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**Evidentiary Requirements to Prove a Claim for Black Lung Benefits: Impact of the Black Lung Benefits Reform Act of 1977**

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EVIDENTIARY REQUIREMENTS TO PROVE A CLAIM FOR BLACK LUNG BENEFITS: IMPACT OF THE BLACK LUNG BENEFITS REFORM ACT OF 1977

The primary purpose of the Black Lung Benefits Reform Act of 1977 (BLBRA) is to remove certain eligibility restrictions from the existing federal black lung benefits program.¹ The original program, established by Congress in 1969, charged the Social Security Administration (SSA) with administration of most claims filed between December 30, 1969 and June 30, 1973. With the exception of certain survivors' claims, the Department of Labor (DOL) assumes responsibility for administering all miners' claims filed after July 1, 1973.

In 1972 Congress enacted the Black Lung Benefits Act (BLBA)² to expand the coverage contemplated by the original program and to liberalize claim awards. The BLBRA is thus the second amendment of the original act. While the expressed congressional intent in the BLBRA remains the same as that stated in the BLBA,³ it was apparent that further modifications to the


To maintain consistency this Note will cite statutory authority to the United States Code Annotated (U.S.C.A.) instead of the United States Code (U.S.C.). This departure is due to the fact that not all amendments to the original black lung compensation program have appeared in the most recent U.S.C. Supplement at the time this Note was written, but all changes do appear in the 1979 West Supplement to the U.S.C.A..


³ Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to
1972 act were necessary because only 7.8% of all claims had resulted in recovery of benefits under the prior law.4

"Benefits are provided under the [BLBRA] to coal miners who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines, and to the eligible survivors of miners who are determined to have been totally disabled due to pneumoconiosis at the time of their death."5

This disease or who were totally disabled by this disease at the time of their deaths; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this title to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease or who were totally disabled by this disease at the time of their deaths; and to insure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.


Briefly, the claims procedure requires the claimant to begin the process by filing a claim at his local Department of Labor field office. The claim will be processed but no determination of eligibility is made at that time. Next, the claim is sent to the Office of Workers' Compensation Programs for the initial determination of eligibility. Claims denied, or claims approved but contested, are then filed with the deputy commissioner, who will set the case for an informal conference and notify all parties. From there the adversely affected party can request a formal hearing before the Office of Administrative Law Judges [hereinafter cited as ALJ] by appealing within 30 days. The next level of appeal is to the Benefits Review Board [hereinafter cited as BRB], and finally, appeal to the United States Circuit Court of Appeals for the circuit in which the claim arose. See 20 C.F.R. §§ 725.401-.483 (1979).

Citation Information

Cases decided by the BRB are collected in a commercial looseleaf service (called the Benefits Review Board Service [hereinafter cited as BRBS]) published by Matthew Bender [hereinafter cited as M-B].

ALJ decisions reported in the BRBS are designated by (ALJ) appearing after the page number of the BRBS citation.

Additionally, BRB numbers are included in the citations for all cases that are included in the BRBS. This number can be used to obtain copies of the cases from the BRB.

Finally, ALJ opinions not appearing in the BRBS are identified solely by their BRB numbers and dates of decision.

Thus, a claimant must establish three elements to be entitled to an award under the BLBRA: (1) that he is or was a miner, (2) that he is totally disabled due to pneumoconiosis, and (3) that his pneumoconiosis arose out of his coal mine employment. 

This Note will analyze the modifications in evidentiary requirements created by the BLBRA. Changes will be discussed in relation to the three elements that a claimant must establish to recover benefits. In developing this analysis three sources are relied upon: (1) the BLBRA, (2) Department of Labor Regulations, and (3) Social Security Administration Regulations.

A comparison of the BLBA and the BLBRA reveals a change in the definition of pneumoconiosis. This was defined previously as simply a chronic dust disease of the lung arising out of employment in a coal mine. The new definition includes the "sequelae" of pneumoconiosis, as well as respiratory and pulmo-

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* 20 C.F.R. § 410.410(b) (1979). Note that the eligible survivors of a deceased miner must show that: (1) the decedent was a coal miner, (2) he was totally disabled due to pneumoconiosis at the time of his death, and (3) his pneumoconiosis arose out of his coal mine employment. See Petry v. Califano, 577 F.2d 860 (4th Cir. 1978), for an excellent discussion of these elements and black lung claims in general.


* Interim criteria at 20 C.F.R. §§ 727.1-.405 (1979) (permanent criteria to be codified at 20 C.F.R. § 718).

* Interim criteria at 20 C.F.R. § 410.490 (1979) (permanent criteria at 20 C.F.R. §§ 410.401-.476 (1979)). Basically, the DOL regulations are to be applied to claims as if to another more restrictive than the SSA regulations. See 20 C.F.R. § 727.200 (1979). For an excellent discussion of the interplay between the DOL's claims criteria and the SSA's claims criteria see Smith, Black Lung Benefits Reform Act of 1977, Complicated But Simple, Ky. Bench & B., April 1979, at 20.

10 In comparing the BLBRA with the BLBA, unless otherwise noted, changes will be shown by three methods: (1) existing law which is omitted in the BLBRA is enclosed in brackets, (2) new matter is italicized, and (3) existing law in which no change is made is shown in regular print.

11 Pneumoconiosis is commonly known as black lung. The terms will be used interchangeably throughout this Note. The statutory definition is as follows: "The term 'pneumoconiosis' means a chronic dust disease of the lung [arising out of employment in a coal mine] and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." FMSHA § 402(b), 30 U.S.C.A. § 902(b) (West Supp. 1979) (emphasis added).
The term "miner" has also been extensively altered. Formerly, "miner" was defined as any individual who is or was employed in a coal mine (underground or surface) and who performed duties in the preparation or extraction of coal. The new definition includes persons who have worked around coal mines or who have been employed in conjunction with coal preparation facilities, construction, or coal transportation in which they are exposed to coal dust.

The two new definitions, when considered in conjunction, serve a twofold purpose. First, it is clear that persons other than those who have actually worked in a coal mine are to be included as potential black lung benefit recipients. Second, these definitions eliminate the argument that only black lung, as historically defined, is compensable under the BLBRA by permitting black lung to be diagnosed from existing respiratory and pulmonary impairments.

