

## **Chapter 16**

### **Survivors' Claims: Entitlement Under Part 718**

#### **I. Applicability**

The regulations at 20 C.F.R. Part 718 apply to survivors' claims that are filed on or after April 1, 1980. 20 C.F.R. § 718.1. There are four possible methods of analyzing evidence in a survivor's claim under Part 718: (1) where the survivor's claim is filed prior to January 1, 1982 and the miner is entitled to benefits as a result of the miner's lifetime claim filed prior to January 1, 1982; (2) the survivor's claim is filed prior to January 1, 1982 and there is no miner's lifetime claim or the miner is not found entitled to benefits from a lifetime claim filed prior to January 1, 1982; (3) the survivor's claim is filed after January 1, 1982 and the miner was found entitled to benefits as a result of the miner's lifetime claim filed prior to January 1, 1982; and (4) the survivor's claim is filed after January 1, 1982 and there is no miner's lifetime claim filed prior to January 1, 1982, or the miner is found not entitled to benefits as a result of a lifetime claim filed prior to January 1, 1982. Select the set of conditions that applies to your claim and proceed to the appropriate subdivision.

#### **II. Standards of entitlement**

##### **A. Survivor's claim filed prior to January 1, 1982 and the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982**

The regulations at 20 C.F.R. § 725.212 (2000) and (2008) provide for automatic entitlement to survivor's benefits in cases where the miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982. For a discussion of automatic entitlement, see Chapter 12. This provision applies to both survivors' benefits arising when the miner is totally disabled during his lifetime as well as benefits awarded when the miner dies due to pneumoconiosis. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321 (3<sup>rd</sup> Cir. 1988).

##### **B. Survivor's claim filed prior to January 1, 1982 and there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982**

Where there is no miner's claim filed before January 1, 1982 resulting in entitlement to benefits, a survivor whose claim is filed prior to January 1, 1982 must establish entitlement to survivor's benefits. The permanent Department of Labor regulations at 20 C.F.R. Part 718 provide that a survivor is entitled to

benefits only where the miner died due to pneumoconiosis. 20 C.F.R. §§ 718.205(a), 725.212(a)(3), 725.218(a)(2), and 725.222(a)(5) (2000) and (2008). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(b) (2000) and (2008).

The regulations at 20 C.F.R. Part 718 afford the survivor, who files a claim prior to January 1, 1982, the aid of presumptions at §§ 718.303, 718.304, and 718.305 as well as the use of lay testimony. As will be discussed later in this Chapter, these presumptions (with the exception of § 718.304 and the lay testimony provisions) become inapplicable where the survivor files his or her claim on or after January 1, 1982.

### **1. Death due to pneumoconiosis**

Subsection 718.205(b) provides that, in the case of a survivor's claim filed prior to January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria are met:

- (1) competent medical evidence established that the miner's death was due to pneumoconiosis;
- (2) death was due to multiple causes including pneumoconiosis and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the cause of death;
- (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable;
- (4) the presumptions of §§ 718.303 or 718.305 are applicable; or
- (5) the cause of death is significantly related to or significantly aggravated by pneumoconiosis.

20 C.F.R. § 718.205(b) (2000) and (2008).

#### **a. Must make threshold finding of pneumoconiosis**

In *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), the Board held that, in a survivor's claim under Part 718, the administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to pneumoconiosis.

## **b. No entitlement for "psychological" injury attributable to pneumoconiosis**

In *Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6<sup>th</sup> Cir. 1994), the Sixth Circuit held that a survivor is not entitled to black lung benefits where her claim was "predicated upon the theory that her husband was severely depressed at the time he committed suicide and that his depression was caused by his illnesses, including pneumoconiosis." The court noted that "legislative history is silent as to whether a psychological component would establish the necessary link between pneumoconiosis and death" and the court was "reluctant to plunge the DOL and the courts into yet another battle of the courtroom experts, unless Congress has decided that is the way it should be."

## **2. Lay evidence**

In the case involving a deceased miner where (1) survivor's claim was filed prior to January 1, 1982, and (2) there is no medical or other relevant evidence addressing the issue of disability, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability. 20 C.F.R. § 718.204(c)(5) (2000) and (2008).

In *Pekala v. Director, OWCP*, 13 B.L.R. 1-1 (1989), the Board concluded that § 718.204(c)(5) was available in cases where the medical evidence of record did not *affirmatively establish the absence* of a lung disease. The Board declined, however, to rule on the applicability of § 718.204(c)(5) where the evidence is *insufficient* to establish total disability under subsections (c)(1)-(4).

