Chapter 9

Living Miners' Claims: Entitlement Under Section 410.490

I. Applicability of 20 C.F.R § 410.490, generally

Congress initially envisioned that the Black Lung Benefits Program would be administered by the Social Security Administration in its 1969 enactment of the Federal Coal Mine Health and Safety Act. However, the 1969 Act resulted in an unexpectedly high volume of claims and the adjudication process was seriously handicapped, with relatively few claims resulting in an award of benefits. Consequently, Congress decided to transfer jurisdiction over processing and adjudicating black lung claims to the Department of Labor.

A. Applies to Part B claims (claims filed prior to July 1, 1973)

The 1972 Amendments to the Act directed the Social Security Administration to promulgate interim regulations for transition of the adjudication process. These regulations are codified at 20 C.F.R. § 410.490 and apply to all miners who filed claims before July 1, 1973. 20 C.F.R. § 410.490(b). In essence, the § 410.490 regulations applied to all Part B claims filed with the Social Security Administration. The Department of Labor began adjudication of the Black Lung Benefits Program with claims filed under §410.490 between July 1 and December 31, 1973 (Section 415 transition claims), and Part C claims, filed after January 1, 1974.

It is important to note that, in light of the regulations at 20 C.F.R. § 727.303(a) and (b), the Board has determined in *Saris v. Director, OWCP*, 11 B.L.R. 1-65, 1-66 (1988), that a miner's previously denied or pending Part B claim, which was referred to the Department of Labor for review, was *converted* to a Part C claim with an effective filing date as the date of the election card. As a result, § 410.490 only applies to Part B claims filed prior to July 1, 1973. *Id.* at 1-67. *See also* 20 C.F.R. § 727.203(a).

B. Applies to Part 727 claims where miner has fewer than 10 years employment

Section 410.490 also applies to claims where Part 727 is rendered inapplicable because the miner is unable to establish ten years of coal mine employment. *Whiteman v. Boyle Land Fuel Co.*, 15 B.L.R. 1-11 (1991)(*en banc*). This decision was the result of a long line of conflicting decisions among the Board and circuit courts, which ultimately was resolved by the United States Supreme Court in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

II. Invocation of presumption of total disability due to pneumoconiosis

The regulation at § 410.490(b) provides that a miner shall be totally disabled due to pneumoconiosis if the following is established:

> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or
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> (ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (of one year duration).

20 C.F.R. § 410.490(b).

It is noteworthy that, although the provisions at § 410.490(b)(i) are written to indicate that a single, positive x-ray study may invoke the presumptions, the United States Supreme Court ruled to the contrary in *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 435 (1987), *reh'g denied* 484 U.S. 1047 (1988). Specifically, the Court held that all x-ray evidence must be weighed prior to invocation. For a detailed discussion of weighing medical evidence, see Chapter 3 (general principles of weighing medical evidence) and Chapter 10 (adjudicating claims under Part 727).

In *Phipps v. Director, OWCP*, 17 B.L.R. 1-39 (1992)(en banc), the Board held that the invocation provisions at § 727.203(a) do not apply to claims adjudicated under § 410.490, but that the rebuttal provisions at § 727.203(b) are applicable to such claims.

III. Etiology of the pneumoconiosis

Subsections 410.490(b)(2) and (3) address the etiology of the miner's pneumoconiosis and provide the following two means for establishing such causation: (1) a miner with ten years of coal mine employment will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment pursuant to § 410.490(b)(3); or (2) if the miner has less than ten years of coal mine employment, then s/he must submit evidence sufficient to establish that the pneumoconiosis arose out of coal mine employment under § 410.490(b)(2). *Campbell v. Director, OWCP*, 10 B.L.R. 1-125 (1987); *Soloe v. Director, OWCP*, 10 B.L.R. 1-125 (1987); *Remetta v. Director, OWCP*, 8 B.L.R. 1-214 (1985); *Marsigio v. Director, OWCP*, 8 B.L.R. 1-190 (1985); *Foster v. Director, OWCP*, 8 B.L.R. 1-188 (1985). Failure to establish that the miner's pneumoconiosis is caused by his or her exposure to coal dust precludes invocation under § 410.490. *Grant v. Director, OWCP*, 857 F.2d 1102 (6th Cir. 1988).

IV. Rebuttal of the presumption of total disability due to pneumoconiosis

On their face, the provisions at § 410.490(c) provide only the following two means of rebutting the interim presumption:

> (1) there is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (*see § 410.412(a)(1)*), or
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> (2) other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated) establish that the individual is able to do his usual coal mine work or comparable and gainful work (*see § 410.412(a)(1)).*

20 C.F.R. § 410.490(c)(1) and (2).

A. Comparison with rebuttal at Part 727

A comparison of the rebuttal provisions at § 410.490(c) with the rebuttal provisions at § 727.203(b), reveals that § 727.203(b) provides two additional means of rebuttal: (1) the miner's total disability did not arise out of coal mine employment and, (2) the miner does not have pneumoconiosis. 20 C.F.R. § 727.203(b)(3) and (b)(4). Therefore, Part 727 requires ten years of coal mine employment to be applicable and provides fours means of rebuttal, whereas the more liberal § 410.490 regulations require no minimum period of coal mine employment, and provide only two means of rebuttal.

B. Incorporation of rebuttal at § 727.203(b)(3) and (b)(4)

In *Phipps v. Director, OWCP*, 17 B.L.R. 1-39 (1992)(en banc), the Board concluded that this disparity needed to be remedied and, based on *dicta* in the United States Supreme Court's decision in *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524 (1991), the Board held that the four methods of rebuttal set forth at § 727.203(b) are applicable to claims adjudicated under § 410.490 of the regulations.

The Supreme Court's *dicta* in *Pauley* appeared to resolve conflict that developed among the Board and circuit courts in an attempt to render just and equitable solutions to the apparent discrepancy between the terms of Part 727 and § 410.490. The *Pauley* Court stated that the rebuttal provisions at § 727.203(b)(3) and (b)(4) are implicitly included at § 410.490. This conclusion was supported through the language at § 410.490, which references § 410.416

involving the ten year coal mine employment causation presumption, as well as § 410.401(b)(1) that defines "pneumoconiosis" as compensable under the Act. Therefore, the Court reasoned that the Part 410 regulations act in concert to infer the inclusion of the rebuttal provisions at subsections 727.203(b)(3) and (b)(4) to claims adjudicated under 20 C.F.R. § 410.490.

C. Physical capability versus vocational capability

In assessing total disability, the Board holds that it will apply the same standard for total disability as under Part 727; namely, only physical capacity is considered. *Shaw v. Cementation Co. of America*, 10 B.L.R. 1-114 (1987). However, for Part B claims, the Sixth Circuit applies the vocational disability standard (*i.e.* the ability of the miner to find comparable employment in his or her immediate area of work). *Neace v. Director, OWCP*, 867 F.2d 264 (6th Cir. 1989). For Part C claims, the Sixth Circuit applies a medical test of physical capabilities, not a vocational analysis. *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985). For further discussion of the factors to consider in determining whether the miner is able to perform "comparable and gainful" employment, *see* Chapter 10.

V. Applicability of Parts 410, 727, and 718

A claim that is analyzed and denied under § 410.490 must also be adjudicated under 20 C.F.R. Part 410. *Wells v. Peabody Coal Co.*, 3 B.L.R. 1-85 (1981).