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The Impact of *Sebben* in Federal Black Lung Litigation

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INTRODUCTION

The federal black lung program[1] was enacted as a result of congressional dissatisfaction with the ability of state workers' compensation laws to adequately compensate miners with pneumoconiosis.[2] However, as it now exists, the program is derived from four statutes,[3] administered by two federal agencies,[4] through three sets of regulations,[5] and has been referred to by courts as a "legislative morass,"[6] a "statutory muddle"[7] and, in a rather understated manner, as simply "not represent[ing] the work of Congress at its most lucid."[8]

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[1] 30 U.S.C. §§ 901-945 (1982).

[2] *See* House of Representatives Committee on Education and Labor, Legislative History of the Coal Mine Health and Safety Act 680, 904-906 (1970); 115 CONG. REC. 39995-39999 (1969) (remarks of Senator Javits).

[3] Title IV of the Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 792 (1969); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (1972); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978); Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1982); *see also* Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978).

[4] Part B claims are administered by the Department of Health and Human Services (formally Health, Education and Welfare) through the Social Security Administration, while Part C claims are administered by the Department of Labor. *See infra* notes 11 & 12 and accompanying text.

[5] 20 C.F.R. Parts 410, 718 and 727 (1988).

[6] U.S. Pipe and Foundry Co. v. Webb, 595 F.2d 264, 265 (5th Cir. 1979).

[7] Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 686 (3d Cir. 1977).

[8] Director, OWCP v. Bivens, 757 F.2d 781, 785 (6th Cir. 1985).

The Supreme Court's recent decision in *Pittston Coal Group v. Sebben*,[9] which will impact hundreds, perhaps thousands, of pending black lung claims, reflects this statutory and regulatory complexity. It is the purpose of this article to explain the impact and limits of *Sebben*, including related issues left unresolved by the decision. To do so, it is necessary to carefully examine the decision itself and untangle the interwinding provisions upon which it is based.

In Part I, this article will set forth the statutory and regulatory background and discuss the lower court decisions leading up to the Supreme Court's decision in *Sebben*. Part II will discuss the *Sebben* decision itself. Part III will describe the impact and limits of this decision and discuss, in some detail, the major related issue which was left unresolved by *Sebben*. The article concludes, in Part IV, with a brief discussion of what the author believes is the most logical resolution of this unresolved aspect of the *Sebben* litigation.

I. BACKGROUND

Congress enacted Title IV of the Federal Coal Mine Health and Safety Act of 1969[10] to establish a black lung benefits program for coal miners who are totally disabled due to pneumoconiosis and for surviving dependents of miners whose death was due to pneumoconiosis. Under Title IV, claims filed prior to December 31, 1973, were to be administered under Part B of the Act, by the Secretary of Health, Education and Welfare [HEW].[11] Claims filed after December 31, 1973, on the other hand, were to be administered under Part C of the Act, by the Secretary of Labor.[12]

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[9] 109 S.Ct. 414 (1988).

[10] Pub. L. No. 91-173, Title IV, 83 Stat. 792 (codified at 30 U.S.C. §§ 901-45 (1970)) [hereinafter cited as Title IV].

[11] 30 U.S.C. §§ 921-25 (1970).

[12] More specifically, claims filed after this date were to be filed under the appropriate state workers' compensation law if the law had been approved by the Secretary of Labor. If no approved state law existed in the state in which the miner had been employed and, to date, no such laws have been approved, the claim was to be filed with the Secretary of Labor, adjudicated by the Secretary pursuant to incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act and paid by the claimant's coal mine employer. 30 U.S.C. §§ 931-36 (1970). *See also* 33 U.S.C. §§ 901-52 (Supp. II 1978). If the coal mine employer was insolvent, bankrupt, or otherwise could not be identified, the Act authorized the Secretary to pay approved claims with federal funds. 30 U.S.C. § 934 (1970).

In an attempt to liberalize the entitlement provisions for black lung benefits, Congress amended Title IV in 1972.[13] Thereafter, HEW promulgated Section 410.490, an "interim" regulation applicable, by its terms, only to Part B claims.[14] This regulation

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[13] 30 U.S.C. §§ 901-45 (1976). *See also* S. REP. No. 743, 92d Cong. 2d Sess. 9-16, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2305, 2317-20; H.R. REP. No. 460, 92d Cong., 1st Sess. (1971).

[14] 20 C.F.R. § 410.490(b) (1988). This interim regulation was promulgated by HEW in response to congressional concern about a large existing backlog of claims and the unavailability of medical testing facilities to evaluate claimants. Mullins Coal Co. v. Director, OWCP, 108 S. Ct. 427, 436-37 (1987); 20 C.F.R. § 410.490(a). In its entirety, the interim regulation provides:

> (b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
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> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray), biopsy or autopsy establishes the existence of pneumoconiosis (see § 410.428); or
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> (ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412 (a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than-	
	FEV 1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).
>
> (3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.
>
> (c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:
>
> (1) There is evidence that the individual is, in fact, doing his usual coal

provided a rebuttable presumption that a miner was totally disabled due to pneumoconiosis where the claimant established pneumoconiosis by x-ray, biopsy or autopsy evidence and established that the pneumoconiosis arose out of coal mine employment.[15] The regulation also provided that a claimant who was employed as a miner for either 10 or 15 years and who presented qualifying ventilatory study evidence was entitled to the presumption.[16] Once invoked, the presumption could be rebutted by evidence that the miner was doing his or her usual coal mine work or comparable work or was able to do so.[17]

In 1978, Congress again amended the Act, directing the Secretary of Labor to "establish criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners."[18] Congress also instructed the Secretary to reopen claims that had been denied prior to the effective date of the 1978 amendments.[19]

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mine work, or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

[15] 20 C.F.R. § 410.490(b)(1)(i) (1988).

