PART IX

REGULATORY PRESUMPTIONS

A. *20 C.F.R. §727.203 INTERIM PRESUMPTION*

2. REBUTTAL OF THE INTERIM PRESUMPTION GENERALLY

Section 727.203(b) provides four alternate methods of rebutting the interim presumption. The party opposing entitlement may rebut the presumption by showing that: 1) the miner is doing his usual coal mine employment or comparable and gainful work; 2) the miner is able to do his usual coal mine employment or comparable and gainful work; or 3) the miner's total disability or death did not arise out of coal mine employment; or 4) the miner does not or did not have pneumoconiosis. 20 C.F.R. §727.203(b)(1), (2), (3), (4). For a discussion of rebuttal in survivors' claims *see* Part X.H. of the Desk Book.

It is the burden of the party opposing entitlement to establish rebuttal by a preponderance of the evidence. If conflicting evidence is equally probative, the party opposing entitlement has failed to carry its burden to rebut. ***Gilson v. Price River Coal Co.***, 6 BLR 1-96 (1983). *See* Part IV.C.3.c. of the Desk Book. ***Endrizzzi v. Bethlehem Mines Corp.***, 8 BLR 1-11 (1985); ***Kozele v. Rochester & Pittsburgh Coal Co.***, 6 BLR 1-378 (1983); ***Ridings v. C & C Coal Co.***, 6 BLR 1-227 (1983); ***Meade v. The Pittston Co.***, 6 BLR 1-224 (1983).

In determining whether or not the interim presumption has been rebutted, the administrative law judge must consider all relevant evidence. 20 C.F.R. §727.203(b); ***York v. Benefits Review Board***, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987); ***Evosevich v. Consolidation Coal Co.***, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); ***Stapleton v. Westmoreland Coal Co.***, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(en banc)*, rev'd on other gr'ds,* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987)); ***Alabama By-Products v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1985); ***White v. Valley Camp Coal Co.***, 7 BLR 1-472 (1984); ***Hill v. Drummond Coal Co.***, 6 BLR 1-1143 (1984). If the administrative law judge finds the interim presumption invoked, s/he must provide a thorough analysis of all relevant evidence in light of the appropriate legal standards applicable to each of the rebuttal methods set forth in 20 C.F.R. §727.203(b). ***Hill v. Drummond Coal Co.***, 6 BLR 1-1143 (1984); ***Bridges v. Director, OWCP***, 6 BLR 1-988 (1984); ***New v. Director, OWCP***, 6 BLR 1-597 (1983).

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[in jurisdictions other than Third, Sixth, Seventh and Eighth Circuits, when rebuttal established under §727.203(b) adjudicator must consider entitlement pursuant to Part 410, Subpart D] ***Muncy v. Wolfe Creek Collieries Coal Co., Inc.***, 3 BLR 1-627 (1978).

[pulmonary function studies do not have to conform to quality standards to constitute relevant rebuttal evidence] ***Drenning v. Delta Mining Co.***, 6 BLR 1-60 (1983).

[adjudicator's application of true doubt rule on rebuttal harmless error as he rationally found contradictory medical evidence equally probative and thus found presumption unrebutted] ***Meade v. The Pittston Co.***, 6 BLR 1-224 (1983).

[adjudicator's failure to consider relevant, conflicting medical reports requires remand] ***Looney v. Jim Walter Resources, Inc.***, 6 BLR 1-361 (1983).

["bursting bubble" theory of presumptions does not apply to rebuttal of interim presumption] ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984); ***Minor v. Alabama By-Products Corp.***, 7 BLR 1-676 (1985); ***Pate v. Alabama By-Products Corp.***, 6 BLR 1-636 (1983).

[medical reports under Part 727 must be measured by "reasonable medical judgment" test] ***Drummond Coal Co. v. Freeman***, 733 F.2d 1523, 6 BLR 2-73 (11th Cir. 1984); ***Underhill v. Peabody Coal Co.***, 687 F.2d 217, 4 BLR 2-142 (7th Cir. 1982); ***Honaker v. Habco Coal Co.***, 6 BLR 1-408 (1983); ***Bray v. Director, OWCP***, 6 BLR 1-400 (1983); ***Simpson v. Director, OWCP***, 6 BLR 1-49 (1983).

[once invocation under §727.203(a) established, it ceases to have effect only if rebutted by §727.203(b)] ***Kennedy v. Jewell Ridge Coal Corp.***, 6 BLR 1-843 (1984); ***Perkins v. Jewell Ridge Coal Corp.***, 4 BLR 1-261 (1981).