The DOL interprets this new definition of pneumoconiosis as

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12 Id.

13 The term "miner" means any individual who [is or was employed in a coal mine] works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. FMSHA § 402(d), 30 U.S.C.A. § 902(d) (West. Supp. 1979) (emphasis added).

14 Id.

15 The BRB has held that the term miner is not to be narrowly construed, e.g., Hunter v. Rochester & Pittsburgh Coal Co., [1976] 4 BRBS (M-B) 538, BRB No. 75-181 BLA (molder in a coal mine operator's foundry considered a miner). See also Adelsberger v. Mathews, 543 F.2d 82 (7th Cir. 1976) (coal mine weighmaster, who served as intermediary between the mine office and tipple, found to be a miner).

16 The regulations interpret "pneumoconiosis" as: coal workers' pneumoconiosis, anthracosilicosis, anthracosianthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.

a rejection of the traditional view that the significant aggravation of a preexisting condition by coal dust exposure should not be considered a basis for eligibility under the BLBRA. However, coal mine operators opposing claims will cite the recent case of United States Steel Corp. v. Gray in support of their argument that aggravation of an existing respiratory or pulmonary impairment is not compensable under the BLBRA. The Fifth Circuit in Gray, through dicta, notes that the introduction of an “aggravation theory” into the DOL regulations may improperly expand the statutory definition of pneumoconiosis as interpreted by the SSA regulations. While this is in direct conflict with the regulations promulgated by the DOL, future litigation will decide exactly how much influence the argument propounded in Gray will have.

The section 402(f) definition of total disability is another

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17 Though this rejection seems to follow from merely reading the definition at 20 C.F.R. § 727.202 (1979), the DOL was explicit in its comments to the regulations.

The Department rejects the view that the significant aggravation of a preexisting condition by coal dust exposure should not be considered a basis for eligibility under the Act. It is a commonly agreed upon and statutory principle of workers’ compensation law that an employer takes an employee with whatever underlying conditions the employee has. Accordingly, aggravation of a preexisting condition to the point of disability is considered a proper basis for awarding benefits under many compensation laws. Contrary to the commentator’s argument, this is a well established principle under the Longshoremen’s and Harbor Workers’ Compensation Act, which Act sets the pattern for the consideration of claims under Part C of the Black Lung Benefits Act. The “aggravation” question has caused considerable confusion in the past and the Department hopes that the clarification in this section will put the matter to rest.


18 588 F.2d 1022 (5th Cir. 1979).

19 Id. at 1026.

20 20 C.F.R. § 410.401(b) (1979).

21 (A) [I]n the case of a living miner, [the Secretary of DOL’s and the Secretary of HEW’s] regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employ-
major revision in the BLBRA. Perhaps the most significant change in the amended definition is that portion which concerns a living miner who is still employed at the time of filing his claim. The former definition did not specify that a living miner could still be employed in a mine, and yet be "totally disabled." Under the new section, however, if there are changed circumstances concerning his employment which indicate a reduced ability to perform his usual coal mine work, then such miner’s employment in a mine may not be used as conclusive evidence that the miner is not totally disabled.\(^2\) This revision prevents the inequitable result where a miner is denied benefits because he continues to be employed, even though he continues to work only by exerting near heroic effort.\(^3\) However, an employed miner whose claim is approved must terminate his employment within one year of the final approval to begin receiving benefits.\(^4\)

\(^1\) Sedentary work is not a qualification for disability. A miner who is employed in a sedentary occupation is not entitled to disability benefits, even though he has a physical disability. See, e.g., Dellosa v. Weinberger, 386 F. Supp. 1122 (E.D. Pa. 1974). That case involved a widow’s claim. In the last year before his death, Mrs. Dellosa’s husband was able to work only two days a week, and even then he required assistance from his co-workers to perform satisfactorily.


\(^2\) No miner who is engaged in coal mine employment shall (except as provided in section 411(c)(3)) be entitled to any benefits under this part while so employed. Any miner who has been determined to be eligible for benefits pursuant to a claim filed while such miner was engaged in coal mine employment shall be entitled to such benefits if his or her employment terminates within one year after the date such determination becomes final.

Similarly, the Benefits Review Board (BRB), by noting that the revised definition of total disability is concerned primarily with work capability, has held that a hearing officer must first make a finding of the claimant's capability to perform his regular coal mine employment before finding the claimant not totally disabled.25 Thus, factors such as the claimant's work attendance, the quality of his performance, and the amount of his earnings must all be considered in determining whether the claimant's disability is total.26

These alterations in the definition of total disability, although important, are but an introduction to the central issue of actually establishing total disability due to pneumoconiosis. The burden of proof for any successful black lung claim may be met by various methods: (1) by the statutory irrebuttable presumption contained in section 411(c)(3) of the FMSHA, (2) through the DOL regulations at 20 C.F.R. § 727.203, or (3) by the statutory rebuttable presumption contained in section 411(c)(4) of the FMSHA. Though this listing is not inclusive, the three methods referred to are those of primary application to claims filed after 1972.27 It should also be noted that the BLBRA adds section 411(c)(5),28 which provides a rebuttable presumption of total disability due to pneumoconiosis for survivors of deceased miners.

25 Murray v. Bishop Coal Co., 1978] 8 BRBS (M-B) 990, BRB No. 77-893 BLA.
26 Collins v. Mathews, 547 F.2d 795 (4th Cir. 1976); Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975).
27 Part C of the BLBRA provides that the duty of administering claims filed after 1972 rests with the Secretary of Labor.
28 In the case of a miner who dies on or before the date of the enactment of the [BLBRA] who was employed for 25 years or more in one or more coal mines, before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, . . . unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death.
INVOKING THE SECTION 411(c)(3) PRESUMPTION

Section 411(c)(3) of the FMSHA provides an irrebuttable presumption of total disability due to pneumoconiosis which may be invoked by one of three methods. Under the first method it is necessary for the claimant miner to have had a chest roentgenogram (X-ray) which meets the standards set forth at section 411(c)(3)(A).\textsuperscript{30} The second method requires the claimant to have

\textsuperscript{30} This section was part of the BLBA and was not altered by the BLBRA.