In *Pekala*, the Board also concluded that, although its decision involved the lay evidence provisions of § 718.204(c)(5), the same rule applied to cases adjudicated under § 727.203(a)(5). As a result, it is noteworthy that several circuit courts of appeal have held that § 727.203(a)(5) is available where the miner is deceased and the medical evidence of record is merely *insufficient to invoke* the presumptions under § 727.203(a)(1)-(4). *Hillibush v. Dept. of Labor*, 853 F.2d 197 (3<sup>rd</sup> Cir. 1988)<sup>1</sup>; *Cook v. Director, OWCP*, 901 F.2d 33 (4<sup>th</sup> Cir. 1990); *Collins v. Old Ben Coal Co.*, 861 F.2d 481 (7<sup>th</sup> Cir. 1988). To the

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<sup>1</sup> In *Soubik v. Director, OWCP*, 366 F.3d 226 (3<sup>rd</sup> Cir. 2004), the court stated that its decision in *Hillibush v. Dep't. of Labor*, 853 F.2d 197, 205 (3<sup>rd</sup> Cir. 1988) provides that the survivor may prove her claim using "medical evidence alone, non-medical evidence alone, or the combination of medical and non-medical evidence . . ." Thus, *Hillibush* required that the judge consider lay evidence in determining whether the miner had a pulmonary or respiratory impairment, but "[e]xpert testimony will usually be required to establish the necessary relationship between . . . observed indicia of pneumoconiosis and any underlying pathology." As a result, the court determined that it was error for the judge to accord less weight to a medical opinion because it was based, in part, on lay evidence.

contrary, the Sixth Circuit Court of Appeals holds that § 727.203(a)(5) is not available where there is medical evidence regarding the miner's pulmonary condition, even if such evidence is insufficient to invoke the presumptions through § 727.203(a)(1)-(4). *Coleman v. Director, OWCP*, 829 F.2d 3 (6<sup>th</sup> Cir. 1987).

In the absence of "medical or other relevant evidence in the case of a deceased miner," the Third Circuit reiterated that lay evidence may be considered in determining whether the miner was totally disabled due to pneumoconiosis or died due to the disease. *Keating v. Director, OWCP*, 71 F.3d 1118 (3<sup>rd</sup> Cir. 1995).

Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death. 20 C.F.R. § 718.204(d)(1). This evidence addresses the existence of, or disability due to, a respiratory or pulmonary impairment. *Gessner v. Director, OWCP*, 11 B.L.R. 1-1, 1-3 (1987).

**C. Survivors' claims filed on or after January 1, 1982 where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982**

**1. Generally**

In cases where a miner is found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on a survivor's claim filed on or after January 1, 1982. This is because survivor's benefits are awarded where the miner was totally disabled due to pneumoconiosis at the time of death, or died due to pneumoconiosis. 20 C.F.R. §§ 718.204(a), 725.212, 725.218, and 725.222 (2000) and (2008).

**2. Automatic entitlement, miner in payment status on claim filed before January 1, 1982**

Section 422(1) of the Act relieves survivors of the requirement of filing a claim specifically for survivor's benefits in cases where the decedent miner was entitled to benefits as the result of a claim filed prior to January 1, 1982. The Board has held that Section 422(1) permits a survivor to benefit from the miner's filing date where the miner's claim was filed before January 1, 1982 and, although not receiving benefits under a finally adjudicated award, the miner was in payment status. *Smith v. Camco Mining Inc.*, 13 B.L.R. 1-17 (1989).

**D. Survivors' claims filed on or after January 1, 1982 where there is no miner's claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982**

The permanent Department of Labor regulations at 20 C.F.R. Part 718 add criteria for demonstrating entitlement to survivors' benefits. Specifically, these regulations provide that a survivor is entitled to benefits only where the miner *died due to pneumoconiosis* (unless 20 C.F.R. § 718.306 is applicable and the survivor's claim was filed before June 30, 1982). 20 C.F.R. §§ 725.212(a)(3), 725.218(a)(2), 725.222(a)(5), and 718.205(a) (2000) and (2008). As a result, the survivor of a miner who was totally disabled due to pneumoconiosis at the time of death, but died due to an unrelated cause, is not entitled to benefits. 20 C.F.R. § 718.205(c) (2000) and (2008).

Consequently, a survivor was automatically entitled to benefits if the miner's lifetime claim filed prior to January 1, 1982 resulted in an award of benefits, but such automatic entitlement no longer exists. Rather, for a survivor's claim filed on or after January 1, 1982, where (1) the miner is not entitled to benefits as a result of a lifetime claim filed prior to January 1, 1982, or (2) no miner's lifetime claim was filed prior to January 1, 1982, then the survivor must demonstrate each element of entitlement (pneumoconiosis, pneumoconiosis causation, and contribution of pneumoconiosis to death). *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). In addition, the survivor is not entitled to the use of lay evidence, or the presumptions at 20 C.F.R. §§ 718.303 and 718.305 (2000) and (2008) to aid in establishing entitlement to benefits.

