

PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

F. SURVIVORS' CLAIMS: (WITHOUT BENEFIT OF A PRESUMPTION)

In a survivor's claim filed after January 1, 1982, the evidence must establish that the decedent miner's death was due to pneumoconiosis, and not due to a medical condition unrelated to pneumoconiosis. ***Neeley v. Director, OWCP***, 11 BLR 1-85 (1988). Exception: If the deceased miner had been awarded benefits on a claim filed prior to January 1, 1982, the survivor is automatically entitled to benefits without showing death due to pneumoconiosis. ***Neeley, supra***.

Under Section 718.205(c), death is considered to be due to pneumoconiosis where the cause of death was significantly related to or significantly aggravated by pneumoconiosis. ***Foreman v. Peabody Coal Co.***, 8 BLR 1-371 (1985). In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, when the existence of pneumoconiosis is an issue, under any of the methods available at Section 718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993).

The Third Circuit held that any condition that actually hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205. ***Lukosevicz v. Director, OWCP***, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989); see also ***Shuff v. Cedar Coal Co.***, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); ***Tackett v. Armco, Inc.***, 17 BLR 1-103 (1993).

The presumption at Section 718.303 is not applicable to claims filed on or after January 1, 1982. 20 C.F.R. §718.303(c); ***Smith v. Camco Mining, Inc.***, 13 BLR 1-17, 1-19, n.3 (1989).

Case listings and digests are presented in three groupings for easy reference under the following headings:

1. ENTITLEMENT: Section 718.205
2. FILING
3. PRESUMPTION: Section 718.303

F. **SURVIVOR'S CLAIMS: (WITHOUT BENEFIT OF A PRESUMPTION)**

1. ENTITLEMENT: Section 718.205

CASE LISTINGS

DIGESTS

To establish entitlement to benefits pursuant to Section 718.205, it must be determined that the miner's pneumoconiosis arose out of coal mine employment. ***Boyd v. Director, OWCP***, 11 BLR 1-39 (1988).

A physician's opinion expressed on a death certificate, in addition to the physician's testimony of claimant's coal worker's pneumoconiosis, is sufficient to establish death due to pneumoconiosis under Section 718.205(c). ***Dillon v. Peabody Coal Co.***, 11 BLR 1-113 (1988); see also ***Addison v. Director, OWCP***, 11 BLR 1-68 (1988).

Section 718.205(c)(4) does not preclude an award of benefits to a surviving widow where the miner's death was caused by a traumatic injury, if the deceased miner has access to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304, implementing Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The irrebuttable presumption of death due to pneumoconiosis found in Section 718.304 is controlling despite the fact that the death of the miner is caused by traumatic injury. ***Sumner v. Blue Diamond Coal Corp.***, 12 BLR 1-74 (1988).

The Third Circuit held that any condition that actually hastens the miner's death is a substantially contributing cause of death for purposes of Section 718.205. ***Lukosevicz v. Director, OWCP***, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

The definition of a traumatic injury under 20 C.F.R. §718.205(c)(4) includes suicide and is not limited to accidental injuries. ***Haduck v. Director, OWCP***, 14 BLR 1-29 (1990).

Section 718.205(c)(4) prohibits entitlement to benefits where a miner's death was caused by traumatic injury unless pneumoconiosis was a substantially contributing cause of death. To be a substantially contributing cause of death, the survivor must establish a *physical* connection between the pneumoconiosis and the miner's death. Therefore, the administrative law judge erred in finding the miner's suicide was a direct result of the depression caused by the severe respiratory distress and anger which arose from his pneumoconiosis, and therefore, that pneumoconiosis was not a substantially contributing cause of the miner's death. ***Haduck v. Director, OWCP***, 14

BLR 1-29 (1990).

The administrative law judge properly found the x-ray evidence, in which Category C opacities were found but qualified by the readers, the autopsy reports (none of which stated that the miner had complicated pneumoconiosis, progressive massive fibrosis or massive lesions), and the death certificate (although finding that the miner's death was related to coal workers' pneumoconiosis it was not supported by the other evidence of record) did not support a finding of death due to pneumoconiosis. **Willis v. Birchfield Mining Co.**, 15 BLR 1-59 (1991); see also 20 C.F.R. §718.205(c).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, when the existence of pneumoconiosis is an issue, under any of the methods available at Section 718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). **Trumbo v. Reading Anthracite Co.**, 17 BLR 1-85 (1993).