If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

FMSHA § 411(c)(3), 30 U.S.C.A. § 921(c)(3) (West Supp. 1979) [hereinafter cited as section 411(c)(3)].

\textsuperscript{30} The standards here require the finding of a category A, B, or C opacity from the X-ray evidence, as per the standards of the International Classification of Radiographs of the Pneumoconiosis by the International Labor Organization [hereinafter cited as U/C Classification]. Categories A, B, and C describe “complicated pneumoconiosis” and are defined as follows:

Category A - An opacity with greatest diameter between 1 cm and 5 cm, or several such opacities the sum of whose greatest diameters does not exceed 5 cm.

Category B - One or more opacities larger or more numerous than in category A whose combined area does not exceed the equivalent of the right upper zone (each lung is divided into three zones by horizontal lines drawn at one third and two thirds of the vertical distance between the apex of the lung and the dome of the diaphragm - so that for each lung there is reference to an upper, middle, and lower zone).

Category C - One or more opacities whose combined area exceeds the equivalent of the right upper zone.

Other notations with which a claimant’s counsel should be familiar in regard to X-ray evidence concern the profusion of opacities observed in an X-ray. There are four categories of profusion, and within each category there are three sub-categories of severity (shown by a fraction) defined as follows:

- 0/- 0/0 0/1 Category 0 - small rounded opacities absent or less profuse than in Category 1.
- 1/0 1/1 1/2. Category 1 - small rounded opacities definitely present,
had a biopsy, or autopsy in the case of a deceased miner, which meets the standards of section 411(c)(3)(B). The third method requires the claimant to have had "diagnosis made by other means." This means that the irrebuttable presumption is invoked if such diagnosis suggests that, had the tests prescribed in clause A or clause B been performed, they would have yielded the results described in either of the clauses.

Because a biopsy is an extremely painful procedure, and because an autopsy is limited to cases involving deceased miners, X-ray evidence is the predominant method used to invoke the irrebuttable presumption of total disability due to pneumoconiosis. Counsel for claimants should be certain that X-rays, submitted along with their client's claims, are read by a DOL-certified radiologist. Additionally, X-rays submitted as part of a claim should be of good quality. These precautions will prevent the practice of X-ray rereading by outside consultants, which often has resulted in negative findings of pneumoconiosis.

but few in number. The normal lung markings are usually visible.
2/1 2/2 2/3 Category 2 - small rounded opacities numerous. The normal lung markings are usually still visible.
3/2 3/3 3/4 Category 3 - small rounded opacities very numerous. The normal lung markings are partly or totally obscured.

According to these notations, a category 0, or 0, finding is indicative of no pneumoconiosis. Findings classified within any of the other three categories will support a showing of pneumoconiosis, with the severity increasing relative to the number representing the category.

A final bit of notation which may appear on a claimant's X-ray report are letters, usually p, q, or r, that are in reference to the shape and detail of the opacities observed in the X-ray. ILO U/C 1971 International Classification of Radiographs of the Pneumoconioses, 48(3) MED. RADIOGRAPHY & PHOTOGRAPHY 67 (1972).

If the biopsy or autopsy reveals massive lesions in the lung, then the irrebuttable presumption will be invoked. See FMSHA § 411 (c)(3), 30 U.S.C.A. § 921 (c)(3) (West Supp. 1979).


A prohibition on X-ray rereading is written into the FMSHA for claims where there is other evidence of a pulmonary or respiratory impairment. In any case in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this title if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the
Even when applying the irrebuttable presumption of section 411(c)(3), there are still two distinct elements of causation which must be established before a claimant can receive black lung benefits. These two elements are: (1) a showing that the claimant’s total disability is due to pneumoconiosis, and (2) a showing that the claimant’s pneumoconiosis arose out of his coal mine employment.

Only the first element, a showing that the claimant’s total disability is due to pneumoconiosis, is included in the irrebuttable presumption at section 411(c)(3). This presumption is of tremendous benefit to claimants because it refutes arguments by employers that the claimant left work for some reason other than pneumoconiosis.\(^4\)

However, the irrebuttable presumption at section 411(c)(3) does not become available merely upon the introduction of evidence by a physician that the claimant has complicated pneumoconiosis. Where the medical evidence is contradictory concerning the presence of simple or complicated pneumoconiosis, the fact finder must resolve the conflict.\(^5\) In addition, the hearing officer may not rely solely on one X-ray report showing complicated pneumoconiosis to the exclusion of a number of more recent and more probative X-ray reports contradicting that diagnosis.\(^6\) That is, the hearing officer as trier of facts is charged with the responsibility of resolving issues of credibility as to lay testimony and choosing between medical test results in the record. However, he

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claim has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest.


\(^4\) See, e.g., Webb v. United States Pipe & Foundry Co., [1977] 6 BRBS (M-B) 279, 283, BRB No. 76-273 BLA, where the employer’s argument that the claimant left work due to cancer and not because of pneumoconiosis was rejected since the claimant had invoked the presumption at section 411(c)(3), which indicates that a claimant diagnosed as suffering from complicated pneumoconiosis is irrebuttable presumed to be totally disabled due to pneumoconiosis.


\(^6\) Travis v. Peabody Coal Co., [1978] 7 BRBS (M-B) 440, BRB No. 76-114
is not free to reject results submitted by reputable physicians merely because they are on the less persuasive side of different medical results which are in accord with his own assessment of the claimant's respiratory problems.\(^{37}\)

Before a claim may be approved, the second element of causation (a showing that the claimant's pneumoconiosis arose out of his coal mine employment) must be satisfied. This requirement is readily fulfilled for those claimants who have worked ten or more years in one or more coal mines by invoking the rebuttable presumption at section 411(c)(1) of the FMSHA.\(^{38}\) This section is interpreted liberally by the BRB. For example, in \textit{Luker v. Old Ben Coal Co.},\(^{39}\) the BRB held that once the existence of pneumoconiosis had been demonstrated, the causal link to coal mine employment would be presumed regardless of whether the ten years were spent as an underground miner, a surface miner, or both, despite the potential differences in levels of dust exposure.

