1987), *aff'd*, 856 F.2d 192 (6th Cir. 1988)(table).

Where death certificate listed "probably myocardial infarction" as cause of death and the autopsy physician found anthracosis, fibrosis, central lobular emphysema, and moderate hypertrophy of the pulmonary arteries and the record also reflected that the miner had been treated for respiratory problems for several months before his death, the Court held that the Section 411(c)(2) presumption was properly invoked under 20 C.F.R. §718.303(a)(1) and that the death certificate was insufficient to rebut the presumption. **McClendon v. Drummond Coal Co.**, 861 F.2d 1512, 12 BLR 2-108 (11th Cir. 1988).

The Third Circuit recognized that the difference in language between Sections 410.462 and 718.303 is a strong indication that in a case governed by Section 718.303, the claimant need not show that the disease reported suggests a reasonable possibility of death due to pneumoconiosis. **Marx v. Director, OWCP**, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989).

The Board held that the administrative law judge could properly rely on the miner's death certificate to raise the presumption provided in Section 718.303, and that the administrative law judge properly found that there was no evidence to establish rebuttal under Section 718.303(b) by demonstrating that the miner did not have pneumoconiosis or that pneumoconiosis did not cause nor contribute to the miner's death. **Smith v. Camco Mining Inc.**, 13 BLR 1-17 (1989).

2. MULTIPLE CAUSES OF DEATH

CASE LISTINGS

[Sixth Circuit determined death certificate completed by mortician not sufficient evidence of cause of death at Section 410.462] **Farmer v. Weinberger**, 519 F.2d 627 (6th Cir. 1975).

[Sixth Circuit held where physician who completed death certificate had no personal knowledge of miner, no autopsy performed, and contradictory evidence exists, death certificate not substantial evidence that pneumoconiosis did not contribute to miner's death] **Craig v. Weinberger**, 522 F.2d 394 (6th Cir. 1975).

[Sixth Circuit held death certificate filled out by family physician is substantial evidence of cause of death; if substantial evidence supports finding no respirable disease, Section 410.462(b) does not apply] **Adkins v. Weinberger**, 536 F.2d 113 (6th Cir. 1976).

[death certificate by treating physician listing cause of death as coronary occlusion due to arteriosclerotic heart disease merely establishes one cause of death, not precluding other causes where evidence supports Section 410.462(a) finding of respirable disease] **Wallace v. Mathews**, 554 F.2d 299 (6th Cir. 1977).

[death certificate insufficient to establish cause of death where undermined by medical and lay testimony] **Smakula v. Weinberger**, 572 F.2d 127 (3d Cir. 1978).

[adjudicator properly found death due to multiple causes at Section 410.462 based on death certificate stating death by ventricular fibrillation, emphysema, pneumoconiosis, and miner's physician's testimony that he suffered from chronic bronchitis and asthma] **Burner v. Genovese Mining Co.**, 1 BLR 1-360 (1978).

[reliable death certificate or autopsy report listing multiple causes of death including respirable disease may constitute substantial evidence to establish death due to multiple causes under Section 410.462(b)] **McLaughlin v. Jones and Laughlin Steel Corp.**, 2 BLR 1-103 (1979).

[adjudicator erred at Section 410.462(b) finding death not due to multiple causes but failed to discuss relevant autopsy and death certificate] **Kinnick v. National Mines Corp.**, 2 BLR 1-221 (1979).

[pneumoconiosis need only be connected with miner's *death* to constitute contributing cause; need not contribute to immediate cause of death (coronary occlusion in the

instant case)] **Brookover v. Consolidation Coal Co.**, 2 BLR 1-373 (1979).

[death certificate evidence of cause of death may be rebutted under Section 410.462 by showing certificate itself invalid (e.g., physician not familiar with miner) or by other evidence of cause of death rebutting medically ascribed cause of death] **Pauline v. Weinberger**, 391 F.Supp. 267 (N.D. Ohio 1975); **Cantrell v. Kentland Elkhorn Coal Corp.**, 2 BLR 1-427 (1979).

