Federal Register

Friday
October 8, 1999

Part II

Department of Labor

Employment Standards Administration

20 CFR Part 718 et al.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969; Proposed Rule

DEPARTMENT OF LABOR

Employment Standards Administration

20 CFR Parts 718, 722, 725, 726, and 727

RIN 1215–AA99

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended

AGENCY: Employment Standards Administration, Labor.

ACTION: Proposed rule.

SUMMARY: On January 22, 1997, the Department issued a proposed rule to amend the regulations implementing the Black Lung Benefits Act. The Department initially allowed interested parties until March 24, 1997 to file comments, but extended that deadline twice. When the comment period finally closed on August 21, 1997, the Department had received almost 200 written submissions from coal miners, coal mine operators, insurers, physicians, and attorneys. In addition, the Department held two hearings, one on June 19, 1997 in Charleston, West Virginia, and another on July 22–23, 1997 in Washington, D.C. Over 50 people testified at the Department's hearings. In total, the Department heard from over 100 former coal miners and members of their families, over 50 coal mine operators and insurance companies that provide black lung benefits insurance, eight physicians, eight attorneys representing both claimants and coal mine operators, nine legislators at the federal and state levels, and groups as diverse as the United Mine Workers of America, the National Black Lung Association, the National Mining Association, the American Insurance Association, and the American Bar Association.

The Department has reviewed all of the comments and testimony, and has decided to issue a second proposal, revising a number of the most important regulations contained in the earlier proposal. In some cases, the Department has proposed additional changes to these regulations. In other cases, the Department has explained its decision not to alter its proposal based on the comments received to date. Finally, the Department has prepared an initial regulatory flexibility analysis. The Department's second proposal is intended to accomplish two purposes. First, it will provide notice to all interested parties of the proposed revisions, as well as of the initial regulatory flexibility analysis set forth in this document. Second, the re-proposal will allow small entities that may have been unaware of the Department's earlier proposal to submit comments on the entire proposed rule.

DATES: Comments must be submitted on or before December 7, 1999.

ADDRESSES: All comments concerning these proposed regulations should be addressed to James L. DeMarce, Director, Division of Coal Mine Workers' Compensation, Room C–3520, Frances Perkins Building, 200 Constitution Ave., NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: James L. DeMarce, (202) 693–0046.

SUPPLEMENTARY INFORMATION:

This notice reprints 20 CFR Parts 718, 722, 725, and 726 in their entirety for the convenience of interested parties. This notice thus necessarily includes proposed revisions contained in the Department's original notice of proposed rulemaking. 62 FR 3338 (Jan. 22, 1997). The Department intends this notice to supplement the original notice, however, and not to replace it. To the extent that previously proposed regulatory changes have not been altered by the revisions contained in this notice, the explanation of those changes contained in the Department's initial notice remains valid. Where the Department has proposed additional changes, those changes are explained below.

Summary of Noteworthy Proposed Regulations

Evidentiary Development

Documentary Medical Evidence

The Department's initial proposal governing evidentiary development in black lung claims resulted in the greatest volume of public comment, from coal mine operators, their insurers, claims servicing organizations and miners. Many commenters were critical of the Department's proposal that all documentary medical evidence was to be submitted to the district director in the absence of extraordinary circumstances. Numerous commenters, expressing widely varying points of view, also addressed the proposed limitation on the amount of documentary medical evidence that each side could submit in a given claim.

After carefully considering the many valid objections to the required submission of documentary medical evidence to the district director, the Department now proposes to retain the current process for submitting documentary medical evidence into the record. Under this process, parties may submit documentary medical evidence either to the district director or to an administrative law judge (ALJ) up to 20 days before an ALJ hearing, or even thereafter, if good cause is shown. This proposal does retain, however, the Department's original limitation on the amount of documentary medical evidence which may be submitted in each claim. To clarify its intent, the Department has defined differently the applicable evidentiary limitations. These limitations are now expressed in terms of the types of evidence most commonly used to establish or refute entitlement to benefits under §§ 718.202 and 718.204. Thus, rather than describing the evidentiary limitations in terms of two pulmonary evaluations or consultative reports, the revised § 725.414 speaks in terms of two chest X-ray interpretations, the results of two pulmonary function tests, two arterial blood gas studies, and two medical reports.

The revised § 725.414 also would make explicit the amount of evidence which each side may submit in rebuttal of its opponent's case. A party may submit no more than one physician's interpretation of each chest X-ray, pulmonary function test, or arterial blood gas study submitted by its opponent. In addition, the Department proposes to permit a party to rehabilitate evidence that has been the subject of rebuttal. For example, where a party submits a physician's interpretation in rebuttal of a chest X-ray interpretation or objective test, the party that originally submitted the chest X-ray or test into evidence may introduce a contrary statement from the physician who originally interpreted it.