[16] 20 C.F.R. § 410.490(b)(3)(10 years); 20 C.F.R. § 410.490(b)(1)(ii)(15 years). In Pittston Coal Group v. Sebben, 109 S.Ct. 414, 428 (1988), the dissent argued that this discrepancy was due to a typographical error. As written, paragraph (b)(3) inexplicably requires miners who have already had to prove 15 years of coal mine employment pursuant to subparagraph (b)(1)(ii), to also prove 10 years of coal mine employment. Although none of the parties had argued this explanation, the dissent reasoned that the reference to subparagraph (b)(1)(ii) was a scrivener's error and that, in fact, the 10 year requirement in paragraph (b)(3) of the regulation was meant to apply to miners who had established x-ray evidence of pneumoconiosis in accordance with subparagraph (b)(1)(i). *Id.* at 428-29. The issue of whether a miner with qualifying ventilatory study evidence must establish 10 or 15 years of coal mine employment may be reached by the Benefits Review Board in the pending case of Barlow v. Kitchekan Fuel Corp., BRB No. 89-1228 (the employer filed its Petition for Review and brief in the case on June 29, 1989).

[17] 20 C.F.R. § 410.490(c)(1), (2) (1988).

[18] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. § 902(f)(1)(D) (1976 & Supp. II 1978).

[19] 30 U.S.C. § 945 (1976 & Supp. II 1978).

In adjudicating these reopened claims, Congress instructed, in Section 902(f)(2) of the Act, that the criteria the Department of Labor applied were to "not be more restrictive than the criteria applicable to a claim filed on June 30, 1973."[20] The Secretary promulgated the Part 727 regulations in response to this mandate.[21]

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[20] 30 U.S.C. § 902(f)(2) (1976 & Supp. II 1978).

[21] 20 C.F.R. § 727.203 (1988). The full text of this regulation is as follows:

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* 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 (see § 410.428 of this title);

(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:

	Equal to or less than-	
	FEV 1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(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:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.

The Part 727 regulation permits invocation of a presumption of total disability due to pneumoconiosis based on chest x-ray, autopsy or biopsy evidence of pneumoconiosis, only if a miner worked 10 or more years in coal mine employment.[22] On the other hand, the Section 410.490 presumption can be invoked by x-ray, autopsy or biopsy evidence of pneumoconiosis, without regard to the length of coal mine employment, so long as the claimant can prove that the miner's pneumoconiosis arose out of coal mine employment.[23]

Plaintiffs in several circuits challenged this difference in operation between the two presumptions, claiming that, for miners with fewer than 10 years of coal mine employment, the Part 727 regulation violated the "not more restrictive" directive in Section

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38	62.
39	61.
40-45	60.
Above 45	Any value.

(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.

(b) *Rebuttal of interim presumption.* 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:

(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.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

[22] 20 C.F.R. § 727.203(a) (1988).

[23] 20 C.F.R. § 410.490(b)(1)(i), (2) (1988).

402(f)(2) of the Act.[24] Four circuit courts agreed, holding that, in such cases, Section 402(f)(2) mandates the application of the less restrictive Section 410.490 criteria.[25] The Seventh Circuit alone reached a contrary conclusion.[26]

Moreover, four named plaintiffs brought a class action in the United States District Court for the Southern District of Iowa[27] on behalf of a putative class of claimants who had submitted x-rays showing the presence of pneumoconiosis, but whose claims were denied under Part 727 because they did not have 10 or more years of coal mine employment. The plaintiffs were seeking a writ of mandamus compelling the Department of Labor to readjudicate these claims under Section 410.490, despite the fact that they had not appealed the denial of their claims within the statutory time limits.[28] The district court, however, ruled that mandamus did not lie and consequently dismissed the claim before deciding the class certification issue.[29] On appeal, the Eighth Circuit reversed on both counts, ordering the lower court to certify the class and issue a writ of mandamus.[30] The Supreme Court granted certiorari in the Eighth Circuit case and consolidated it with two other cases.[31]

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[24] 30 U.S.C. § 902(f)(2) (1976 & Supp. II 1978). The text of this provision is as follows:

> (2) Criteria applied by the Secretary of Labor in the case of
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> (A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under Section 945(a) of this title;
>
> (B) any claim which is subject to review by the Secretary of Labor under Section 945(b) of this title; and
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;
>
> shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

[25] *See* Kyle v. Director, OWCP, 819 F.2d 139 (6th Cir. 1987); Broyles v. Director, OWCP, 824 F.2d 327 (4th Cir. 1987); Coughlan v. Director, OWCP, 757 F.2d 966 (8th Cir. 1985); Halon v. Director, OWCP, 713 F.2d 21 (3d Cir. 1983).

[26] *See* Strike v. Director, OWCP, 817 F.2d 395 (7th Cir. 1987).

[27] Sebben v. Brock, Civil No. 85-589-A (S.D. Iowa filed July 17, 1985).