**1. Death due to pneumoconiosis**

Subsection 718.205(c) applies to survivor's claims filed on or after January 1, 1982 and provides that death will be due to pneumoconiosis if any of the following criteria are met:

- (1) competent medical evidence established that the miner's death was due to pneumoconiosis; or
- (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis; or
- (3) the presumption of § 718.304 [complicated pneumoconiosis] is applicable.

20 C.F.R. § 718.205(c) (2000) and (2008).

These provisions narrow eligibility for survivors' benefits to cases where the miner's death is due to pneumoconiosis. 20 C.F.R. § 718.205(a) (2000) and (2008). Moreover, it is important to note that the regulations at § 718.204(c)(5), permitting lay evidence testimony to establish total disability do not apply where (1) the survivor's claim is filed on or after January 1, 1982, and (2) there is no miner's lifetime claim resulting in entitlement to benefits filed prior to January 1, 1982. 20 C.F.R. § 718.204(c)(5) (2000) and (2008).

In *Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993), the Board held that, in a Part 718 survivor's claim, the administrative law judge must make a threshold determination as to the existence of pneumoconiosis under 20 C.F.R. § 718.202(a) prior to considering whether the miner's death was due to the disease under § 718.205.

## **2. "Hastening death" standard**

### **a. Prior to applicability of 20 C.F.R. Part 718 (2008)**

The Board and circuit courts adopted divergent standards with regard to determining whether a miner's death was due to pneumoconiosis. While the Board concluded that death must be "significantly" related to (or aggravated by) pneumoconiosis, certain circuit courts adopted the "hastening death" standard, which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. The following sets forth the holdings of the Board and circuit courts with regard to the standard under § 718.205(c):

#### *Benefits Review Board*

Under the provisions of § 718.205(c), "death will be considered to be due to pneumoconiosis where the cause of death is significantly related to or significantly aggravated by pneumoconiosis." *Foreman v. Peabody Coal Co.*, 8 B.L.R. 1-371, 1-374 (1985).

#### *Third, Fourth, Sixth, Seventh, and Tenth Circuits*

The Third Circuit has held that any condition that *hastens* the miner's death is a substantially contributing cause of death for purposes of § 718.205. *Lukosevich v. Director, OWCP*, 888 F.2d 1001 (3<sup>rd</sup> Cir. 1989). The Fourth, Sixth, Seventh, and Tenth Circuits have adopted this position in *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4<sup>th</sup> Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993); *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6<sup>th</sup> Cir. 1993)(J. Batchelder dissenting); and *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178 (7<sup>th</sup> Cir. 1992); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10<sup>th</sup> Cir. 1996) (a survivor is entitled to benefits if pneumoconiosis hastened the miner's death

"to any degree").

The following case summaries contain a few principles of weighing medical evidence under 20 C.F.R. § 718.205:

*Lay and medical testimony regarding "breathing difficulties"*

In *Mancia v. Director, OWCP*, 130 F.3d 579 (3<sup>rd</sup> Cir. 1997), the Third Circuit held that it was error for the administrative law judge to discredit a treating physician's opinion that the miner suffered from cor pulmonale on grounds that the physician did not conduct objective testing in support of his diagnosis. The court held that there was no indication that objective testing was necessary to diagnose cor pulmonale and that this condition is generally associated with pneumoconiosis. The physician concluded that the miner's cardiac arrest, which resulted in his death, was hastened by the progressive breathing difficulties he experienced due to pneumoconiosis. The court noted that, while lay testimony cannot be used to determine the cause of death, uncontradicted lay testimony of the miner's breathing difficulties further supporting the treating physician's medical conclusion is probative and must be considered. Thus, Claimant established entitlement to benefits because the treating physician "clearly, consistently and unwaveringly opined that the miner's chronic lung disease led to his deteriorating medical condition, and, ultimately, to his death."

*Equivocal opinion insufficient to satisfy "hastening death" standard*

The Fourth Circuit, in *U.S. Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384 (4<sup>th</sup> Cir. 1999), held that the administrative law judge erred in finding that pneumoconiosis contributed to the miner's death based on an equivocal physician's opinion. Specifically, Dr. Rasmussen opined that it was "possible" and "[i]t can be stated" that pneumoconiosis contributed to the miner's death. The court held that his opinion was "merely a statement that it is possible that the condition could have contributed to death." The court also stated that the opinion could support a contrary conclusion. It noted that "in an agency proceeding the gate-keeping function to evaluate evidence occurs when the evidence is considered in decision making rather than when the evidence is admitted." Said differently, while evidence is generally admitted in administrative proceedings with less regard for reliability, the administrative law judge must determine its probative value as an expert fact-finder.

