

Chapter 5

What Is the Applicable Law?

I. Overview of the Black Lung Benefits Act

A. Generally

The black lung benefits program was first established under Title IV of the Federal Coal Mine Health and Safety Act of 1969. The program was administered by the Social Security Administration, which promulgated regulations at 20 C.F.R. Part 410 to accomplish the task. Claims adjudicated under these regulations are commonly referred to as "Part B" claims. The number of claims filed in these early years greatly exceeded Congress' expectations and this resulted in longer-than-anticipated processing times with relatively few claimants being awarded benefits.

Therefore, in 1972, Congress passed the Black Lung Benefits Act in an effort to liberalize the requirements of entitlement and to transfer jurisdiction over such claims to the Department of Labor. The Act required that the Social Security Administration promulgate interim regulations governing entitlement to facilitate the transfer of jurisdiction to the Department of Labor. These interim Social Security regulations are located at 20 C.F.R. § 410.490. Claims governed by these regulations are commonly referred to as a "section 415 transition claims." Because the interim regulations at 20 C.F.R. § 410.490 were more favorable to the claimant than the Part 410 regulations, a disparity arose in the adjudication of claims. Moreover, state compensation programs were providing inadequate benefits to miners who were totally disabled due to coal workers' pneumoconiosis. See, e.g., *O'Brockta v. Eastern Assoc. Coal Co.*, 18 B.L.R. 1-71 (1994).

For these reasons, Congress again amended the Black Lung Benefits Act in 1977. The 1977 enactment authorized the Department of Labor to promulgate interim and permanent regulations for all black lung claims. Section 435 of the 1977 Act provided that the miner could elect review of all pending or previously denied Part B claims by either the Social Security Administration or Department of Labor under 20 C.F.R. § 410.490. Moreover, all pending or previously denied Part C claims would be reviewed automatically by the Department of Labor.

The interim Department of Labor regulations at 20 C.F.R. Part 727 became effective in March of 1978 and applied to all reviewed claims as well as newly filed claims until completion of the permanent regulations. Two

years later, the Department of Labor completed the promulgation of the permanent regulations at 20 C.F.R. Part 718.

In general, claims filed on or before July 1, 1973 are categorized as Part B claims and are adjudicated under the regulations at 20 C.F.R. Part 410 and/or § 410.490. Claims filed after July 1, 1973 constitute Part C claims and are adjudicated under Parts 727 and/or 718 of the regulations. For an instructive discussion of the history of the Black Lung Benefits Act, see the Third Circuit's decision in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3rd Cir. 1994). See also *Harman Mining Co. v. Layne*, 21 B.L.R. 2-507 (4th Cir. 1998) (unpub.).

B. Regulatory amendments at 20 C.F.R. Part 718 (2008), effective dates of

On December 20, 2000, the Department substantively amended certain regulatory provisions at 20 C.F.R. Parts 718 and 725 (2008). The Department stated that the amendments were made to (1) simplify administrative procedures before the district director, (2) provide new rules on evidentiary development, primarily in regard to the numerical limitations on medical evidence and in regard to the early identification of a single responsible operator, and (3) clarify the meaning of legal requirements, such as the definition of pneumoconiosis and the extent to which pneumoconiosis must contribute to the miner's total disability or death. See 65 Fed. Reg. 79,920-79,924 (Dec. 20, 2000).

The effective date of the amended regulations is January 19, 2001. Subsection 725.2(c) states the following:

The provisions of this part reflect revisions that became effective on January 19, 2001. With the exception of the following sections, this part shall also apply to the adjudication of claims that were pending on January 19, 2001: §§ 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.494, 725.495, 725.547. The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim shall be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

20 C.F.R. § 725.2(b) (2008). In its comments, the Department states that its:

. . . definition of a 'pending claim' is intended to prevent the application of certain regulatory revisions (those which will be applied only on a prospective basis) to any claim that was filed before the date on which those revisions take effect. The definition includes claims pending at various stages of adjudication (*i.e.*, before the district directors, the Office of Administrative Law Judges, the Benefits Review Board, or the federal courts). In addition, some claims that have been finally denied prior to the effective date of the revisions can be revived by a subsequent request for modification. For example, a claim may have been finally denied three months before the rules became effective, and the claimant may file a request for modification nine months later (or six months after the revised regulations took effect). The Department does not intend that the revised regulations that are prospective only (including, for example, the limitation on evidence) be used to adjudicate such a claim, and has drafted the definition of a 'pending claim' to ensure that result.