[28] The plaintiffs claimed jurisdiction under 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[29] Sebben v. Brock, Civil No. 85-589-A (S.D. Iowa Feb. 6, 1986)(order granting motion to dismiss).

[30] *In re* Sebben, 815 F.2d 475 (8th Cir. 1987).

[31] Broyles v. Director, OWCP, 824 F.2d 327 (4th Cir. 1987), *cert. granted*, 108 S.Ct.

II. THE *SEBBEN* DECISION

A five member majority of the Supreme Court upheld the Fourth Circuit's decision on the applicability of Section 410.490 "with the clarification, however, that its opinion requires application of criteria no more restrictive than Section 410.490 only as to the affirmative factors for invoking the presumption of entitlement, and not as to the rebuttal factors, the validity of which respondents have conceded."[32]

In the brief submitted to the Supreme Court on behalf of the Secretary of Labor and the Director, Office of Workers' Compensation Programs, the Secretary argued that the word "criteria" in Section 402(f)(2) of the Act refers to medical criteria used to measure disability and does not prohibit the Secretary from developing distinct standards, such as the 10 year requirement, for establishing causation.[33] Because the disability criteria in Part 727 are no more restrictive than those in Section 410.490, the Secretary reasoned that Section 410.490 is not applicable in Part C claims.[34] The Secretary also argued that, even assuming that her construction of Section 402(f)(2) was erroneous, mandamus was not warranted in the Eighth Circuit case because the Secretary did not owe a clear, nondiscretionary duty to apply Section 410.490 and because the plaintiffs, in failing to appeal their claims, had not exhausted their administrative remedies.[35]

The Courts rejected the Secretary's argument that the term criteria in Section 402(f)(2) was restricted to "medical criteria."[36] The Court held, however, that even if the Secretary's interpretation of the term was correct, the 10 year requirement in Part 727 still rendered the Secretary's interim criteria more restrictive than the HEW interim criteria.[37] Nevertheless, the Court unanimously reversed the Eighth Circuit's decision regarding mandamus, and held that the Department of Labor was not required to reconsider finally denied Part C claims.[38]

1288 (1988) *and consolidated with* Pittston Coal Company v. Sebben, 108 S.Ct. 1011 (1988) and McLaughlin v. Sebben, 108 S.Ct. 1011 (1988).

[32] Pittston Coal Group v. Sebben, 109 S.Ct. 414, 424 (1988).

[33] Brief for the Federal Petitioner at 17-18, Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988)(No. 87-821).

[34] *Id.*

[35] *Id.* at 28-29.

[36] *Sebben*, 109 S.Ct. at 420-21.

[37] *Id.* at 421.

[38] *Id.* at 424-25. This case is now on remand before the District Court for the

III. THE IMPACT OF *SEBBEN* AND UNRESOLVED ISSUES

In finding that a mandamus action did not lie, the Supreme Court foreclosed reconsideration of perhaps as many as 94,000[39] previously denied claims. Because of this there are a fairly limited number of pending cases which will be directly affected by the *Sebben* decision.[40] The impact of the decision will also be lessened by the fact that, prior to the Supreme Court's decision, only one circuit which was presented with the issue had held Section 410.490 wholly inapplicable in Part C claims.[41] Nevertheless, the *Sebben* decision has already generated substantial litigation by the claimants' bar. While some of this litigation appears to be based on confusion over the Court's holding, at least one important issue, requiring further clarification of the "not more restrictive" directive in Section 402(f)(2), remains unresolved.

A. *The Limits of Sebben*

In order to clarify the *Sebben* holding, it may be helpful to begin by describing the claims which will not be affected by the decision. First, the decision will not affect claims filed after January 1, 1980, the effective date of the final Part 718 regulations.[42] The *Sebben* decision is based on the fact that Section 402(f)(2) of the Act requires the Secretary's interim regulations in Part 727 to be "not more restrictive" than Section 410.490.[43] There is no similar statutory provision which requires that Part

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Southern District of Iowa, Central Division. *See supra* note 27. On January 25, 1989, the plaintiffs moved to amend their complaint to allege that, in fact, the claims at issue in the class action were never properly denied by the Department of Labor because the notice of denial was faulty. On May 31, 1989, Judge W.C. Stewart denied the plaintiff's motion.

[39] Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit at 12, Pittston Coal Group v. Sebben, 109 S.Ct. 414. On April 18, 1989, Representative Miller of Calilfornia introduced legislation, entitled the Coal Miner's Justice Act of 1989, which is designed to apply the *Sebben* holding to these tens of thousands of previously denied claims. H.R. 2050, 101st Cong., 1st Sess. (1989). This bill, however, has not generated a great deal of interest and seems unlikely to progress past the committee stage.

[40] In all, there are approximately 10,000 black lung claims filed before the effective date of the Part 718 final regulations which are still pending. Petition for a Writ of Certiorari, *supra* note 39.

[41] Strike v. Director, OWCP, 817 F.2d 395 (7th Cir. 1982).

[42] 20 C.F.R. § 718.2 (1983); Muncy v. Wolfe Creek Collieries Coal Co., 3 BLR (MB) 1-627 (BRB 1981).

[43] Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2) (1976 & Supp. II 1978) and Section 410.490, 20 C.F.R. § 410.490 (1988), are set forth fully *supra* at notes 14 and 24.