When a claimant is unable to invoke the presumption at section 411(c)(1), he is faced with a more difficult burden. For example, the BRB has held that the "aggravation theory" (i.e., that the claimant's prior respiratory or pulmonary ailment has been aggravated by coal dust) may not be used to invoke the presumption that a claimant's pneumoconiosis arose out of his coal mine employment.\(^{40}\) Consequently, where the claimant has worked at

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\(^{37}\) Gober v. Mathews, 574 F.2d 772, 777 (3d Cir. 1978).

\(^{38}\) "[If] a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment." FMSHA § 411(c)(1), 30 U.S.C.A. § 921(c)(1) (West Supp. 1979). Similarly, § 411(c)(2) of the FMSHA, 30 U.S.C.A. § 921(c)(2) (West Supp. 1979) provides this presumption for survivors who file claims: "[If] a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis."

\(^{39}\) [1979] 10 BRBS (M-B) 297, 306-07, BRB No. 77-827 BLA.

\(^{40}\) "[T]he aggravation, acceleration theory applied by the hearing officer in the instant case was an incorrect legal theory when used to establish the causal relationship between claimant's respiratory impairment and his mine employment required by the Black Lung Act." Fly v. Peabody Coal Co., [1978] 8 BRBS (M-B) 1001, 1007, BRB No. 77-827 BLA. Thus, the \textit{Fly} case is merely a limitation on the use of the "aggravation theory" and does not contradict the definition of pneumoconiosis at section 402(b) of the FMSHA, 30 U.S.C.A. § 902(b) (West Supp. 1979), or at 20 C.F.R. § 727.202 (1979).
other jobs exposing him to dust, has been a smoker for some years, or is allergic to dust and fumes, his ability to establish the causal connection (between his pneumoconiosis and his coal mine employment) is hampered. However, despite the difficulty, a claimant can still establish the causal connection by proving the existence of a lung disease and that no other job in his employment history could have given rise to his lung impairment, along with an absence of other factors, such as smoking, which could have caused the impairment.

**INVOKING THE DOL INTERIM PRESUMPTION**

The DOL regulations provide additional methods of invoking the presumption that a claimant’s total disability is due to pneumoconiosis. A rebuttable presumption (termed the “interim presumption”) is available to those claimants who can establish coal mine employment of at least ten years and who can meet any one of the four medical requirements set forth in the regula-

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41 *E.g.*, Lewandowski v. Director, [1978] 9 BRBS (M-B) 55, BRB. No. 77-273 BLA; Menzie v. Director, [1978] 8 BRBS (M-B) 1016, BRB No. 77-880 BLA.

42 Rocchetti v. Jones & Laughlin Steel Corp., [1978] 9 BRBS (M-B) 27, BRB No. 77-185 BLA. In that case the BRB said that the employer had failed to produce sufficient evidence to show that the claimant’s impairment was due to smoking, or some other cause, and not due to his coal mine employment.

In order for a pulmonary impairment to be ascribed to smoking (and thus shown not to be primarily due to pneumoconiosis), however, such ascription must be made in terms of a “reasonable medical certainty.” Rogers v. Ziegler Coal Co., [1978] 9 BRBS (M-B) 62, BRB No. 77-195 BLA. Specific evidentiary guidelines for establishing smoking rather than pneumoconiosis as the main etiological factor in pulmonary impairment were outlined by the BRB in Blevins v. Peabody Coal Co., [1978] 9 BRBS (M-B) 510, BRB No. 78-406 BLA.

43 The rebuttable presumption promulgated by the DOL is as follows: A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

1. A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . . ;

2. Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:
Evidentiary Requirement

Because that presumption requires at least ten years of

Equal to or less than

FEV₁        MVV

<table>
<thead>
<tr>
<th>[miner's height in inches]</th>
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<tbody>
<tr>
<td>67&quot; or less</td>
<td>2.3</td>
</tr>
<tr>
<td>68&quot;</td>
<td>2.4</td>
</tr>
<tr>
<td>69&quot;</td>
<td>2.4</td>
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<td>70&quot;</td>
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<tr>
<td>71&quot;</td>
<td>2.6</td>
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<tr>
<td>72&quot;</td>
<td>2.6</td>
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<tr>
<td>73&quot; or more</td>
<td>2.7</td>
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(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

<table>
<thead>
<tr>
<th>Arterial pCO₂</th>
<th>Arterial pO₂ equal to or less than (mm. Hg.)</th>
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<tbody>
<tr>
<td>30 or below</td>
<td>70</td>
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<td>31</td>
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<td>32</td>
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<td>61</td>
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<tr>
<td>40-45</td>
<td>60</td>
</tr>
<tr>
<td>Above 45</td>
<td>Any Value</td>
</tr>
</tbody>
</table>

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.


The presumption at 727.203(a) is part of the DOL's interim regulations, which will be superseded when the DOL promulgates its permanent regulations (to be codified at 20 C.F.R. § 718). While this presumption will still be available to claimants, the qualifying medical requirements will most likely be more
coal mine employment, a claimant who successfully invokes it has also satisfied the FMSHA section 411(c)(1) rebuttable presumption that his pneumoconiosis arose out of his coal mine employment.

The first method that can be used to invoke the DOL's interim presumption involves the use of X-ray, biopsy, or autopsy evidence.\(^4\)

The second method by which the DOL presumption may be invoked requires the use of a ventilatory study, or breathing test, to establish the presence of a chronic respiratory or pulmonary disease.\(^5\) A ventilatory study yields various measurements relating to a claimant's lung and breathing capacity, two of which are used in determining whether there is sufficient medical evidence to invoke the presumption. The two measurements used in the table included in the regulations are the FE\(_V_1\) (forced expiratory volume) and MVV (maximal voluntary ventilation). The FE\(_V_1\) measures the volume of air a person can expel from his lungs in one second (when starting from maximal inspiration),\(^6\) while the MVV measures a person's ability to take air into his lungs (by calculating the volume of air exchanged when a subject breathes into a spirometer without a carbon dioxide absorber).\(^7\)

\(^{4}\) Note that while ten years or more of coal mine employment make the presumption at 20 C.F.R. § 727.203(a) (1979) available, at least one or more of the medical requirements thereunder must be met to actually invoke the presumption. Codeluppi v. Mathis Coal Co., BRB No. 78-78 BLA (Feb. 15, 1979).