[affirmance of no invocation under §727.203(a) precludes need to address rebuttal under §727.203(b)] ***Coen v. Director, OWCP***, 7 BLR 1-30 (1984); ***Rysz v. Director, OWCP***, 7 BLR 1-18 (1984).

[negative x-rays and non-qualifying objective studies can not be used as exclusive means of rebutting interim presumption] ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Strunk v. Monarch Coal Inc.***, 7 BLR 1-49 (1984)[objective study]; ***Boyd v. Freeman***, 6 BLR 1-159 (1983)[negative x-ray].

[adjudicator failed to provide requisite rebuttal analysis but error harmless since substantial evidence supports finding of no rebuttal] ***Farber v. Island Creek Coal Co.***, 7 BLR 1-428 (1984).

[claimant's argument that since adjudicator found subsection (a)(1) invocation, he could not rely on medical report diagnosing absence of pneumoconiosis to establish rebuttal rejected] ***Pastva v. The Youghiogheny and Ohio Coal Co.***, 7 BLR 1-829 (1985).

[if one method of rebuttal established, discussion of other rebuttal methods unnecessary] ***Endrizzi v. Bethlehem Mines Corp.***, 8 BLR 1-11 (1985); ***Compton v. Itmann Coal Co.***, 7 BLR 1-644 (1985); ***Tucker v. Consolidation Coal Co.***, 6 BLR 1-720 (1983).

[finding of rebuttal under §727.203(b)(2), (b)(3) or (b)(4) precludes entitlement under Part 410, Subpart D] ***Wheaton v. North American Coal Co., Inc.***, 8 BLR 1-21 (1985)[(b)(2)]; ***Pastva v. Youghiogheny and Ohio Coal Co.***, 7 BLR 1-829 (1985)[(b)(3)]; ***Lefler v. Freeman United Coal Co.***, 6 BLR 1-579 (1983)[(b)(4)].

DIGESTS

The Fourth Circuit held that at rebuttal all evidence must be considered and weighed, including but not exclusively, non-qualifying x-rays, test results and opinions regardless of the section under which the presumption was invoked. The court stated that this consideration was limited only by 30 U.S.C. §923(b) which provides that a claim may not be denied solely on the basis of one negative x-ray. ***Stapleton v. Westmoreland Coal Co.***, 785 F.2d 424, 8 BLR 2-109 (4th Cir. 1986)(en banc)*, rev'd on other gr'ds,* ***Mullins Coal Co., Inc. of Virginia v. Director, OWCP***, 484 U.S. 135, 108 S.Ct. 427, 11 BLR 2-1 (1987).

The effect of altitude on the results of a blood gas study may be considered relevant evidence concerning rebuttal under §727.203(b). ***Big Horn Coal Co. v. Temple***, 793 F.2d 1165, 9 BLR 2-67 (10th Cir. 1986); ***Martino v. United States Fuel Co.***, 6 BLR 1-33 (1983).

The Seventh Circuit applied the Board's analysis under subsection (b)(2) to affirm a denial of benefits based on rebuttal established at subsection (b)(3), finding that the Board mistakenly applied the correct standard for rebuttal under subsection (b)(3) to subsection (b)(2). ***Wetherill v. Director, OWCP***, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

At rebuttal, the administrative law judge must discuss not only medical evidence that would qualify to invoke the interim presumption, but all other medical evidence, including examinations and tests that were not conducted in compliance with the regulations and therefore would not be sufficient to invoke the presumption. ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

In the appellate jurisdiction of the Third, Sixth, Seventh and Eighth Circuits when rebuttal of the interim presumption is established under §727.203(b) the administrative law judge must consider entitlement under 20 C.F.R. Part 718. ***Knuckles v. Director, OWCP***, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); ***Saginaw Mining Co. v. Ferda***, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989); ***Caprini v. Director, OWCP***, 824 F.2d 825, 10 BLR 2-180 (3d Cir. 1987); ***Strike v. Director, OWCP***, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); ***Oliver v. Director, OWCP***, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989).

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).

The Board held that, pursuant to the U.S. Supreme Court's decision in ***Pauley v. Bethenergy Mines, Inc.***, 111 S.Ct. 2524, 15 BLR 2-155 (1991), Section 727.203(b) should be applied as written, *i.e.*, as providing the four methods of rebuttal set forth at 20 C.F.R. §727.203(b)(1)-(4). ***Whiteman v. Boyle Land and Fuel Co.***, 15 BLR 1-11 (1991)(en banc).

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