718 be less stringent than the HEW interim regulation. Section 402(f)(1)(D) of the Act merely required the Secretary, in promulgating the permanent Part 718 standards, to develop "criteria for all appropriate medical tests . . . which accurately reflect total disability from [pneumoconiosis] in coal miners."[44] The intent was that the Secretary enact more medically accurate standards, not necessarily more liberal ones.

Second, careful analysis of *Sebben* makes it clear that the decision has no direct bearing upon cases in which the miner has 10 or more years of coal mine employment. The thrust of the *Sebben* holding is to insure that Part C claimants who filed applications before January 1, 1980, have access to invocation criteria as favorable as those contained in Section 410.490.[45] The only instance in which the invocation provisions contained in Section 410.440 afford a claimant any advantage over the provision in 20 C.F.R. Section 727.203(a) is when a miner with fewer than 10 years of coal mine employment can establish pneumoconiosis by x-ray, autopsy or biopsy evidence, and can demonstrate, through other evidence, that a causal relationship exists between the pneumoconiosis and coal mine employment. Prior to *Sebben*, if a Part C claimant was unable to show 10 years of coal mine employment, then the claimant was not afforded the benefit of the presumption. However, where a claimant could establish 10 or more years of coal mine employment and pneumoconiosis by x-ray, autopsy or biopsy evidence, he or she was entitled to invocation under 20 C.F.R. Section 727.203(a)(1). Similarly, a claimant who had more than 10 years of coal mining and qualifying ventilatory studies was able to invoke the presumption of total disability due to pneumoconiosis under Section 727.203(a)(2). In each case, Part 727 affords a miner with at least 10 years of coal mine employment the same opportunity for invocation as provided by Section 410.490.[46]

In fact, the Court in *Sebben* explicitly recognized that it was "central to the present case that under this interim regulation, unlike the HEW regulation (Sections 410.490(b)(1)(i), (b)(2)), a miner cannot obtain the first presumption of entitlement without 10 years of coal mine service."[47] To redress this inequality of

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[44] 30 U.S.C. § 902(f)(1)(D) (1976 & Supp. II 1978).

[45] *Sebben*, 109 S. Ct. at 421-22.

[46] *See* 20 C.F.R. § 410.490(b)(1)(i), (ii), (2).

[47] *Sebben*, 109 S. Ct. at 418-19.

treatment, the Court required the application of Section 410.490 invocation criteria in such cases.[48]

B. *The Unresolved Issue: What Rebuttal Methods Remain Available*

Simply because the *Sebben* decision is not directly applicable to cases involving 10 year coal mining histories is not to say that the decision forecloses the application of Section 410.490 in such cases. To understand why, it is necessary to consider the major question left unresolved by *Sebben*. Put simply, that question is whether Section 402(f)(2) also mandates the application of the rebuttal provisions contained in Sections 410.490(c)(1), (2).[49] The rebuttal provisions of Section 401.490 only expressly allow rebuttal of the presumption through evidence that a miner was doing or was able to do his coal mine work or comparable work.[50] In addition to these two methods of rebuttal, the Part 727 presumption also provides for rebuttal through evidence showing that the miner's disability did not arise out of coal mine employment or that the miner did not have pneumoconiosis.[51] If the Section 410.490 provisions apply, rather than the arguably more expansive rebuttal provisions contained in 20 C.F.R. Sections 727.203(b)(1)-(4), claimants who have established 10 or more years of coal mine service, but who are not working and are unable to work, may be able to persuasively argue that they are entitled to have their claim reconsidered under the HEW interim regulations. In fact, the Seventh Circuit has recently been persuaded by this argument, finding the Department of Labor's rebuttal provisions invalid as more restrictive than the HEW provisions.[52] As the Seventh Circuit recognized, its decision conflicts with Sixth Circuit decisions

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[48] *Id.* at 424.

[49] For the text of the rebuttal provisions in 20 C.F.R. § 410.490(c), *see supra* note 14.

[50] 20 C.F.R. § 727.203(b)(1), (2) (1988).

[51] 20 C.F.R. § 727.203(b)(3), (4) (1988).

[52] Taylor v. Peabody Coal Company, No. 86-2590 (7th Cir. Aug. 28, 1989). The *Taylor* case involved a miner with 42 years of coal mine employment. Slip. op. at 9. The court found that the Department of Labor rebuttal provisions violated the "not more restrictive" mandate because these provisions allow the consideration of medical evidence while the HEW provisions, in the court's view, do not. Slip. op. at 6. Thus, the court not only invalidated the Department of Labor's subsection (b)(3) and (b)(4) rebuttal methods, but also invalidated the (b)(2) method, finding that the nearly identical HEW rebuttal method (20 C.F.R. § 410.490(c)(2)) actually requires that rebuttal be established through vocational evidence and not merely medical evidence. Slip. op. at 3, 5.

upholding the Department of Labor rebuttal provisions and finding Section 410.490, therefore, inapplicable in cases involving 10 or more years of coal mine employment.[53] The Third Circuit has also recently addressed these issues and held all four rebuttal provisions applicable.[54] These issues are also currently being considered in cases pending before the Fourth Circuit.[55]

In the *Sebben* case, the Secretary acknowledged that if Section 410.490 restricts rebuttal to the two methods explicitly provided in the regulation, then the Part 727 rebuttal methods are more restrictive than those set forth in the HEW regulation.[56] The Secretary argued, nevertheless, that limiting rebuttal to the two methods enumerated in Section 410.490 would disrupt the statutory scheme[57] and possibly violate the due process rights of coal mine operators.[58] The respondents in *Sebben*, however, had conceded the validity of the rebuttal provisions.[59] Because of this concession, the Court declined to resolve the rebuttal question or