In light of the Fourth Circuit court's holding in **Shuff v. Cedar Coal Co.**, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), the Board reversed its prior holding that the administrative law judge erred in applying **Lukosevicz** to this Fourth Circuit case and affirmed the construction of Section 718.205(c)(2), which was adopted in **Shuff. Tackett v. Armco, Inc.**, 17 BLR 1-103 (1993).

An administrative law judge properly relied on the opinion of a physician who performed an autopsy to find that pneumoconiosis hastened death by causing an inability to expectorate mucus secretions and, thus, the administrative law judge properly found that the miner's pneumoconiosis substantially contributed to death pursuant to 20 C.F.R. §718.205(c). **Mays v. Piney Mountain Coal Company, Inc.**, 21 BLR 1-59 (1997)(Dolder, J., dissenting in part and concurring in part), *aff'd sub nom. Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999); see **Peabody Coal Co. v. Director, OWCP [Ricker]**, 182 F.2d 637, 21 BLR 2-663 (8th Cir. 1999).

The Fourth Circuit held that a death certificate signed by the autopsy prosector which listed simple coal workers' pneumoconiosis in the blank for "other significant conditions contributing to death," combined with a notation in the autopsy report that pneumoconiosis was present at the time of death, without additional support or explanation, was insufficient to establish that pneumoconiosis hastened the miner's death. The Court also held that administrative law judge's are not to credit the opinion of an autopsy prosector, to the exclusion of all other experts, solely because the autopsy prosector was the only physician to examine the whole body near the time of death. **Bill Branch Coal Corp. v. Sparks**, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §718.205(c)(5) does not mandate the conclusion that pneumoconiosis be regarded as a hastening cause of death, but only describes circumstances under which pneumoconiosis may be found to

have hastened death. Claimant retains the burden of proving that pneumoconiosis hastened the miner's death. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 871, 22 BLR 2-386 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The Third Circuit reversed the administrative law judge's finding that claimant failed to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c), and remanded the case. The majority held that the administrative law judge erroneously rejected the opinions of two treating physicians. The majority held that the administrative law judge did not view Dr. Kraynak's qualified testimony in the context of his opinion, and that the fact that Dr. Abdul-Al may not have examined the miner on the last day of the miner's life did not warrant the administrative law judge's rejection of his opinion on this basis where the record shows that Dr. Abdul-Al saw the miner in the hospital at or about the time of his death and was a treating physician. The majority also determined that contrary to the administrative law judge's indication, Dr. Simelaro's consulting report focuses on how the miner's anthracosilicosis caused fibrosis which lead to cardiac dysfunction. The majority held that the administrative law judge erroneously deferred to Dr. Spagnolo's contrary opinion partly based on his credentials which did little to resolve the question of whether substantial evidence supported the administrative law judge's conclusion. The majority determined that the fact that Dr. Spagnolo comprehensively analyzed "the cardiac factors" was not pertinent to the issue of whether the miner's pneumoconiosis substantially contributed to or hastened his death. **Balsavage v. Director, OWCP**, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

Circuit Judge Roth dissented, and would hold that the administrative law judge permissibly credited Dr. Spagnolo's reasoned opinion, that there was no evidence that pneumoconiosis contributed in any way to the miner's death, because the physician's opinion was comprehensive and he possessed superior credentials. **Balsavage v. Director, OWCP**, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002).

Where a physician stated that the deceased miner did not have pneumoconiosis, contrary to the parties' stipulation that the miner had pneumoconiosis, the administrative law judge failed to state "specific and persuasive reasons" why he relied on the physician's opinion that the miner's death was unrelated to pneumoconiosis. **Soubik v. Director, OWCP**, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting).

F. **SURVIVOR'S CLAIMS: (WITHOUT BENEFIT OF A PRESUMPTION)**

2. FILING

CASE LISTINGS

DIGESTS

Where a miner was in payment status at the time of his death on a claim he had filed before January 1, 1982 during his lifetime, any eligible survivor of the miner need not file a new claim after the miner's death to prove entitlement on the basis of death due to pneumoconiosis. See **Smith v. Camco Mining Incorporated**, 13 BLR 1-17 (1989); **Pothering v. Parkson Coal Co. and Constitution State Service Co.**, 861 F.2d 321, 12 BLR 2-60 (3d Cir. 1988).