\(^{5}\) 20 C.F.R. § 727.203(a)(1) (1979). The use of X-ray, biopsy, and autopsy evidence will not be further developed at this point, but note that the presumption at 727.203(a) is invoked by a showing of pneumoconiosis from such methods and does not require a showing of complicated pneumoconiosis. See text accompanying note 30 supra.


\(^{7}\) STEDMAN'S MEDICAL DICTIONARY 1567 (23d ed. 1976).

\(^{8}\) Id. at 220. It should be noted that the ventilatory testing is physically tiring and claimants with severe lung impairments find the tests extremely difficult to perform. As a result of this difficulty a doctor might believe that the claimant was uncooperative and make such notation on the test form. This could be a fac-
The ventilatory testing must yield results less than or equal to the corresponding values in the table to be considered sufficient to invoke the presumption.\footnote{See table supra note 43. To use the table it is necessary to calculate the claimant's height in inches. The organization of the tabular values by height recognizes that a taller person, merely by having a larger chest cavity, will normally have a greater lung capacity than a shorter person. Also note that the tabular values chosen by the DOL are identical to the tabular values in the SSA interim regulations at 20 C.F.R. § 410.490(b)(1)(ii) (1979). These values are decidedly relaxed from the values set forth in the SSA permanent regulations at 20 C.F.R. § 410.426(b) (1979). Of course, there is no guarantee that the DOL permanent regulations (to be codified at 20 C.F.R. § 718) will be as favorable to claimants as the present tabular values at 20 C.F.R. § 727.203(a)(2) (1979).} The values in the table are theoretical minimum standards for normal lungs of a person of the corresponding height. Thus, values less than or equal to those set forth in the table are indicative of a breathing impairment.\footnote{The values chosen to be used in the tables at 20 C.F.R. §§ 727.203(a)(2)-(3) (1979) have been the subject of much discussion. Many people argue that the values chosen do not support the inference of any physical impairments because the criteria is much too liberal in favor of claimants. Others argue that the criteria is too restrictive and should be relaxed further. See 43 Fed. Reg. 36,826 (1978).}

The question arises at this point whether both the FEV₁ and MVV values must be less than or equal to the tabular values before the medical evidence is considered sufficient to invoke the presumption. Generally the interpretation given to the DOL regulations is that both the FEV₁ and MVV values must be less than or equal to the criteria set forth in the table before the presumption arises.\footnote{Jarrell v. Oglebay Norton Co., [1977] 6 BRBS (M-B) 12, 17 (ALJ), BRB No. 76-760 BLA.} However, the medical evidence must be considered as a whole. The fact finder has the authority to weigh all of the medical evidence and to draw inferences from it. Further, he is not bound by any one doctor's opinion or theory.\footnote{Wells v. Peabody Coal Co., [1976] 4 BRBS (M-B) 506, 515, BRB No. 75-219 BLA. Note too that conclusory evidence of a physician may be disregarded if there is not sufficient explanation of the reasons for his conclusion. Johnson v. Cannelton Industries, Inc., BRB No. 78-44 BLA (Feb. 28, 1979). In regard to unfavorable breathing test results, see Hubbard v. Califano, 582 F.2d 319 (4th Cir. 1978).} Therefore, a
claimant need not be overwhelmingly discouraged if both his FEV₁ and MVV measurements are not within the tabular criteria, so long as he has other medical evidence that supports his claim.

The third method which can be used to invoke the interim presumption relies on the use of blood gas studies.⁶³ There are both at rest and exercise blood gas tests.⁶⁴ A claimant who is able to perform the exercise blood gas test may use positive results to invoke the presumption and to establish valuable medical evidence in support of his claim.

A blood gas study demonstrates the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood by measuring the levels of oxygen (O₂) and carbon dioxide (CO₂) present in blood which has passed through the lung alveoli.⁶⁵ The table in the regulation⁶⁶ recognizes that there are minimum amounts of oxygen which should be present in arterial blood having a particular amount of carbon dioxide.⁶⁷ Thus the interim presumption is invoked if the blood gas study yields a result showing a level of oxygen in arterial blood less than or equal to the appropriate tabular value of oxygen corresponding to the measured carbon dioxide.⁶⁸ Additionally, such a result, from an

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⁶⁴ The muscles, organs, and tissues of the body require oxygen to perform work, and one waste product of that work is carbon dioxide. The blood not only supplies the needed oxygen to the muscles, organs, and tissues, but it also removes the carbon dioxide from them. In the lungs the carbon dioxide is removed from the blood and the blood’s oxygen supply is replenished. The actual site of the gaseous transfer within the lungs is in the minuscule alveoli.

An exercise blood gas study tests the level of carbon dioxide and oxygen in blood which has passed through the lung alveoli after the person being tested has been subjected to exercise (such as climbing stairs). These results can be valuable medical evidence that a claimant does not receive adequate oxygen in activities similar to those encountered on the job.

⁶⁵ The blood is then called “arterial” or “oxygenated” blood. STEEDMAN’S MEDICAL DICTIONARY 181 (23d ed. 1976).
⁶⁶ Reprinted at note 43 supra.
⁶⁷ Using the table at § 727.203(a)(3) is a two step process. First, the value for the amount of carbon dioxide present in arterial blood is determined from the blood gas study (i.e., the pCO₂ value). This will refer you to the appropriate row in the table. Next, the value for the amount of oxygen present in the arterial blood, as per the blood gas study (i.e., pO₂ value), is compared with the corresponding tabular value.
⁶⁸ As is the case with the ventilatory studies, the use of blood gas studies as a method of invoking the presumption at § 727.203(a) has been the subject of much
exercise blood gas study, indicates that the tested person’s body does not receive the minimum amounts of oxygen it requires to function normally in a work situation.