This proposal would alter in one significant way the limitations on the amount of medical evidence admissible in each claim. In order to allow for a more careful consideration of the unique facts and circumstances of each case, and to provide an additional procedural safeguard, this proposal would permit an administrative law judge to admit medical evidence into the record in excess of the limits outlined in § 725.414 upon a showing of good cause. The Department's prior proposal would have permitted the admission of such evidence only if a moving party could demonstrate extraordinary circumstances.

Complete Pulmonary Evaluation

The Department also proposes a change in the manner in which it administers the complete pulmonary evaluation required by the Black Lung Benefits Act. Under the Department's original proposal, a miner could be examined either by a physician selected

by the Department or by a physician of his choosing. If the miner selected the physician, however, the report of that examination would have counted as one of the two pulmonary evaluations the miner was entitled to submit into evidence. The Department now proposes to allow the miner to choose the physician or facility to perform the complete pulmonary evaluation from a list of providers maintained by the Department. The authorized list of physicians and facilities in a given case would include all those in the state of the miner's residence and contiguous states. If, however, a miner chose a provider more than one hundred miles from his residence to administer the 413(b) evaluation, the designated responsible operator could choose to send the miner a comparable distance for its examination. The 413(b) examination results would not count against the miner's quota. § 725.406.

The Department believes that this proposal would benefit all parties to a claim. It would make possible the best quality respiratory and pulmonary evaluation and would insure each miner a thorough examination, performed in compliance with the applicable quality standards. Such a pulmonary evaluation would therefore give the Department a sound evidentiary basis upon which to make an initial finding, a finding which both the claimant and the operator may find credible. The Department intends to develop more rigorous standards for physicians and facilities that perform pulmonary evaluations and to reevaluate the fees it pays physicians to perform and explain the results of these examinations. The Department has discussed in the preamble to § 725.406 several possible criteria that the Office might use in selecting appropriate physicians and facilities, and invites comment on these and other possible criteria.

Developing medical evidence relevant to the claimant's respiratory and pulmonary condition, including the objective medical testing required by the Department's quality standards, may involve costs beyond the reach of some claimants. Thus, this proposal would require a district director to inform the claimant that he may have the results of the Department's initial objective testing sent to his treating physician for use in the preparation of a medical report that complies with the Department's quality standards. The district director's notice would also inform the claimant that, if submitted, a report from his treating physician would count as one of the two reports he is entitled to submit under § 725.414, and that he may wish to seek advice, from a lawyer or other qualified representative, before requesting his treating physician to supply such a report. In this way, the Department hopes to assist claimants who may not be able to afford the necessary objective testing.

Documentary Evidence Pertaining to the Liability of a Potentially Liable Operator or the Responsible Operator

Although the Department now proposes to allow the submission of new documentary medical evidence while a case is pending before the Office of Administrative Law Judges, it has not altered the proposal with respect to the required submission to the district director of all documentary evidence relevant to potentially liable operators and the responsible operator. Proposed §§ 725.408, 725.414 and 725.456 would continue to require that such evidence be submitted to the district director and that an administrative law judge may admit additional evidence on such issues only if the party seeking to submit the evidence demonstrates extraordinary circumstances justifying its admission. The Department has revised proposed § 725.408, however, in response to operators' comments. That section would now allow an operator, notified of its potential liability under proposed § 725.407, 90 days, rather than 60, to submit documentary evidence challenging the district director's determination that it meets the requirements in § 725.408(a)(2). In addition, the 90 day period could be extended for good cause pursuant to § 725.423.

Witnesses

This proposal alters the provisions governing witnesses testimony. §§ 725.414, 725.456, 725.457. The revisions would allow a physician to testify, either at a hearing or pursuant to deposition, if he authored a ''medical report'' admitted into the record pursuant to § 725.414. Alternatively, if a party has submitted fewer than the two medical reports allowed as an affirmative case, a physician who did not prepare a medical report could testify in lieu of such a report. No party would be allowed to offer the testimony of more than two physicians, however, unless the administrative law judge found good cause to allow evidence in excess of the § 725.414 limitations. The Department also has proposed altering its original limitation on the scope of a physician's testimony. If a physician is permitted to testify, he may testify as to any medical evidence of record, and not solely with respect to the contents of the report he prepared.

The regulations governing witnesses testimony would continue to require that the parties notify the district director of any potential witness whose testimony pertains to the liability of a potentially liable operator or the responsible operator. Absent such notice, the testimony of such a witness may not be admitted into a hearing record absent an administrative law judge's finding of extraordinary circumstances. §§ 725.414, 725.457.