65 Fed. Reg. 79,956 (Dec. 20, 2000).

With regard to the applicability of the substantively changed Part 718 regulations, 20 C.F.R. § 718.2 (2008) provides the following:

This part is applicable to the adjudication of all claims filed after March 31, 1980, and considered by the Secretary of Labor under section 422 of the Act and part 725 of this subchapter. If a claim is subject to the provisions of section 435 of the Act and subpart C of part 727 of this subchapter (see 20 C.F.R. § 725.4(d)) cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

20 C.F.R. § 718.2 (2008). In its comments to Part 718, the Department states:

[The Department] rejected recommendations to make all of the revisions either fully retroactive or entirely prospective. The Department adhered to its earlier explanation in the initial notice of proposed rulemaking: some regulations could apply to pending claims because they codify existing agency

interpretations of the BLBA and regulations, while other regulations must be limited to prospective application because they involve significant changes to the existing program which could disrupt the parties' interests. The Department therefore declined to adopt a single approach for all of the revisions.

65 Fed. Reg. 79,949 (Dec. 20, 2000). In its comments to the amended regulations, the Department further states:

With respect to rules that clarify the Department's interpretation of former regulations, the Department quoted *Pope v. Shalala*, 998 F.2d 473 (7th Cir. 1993), *overruled on other grounds*, *Johnson v. Apfel*, 189 F.3d 561, 563 (7th Cir. 1999), for the proposition that an agency's rules of clarification, in contrast to rules of substantive law, may be given retroactive effect.

. . .

The Department's rulemaking includes a number of such clarifications. For example, the revised versions of §§ 718.201 (definition of pneumoconiosis), 718.204 (criteria for establishing total disability due to pneumoconiosis) and 718.205 (criteria for establishing death due to pneumoconiosis) each represent a consensus of the federal courts of appeals that have considered how to interpret former regulations.

. . .

Moreover, none of the appellate decisions with respect to these regulations represents a change from prior administrative practice. Thus, a party litigating a case in which the court applied such an interpretation would not be entitled to have the case remanded to allow that party an opportunity to develop additional evidence.

65 Fed. Reg. 79,955 (Dec. 20, 2000).

In *Nat'l. Mining Ass'n., et al. v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001), the National Mining Association challenged the validity of a number of the amended regulations before District Judge Emmet G. Sullivan. During litigation of the case, District Judge Sullivan issued a *Preliminary Injunction Order* requiring that all cases be stayed unless the adjudicator determined that application of the amended regulations would not have an affect on the outcome of the claim. On August 9, 2001, District Judge Sullivan issued a *Memorandum Opinion and Order* lifting the stay and affirming the validity of

all challenged regulations. See *Nat'l. Mining Ass'n., et al. v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

On appeal, the U.S. Circuit Court of Appeals for the D.C. Circuit affirmed Judge Sullivan's decision finding that all of the regulatory amendments were valid (except the fee-shifting provisions at § 725.459)¹, but certain amendments were impermissibly retroactive. In *National Mining Ass'n. et al v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the court held that the following amendments, although valid, could only be applied to claims filed on or after January 19, 2001: 20 C.F.R. §§ 725.101(a)(31), 718.204(a), 725.212(b), 725.213(c), 725.214(d), 725.219(c) and (d), and 725.701(e) (2008).

II. Types of claims

Under the regulations, there are eight types of black lung claims that are adjudicated by this Office.

A. The living miner's claim (BLA)

The miner files a claim for benefits during his or her lifetime. This claim may be pursued by the estate of the miner or by a survivor in the event the miner dies before his or her claim is finally adjudicated. This claim will be assigned a "BLA" case number. See Chapters 8 - 11.

