

PART VII

ESTABLISHING ENTITLEMENT UNDER 20 C.F.R. PART 718

E. CAUSE OF DISABILITY: SECTION 718.204(b)

1. SECTION 718.204(b)

Several U.S. Courts of Appeal have recently issued decisions that impact on the interpretation of Section 718.204(b). In the Third Circuit, claimant must establish that pneumoconiosis is a substantial contributor to any respiratory or pulmonary disability diagnosed. ***Bonessa v. United States Steel Corp.***, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).

In the Fourth Circuit, claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. To be a contributing cause, the claimant's coal mining must be a necessary condition of his disability. If the claimant would have been disabled to the same degree and by the same time in his life if he had never been a miner, then claimant has failed to meet his burden. On the other hand, if his mining has contributed to his disability, then the burden is met. ***Robinson v. Pickands Mather & Co.***, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

In the Tenth Circuit, claimant must establish that his pneumoconiosis was at least a contributing cause of his total disability. ***Mangus v. Director, OWCP***, 882 F.2d 152, 13 BLR 2-9 (10th Cir. 1989). In ***Adams v. Director, OWCP***, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the Sixth Circuit held that claimant must affirmatively establish that his totally disabling respiratory impairment was due "at least in part" to his pneumoconiosis. Similarly, in the Eleventh Circuit, claimant must establish that his pneumoconiosis must be a substantial contributing factor in the miner's total disability. ***Lollar v. Alabama By-Products***, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

For cases arising in all Circuits not yet ruling on this issue, the Board overruled the "in and of itself" standard enunciated in ***Wilburn v. Director, OWCP***, 11 BLR 1-135 (1988), and holds that claimant has the burden to establish that the miner's pneumoconiosis was a "contributing cause" of the miner's total disability. ***Scott v. Mason Coal Co.***, 14 BLR 1-37 (1990)(en banc recon.).

CASE LISTINGS

DIGESTS

An administrative law judge who has found that claimant has established total disability pursuant to Section 718.204(c) must also determine whether claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(b). **Tucker v. Director, OWCP**, 10 BLR 1-35 (1987).

If the miner has the benefit of Section 718.305, the causal relationship is presumed and the burden to disprove this relationship lies with the party opposing entitlement. **Tanner v. Freeman United Coal Co.**, 10 BLR 1-85 (1987).

A diagnosis of cor pulmonale may be relevant in determining whether a miner's disability was caused by pneumoconiosis. **Christian v. Mansanto Corp.**, 12 BLR 1-56 (1988).

Claimant's burden at Section 718.204 is to establish total disability due to pneumoconiosis as defined in Section 718.201. **Gee v. W.G. Moore and Sons**, 9 BLR 1-4 (1986); see also **Nance v. Benefits Review Board**, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988).

In an en banc reconsideration, the Board distinguishes the difference between the burdens to rebut and establish cause of disability under Sections 727.203(b)(3) and 718.204(b). **Hutson v. Freeman United Coal Mining Co.**, 12 BLR 1-72 (1988)(en banc).

Lay evidence constitutes relevant evidence in determining whether claimant has established total disability under Section 718.204(c); however, lay testimony may not be relied on solely to find total disability established at Section 718.204(c) in a living miner's case. See 20 C.F.R. §718.204(d)(2); **Salyers v. Director, OWCP**, 12 BLR 1-193, 1-196 (1989); **Trent v. Director, OWCP**, 11 BLR 1-26, 1-28 (1987); **Tucker v. Director, OWCP**, 10 BLR 1-35, 1-38 (1987); **Fields v. Island Creek Coal Co.**, 10 BLR 1-19, 1-22 (1987); **Matteo v. Director, OWCP**, 8 BLR 1-200, 1-203 (1985).

The Board rejected employer's assertion that the Fourth Circuit, in **Milburn Colliery Co. v. Hicks**, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and **Dehue Coal Co. v. Ballard**, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), has adopted the holding of the Seventh Circuit, in **Freeman United Coal Mining Co. v. Foster**, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), and **Peabody Coal Co. v. Vigna**, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), that a claimant is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems, if he suffers from a pre-existing nonrespiratory disability. Further, although the Board agreed with employer that the revised regulation at 20 C.F.R. §718.204(a) is

impermissibly retroactive as applied to pending cases, the Board declined to apply **Vigna** and **Foster** in cases such as the instant one, which arise outside of the Seventh Circuit. **Bateman v. Eastern Associated Coal Corp.**, BLR 1- , BRB No. 02-0443 BLA (Mar. 31, 2003).

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