Where the decedent miner was not awarded benefits on a claim filed after January 1, 1982, the miner's claim does not function under Section 422(1) of the Act, 30 U.S.C. §932(1), to relieve the surviving spouse of the requirement of filing a survivor's claim. **Bianco v. Director, OWCP**, 12 BLR 1-94, 1-97, n. 4 (1989); **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

The Seventh Circuit affirmed the administrative law judge's award of survivor's benefits under 20 C.F.R. §718.205(c). The Seventh Circuit determined that the correct application of nonmutual collateral estoppel precluded employer from arguing that the miner did not have pneumoconiosis, a fact established by the award of benefits in the miner's claim. Regarding the cause of the miner's death, the Seventh Circuit rejected employer's argument that the administrative law judge improperly relied on the opinion of Dr. Ridge, the miner's physician. Dr. Ridge was a general practitioner who treated neither the miner's cancer nor his pulmonary disease and referred the miner to specialists for both. Dr. Ridge opined that the acceleration seen in the miner's demise due to cancer was attributable to his weakened state which was due to pneumoconiosis. The court cited the Department of Labor's observation, when promulgating the regulation at 20 C.F.R. §718.205(c)(5), that persons weakened by pneumoconiosis "may expire quicker from other diseases," see 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000), and referred to Dr. Ridge's advantage of observing whether a pulmonary problem "sapped" the miner's ability to withstand the effects of the cancer. One judge concurred in the opinion, declining to join the portions of the decision wherein the court discussed hypothetical ways in which employer might have prevailed. **Zeigler Coal Co. v. Director, OWCP [Villain]**, 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002).

The Sixth Circuit reversed the Board's Decision and Order in which the Board affirmed the administrative law judge's award of survivor's benefits. The Sixth Circuit held that the Board erred in affirming the administrative law judge's reliance on the opinion of the miner's treating physician to find that claimant established death due to pneumoconiosis under 20 C.F.R. §718.205(c), because the administrative law judge improperly gave preference to the treating physician's opinion based on his status. The Sixth Circuit determined that the miner's treating physician's opinion, that pneumoconiosis hastened the miner's demise because the miner's lack of oxygen and retention of carbon dioxide had an effect on all parts of his body, "suffers from several serious problems that render his opinion an inadequate basis for the ALJ's conclusion," slip op. at 12, and "[even] if [the opinion] is an accurate medical conclusion, it is legally inadequate," slip op. at 13. The Sixth Circuit indicated that under the treating physician's interpretation, pneumoconiosis would virtually always "hasten' death at least some minimal degree. The Sixth Circuit held, "Legal pneumoconiosis only hastens death if it does so through a specifically defined process that reduces the miner's life by an estimable time." *Id.* The Sixth Circuit thus concluded that the miner's treating physician's opinion is conclusory and inadequate. The Sixth Circuit also reviewed its cases and those of other circuit courts of appeal, as well as the regulation at 20 C.F.R. §718.104(d). The Sixth Circuit concluded that there is no rule requiring deference to the opinion of a treating physician in black lung claims, and indicated that, rather, "the opinions of treating physicians get the deference they deserve based on their power to persuade." Slip op. at 9. ***Eastover Mining Co. v. Williams***, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

F. **SURVIVOR'S CLAIMS: (WITHOUT BENEFIT OF A PRESUMPTION)**

3. PRESUMPTION: Section 718.303

CASE LISTINGS

DIGESTS

The presumption at Section 718.303 is not applicable to claims filed on or after January 1, 1982. 20 C.F.R. §718.303(c); ***Smith v. Camco Mining, Inc.***, 13 BLR 1-17, 1-19, n.3 (1989).

The Board held that the administrative law judge properly relied on the death certificate to raise the presumption in Section §718.303. ***Smith v. Camco Mining Incorporation***, 13 BLR 1-17, 1-22 (1989).

Third Circuit dicta suggests that while Section 410.462 and Section 718.303 each provide a rebuttable presumption of death due to pneumoconiosis where the miner was employed for at least ten years of coal mine employment and died of a respirable disease, claimant need not show that the respirable disease suggests a reasonable possibility of death due to pneumoconiosis under Section 718.303. ***Marx v. Director, OWCP***, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *cf. Hunter v. Director, OWCP*, 803 F.2d 800, 9 BLR 2-140 (4th Cir. 1986); ***Tackett v. Benefits Review Board***, 806 F.2d 640, 9 BLR 2-93 (6th Cir. 1986)[in ***Hunter*** and ***Tackett***, claimant must establish that the respirable disease reported suggests a reasonable possibility of death due to pneumoconiosis].

11/04