B. The survivor's claim (BLA)

The widow or dependent of a miner files a claim for benefits after the miner's death asserting that the miner died due to coal workers' pneumoconiosis, or was totally disabled due to coal workers' pneumoconiosis at the time of death. This claim is considered independently of a miner's lifetime claim (if one was filed). The survivor's claim will be assigned a "BLA" case number. See Chapters 12 - 16.

C. Medical Benefits Only (BMO)

When the Act was administered by the Social Security Administration, miners were only entitled to benefits, and not related medical services required due to the miner's poor health. The Department of Labor regulations, on the other hand, provide for automatic entitlement to medical services related to the miner's condition if benefits are awarded. A special provision was made for those claims that resulted in entitlement to benefits under the Act as administered by the Social Security Administration whereby

¹ The Department subsequently amended the regulations on December 15, 2003 and removed the December 2000 version of 20 C.F.R. § 725.459.
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the miner could request reimbursement for medical services. These claims are assigned "BMO" case numbers. See Chapter 19.

D. Medical Treatment Dispute (BTD)

In some cases, the employer or Director will allege that certain medical treatment received by the miner is unnecessary and/or unrelated to his or her black lung condition. These cases are assigned "BTD" case numbers. See Chapter 20.

E. Medical Interest (BMI)

Often a miner's medical bills will be paid by the Director out of the Black Lung Disability Trust Fund while the employer disputes such medical treatment. Once the employer is finally adjudicated to be liable for such medical treatment, then it must reimburse the Trust Fund with the costs of the medical services plus interest. Medical interest cases generally arise from a dispute regarding the date of accrual of the interest due. These claims are assigned "BMI" numbers. *But see* Chapter 21 (an administrative law judge does not have authority to award such interest and, if s/he is assigned the case, it should be remanded to the district director).

F. Overpayment (BLO)

Where the claimant (miner or survivor) received benefits in error or received more benefits than he or she was entitled to receive, an overpayment is created. The employer or Director, OWCP may then commence collection of the overpayment amount. The administrative law judge must decide (1) the amount of the overpayment, and (2) whether the overpayment may be waived. These claims are assigned "BLO" case numbers. See Chapter 18.

G. Black Lung Civil Money Penalty (BCP)

If the responsible operator fails to obtain insurance coverage for the payment of benefits as required by law, the Director, OWCP may pursue the corporate officers personally and/or the assets of the operator. 20 C.F.R. § 725.620 (2008). These claims are assigned "BCP" case numbers.

H. Black Lung Part B Claim (BLB)

The "Black Lung Consolidation of Administrative Responsibilities Act" of 2002, 30 U.S.C. § 801 (P.L. 107-275, 116 STAT. 1925 (Nov. 2, 2002)) was enacted to amend the Black Lung Benefits Act at 30 U.S.C. §§ 901-945 to transfer responsibility for adjudicating and administering all pending Part B claims from the Social Security Administration (SSA) to the Department of USDOL/OALJ Black Lung Benchbook (Rev. June 24, 2008)

Labor (DOL). Prior to enactment of the 2002 Act, the SSA administered and adjudicated all black lung claims filed prior to June 30, 1973, also known as "Part B" claims. The SSA and DOL shared responsibility for adjudicating "transition period" claims filed between July 1, 1973 and December 31, 1973 and, then the DOL was responsible for adjudicating and administering claims filed on or after January 1, 1974, also known as "Part C" claims. The effect of the 2002 Act is to transfer jurisdiction of remaining Part B claims to the DOL to administer and adjudicate, in addition to Part C claims already administered and adjudicated by the DOL.