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[53] Youghiogheny and Ohio Coal Company v. Miliken, 866 F.2d 195 (6th Cir. 1989) (Sixth Circuit's decision in *Kyle* does not apply in claims involving 10 or more years of coal mine employment and does not require application of § 410.490 rebuttal provisions in Part C claims); Neace v. Director, OWCP, No. 86-3756 (6th Cir. June 15, 1989)(in this supplemental opinion, the Sixth Circuit indicated that *Sebben* might apply in Part B reopened claims involving 10 year mining histories); Hall v. Consolidation Coal Company No. 88-3725 (6th Cir. Aug. 21, 1989)(following *Miliken*); Baker v. Blue Diamond Coal Co., No. 88-3986 (6th Cir. Aug. 28, 1989)(following *Miliken*).

[54] Beth Energy Mines, Inc. v. Pauley, No. 89-3364 (3d Cir. Dec. 7, 1989).

[55] Robinette v. Director, OWCP, No. 88-1114 (4th Cir. filed August 22, 1988); Elkins v. Elro Coal Corp., No. 88-3659 (4th Cir. filed December 8, 1988); Dayton v. Consolidated Coal Co., No. 89-3203 (4th Cir. filed January 9, 1989).

[56] Brief for the Federal Petitioners at 25-26, Pittston Coal Group v. Sebben, 109 S.Ct. 414 (1988)(No. 87-821).

[57] Specifically, the Secretary argued that restricting rebuttal to the two explicit methods in § 410.490(c) would run afoul of the statutory mandate in 30 U.S.C. § 923(b) that "all relevant evidence shall be considered." *Id.* at 27.

[58] *Id.* at 26. The Secretary argued that limiting the rebuttal inquiry to the issue of total disability would appear irrational since Congress enacted the Act to provide benefits to miners who are totally disabled due to pneumoconiosis arising out of coal mine employment. *Mullins Coal Co.*, 108 S.Ct. at 431. Moreover, the Secretary referred to an earlier Supreme Court decision in which the Court indicated, in dicta, that any regulation limiting a coal mine operator's ability to rebut would not be authorized by the statute. Usery v. Turner-Elkhorn Mining Co., 423 U.S. 1, 37 (1976). In the *Usery* case, the Court considered the employer's objections to the ostensibly limited rebuttal allowed in Section 411(c)(4) of the Act, but found it unnecessary to reach the due process argument because the Court interpreted the language which the employers claimed limited rebuttal as applying only to the Secretary and not to operators. *Id.* The Secretary, of course, could not independently assert a due process violation.

[59] *Sebben*, 109 S. Ct. at 422-23.

address the concerns of the Secretary regarding that issue. Specifically, the Court wrote:

> Respondents' concession on the rebuttal provisions means that we are not required to decide the question of their validity, not that we must reconcile their putative validity with our decision today. (The concession also means that we have no occasion to consider the due process arguments of the petitioners, which are predicated upon the proposition that the rebuttal provisions must be more expansive than those in the HEW interim regulation).[60]

1. One Solution: The Labor Regulation Is No More Restrictive Than The HEW Regulation

Thus, the *Sebben* decision gives no guidance on this issue. Unfortunately, there is also no case law which describes how the Section 410.490 rebuttal provisions were actually applied by the Social Security Administration.[61] The issue must be resolved, therefore, through a careful examination of the rather obtuse language of the regulation itself.[62]

To facilitate this examination, is helpful to reiterate the requirements of Section 410.490(b). First, in order to be eligible for the presumption of total disability or death due to pneumoconiosis, a claimant is required to either establish pneumoconiosis by x-ray, biopsy or autopsy evidence or establish 15 years of coal mine employment and present qualifying ventilatory study evi-

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[60] *Id.* at 423.

[61] One commentator has suggested that Congress was quite concerned with allegations that the Social Security Administration invoked the § 410.490 presumption based on any single item of qualifying evidence and then simply awarded benefits without considering any rebuttal evidence. Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues*, 83 W. VA. L. REV. 869, 893 & n. 123 (1981) [hereinafter "A Critical Analysis"]. Their concern was reflected in language in the Conference Report admonishing that "all relevant medical evidence be considered." *Id.* at 893 *citing* H.R. REP. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 309-10. In another context, the Supreme Court had indicated agreement with this analysis, writing that:

> [t]o assure that [SSA's] problem [of failing to consider all relevant evidence] would not infect adjudications under the new Labor interim presumption, the requirement of 30 U.S.C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section.

Mullins, 108 S.Ct. at 435. *See infra* notes 87-89 and accompanying text.

[62] 20 C.F.R. § 410.490(b) (1988).

dence. In addition to meeting the medical requirements under Section 410.490(b)(1), the regulation requires:

> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).
>
> (3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.[63]

Finally, subpart (c) of the regulation provides that the presumption may be rebutted by evidence that the miner is doing his usual coal mine work or comparable work or by evidence that the miner is able to do such work.