*Hastens death "in any way" sufficient to support entitlement*

The Sixth Circuit reaffirmed its holding in *Brown* to state that benefits are awarded to a survivor who establishes that "'pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way.'" *Griffith v. Director, OWCP*, 49 F.3d

184 (6<sup>th</sup> Cir. 1995).

Similarly, in *Richardson v. Director, OWCP*, 94 F.3d 164 (4<sup>th</sup> Cir. 1996), the Fourth Circuit held that, in a survivor's claim under Part 718, the claimant must demonstrate that pneumoconiosis "hastened" the miner's death "in any way." In this vein, the court held that the Director's "stipulation," that the miner suffered from legal pneumoconiosis arising from coal dust exposure at the time of death, was binding notwithstanding a lack of medical evidence in the record to support the stipulation.

*Suicide; no entitlement*

In *Johnson v. Peabody Coal Co.*, 26 F.3d 618 (6<sup>th</sup> Cir. 1994), the Sixth Circuit held that a survivor was not entitled to benefits based on her theory that "her husband was severely depressed at the time he committed suicide and that his depression was caused by his illnesses, including pneumoconiosis."

*"Negligible" effect; no entitlement*

In *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4<sup>th</sup> Cir. 1993), the Fourth Circuit held that a physician's opinion that pneumoconiosis contributed to the miner's death to a "negligible" degree was insufficient to satisfy the "hastening death" standard.

**b. After applicability of  
20 C.F.R. Part 718 (2008)**

A new subsection has been added to § 718.205(c), which codifies the pre-amendment "hastening death" standard of several circuit courts and provides the following:

(5) Pneumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c)(5) (2008).

In *Bailey v. Consolidation Coal Co.*, BRB No. 05-0324 BLA (Sept. 30, 2005) (unpub.), the the Board upheld the administrative law judge's finding that coal workers' pneumoconiosis substantially contributed to the miner's pneumonia which, in turn, caused his death. In so holding, the Board stated:

We note that as the Secretary observed when promulgating Section 718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. See 65 Fed. Reg.

79,920, 79,950 (Dec. 20, 2000).

Slip op. at 6 (emphasis in original).

For additional discussion on weighing evidence, see Chapter 3. For a discussion of the limitations on the admission of evidence under the amended regulations, see Chapter 4.

### **3. Traumatic injury or principal cause of death is an unrelated medical condition**

Survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4) (2000) and (2008). *Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988) (survivor not entitled to benefits where the miner's death was due to a ruptured abdominal aortic aneurysm).

A survivor, however, is not precluded from benefits where the miner's death is due to traumatic injury if the deceased miner had access to the irrebuttable presumption of death due to pneumoconiosis at § 718.304 (complicated pneumoconiosis). *Sumner v. Blue Diamond Coal Co.*, 12 B.L.R. 1-74 (1988).

## **III. Presumptions available under 20 C.F.R. Part 718**

Section 411(c) of the Black Lung Benefits Act, as amended, 30 U.S.C. § 921(c), provides certain statutory presumptions applicable to survivors' claims. This section is implemented at 20 C.F.R. §§ 718.303-718.306 (2000) and (2008). The presumptions applicable to survivors' claims include the following: (1) § 718.303, ten years employment and death from a respirable disease; (2) § 718.304, complicated pneumoconiosis; (3) § 718.305, the 15 year presumption; and (4) § 718.306, the 25 year presumption. 20 C.F.R. §§ 718.303-718.306 (2000) and (2008).

### **A. Ten years or more of coal mine employment and death from a respirable disease**

#### **1. Applicability**

This presumption is applicable only to survivors' claims filed prior to January 1, 1982. 20 C.F.R. § 718.303(c) (2000) and (2008).

## **2. Requirements**

Under 20 C.F.R. § 718.303, if a deceased miner was employed for ten or more years in one or more coal mines and died from a respiratory disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis. Also, death shall be found to be due to a respirable disease in any case in which 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. The claimant is only required to demonstrate that the miner's death was due to a respirable disease, and "does not have to establish a reasonable possibility that death was due to pneumoconiosis." *Beard v. Director, OWCP*, 10 B.L.R. 1-82, 1-84 (1987). The presumption is rebutted by establishing 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 the death. 20 C.F.R. § 718.303(b) (2000) and (2008). See *Bury v. Director, OWCP*, 9 B.L.R. 1-79 (1986).