The fourth method by which the interim presumption can be invoked is by presenting other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, that establishes the presence of a totally disabling respiratory or pulmonary impairment. Though this section may be of limited utility to claimants, it does offer another opportunity for claimants to shift the burden to the opposing parties to rebut their entitlement to an award.

One final method of invoking the interim presumption is provided exclusively for survivors who file claims when no medical evidence is available. The survivor of a deceased miner may invoke the presumption by filing an affidavit or by having other persons with knowledge of the miner’s physical condition file affidavits that demonstrate the presence of a totally disabling respiratory or pulmonary impairment.

Once the interim presumption has been invoked, the burden is shifted to the opposing party to rebut. The DOL regulations

discussion. Opponents argue that such studies do not measure any impairment and, regardless of their validity, the tabular values cannot be supported. The DOL generally rejects these arguments but recognizes that the tabular values could be changed in the permanent regulations (to be codified at 20 C.F.R. § 718). Presently the arterial pO₂ values at § 727.203(a)(3) are 5 points higher than the corresponding values of the SSA interim regulations at 20 C.F.R. § 410, sub pt. D app. (1979), which means the current DOL standards are less stringent than SSA standards.


60 20 C.F.R. § 727.203(a)(5) (1979). This is the only instance where lay testimony is acceptable to invoke the presumption at § 727.203(a) and even here it is confined to the situation where no medical evidence is available. To invoke the presumption the evidence must establish the existence of a totally disabling respiratory or pulmonary impairment (as per the regulations defining total disability at 20 C.F.R. § 410.412 (1979)).

61 In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:
provide four specific methods for rebutting the presumption. The first two rebuttal methods require a showing that the individual is, or is capable of, doing his usual coal mine work or comparable and gainful work. The third rebuttal method requires a negation of the causal connection between the miner’s death or total disability and his coal mine employment, while the final method requires a showing that the miner does not, or did not, have pneumoconiosis.

Because most miners who have filed claims are retired due to either their age or disability, which means they are no longer performing their usual coal mine work or that they are unable to do comparable work, the initial two rebuttal methods are not often successfully argued. An excellent example of the difficulty of making a successful rebuttal under these two methods is seen in the case of Kington v. Peabody Coal Co. Kington, who held a bachelor’s degree in biology, had worked as a coal miner for nearly thirty years, the last three as a training instructor for Peabody. Peabody contended that his coal mine job was teaching, and that teaching biology in a school was comparable to training miners, which they contended he was still able to do. However, the adjudication officer, after considering the conditions of the working environment in addition to the comparable skills and physical exertion involved, determined that teaching in a school was not comparable to training miners in and around the dusty environment of a coal mine. Despite this, Kington still might have been judged not totally disabled, under the employment standard, if not for his age. Since he was seventy years old, it is unlikely that he would have been hired for a new job at that age.

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or
(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or
(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.


Id. § 727.203(b)(1), (2).

BRB No. 78-108 BLA (Feb. 28, 1979).
Thus, even if a comparable job is identified, there is still a burden on the opponent to identify a job in the immediate area of the claimant’s residence and to show that he would have a reasonable opportunity to be hired.  

Further, since exposure to coal mine dust undoubtedly causes some breathing impairment, it is extremely difficult to show that total disability did not arise in whole or in part out of coal mine employment. Finally, since there must have been sufficient evidence of the existence of pneumoconiosis to invoke the interim presumption initially, to prove that the miner does not or did not have pneumoconiosis is practically impossible.

**Invoking the Section 411(c)(4) Presumption**

Section 411(c)(4) was added by the BLBA in 1972 in an ap-

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64 Fletcher v. Central Appalachian Coal Co., [1975] 9 BRBS (M-B) 342, 350, BRB No. 78-301 BLA.

65 20 C.F.R. § 727.203(b)(3) (1979). Many employers argue that if a miner is disabled, it is due to other causes, such as heart disease or back injuries. Bolling v. Old Ben Coal Co., BRB No. 77-1816 BLA (Feb. 26, 1979). Also, where there is unquestionably an existing respiratory impairment, employers argue it is due to cigarette smoking or causes other than coal workers pneumoconiosis. Hill v. Peabody Coal Co., BRB No. 78-65 BLA (Feb. 15, 1979). However, the success of this argument is limited by the inability to distinguish the medical effects of cigarette smoking from pneumoconiosis.

66 If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner’s, his widow’s, his child’s, his parent’s, . . . claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife’s affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner’s employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.
parent response to the difficulty encountered by many claimants in establishing the existence of pneumoconiosis through the objective criteria of the SSA regulations. Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis for qualified claimants. To invoke this presumption a claimant must establish three elements: (1) employment for fifteen or more years in one or more underground coal mines; a chest X-ray interpreted as negative according to the strict standards established by section 411(c)(3), discussed earlier, and (3) other evidence of a totally disabling respiratory or pulmonary impairment.

Using “other evidence” to establish the existence of a totally disabling respiratory or pulmonary impairment is readily identified as the claimant’s principal concern in availing himself of this presumption. In determining whether the evidence establishes that the respiratory or pulmonary impairments are totally disabling, the same criteria used to determine if clinical pneumoconiosis (section 411(c)(3)) is totally disabling are applied (inability to engage in gainful work with regularity, or medical criteria such as breathing tests, blood gas studies, and certain heart disorders). Thus, the claimant’s burden is fairly easily met when the


67 See Morris v. Mathews, 557 F.2d 563, 567 (6th Cir. 1977). The SSA regulations provided that “[a]-finding of the existence of pneumoconiosis as defined in § 410.428 by: (1) Chest roentgenogram (X-ray); or (2) Biopsy; or (3) Autopsy,” 20 C.F.R. § 410.414(a) (1979).

68 The fifteen years must have been spent in an underground mine, or under conditions substantially similar to an underground mine, in order for the § 411(c)(4) presumption to be invoked. Therefore, the argument that gave § 411(c)(1) a wide base of applicability is not available in invoking the § 411(c)(4) presumption (i.e., the level of dust exposure is considered before the § 411(c)(4) presumption is invoked).