Witnesses' Fees

The Department received comments from both miners and coal mine operators criticizing its initial proposal, which would have assessed liability for witnesses' fees on the party seeking to cross-examine a witness if the witness's proponent did not intend to call the witness to appear at the hearing. In response to these objections, the Department now proposes to assess the costs of cross-examination of a witness on the party relying on that witness's affirmative testimony. This change will make the regulation more consistent with the manner in which witnesses' fees are paid in general litigation. Under the proposal, the party whose witness is to be cross-examined may request the administrative law judge to authorize a less burdensome method of cross-examination than an actual appearance at a hearing, provided that the alternative method authorized will produce a full and true disclosure of the facts.

The only exception to this general rule would be in the case of an indigent claimant. If a claimant is the proponent of the witness whose cross-examination is sought, and the claimant demonstrates that he would be deprived of ordinary and necessary living expenses if required to pay the witness's fee and mileage necessary to produce the witness for cross-examination, the administrative law judge may apportion the costs of the cross-examination between the parties, up to and including the assessment of the total cost against the party opposing claimant's entitlement. A claimant shall be considered deprived of funds required for ordinary and necessary living expenses under the standards set forth at 20 CFR 404.508. The Black Lung Disability Trust Fund may not be held liable for such witness's fee in any case in which the district director has designated a responsible operator, except that the fund may be assessed the cost associated with the cross-examination of the physician who performed the miner's complete pulmonary evaluation.

Subsequent Claims

Subsequent applications for benefits are filed more than one year after the denial of a previous claim and may be adjudicated only if the claimant demonstrates that an applicable condition of entitlement has changed in the interim. In its initial notice of proposed rulemaking, the Department attempted to clarify the regulation governing subsequent claims by summarizing and incorporating into the regulation's language the outcome of considerable appellate litigation. 62 FR 3351–3353 (Jan. 22, 1997). Because the courts of appeals have issued additional decisions since the Department's initial proposal, the proposal now merely codifies caselaw that is already applicable to more than 90 percent of the claimants who apply for black lung benefits. The Department's complete discussion of the numerous comments received in response to the first notice of proposed rulemaking is found under § 725.309.

This second proposal contains two changes to § 725.309 as initially proposed. Both changes affect § 725.309(d)(3). The Department now proposes elimination of the rebuttable presumption that the miner's physical condition has changed if the miner proves with new medical evidence one of the applicable conditions of entitlement. Commenters responded that the proposal was confusing and would lead to considerable litigation. The Department agrees that the presumption is unnecessary and suggests its deletion. Under the new proposal, a subsequent claim will be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. Section 725.309(d)(3) of this proposal also clarifies the Department's original intent with respect to subsequent survivors' claims. In order to avoid an automatic denial, the applicant in a subsequent survivor's claim must demonstrate that at least one of the applicable conditions of entitlement is unrelated to the miner's physical condition at the time of his death. Thus, if the prior denial was based solely on the survivor's failure to establish that the miner had pneumoconiosis, that the miner's pneumoconiosis was caused by coal mine employment, or that the pneumoconiosis contributed to the miner's death, any subsequent claim must also be denied, absent waiver by the liable party.

By allowing the filing of a subsequent claim for benefits which alleges a worsening of the miner's condition, the Department merely recognizes the progressive nature of pneumoconiosis. The proposed regulation does not allow the reopening of any prior claim which was denied more than one year before the filing of the subsequent claim. It also prohibits any award of benefits for a period of time covered by that prior denial. Responsible operators have argued to the circuit courts of appeals that the Department's regulatory scheme allows the ''recycling'' of an old claim in violation of the Supreme Court's holding that a black lung claimant may not ''seek[] to avoid the bar of res judicata [finality] on the ground that the decision was wrong.'' *Pittston Coal Group* v. *Sebben,* 488 U.S. 105, 123 (1988). The courts have uniformly rejected this argument, see *Lovilia Coal Co.* v. *Harvey,* 109 F.3d 445, 449–450 (8th Cir. 1997), *cert. denied,* 118 S. Ct. 1385 (1998). Thus, the Department's proposal is fully consistent with the Supreme Court's holding in *Sebben,* and gives appropriate finality to prior denials.

The Department's experience with subsequent claims also demonstrates the need for such filings. During the period between January 1, 1982, when the Black Lung Benefits Amendments of 1981 took effect, and July 16, 1998, 10.56 percent of the subsequent claims filed by living miners were ultimately awarded as opposed to only 7.47 percent of first-time claims. To prevent a miner who has previously been denied benefits from filing a subsequent claim would force each miner to ''guess'' correctly when he has become totally disabled due to pneumoconiosis arising out of coal mine employment because a premature and unsuccessful filing would forever bar an award. In addition, the total number of subsequent claims filed by miners during that same time period, 30,964, as compared to the total number of claims filed, approximately 107,000, indicates that the provision is not abused. Of the total number of claims filed, only approximately 1,400, or 1.3 percent, were from individuals who had been denied benefits three or more times. Thus, in general, only an individual who believes his condition has truly worsened files a subsequent claim.

