

PART X
SURVIVORS' CLAIMS

I. SURVIVORS' CLAIMS UNDER 20 C.F.R. PARTS 410 AND 718

In instances where a survivor is unable to qualify for the statutory or regulatory presumptions, the elements of entitlement that are not established by presumption must be proven under the appropriate regulations. For claims filed on or before March 31, 1980, the applicable regulations are those set forth at 20 C.F.R. Part 410, Subpart D. For claims filed after March 31, 1980, 20 C.F.R. Part 718 applies. In the Third, Sixth, Seventh and Eighth Circuits, Part 718 applies to claims adjudicated after March 30, 1980. ***Oliver v. Director, OWCP***, 888 F.2d 1239, 13 BLR 2-124 (8th Cir. 1989); ***Strike v. Director, OWCP***, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1989); ***Knuckles v. Director, OWCP***, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); ***Caprini v. Director, OWCP***, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

Unless a miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivor's claims filed on or after *January 1, 1982*, ONLY WHEN the miner's death was due to pneumoconiosis EXCEPT if the survivor's entitlement is established by *Section 718.306* on a claim *filed PRIOR TO June 30, 1982*. Note, a claim for survivor's benefits need *not* be reached if benefits are awarded in a living miner's claim filed prior to June 30, 1982. ***Freeman United Coal Mine Co. v. Benefits Review Board***, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, when the existence of pneumoconiosis is an issue, under any of the methods available at Section 718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993).

CASE LISTINGS

[presence of pneumoconiosis not established under Section 410.414(a) where no record x-ray, autopsy or biopsy evidence; miner died of gunshot wound, therefore death not due to pneumoconiosis; remand to consider lay testimony regarding total disability due to pneumoconiosis at time of death under Section 410.414(c)] ***Henderson v. Director, OWCP***, 7 BLR 1-866 (1985).

[20 C.F.R. §718.205(c)(1980), *cf.* 20 C.F.R. §718.205(c)(1989), construed as permitting finding of death due to pneumoconiosis where cause of death significantly related to or

aggravated by pneumoconiosis] **Foreman v. Peabody Coal Co.**, 8 BLR 1-371 (1985).

Where the previous finding of pneumoconiosis in the miner's lifetime claim was based on the true doubt rule, which is no longer valid, the doctrine of collateral estoppel does not apply to preclude litigation of the issue of pneumoconiosis in the survivor's claim because the allocation of the burden of proof differs in the two proceedings. Additionally, where the previous finding of pneumoconiosis was based solely on the x-ray evidence in the miner's claim, whereas the subsequent holding in **Island Creek Coal Co. v. Compton**, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000), requires that the different types of evidence submitted pursuant to 20 C.F.R. §718.202(a)(1)-(4) be weighed together to determine whether a preponderance of all the evidence establishes the existence of pneumoconiosis, collateral estoppel does not apply to preclude litigation of the issue of pneumoconiosis in the survivor's claim because the issue of the existence of pneumoconiosis is not identical to the one previously litigated in the miner's claim. **Sturgill v. Old Ben Coal Co.**, BRB No. 02-0874 (Aug. 28, 2003).

DIGESTS

To establish entitlement to benefits pursuant to Section 718.205, it must be determined that a miner's pneumoconiosis arose out of coal mine employment. **Boyd v. Director, OWCP**, 11 BLR 1-39 (1988).

In a case involving eight and one-quarter years of coal mine employment and considered under Part 410, the Board vacated the administrative law judge's finding of death due to pneumoconiosis and remanded for the administrative law judge to reconsider the credibility of the death certificate and his reliance on it in light of the Director's contention that, because there is nothing in the record indicating that the person signing the death certificate (the coroner) possessed any relevant qualifications or personal knowledge from which to assess the cause of death, the death certificate is unreliable. The Board held that the administrative law judge erred in accepting the death certificate at face value without considering the underlying basis for the coroner's conclusions as to the cause of death. **Addison v. Director, OWCP**, 11 BLR 1-68 (1988).

Unless the miner had been awarded benefits on a claim filed prior to January 1, 1982, benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis, except where the survivor's entitlement is established pursuant to Section 718.306 on a claim filed prior to June 30, 1982. **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988).

The administrative law judge's finding that claimant failed to establish death due to pneumoconiosis under Section 718.205(c) was affirmed. **Dillon v. Peabody Coal Co.**,

11 BLR 1-113 (1988).

Section 718.205(c)(4) does not preclude an award of benefits to a surviving widow where the miner's death was caused by a traumatic injury, if the deceased miner has access to the irrebuttable presumption of death due to pneumoconiosis at Section 718.304. See Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). The irrebuttable presumption of death due to pneumoconiosis found in Section 718.304 is controlling despite the fact that the death of a miner is caused by traumatic injury. **Sumner v. Blue Diamond Coal Co.**, 12 BLR 1-74 (1988).

Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivor's claims filed on or after *January 1, 1982*, ONLY WHEN the miner's death was due to pneumoconiosis EXCEPT if the survivor's entitlement is established by *Section 718.306* on a claim filed *PRIOR TO June 30, 1982*. Note, a claim for survivor's benefits need *not* be reached if benefits are awarded in a living miner's claim filed prior to June 30, 1982. **Freeman United Coal Mine Co. v. Benefits Review Board**, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990).

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis as an issue under any of the methods available at Section 718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). **Trumbo v. Reading Anthracite Co.**, 17 BLR 1-85 (1993).