70 See Stone v. Clinchfield Coal Co., [1978] 7 BRBS (M-B) 575, 579, BRB No. 76-514 BLA.

71 “Clinical” pneumoconiosis is tantamount to “true” pneumoconiosis, or pneumoconiosis which is established by X-ray, biopsy, or autopsy evidence, and is to be distinguished from “presumptive” pneumoconiosis, which is established by the methods found in § 411(c)(4) and the SSA regulations at 20 C.F.R. § 410.414(b) (1979).

72 20 C.F.R. §§ 410.412, .422, .424, .426, .490 and subpt. D app. (1979). Also,
evidence of record contains a pulmonary function study meeting the tabular criteria of the SSA regulations, or where the evidence of record meets the medical criteria requirements of those regulations. That is, the claimant can satisfy his evidentiary burden by producing either breathing test scores or blood gas study values which indicate a breathing impairment.

However, where the above types of evidence are not available, "other relevant evidence" must be used to establish a disa-

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there must be medical evidence, not merely lay testimony, that the impairment in question is of a severity to be considered totally disabling. Peabody Coal Co. v. Director, 581 F.2d 121, 123 (7th Cir. 1978).

73 This study measures the FEV, and MVV. See notes 47 and 48 supra and accompanying text.

74 Subject to the limitations in paragraph (a) of this section, pneumoconiosis shall be found disabling if it is established that the miner has (or had) a respiratory impairment because of pneumoconiosis demonstrated on the basis of a ventilatory study . . . .

20 C.F.R. § 410.426(b) (1979).

75 (a) Medical considerations alone shall justify a finding that a miner is (or was) totally disabled where his impairment is one that meets (or met) the duration requirement in § 410.412(a)(2) or § 410.412(b)(2), and is listed in the Appendix to this subpart, or if his impairment is medically the equivalent of a listed impairment. However, medical considerations alone shall not justify a finding that an individual is (or was) totally disabled if other evidence rebuts such a finding, e.g., the individual is (or was) engaged in comparable and gainful work (see § 410.412).

(b) An individual's impairment shall be determined to be medically equivalent of an impairment listed in the appendix to this subpart only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment. Any decision as to whether an individual's impairment is medically the equivalent of an impairment listed in the Appendix to this subpart, shall be based on medically accepted clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Administration, relative to the question of medical equivalence.


77 Where a ventilatory study and/or a physical performance test is medically contraindicated, or cannot be obtained, or where evidence obtained as a result of such tests does not establish that the miner is totally disabled, pneumoconiosis may nevertheless be found totally disabling if other relevant evidence (see § 410.414(c)) establishes that the miner has (or had) a chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal
bling impairment. The claimant's burden here is far more difficult. The SSA test for total disability requires that the claimant be suffering from a "chronic respiratory or pulmonary impairment, the severity of which prevents (or prevented) him not only from doing his previous coal mine work, but also, considering his age, his education, and work experience, prevents (or prevented) him from engaging in comparable and gainful work."\(^{77}\)

In this connection, the BRB has held that the five following elements were sufficient evidence to vacate a hearing officer's finding that the claimant was not totally disabled under that test (despite nonqualifying pulmonary function studies and blood gas studies contained in the record): (1) the claimant's treating physician's report, which diagnosed total disability, (2) a second physicians' opinion, which reflected fifty percent disability and capacity to perform only light to moderate work, (3) two other physicians' opinions, which reflected twenty five percent loss of work capacity, (4) opinions of other physicians that reflected either a moderate or moderately severe pulmonary impairment, and (5) claimant's undisputed testimony that he could no longer perform his coal mining duties.\(^{78}\)

The BRB has also held that a claimant's hearing testimony\(^{60}\) is proper "other evidence" to be considered in making a finding of a totally disabling respiratory impairment for purposes of invoking the rebuttable presumption. This testimony, in addition to a doctor's opinion that the claimant was unable to work due to a shortness of breath, may constitute sufficient evidence to support a finding of total disability so as to invoke the rebuttable presumption at section 411(c)(4).\(^{81}\)

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mine work, but also, considering his age, his education, and work experience, prevents (or prevented) him from engaging in comparable and gainful work.


\(^{77}\) Id.

\(^{78}\) Murray v. Bishop Coal Co., [1978] 8 BRBS (M-B) 990, 996, BRB No. 77-893 BLA.

\(^{60}\) See note 4 supra for a description of claims procedure.

\(^{81}\) Bridges v. United States Steel Corp., [1978] 7 BRBS (M-B) 367, 372, BRB No. 76-260 BLA, aff'd sub nom. United States Steel Corp. v. Bridges, 582 F.2d 7 (5th Cir. 1979). In that case a miner with 29 years of coal mine employment was found to be entitled to the § 411(c)(4) presumption based on the opinion of his treating physician that he was totally disabled, coupled with the lay testimony of
However, the BRB has also held that a claimant's testimony, even if corroborated by his wife, may not be used to establish total disability due to a respiratory impairment without some supportive medical evidence.\textsuperscript{82} Similarly, in a case involving conflicting medical evidence, a treating physician's diagnosis, when not accompanied by any documentation or estimate of the severity of the impairment, is not sufficient to establish a totally disabling respiratory impairment even when considered with lay testimony.\textsuperscript{83}

Although the preceding discussion indicates the relevance of an inquiry into what mixture of lay and medical evidence is required to invoke the rebuttable presumption of section 411(c)(4), unfortunately, there is no clear answer in this regard.\textsuperscript{84}

As is the case with the other presumptions at section 411(c) discussed herein,\textsuperscript{85} the effect of invoking the presumption at section 411(c)(4) is to shift the burden of proof to the party opposing entitlement, who must then produce sufficient evidence to rebut the presumption.\textsuperscript{86} While section 411(c)(3) establishes an irrebuttable presumption, there are specific rebuttal methods prescribed in section 411(c)(4).\textsuperscript{87}

Once the burden of proof is shifted, the opposing party must "show that the miner's pneumoconiosis does not prevent him from engaging in gainful work available in the immediate area of record.\textsuperscript{88}

\textsuperscript{82} Casias v. Director, [1979] 10 BRBS (M-B) 235, 240, BRB No. 77-919 BLA. \textit{See also} Wozny v. Director, [1979] 10 BRBS (M-B) 49, BRB No. 77-484 BLA; Peabody Coal Co. v. Director, 581 F.2d 121 (7th Cir. 1978). Note also that a claimant's testimony and appearance at a hearing is not alone sufficient other evidence to demonstrate the existence of a totally disabling chronic respiratory or pulmonary impairment. Ward v. National Mines Corp., [1979] 9 BRBS (M-B) 984, 988, BRB No. 77-843 BLA.