[death due to multiple causes established at Section 410.462 by autopsy report showing respiratory diseases at time of death and physician's report attributing death to arteriosclerotic heart disease complicated by pneumoconiosis] **Cantrell v. Kentland Elkhorn Coal Corp.**, 2 BLR 1-427 (1979).

[adjudicator failed to resolve inconsistencies in medical and expert testimony, discuss evidence credited and reliability of death certificate and autopsy and make specific findings under three elements of Section 410.462(b)] **Williams v. South East Coal Co.**, 2 BLR 1-652 (1979).

[pneumoconiosis need not be "primary cause" of death to invoke Section 410.462(a) presumption] **Zavora v. United States Steel Corp.**, 2 BLR 1-1202 (1980).

[adjudicator erroneously found multiple causes of death at Section 410.462 where sole cause of death was gunshot wound] **Clites v. Jones & Laughlin Steel Corp.**, 2 BLR 1-1019 (1980), *rev'd on other grounds*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

[death certificate unreliable to establish multiple causes of death at Section 410.462(b) where no autopsy performed and doctor had no personal knowledge of deceased miner] **Craig v. Weinberger**, 522 F.2d 394 (6th Cir. 1975); **Copley v. Olga Coal Co.**, 6 BLR 1-181 (1983).

[physician's opinion must specifically attribute death to lung disease to establish invocation of Section 410.462] **Krantwashl v. Kaiser Steel Corp.**, 7 BLR 1-263, 1-265 n.2 (1984).

[adjudicator's failure to weigh evidence under Section 410.462(b) harmless error where does not support finding miner's death due to multiple causes] **Conners v. Director, OWCP**, 7 BLR 1-482 (1984).

[Sixth Circuit held adjudicator properly awarded under Sections 411(c)(2), 410.462(b) because opinion of treating physician that miner's death resulted in part from pneumoconiosis constituted substantial evidence, notwithstanding other medical evidence supporting rebuttal] **Bizzarri v. Consolidation Coal Co.**, 775 F.2d 751, 8 BLR 2-65 (6th Cir. 1985), *rev'g* 7 BLR 1-343 (1984).

DIGESTS

3. PNEUMOCONIOSIS OR A RESPIRABLE DISEASE

CASE LISTINGS

[in SSA black lung case, Court held no evidence of respiratory disease where lung cancer cause of death, no autopsy performed and x-rays negative for pneumoconiosis, Section 410.462(b) presumption unavailable] **Hash v. Califano**, 451 F. Supp. 383 (S.D. Ill. 1978).

[adjudicator properly found miner had pneumoconiosis at time of death, death caused by pneumoconiosis under Section 410.462 based on testimony of miner's physician and wife] **Burner v. Genovese Mining Co.**, 1 BLR 1-360 (1978).

[adjudicator's finding under Section 410.462 irrational that miner's cancer and death were pneumoconiosis-induced finding that both diseases originated in lung with no supporting medical evidence] **Fondren v. Alabama By-Products Corp.**, 2 BLR 1-7 (1979).

[adjudicator's finding under Section 410.462 that miner suffered from pneumoconiosis based on three positive x-rays and autopsy report diagnosing pneumoconiosis rational even though he did not discuss rereading of one x-ray] **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103 (1979).

[adjudicator's finding under Section 410.462 that miner suffered from pneumoconiosis affirmed as based on reliable autopsy] **Kinnick v. National Mines Corp.**, 2 BLR 1-221 (1979).

[where existence of pneumoconiosis established, finding that miner suffered from respirable disease under Section 410.462 need not be made] **Cantrell v. Kentland Elkhorn Coal Co.**, 2 BLR 1-427 (1979); see **Williams v. South-East Coal Co.**, 2 BLR 1-652 (1979).

[terms "respirable" and "respiratory," while not synonymous in common usage, are for purposes of Act's implementing regulations] **Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143 (1981).