Section 410.490(b)(2) requires that the "impairment" established under paragraph (b)(1) arose out of coal mine employment. It seems clear that, despite its reference to "impairment," (b)(2) actually requires that a claimant's "pneumoconiosis" arose out of coal mine employment. In fact, both the Board[64] and the Sixth Circuit[65] have interpreted Section 410.490 in this manner. This interpretation is bolstered by the parenthetical reference in Section 410.490(b)(2) to Sections 410.416[66] and 410.456[67], which provide

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[63] 20 C.F.R. § 410.490(b)(2), (3) (1988).

[64] *See, e.g.*, Foster v. Director, OWCP, 8 BLR (MB) 1-188 (BRB 1985)(Section 410.490 presumption could not be invoked where ALJ determined claimant's pneumoconiosis did not arise out of coal mine employment); Thornton v. Director, OWCP, 8 BLR (MB) 1-277 (BRB 1985)(Section 410.490 presumption invoked where existence of pneumoconiosis and its relationship to coal mine employment were conceded).

[65] Johnson v. Director, OWCP, No. 88-3013, slip op. at 2 (6th Cir. Dec. 9, 1988) (unpublished) *citing* Grant v. Director, OWCP, 857 F.2d 1102, 1106 (6th Cir. 1988).

[66] 20 C.F.R. § 410.416 (1988), in its entirety provides:

> § 410.416 DETERMINING ORIGIN OF PNEUMOCONIOSIS, INCLUDING STATUTORY PRESUMPTION.
>
> (a) If a miner was employed for 10 or more years in the Nation's coal mines, and is suffering or suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.
>
> (b) In any other case, a miner who is suffering or suffered from pneumoconiosis, must submit the evidence necessary to establish that the pneumoconiosis

that, in the absence of evidence to the contrary, a miner with 10 or more years of coal mine employment is entitled to the presumption that his *pneumoconiosis* arose out of coal mine employment.[68] These same regulations require a miner with fewer than 10 years of coal mine employment, to affirmatively prove the causal relationship between his coal mine employment and his pneumoconiosis.[69] Presumably, the drafters of Section 410.490(b)(2) simply made reference to these provisions in order to clarify the situations in which the claimant's pneumoconiosis will be found to have arisen out of coal mine employment.[70]

Thus, where a claimant with fewer than 10 years of coal mine employment is asserting entitlement to benefits based on positive x-ray evidence, Section 410.490(b)(2) places the burden on the claimant of establishing that the miner's radiologically indicated pneumoconiosis arose out of his coal mine employment. Under Part 727, on the other hand, a claimant with x-ray evidence of pneumoconiosis and the requisite length of coal mine employment is not required to prove the relationship between his pneumoconiosis and his coal mine employment. Rather, under Section

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arose out of employment in the Nation's coal mines. (*See* § 410.110(h), (i), (j), (k), (l), and (m)).

[67] 20 C.F.R. § 410.456 (1988) provides:

§ 410.456. DETERMINING ORIGIN OF PNEUMOCONIOSIS, INCLUDING STATUTORY PRESUMPTION-SURVIVOR'S CLAIM.

(a) If a miner was employed for 10 years or more in the Nation's coal mines, and suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.

(b) In any other case, the claimant must submit the evidence necessary to establish that the pneumoconiosis from which the deceased miner suffered, arose out of employment in the Nation's coal mines. (*See* § 410.110(b), (i), (j), (k), (l), and (m)).

[68] These sections implement the rebuttable presumption found in Section 411(c)(1) of the Act, which provides, in relevant part:

(c) For purpose of this section -

(1) 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.

30 U.S.C. § 921(c)(1) (1982).

[69] 20 C.F.R. §§ 410.416(b), .456(b)(1988).

[70] In *Sebben*, the Supreme Court appears to have accepted this interpretation of the parenthetical reference in § 410.490. In describing the manner in which the § 410.490 provision works, the Court wrote that "[t]he proof of causality required for this first presumption was to be established under §§ 410.416 or 410.456, both of which accorded a rebuttable presumption of causality to claimants with 10 years of mining service and *also permitted claimant's to prove causality by direct evidence.*" *Sebben*, 109 S.Ct. at 418 (citation omitted) (emphasis in original).

727.203(b)(4),[71] the party opposing entitlement is allowed to rebut the presumption through evidence proving that the miner does not have pneumoconiosis.[72] What is part of the rebuttal inquiry under Part 727, therefore, is part of the invocation inquiry under Section 410.490 where a miner has fewer than 10 years of coal mine employment.

Even where a miner has more than 10 years of coal mine employment, Section 410.490 may allow rebuttal through evidence disproving the existence of pneumoconiosis. Given that Section 411(c)(1) mandates the application of a presumption that a miner's pneumoconiosis arose out of coal mine employment,[73] it is not surprising that Section 410.490(b)(2) refers to and presumably follows the permanent Part 410 regulations which implement the presumption. This presumption is rebuttable according to the express terms of both the statutory provisions[74] and the implementing regulations.[75] Therefore, if Section 410.490 is intended to follow the Part 410 regulations and adopt the Section 411(c)(1) presumption, it should be interpreted as allowing rebuttal of the presumption that the miner's pneumoconiosis arose out of coal mine employment, through "persuasive evidence to the contrary."[76] This is equivalent to the rebuttal method contained in Section 727.203(b)(4).[77]

The Section 410.490 provision can also be interpreted as providing a rebuttal method equivalent to the method contained in Section 727.203(b)(3). To reiterate, Section 410.490(c) explicitly

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[71] 20 C.F.R. § 727.203(b)(4) (1988).