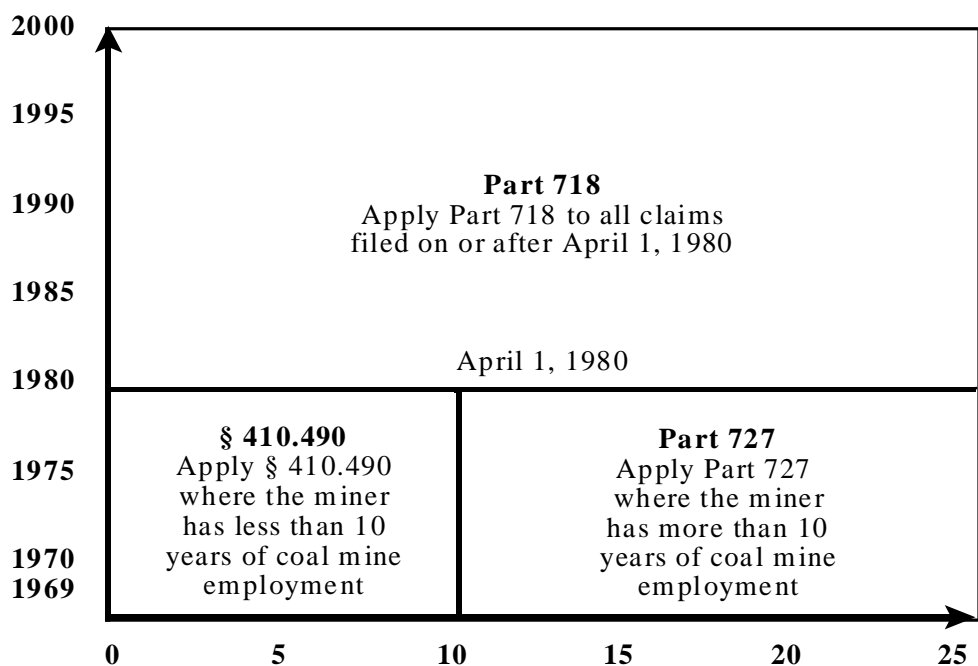
Part B claims transferred to the DOL under the 2002 Act are designated as "BLB" claims by the Office of Administrative Law Judges. Adjudicatory proceedings for these claims follow the procedures set forth at 20 C.F.R. Part 410. They are non-adversarial in nature so the caption will list only the claimant (miner, survivor, or dependent). The Director, OWCP is not a party-in-interest in these claims and will not participate in the proceedings or present any evidence to challenge a claimant's entitlement under Part B. Benefits awarded under Part B are paid by the federal treasury. Finally, unlike other black lung case types adjudicated by the Office of Administrative Law Judges that are appealed to the Benefits Review Board, if a claimant is dissatisfied with the judge's decision in a BLB claim, s/he may request review with the Administrative Review Board. See Chapter 19.

III. Department of Labor jurisdiction

Jurisdiction to adjudicate claims under the Black Lung Benefits Act lies with the Department of Labor pursuant to 30 U.S.C. § 901, *et seq.* and the regulations promulgated at Title 20, Code of Federal Regulations. The procedural regulations at 29 C.F.R. Part 18 apply to black lung claims, but the evidential rules at § 18.101, *et seq.* do not. 29 C.F.R. § 18.1101.

IV. The applicable regulatory scheme

The applicability of a particular set of regulations is determined primarily from the date on which a claim was filed. Once you conclude which regulations should be applicable from the chart below, turn to the appropriate chapter in this *Benchbook* to determine whether any other necessary criteria are met. The vertical axis represents the year the claim is filed. The horizontal axis represents the number of years of coal mine employment.



For a claim filed during the effective dates of the Part 727 regulations, but the miner demonstrated fewer than ten years of coal mine employment, the claim is adjudicated under 20 C.F.R. § 410.490. See Chapters 9, 10, and 11 for the specific effective dates of these regulations and other entitlement criteria.

V. Circuit court jurisdiction

Generally, appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc). In *Broyles v. Director, USDOL/OALJ Black Lung Benchbook* (Rev. June 24, 2008)

OWCP, 143 F.3d 1348 (10th Cir. 1998), the Tenth Circuit held that a survivor's appeal must be filed in the jurisdiction where the miner's coal mine employment, and therefore his harmful exposure to coal dust, occurred. The court stated that, based upon the record before it, the miner's "only exposure to coal dust occurred in the Seventh Circuit" such that the case would be transferred to that court for adjudication pursuant to 28 U.S.C. § 1631.