### **B. The "15 year" presumption**

#### **1. Applicability**

This presumption is applicable only to survivors' claims filed prior to January 1, 1982. 20 C.F.R. § 718.305(e) (2000) and (2008).

#### **2. Requirements**

Under § 718.305, if (1) a miner was employed for fifteen years or more in one or more underground coal mines or in "substantially similar" coal mine conditions, (2) there is a chest x-ray interpreted negative for *complicated* pneumoconiosis such that § 718.304 is inapplicable, and (3) other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner's death was due to pneumoconiosis.

The claimant is not required to establish that the respiratory or pulmonary impairment arose out of coal mine employment prior to invocation of the presumption. *Tanner v. Freeman United Coal Co.*, 10 B.L.R. 1-85 (1987); *Snorton v. Ziegler Coal Co.*, 9 B.L.R. 1-106 (1986). The presumption may be rebutted by establishing that the miner did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a

totally disabling obstructive respiratory or pulmonary disease of unknown origin. 20 C.F.R. § 718.305(d) (2000) and (2008). See *Bury v. Director, OWCP*, 9 B.L.R. 1-79 (1986).

### **3. Lay testimony**

A determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made in accordance with 20 C.F.R. § 718.204. 20 C.F.R. § 718.305(c) (2000) and (2008). In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment. 20 C.F.R. § 718.305(b) (2000) and (2008). The Board has held that "[l]ay evidence may not be used to establish the existence of a totally disabling respiratory impairment under § 718.305 if the record contains other medical evidence." *Bury v. Director, OWCP*, 9 B.L.R. 1-79, 1-81 (1986).

### **C. The "25 years" presumption**

#### **1. Applicability**

The 25 years presumption is only applicable to survivors' claims filed between January 1, 1982 and June 30, 1982. 20 C.F.R. § 718.306(a) (2000) and (2008).

#### **2. Requirements**

In the case of a miner who (1) died on or before March 1, 1978, and (2) was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors who filed claims prior to June 30, 1982, shall be entitled to payment of benefits, unless it is established that the miner was not partially or totally disabled due to pneumoconiosis at the time of his/her death. 20 C.F.R. § 718.306(a) (2000) and (2008). For purposes of the 25 year presumption, a miner will be considered "partially disabled" if s/he had a reduced ability to engage in work as defined at 20 C.F.R. § 718.204(b). 20 C.F.R. § 718.306(b) (2000) and (2008).

#### **3. Rebuttal**

To rebut the presumption, evidence must demonstrate that (1) the miner's ability to perform work was not reduced at the time of his or her death, (2) the miner did not have pneumoconiosis, or (3) any disability that existed at the time of death was due to a cause other than pneumoconiosis. 20 C.F.R. § 718.306(c); *Freeman v. Old Ben Coal Co.*, 3 B.L.R. 1-599 (1981), *aff'd sub nom. Freeman v. Director, OWCP*, 687 F.2d 214 (7<sup>th</sup> Cir. 1982). None of the following items, by itself, shall be sufficient to rebut the presumption:

(1) evidence that a deceased miner was employed in a coal mine at the time of death;

(2) evidence pertaining to a deceased miner's level of earnings prior to death;

(3) a chest x-ray interpreted as negative for the existence of pneumoconiosis; or

(4) a death certificate that makes no mention of pneumoconiosis.

20 C.F.R. § 718.306(d) (2000) and (2008).

#### **4. Lay testimony**

In a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, where entitlement is sought under 20 C.F.R. § 718.306 and there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable about the miner's physical condition shall be sufficient to establish total or partial disability. However, a determination of total disability may not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim was approved. 20 C.F.R. § 718.204(c)(5) (2000) and (2008).

#### **D. Complicated pneumoconiosis**

Under 20 C.F.R. § 718.304, there is an irrebuttable presumption that a miner's death was due to pneumoconiosis if the miner suffered from complicated pneumoconiosis. 20 C.F.R. § 718.304 (2000) and (2008). In a survivor's claim, where claimant has established the presumption under § 718.304, the survivor must still establish that the miner's pneumoconiosis arose out of coal mine employment. This is because the regulations at Part 718 require that the miner be totally disabled due to *coal workers'* pneumoconiosis, and the presumption at § 718.304 affords only an irrebuttable presumption of total disability due to pneumoconiosis without regard to the etiology of the disease. For an analysis of evidence pertaining to complicated coal workers' pneumoconiosis exists, see Chapter 11.