[72] To rebut under subsection (b)(4), the party opposing entitlement must establish the absence of pneumoconiosis as defined in the Act, including chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to or significantly aggravated by dust exposure in coal mine employment. *See, e.g.*, Pavesi v. Director, OWCP, 758 F.2d 956, 964 (3d Cir. 1985); Biggs v. Consolidation Coal Co., 8 BLR 1-317, 320 (1985); *see also* 30 U.S.C. § 902(b) (1982); 20 C.F.R. § 727.203(b)(4) (1988).

[73] The presumption in Section 411(c)(1) has been held to apply to Part C as well as Part B claims. Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 24 (1976).

[74] 30 U.S.C. § 921(c)(1) (1982)("[T]here shall be a *rebuttable* presumption.")(emphasis added).

[75] 20 C.F.R. § 410.416 (1988)(". . . it will be presumed, in the absence of persuasive evidence to the contrary . . .").

[76] Because pneumoconiosis is defined by the Act and the regulations as including any chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment, evidence that a miner's pneumoconiosis did not arise out of coal mine employment is also evidence that the miner does not have statutory pneumoconiosis. *See* 30 U.S.C. § 902(b) (1982); 20 C.F.R. §§ 410.110(o), 718.201, 727.202 (1988).

[77] For an explanation of rebuttal under 20 C.F.R. § 727.203(b)(4), *see supra* note 72.

allows rebuttal only through proof that a miner is not totally disabled.[78] However, like paragraph (b)(2), Section 410.490(c) also parenthetically refers to another Part 410 regulation, Section 410.412(a)(1).[79] In turn, Section 410.412(a)(1) provides that a miner will only be considered totally disabled *if his pneumoconiosis* prevents his return to his usual coal mine employment or comparable employment.[80] In a sense, this reference in Section 410.490(c) can be seen as definitional since it simply spells out the situations in which the party opposing entitlement will be deemed to have ruled out "total disability." In other words, to give logical effect to the Section 410.412(a)(1) reference, Section 410.490(c) can be read as allowing rebuttal not only through evidence ruling out total disability in the broad sense, but also, more specifically, through proof that the miner's total disability is *not due to pneumoconiosis*. The Director has argued for this precise interpretation of the Section 410.490 rebuttal provisions.[81]

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[78] Specifically, the party opposing entitlement may rebut through evidence that the miner is doing his usual coal mine work or comparable work, 20 C.F.R. § 410.490(c)(1) (1988), or evidence that the miner is able to do his usual coal mine work or comparable work. 20 C.F.R. § 410.490(c)(2) (1988). The Act requires that a living miner be considered totally disabled when pneumoconiosis prevents the miner from engaging in gainful employment requiring the skills and abilities comparable to any coal mine employment in which the miner previously engaged with regularity over a substantial period of time. 30 U.S.C. § 902(f)(1)(A) (1982); *see also* 20 C.F.R. §§ 410.412(a)(1), 718.204(b) (1988).

[79] This regulation, in its entirety, defines total disability in the following manner:

> (a) 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 through 410.426); and
> (2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.
> (b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of this death:
> (1) His pneumoconiosis prevented 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 through 410.426); and
> (2) His impairment was expected to result in death, or it lasted or was expected to last for a continuous period of not less than 12 months.

C.F.R. § 410.412 (1988).

[80] This, of course, is consistent with the statutory definition of total disability coned in 30 U.S.C. § 902(f)(1) (1982). *See supra* note 78.

[81] Response Brief for the Director, Office of Workers' Compensation Programs, ted States Department of Labor at 19-23, Consolidation Coal Co. v. Smith, 699 F.2d (8th Cir. 1983).

If this analysis is correct, claimants do not receive any rebuttal advantage under Section 410.490 regardless of the length of their coal mine employment. A claimant with fewer than 10 years of coal mine employment has the affirmative burden under Section 410.490(b)(2) of establishing that his pneumoconiosis arose out of coal mine employment. A miner with more than 10 years is given a presumption that his pneumoconiosis arose out of coal mine employment, but this presumption may be rebutted by evidence ruling out causation. Moreover, under the interpretation of Section 410.490(c) described above, the party opposing entitlement may also rebut by establishing that any disability from which the miner suffers did not arise out of coal mine employment. Therefore, Section 410.490 can be read as providing rebuttal methods precisely analogous to those contained in Sections 727.203(b)(1) through (b)(4).

Aside from the obvious complexity of this scheme, there is at least one other major problem with this interpretation. Several courts have already rejected a quite similar argument which the Director made in reference to Section 727.203(b)(2).[82] This section, like Section 410.490(c), also parenthetically refers to Section 410.412(a). The Director has argued that because Section 410.412(a)(1) defines total disability in terms of disability due to pneumoconiosis, the party opposing entitlement under (b)(2) should be able to rebut through evidence showing that any disability from which the miner suffers is not due to pulmonary impairment. However, the federal courts of appeals which have addressed the issue have unanimously rejected the Director's position, holding that there can be no rebuttal under Section 727.203(b)(2) if a miner is totally disabled from any cause, whether or not that disability is the result of a pulmonary or respiratory condition.[83] Specifically, the Fourth Circuit held that the reference to Section 410.412(a) was merely to clarify what would be considered "comparable and gainful" work and was not designed to bring the causation issue into question.[84] It seems unlikely that these courts will accept, in its new guise, the argument which they have resoundingly rejected in reference to Section 727.203(b)(2) rebut-

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[82] For the full text of 20 C.F.R. § 727.203(b)(2) (1988), *see supra* note 21.