An administrative law judge properly relied on the opinion of a physician who performed an autopsy to find that pneumoconiosis hastened death by causing an inability to expectorate mucus secretions and, thus, the administrative law judge properly found that the miner's pneumoconiosis substantially contributed to death pursuant to 20 C.F.R. §718.205(c). **Mays v. Piney Mountain Coal Company, Inc.**, 21 BLR 1-59 (1997)(Dolder, J., dissenting in part and concurring in part), *aff'd sub nom. Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999); see **Peabody Coal Co. v. Director, OWCP [Ricker]**, 182 F.3d 637, 21 BLR 2-663 (8th Cir. 1999).

In a survivor's claim, the doctrine of collateral estoppel is not applicable to preclude employer or the Director from relitigating the issue of occupational pneumoconiosis previously established in the living miner's claim if benefits were ultimately denied in the miner's claim, because the issue was not necessary to the judgment. Additionally, where a survivor's claim includes autopsy evidence which was not available and could not have been adduced at the time of adjudication of the miner's claim, an exception to application of the doctrine of collateral estoppel may be warranted to allow relitigation of the issue of occupational pneumoconiosis. **Hughes v. Clinchfield Coal Co.**, 21 BLR 1-134 (1999)(*en banc*).

In a survivor's claim where no autopsy was performed and entitlement to benefits was established in the living miner's claim, the Board upheld the administrative law judge's

determination that the doctrine of collateral estoppel was not applicable to preclude litigation of the issue of the existence of pneumoconiosis, because the change in law enunciated by the Fourth Circuit in ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), affected the fact-finder's weighing of the evidence, thus the issue was not identical to the one previously litigated. ***Collins v. Pond Creek Mining Co.***, 22 BLR 1-129 (2003).

In a Part 718 survivor's claim where no autopsy was performed and entitlement to benefits was established in the living miner's claim, the doctrine of non-mutual offensive collateral estoppel may be available to preclude litigation of the issue of the existence of the pneumoconiosis. However, even where the criteria for application of the doctrine are met, collateral estoppel may not be invoked where the circumstances of the case justify an exception to the general issue preclusion principles. ***Polly v. D & K Coal Co.***, 23 BLR 1-77 (2005).

Where there is a question of whether or not to apply the doctrine of non-mutual offensive collateral estoppel under the specific circumstances of a case, the "preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." ***Polly v. D & K Coal Co.***, 23 BLR 1-77 (2005).

Citing the holding of the United States Supreme Court in ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 326, n.4 (1979), the Board held that the use of offensive non-mutual collateral estoppel may be unfair in certain circumstances, such as where a defendant may have little incentive to defend vigorously a claim in which the amount in controversy is nominal, and future suits are not foreseeable. Thus, the Board vacated the administrative law judge's decision and remanded the case for the administrative law judge to determine whether the offset of federal benefits in the living miner's claim created a disincentive for employer to vigorously litigate the miner's claim thereby making application of collateral estoppel unfair. ***Polly v. D & K Coal Co.***, 23 BLR 1-77 (2005).

Although the Fourth Circuit in ***Island Creek Coal Co. v. Compton*** invalidated the practice of allowing administrative law judges to find the existence of pneumoconiosis established by looking exclusively at evidence within one of the four subsections at 20 C.F.R. §718.202(a), while ignoring contrary evidence belonging to one of the other three subsections, the court noted that in so ruling, it left unaltered the legal definition of pneumoconiosis, the methods by which a claimant may establish the existence of pneumoconiosis, and the burden of proving the existence of pneumoconiosis by a preponderance of the evidence. The court thus concluded that the issue sought to be precluded in the survivor's claim was identical to that previously adjudicated in the successful miner's claim decided prior to ***Compton***, and that the doctrine of offensive nonmutual collateral estoppel was applicable to preclude relitigation of the issue under the facts of this case. Consequently, the Court overruled the Board's holding in ***Collins***

v. Pond Creek Mining Co., 22 BLR 1-229 (2003), that collateral estoppel was inapplicable, and remanded the case for the Board to assess whether the administrative law judge's weighing of the evidence on the issue of death causation met the "rigorous standards" outlined in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002). *Collins v. Pond Creek Mining Co.*, 468 F.3d 213 (4th Cir. 2006)(Shedd, C.J., dissenting).

Where the administrative law judge applied the doctrine of offensive non-mutual collateral estoppel to the finding of pneumoconiosis that was made in the miner's successful claim for lifetime benefits, the Board rejected employer's assertion that it was disadvantaged because claimant had the exclusive authority to allow an autopsy. Further, the Board rejected employer's assertion that it was unfair to apply collateral estoppel because the evidentiary limitations in 20 C.F.R. §725.414 substantially changed the law and provided employer with greater procedural opportunities in the survivor's claim than it had in the miner's claim. *V.M. v. Clinchfield Coal Co.*, BLR , BRB No. 07-0822 BLA (July 29, 2008).

In this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, where the administrative law judge found the existence of pneumoconiosis established by collateral estoppel, the Board held that the administrative law judge properly applied *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), to accord little weight to the death causation opinions of the physicians who did not diagnose pneumoconiosis. The Board held that the fact that the coal mine operator's physicians assumed the existence of pneumoconiosis for part of their causation opinions did not alter the analysis under *Scott*. *V.M. v. Clinchfield Coal Co.*, BLR , BRB No. 07-0822 BLA (July 29, 2008).

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