

Chapter 14

Survivors' Claims: Entitlement Under § 410.490

I. Applicability

The regulations provide that 20 C.F.R. § 410.490 applies to survivors' claims where (1) the miner dies before January 1, 1974, and (2) the survivor files a claim for benefits within six months of the miner's death. 20 C.F.R. § 410.490(b).

Section 410.490 is also applicable to claims filed under Part 727, where the miner has established less than ten years of coal mine employment. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988); *Whiteman v. Boyle Land Fuel Corp.*, 15 B.L.R. 1-11 (1991)(*en banc*).

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

II. Invocation of the interim presumptions

Similar to 20 C.F.R. Part 727, 20 C.F.R. § 410.490 provides two presumptions applicable to survivors' claims. A miner will be presumed to have been totally disabled at the time of death, and his death will be presumed to be due to pneumoconiosis if chest x-ray, autopsy, or biopsy evidence establishes the existence of pneumoconiosis. Or, in the case of a miner employed for at least 15 years in underground or comparable coal mine employment, the presumptions are invoked if ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (meeting the duration requirements of § 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the table), and the impairment arose out of coal mine employment. 20 C.F.R. § 410.490(b)(1) and (2). "Lay testimony about the miner's physical condition will not suffice to invoke the presumption." *Lloyd v. Mathews*, 413 F. Supp. 1161, 1163 (E.D. Pa. 1976).

Where the presumption that a miner was totally disabled due to pneumoconiosis at the time of death, or that his death was due to pneumoconiosis is not invoked, the claimant may establish the requisite disability or cause of death of the miner under the provisions set forth at 20 C.F.R. §§ 410.412 to 410.462. 20 C.F.R. § 410.490(e).

III. Rebuttal of the interim presumptions

The interim presumptions are rebutted if evidence establishes: (1) the individual was in fact doing his usual coal mine work or comparable and gainful work, or (2) the individual was able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. § 410.490(c)(1) and (2). Evidence that the miner was in fact doing his usual coal mine work at the time of death is relevant to rebuttal of the interim presumption. *Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

A. Physical 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).

In the Sixth Circuit, for Part B claims, the court applies the vocational disability standard (*i.e.*, 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 Chapters 8 and 10.

B. Rebuttal methods under Part 727 incorporated into § 410.490

A comparison of the rebuttal provisions at 20 C.F.R. § 410.490(c) with those at 20 C.F.R. § 727.203(b) reveals that § 727.203(b) provides two additional means of rebuttal: (1) the miner's total disability does 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). The provisions at Part 727 require ten years of coal mine employment to be applicable and provide four means of rebuttal whereas the more liberal § 410.490 regulations require no minimum period of coal mine employment, and set forth only two means of rebuttal.

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, in accordance with 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 decision in *Pauley* resolved the 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. It was determined in *Pauley* that the rebuttal provisions at 20 C.F.R. § 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), which defines "pneumoconiosis" as compensable under the Act. Therefore, the Court reasoned that the Part 410 regulations act in concert to infer inclusion of the rebuttal provisions at § 727.203(b)(3) and (b)(4).

For a discussion of rebuttal under § 727.203(b)(3) and (b)(4) in survivors' claims, see Chapters 10 and 15.