\textsuperscript{83} Gibson v. Director, [1978] 9 BRBS (M-B) 468, BRB No. 77-541 BLA.

\textsuperscript{84} For a general discussion of the problem see Hoffman v. Califano, 450 F. Supp. 1313 (E.D. Pa. 1978).

\textsuperscript{85} FMSHA § 411(c)(1), (3), 30 U.S.C.A. § 921(c)(1), (3) (West Supp. 1979); see notes 38 and 29 supra and accompanying text.

\textsuperscript{86} Prokes v. Mathews, 559 F.2d 1057 (6th Cir. 1977).

\textsuperscript{87} "The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." FMSHA § 411(c)(4), 30 U.S.C.A. § 921(c)(4) (West Supp. 1979).
his residence requiring the skills and abilities comparable to those of any work in the coal mines in which the miner previously engaged with some regularity and over a substantial period of time.”88 This “comparable and gainful work” definition of total disability, under the SSA regulations,89 requires that a comparison be made between the exertion involved in the customarily performed coal mine employment (of the claimant) and the exertion required by his subsequent job.80 Furthermore, both the statute91 and the SSA regulations92 require not only that abilities be comparable but also that the skills required of the two jobs be comparable. Finally, Ansel v. Weinberger93 rejected the view that X-ray and pulmonary function studies showing no breathing impairment are sufficient evidence to rebut the presumption of section 411(c)(4).

In retrospect, the presumption of death or total disability due to pneumoconiosis at section 411(c)(3) is the most beneficial presumption that is available to a claimant because it is irrebuttable. However, it is by far the most difficult presumption to invoke since it requires that a finding of complicated pneumoconiosis be established by X-ray, biopsy, or equivalent evidence.

Medical evidence of complicated pneumoconiosis is often difficult to produce, even for miners who have worked for many years in conditions exposing them to high levels of coal dust. Thus, section 411(c)(4) provides a less stringent burden for claimants and establishes the presumption of death or total disability due to pneumoconiosis for claimants who have worked for at least fifteen years in an underground mine or in conditions substantially similar to an underground mine. This section recognizes

88 Fletcher v. Central Appalachian Coal Co., [1978] 9 BRBS (M-B) 342, 349, BRB No. 78-301 BLA.
89 A miner shall be considered totally disabled due to pneumoconiosis if:
(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, 'comparable and gainful work'; see §§ 410.424-410.426).
90 Cutter v. Director, [1978] 8 BRBS (M-B) 979, BRB No. 77-768 BLA.
93 529 F.2d 304 (6th Cir. 1976).
that after fifteen years of such employment, and the accompanying exposure to coal dust, it is reasonable to assume that a miner's health has been adversely affected (even though X-rays are interpreted as negative as to a showing of complicated pneumoconiosis - provided there is other evidence produced of a totally disabling respiratory or pulmonary impairment). The validity of this assumption may be challenged since the presumption is rebuttable.

The interim presumption in the DOL regulations is quite similar to the section 411(c)(4) presumption, although there is a relaxation of the required number of years of coal mine employment (from fifteen to ten) necessary to invoke the presumption. A claimant will probably try to invoke both of these, depending on the quality and quantity of his evidence.

CONCLUSION

The BLBRA has effected changes in all three of the elements that a claimant must establish in order to gain black lung benefits. That is, by modifying the definitions of miner, pneumoconiosis, and total disability, the BLBRA has had a substantial impact on the evidentiary burden of a claimant, whether a living miner or survivor of a deceased miner.

At first glance it might appear that the BLBRA and regulations thereunder have been too liberal in providing presumptions for claimants and lessening the claimant's evidentiary burden. However, after a consideration of several factors, this does not seem to be the case.

First, and perhaps most important, is the realization that only since about 1968 has American medicine taken positive action to overcome its "ill-informed complacency and discover the true state of affairs regarding coal workers' pneumoconiosis." That is, only for a little more than ten years has there been any real acceptance in the United States of the fact that there is an occupational disease associated with coal mining. Thus, without the presumptions and specific identification of evidentiary requirements found in the BLBRA, a claimant might be totally

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64 See note 6 supra.
65 L. Kerr, Black Lung 8 (1972).
frustrated in his attempt to establish that he is suffering (or in the case of a survivor’s claim that the deceased miner suffered) from a disease arising out of his coal mine employment.

While it is true that, due to the liberality of the presumptions, an undeserving person could invoke many of them, it must be remembered that the presumptions are rebuttable. Consequently, the drafters of the BLBRA have placed some degree of confidence in the ability of those who would oppose claims to “weed out” and prevent the distribution of awards to undeserving claimants by contesting such claims and coming forward with sufficient rebuttal evidence. Further, because of the tremendous economic imbalance in resources available to a claimant and those parties who would oppose his claim (primarily the coal company by whom he was last employed or the Secretary of Labor, as trustee of the Black Lung Disability Trust Fund), it seems equitable to allow the claimant to shift the burden to the opposing side by use of the presumptions and regulations.

A final argument justifies the liberality of the BLBRA. Allocating the cost burden for disability and death due to pneumoconiosis to the coal mining industry is fair—especially in light of the fact that for too many years the physical and financial burdens of this crippling occupational disease were borne solely by coal miners and their families.

F. Thomas Rubenstein

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95 The § 411(c)(3) presumption, reprinted at note 29 supra, is irrebuttable. However, it is unlikely that someone who demonstrates the existence of complicated pneumoconiosis according to § 411(c)(3) requirements could be labeled undeserving.