Some circuit courts have accepted appeals in claims where the miner worked in the coal mines in their jurisdiction *at some point in time*. For example, in *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983), the Eighth Circuit held that "black lung disease is a 'cumulative injury'" which is "caused by extensive exposure to coal dust, and it is impossible to say that any one exposure 'caused the miner to get black lung.'" Consequently, the court rejected the "last injurious contact" rule to state that the "appeal lies in any circuit in which claimant worked and was exposed to the danger, prior to manifestation of the injury." See also *Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3rd Cir. 2002) (the miner last worked in West Virginia, which lies in the Fourth Circuit, but he also worked in Pennsylvania; Third Circuit accepted the appeal and cited to Fourth Circuit as well as its own case law in deciding the appeal).

VI. Addresses and phone numbers of Circuit Courts; jurisdiction

In the event you need to know the status of a case pending with the circuit court, or need other information, the following is a list of the addresses and phone numbers of the circuit courts as well as the states and/or territories over which they have jurisdiction:

<u>FIRST CIRCUIT</u> (Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island)	RICHARD C. DONOVAN, CLERK U.S. Court of Appeals for the First Circuit One Courthouse Way, Suite 2500 Boston, MA 02210 Tel. (617) 748-9057
<u>SECOND CIRCUIT</u> (Connecticut, New York, Vermont)	CATHERINE O'HAGAN-WOLFE, CLERK U.S. Court of Appeals for the Second Circuit 40 Foley Square, Rm. 1702 New York, NY 10007 Tel. (212) 857-8500
<u>THIRD CIRCUIT</u> (Delaware, New Jersey, Pennsylvania, Virgin Islands)	MARCIA M. WALDRON, CLERK U.S. Court of Appeals for the Third Circuit 21400 U.S. Courthouse 601 Market Street Philadelphia, PA 19106-1790 Tel. (215) 597-2995
<u>FOURTH CIRCUIT</u> (Maryland, North Carolina, South Carolina, Virginia, West Virginia)	PATRICIA S. CONNOR, CLERK U.S. Court of Appeals for the Fourth Circuit U.S. Courthouse 1100 East Main St., Room 501 Richmond, VA 23219 Tel. (804) 916-2700
<u>FIFTH CIRCUIT</u> (Louisiana, Mississippi, Texas)	CHARLES FULBRUGE, III, CLERK U.S. Court of Appeals for the Fifth Circuit 600 South Maestri Place New Orleans, LA 70130 Tel. (504) 310-7700

SIXTH CIRCUIT**(Kentucky, Michigan, Ohio, Tennessee)**

LEONARD GREEN, CLERK
U.S. Court of Appeals for the Sixth Circuit
Potter Steward Courthouse, Room 532
100 East 5th Street
Cincinnati, OH 45202
Tel. (513) 564-7000

SEVENTH CIRCUIT**(Illinois, Indiana, Wisconsin)**

GINO J. AGNELLO, CLERK
U.S. Court of Appeals for the Seventh Circuit
219 S. Dearborn St., Rm. 2722
Chicago, IL 60604
Tel. (312) 435-5850

EIGHTH CIRCUIT**(Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)**

MICHAEL E. GANS, CLERK
U.S. Court of Appeals for the Eighth Circuit
111 South 10th Street
Room 24.329
St. Louis, MO 63102
Tel. (314) 244-2400

NINTH CIRCUIT**(Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Marianna Islands, Oregon, Washington)**

MOLLY DWYER, CLERK
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103
Tel. (415) 355-8000

TENTH CIRCUIT**(Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming)**

ELISABETH A. SHUMAKER, CLERK
U.S. Court of Appeals for the Tenth Circuit
The Byron White U.S. Courthouse
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Denver, CO 80257
Tel. (303) 844-3157

ELEVENTH CIRCUIT**(Alabama, Florida, Georgia)**

THOMAS K. KAHN, CLERK
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Atlanta, GA 30303
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