[in departure from former case law, Board held Section 411(c)(2) may be invoked under Section 410.462(a) upon showing of death caused by lung cancer because cancer is "chronic" condition] ****[This case has been overruled to the extent that it held that lung cancer is always chronic, Hunter v. Director, OWCP, 8 BLR 1-120 (1985), but offers an informative summary of cases involving lung cancer as a respirable disease under Section 411(c)(2)]** Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143 (1981).

[where only medical evidence of record establishes miner's death not due to respirable disease but carcinoma of pancreas, adjudicator properly found no entitlement under Section 410.462] **Serafin v. Director, OWCP**, 3 BLR 1-380 (1981).

[bronchopneumonia or diagnosis of death due to pneumoconiosis based solely on history not sufficient to invoke Section 410.462 presumption. **Martin v. Director, OWCP**, 6 BLR 1-535 (1983).

[adjudicator properly found miner suffered from pneumoconiosis or respirable disease based on two physicians' opinions and death certificate listing pneumoconiosis as contributing cause of death] **Bosser v. United States Steel Corp.**, 7 BLR 1-478 (1984).

[chronic nature of lung cancer is factual determination under Section 410.462 to be made by adjudicator on case-by-case basis; burden is on claimant to establish chronic nature of miner's lung cancer, *i.e.*, that cancer is "chronic disease of the lung", before invocation of Section 411(c)(2) presumption; **overrules Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143, to the extent that it held lung cancer is always chronic] **Hunter v. Director, OWCP**, 8 BLR 1-120 (1985), *aff'd*, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986).

DIGESTS

The Fourth Circuit has held that the Board's requirement that claimants show the chronic nature of lung cancer on a case-by-case basis under 20 C.F.R. §410.462(b) is not unreasonable. Further, the Fourth Circuit stated that **Rose v. Clinchfield Coal Co.**, 614 F.2d 936 (4th Cir. 1980) does not stand for the proposition that "lung cancer" is "chronic" as a matter of law. Furthermore, to be entitled to the Section 411(c)(2) presumption pursuant to Section 410.462, claimant must establish that the disease that caused the miner's death was a chronic dust disease or a chronic disease of the lung *and* that the disease suggested a reasonable possibility of death. **Hunter v. Director, OWCP**, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986), *aff'g*, 8 BLR 1-120 (1985).

4. MEDICAL INFEASIBILITY OF DISTINGUISHING WHICH DISEASE CAUSED DEATH

CASE LISTINGS

[Section 410.462(b) requires not medically feasible to ascribe death to one specific cause or to ascertain specific contribution of each of several conditions; pneumoconiosis need not be shown to be "significant contributing factor to death"] **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103 (1979).

[adjudicator properly credited autopsy prosector's opinion under Section 410.462 that "[pneumoconiosis] was a contributing factor [to death], to what degree I can't say," over opinion of physician who merely reviewed slides and autopsy protocol] **McLaughlin v. Jones & Laughlin Steel Corp.**, 2 BLR 1-103 (1979); see **Kinnick v. National Mines Corp.**, 2 BLR 1-221 (1979).

[failure of any physician of record to establish firmly a sole cause of death, even with aid of an extensive autopsy, may be substantial evidence to establish medical infeasibility to distinguish diseases causing death under Section 410.462] **Blankenship v. Pikeville Coal Co.**, 2 BLR 1-329 (1979).

[physician's statement that "pneumoconiosis...was a major factor contributing to [the miner's] death" and that miner's "primary cause" of death was "advanced arteriosclerotic heart disease" allows inference that not medically feasible to isolate single disease as sole cause of death under Section 410.462] **Brookover v. Consolidation Coal Co.**, 2 BLR 1-373 (1979).

[clearly medically feasible to distinguish cause of death under Section 410.462 where death certificate, autopsy protocol and consulting physician's report all attributed death to coronary insufficiency and myocardial infarction] **McGhee v. Westmoreland Coal Co.**, 2 BLR 1-607 (1979).

[physician's failure to establish firmly sole cause of death may be substantial evidence to establish infeasibility of distinguishing cause of death under Section 410.462] **Bosser v. United States Steel Corp.**, 7 BLR 1-478 (1984).