[83] *See, e.g.*, Oravitz v. Director, OWCP, 843 F.2d 738, 740 (3d Cir. 1988); York v. Benefits Review Board, 819 F.2d 134, 137 (6th Cir. 1987); Sykes v. Director, OWCP, 812 F.2d 890, 894 (4th Cir. 1987).

[84] *Sykes*, 812 F.2d at 894.

tal. Of course, it is possible that a higher authority will be called upon to resolve the issue.

2. A Second Solution: Congress Did Not Intend To Limit The Part 727 Rebuttal Inquiry

A more compelling argument can be made that the "not more restrictive" mandate was never intended to apply to or limit rebuttal under Part C. The legislative history surrounding the adoption of this provision, as well as the Act itself, lend some support to this argument. First, Section 401(a)[85] states that the purpose of the Act is to provide benefits to eligible miners and their dependents if the miner's total disability or death was due to pneumoconiosis. Second, a miner is to be considered "totally disabled" only if the miner's pneumoconiosis prevents him from working.[86] Regardless of what HEW had intended in enacting Section 410.490, it would make little sense to presume that Congress intended to statutorily limit the rebuttal inquiry to a determination of disability, since in some cases this would allow an award of benefits despite clear evidence that a miner did not have pneumoconiosis or that his disability was not related to his coal mine employment. Finally, in discussing the requirement that the Part 727 criteria be not more restrictive than the Section 410.490 criteria, the House Conferees explicitly qualified that requirement. Specifically, the Conferees directed:

> With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that in determining claims under such criteria all relevant medical evidence should be considered* in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.[87] (emphasis added)

One problem with attaching too much significance to this expressed intent, however, is that the above-quoted language was

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[85] 30 U.S.C. § 901(a) (1982).

[86] 30 U.S.C. § 902(f)(1)(A) (1982).

[87] H.R. REP. No. 864, 95th Cong., 2d Sess. 16, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 309-10. In his article on the interim presumption, Mark Solomons argues that "[b]y this statement, the conferees alerted the Secretary of Labor that he was not to treat the interim presumption as irrebuttable." *A Critical Analysis*, *supra* note 61 at 893.

not included in Section 402(f)(2) of the Act,[88] although a similar requirement that all relevant evidence be considered was included in another statutory provision dealing, more generally, with entitlement to benefits under Part C.[89] Furthermore, the Supreme Court in *Sebben* seemed disinclined to read any limitations on the word "criteria" based on the legislative history, finding that "the text of the present statute plainly embraces criteria of more general application."[90] The Court reasoned that the "not more restrictive" mandate should be construed broadly because "Congress had no particular motive in preserving the HEW interim medical criteria other than to assure the continued liberality of black lung awards."[91] However, as one commentator has noted, because Congress was also concerned that the Social Security Administration had improperly treated the Section 410.490 presumption as irrebuttable, Congress indicated, through their admonition in the Conference Report that all relevant evidence be considered, that they did not intend to restrict rebuttal of the interim presumption.[92] Perhaps, given the significantly different legislative concern expressed by Congress in reference to rebuttal of the interim presumption, and given the clear intent of the Act to provide benefits, not to every disabled miner, but only to those who are disabled due to pneumoconiosis, the courts will be willing to limit the scope of the "not more restrictive" mandate in this context.

CONCLUSION

As the foregoing discussion indicates, it is a close question whether the application of all four rebuttal provisions in Section 727.203(b) is consistent with the Section 402(f)(2) mandate. Although it is possible to interpret Section 410.490 as actually having provided all four rebuttal methods, this interpretation is rather complex and requires that arguably vague, parenthetical cross-references be given a pivotal role in the analysis of Section 410.490. On the other hand, there is some evidence that the Social Security Administration simply was not interested in considering rebuttal

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[88] *See supra* note 61.

[89] Section 413(b) provides, in relevant part, that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered." 30 U.S.C. § 923(b) (1982).

[90] *Sebben*, 109 S.Ct. at 421.

[91] *Id.*

[92] *See supra* notes 61 and 87.

of the Section 410.490 presumption.[93] It is in this context that Congress acted and, as is often the case, its action reflected a desire for both change and compromise. Indisputably, Congress was concerned that the Department of Labor's approval rate was significantly lower than the Social Security Administration's interim approval rate. Congress was also concerned, however, that the Social Security Administration had preemptively and, presumably, incorrectly created an irrebuttable presumption. Given this background, the statute can be read, without violence to its language, as limiting the "not more restrictive" mandate to invocation criteria. Because Congress explicitly created only one irrebuttable presumption and, throughout the statute expressed the intent to compensate not all miners, but only those who are totally disabled due to pneumoconiosis, this reading would seem warranted.

On balance, therefore, it is this commentator's opinion that Section 402(f)(2) should be read as applying only to invocation and not as blocking any of the rebuttal methods in Section 727.203(b). If all four rebuttal methods are available, claimants with 10 or more years of coal mine employment could not receive any possible advantage under Section 410.490. Under this analysis, Section 402(f)(2) merely mandates the application of the Section 410.490 invocation criteria in cases involving mining histories of fewer than 10 years. Accordingly, the *Sebben* decision should be understood as defining the only situation in which the provisions of Section 410.490 are still viable.

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[93] *See supra* note 61.