DIGESTS

5. REBUTTAL OF SECTION 411(c)(2)

CASE LISTINGS

[treating physician's opinion that pneumoconiosis had nothing to do with miner's cancer or death supported rebuttal under Section 410.462 by death certificate indicating that miner died of lung cancer and, while pneumoconiosis contributing condition, did not cause death] **Lawson v. Island Creek Coal Co.**, 1 BLR 1-80 (1977).

[Section 410.462 presumption rebutted where miner underwent surgery for colon cancer, x-ray read negative for pneumoconiosis, pulmonary function studies normal, autopsy showed carcinoma and emphysematous changes in lungs consistent with but not diagnosed pneumoconiosis] **Kerr v. Freeman Coal Mining Corp.**, 1 BLR 1-754 (1978).

[Section 410.462(b) rebuttal established as medical evidence eliminated any reasonable possibility that miner's death due to pneumoconiosis; lung cancer was primary cause of death] **Drake v. Peabody Coal Co.**, 2 BLR 1-378 (1979).

[although decedent miner had simple pneumoconiosis and pulmonary emphysema at time of death, no indication cause of death was respirable disease; cause of death, coronary insufficiency and myocardial infarction, does not "suggest a reasonable possibility that death was due to pneumoconiosis under Section 410.462"] **McGhee v. Westmoreland Coal Co.**, 2 BLR 1-607 (1979).

[overwhelming medical evidence that miner suffered from and died of heart disease forecloses any reasonable possibility that death was due to pneumoconiosis under Section 410.462] **Carrel v. Central Ohio Coal Co.**, 2 BLR 1-662 (1979).

[once Section 411(c)(2) presumption invoked under Section 410.462(a), evidentiary burden shifts to employer to show that there is no reasonable possibility death was due to pneumoconiosis, or that miner did not suffer from pneumoconiosis] **Pyle v. Allegheny River Mining Co.**, 2 BLR 1-1143 (1981)[**overruled** to the extent that it held that lung cancer is always chronic: **Hunter v. Director, OWCP**, 8 BLR 1-120 (1985), *aff'd*, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986)].

[award of benefits under Section 410.462 reversed where miner died of gunshot wound; although miner suffered from pneumoconiosis at death, medical report showed it did not contribute in any way to death] **Clites v. Jones & Laughlin Steel Corp.**, 2 BLR 1-1019 (1980), *rev'd on other grds*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981).

[adjudicator's finding that prosecutor's autopsy report and reports of two reviewing

physicians overwhelmingly indicated respirable disease played no part in miner's death affirmed] **Gusmerotti v. Island Creek Coal Co.**, 7 BLR 1-391 (1984).

[adjudicator properly found Section 727.203(b)(3) rebuttal based on doctor's opinion that miner died of heart condition and that "minimal degree" of pneumoconiosis did not cause or influence death; failure to weigh evidence under Section 410.462(b) harmless error] **Connors v. Director, OWCP**, 7 BLR 1-482 (1984).

DIGESTS

A medical opinion that reports "no evidence to suggest disability due to a respiratory impairment or that a chronic respiratory impairment such as pneumoconiosis either caused or was a contributing factor to the miner's death" is substantial evidence to rebut the Section 718.303(a) presumption of death due to pneumoconiosis pursuant to Section 718.303(b). **Bury v. Director, OWCP**, 9 BLR 1-79 (1986).

The Fourth Circuit held that rebuttal under Section 410.462(b) requires the party opposing entitlement to establish either that miner did not have pneumoconiosis *or* that the lung disease did not arise out of coal mine employment. It is insufficient to show that the miner's fatal disease did not suggest a reasonable possibility of death due to pneumoconiosis. **Hunter v. Director, OWCP**, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986), *aff'g*, 8 BLR 1-120 (1985).

The Sixth Circuit affirmed the administrative law judge's finding that rebuttal of the Section 411(c)(2) presumption was established under 20 C.F.R. §410.462 since the medical evidence established that there was no connection between the miner's disability and death and his coal mine employment. **Colvin v. Director, OWCP**, 838 F.2d 192 (6th Cir. 1988).

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