Although the Department's proposal would allow the filing of subsequent claims, the Department also intends to take steps to better educate claimants with respect to the requirements for entitlement. The Department intends to provide better initial pulmonary evaluations and better reasoned, more detailed explanations of denials of claims. By providing claimants with a more realistic view of their possible entitlement, the Department expects that the number of nonmeritorious applications will be reduced.

Attorneys' Fees

In its first notice of proposed rulemaking, the Department attempted to clarify an operator's liability for a claimant's attorney's fees and the dates on which the operator's liability commenced. The Department also recognized the Trust Fund's liability for attorneys' fees and made it coextensive with a liable operator's. In general, the Department used the date of the event which created an adversarial relationship between the claimant and either the operator or the fund as the date on which liability for a claimant's attorney's fees commenced. The Department used this date based on the theory that it was the creation of an adversarial relationship which required employment of an attorney. Thus, for example, a successful claimant's attorney could only collect a fee from an operator or the fund for necessary work performed after the liable operator first contested the claimant's eligibility or the fund first denied the claim. *See* 62 FR 3354, 3399 (Jan. 22, 1997).

Upon further reflection and consideration of the comments received, however, the Department now proposes to allow successful claimants' attorneys to collect fees from an operator or the fund for all necessary work they perform in a case rather than only the work performed after creation of an adversarial relationship. Although the creation of an adversarial relationship and the ultimately successful prosecution of a claim are still necessary to trigger employer or fund liability for attorneys' fees, the date on which the adversarial relationship commenced will no longer serve as the starting point of liability. The Department believes this change may be appropriate in light of the evidentiary limitations present in the proposal. These limitations significantly alter the consequences of an early submission of evidence and make the quality of each piece of evidence submitted significantly more important. Thus, in an attempt to avoid setting a trap for the unwary claimant and to encourage early attorney involvement in these claims, the Department proposes allowing successful attorneys to collect fees for all of the necessary work they perform.

Treating Physicians' Opinions

In the preamble accompanying its initial proposal, the Department noted that its proposal to allow a fact-finder to give controlling weight to the opinion of

a treating physician attempted to codify principles embodied in case law and also drew on a similar regulation adopted by the Social Security Administration, 20 CFR 404.1527(d)(2). See 62 Fed. Reg. 3338, 3342 (Jan. 22, 1997). The Department's proposal elicited widely divergent comment from numerous sources. The Department now invites comment on alternative ways to determine when a treating physician's opinion may be entitled to controlling weight.

The purpose of this proposal is not to limit a factfinder's consideration of any properly admitted medical or other relevant evidence. Rather, this regulation would mandate only that the factfinder recognize that a treating physician may possess additional insight into the miner's respiratory or pulmonary condition by virtue of his extended treatment. The Department has proposed two changes to § 718.104(d). In the absence of contrary probative evidence, the adjudication officer would be required to accept the physician's statement with regard to the nature and duration of the doctor's treatment relationship with the miner, and the frequency and extent of that treatment. § 718.104(d)(5). The Department has also added language to § 718.104(d) to make explicit its intent that a treating physician's opinion may establish all of the medical elements of entitlement. Finally, the Department has retained the language in the original proposal that whether controlling weight is given to the opinion of a treating physician shall also be based on the credibility of that opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

Waiver of Overpayments

In its previous notice of proposed rulemaking, the Department extended the right to seek waiver of recovery of an overpayment to all claimants, without regard to whether recovery was sought by a responsible operator or the Black Lung Disability Trust Fund. 62 FR 3366–3367 (Jan. 22, 1997). The Department received numerous comments in response, many urging adoption of a more generous waiver provision fashioned after the Longshore and Harbor Workers' Compensation Act. Many other comments opposed the extension of waiver rights to all claimants as an unconstitutional deprivation of responsible operators' property rights and right to appeal. Thus far, these comments have not provided the Department with a sufficient basis for altering its original proposal. *See* the discussion under § 725.547.

The Department also heard testimony from a number of witnesses generally critical of the application of the criteria used to determine whether recoupment of an overpayment would defeat the purposes of title IV of the Federal Coal Mine Health and Safety Act or would be against equity and good conscience. These waiver criteria are incorporated into the Black Lung Benefits Act from the Social Security Act, 30 U.S.C. 923(b), 940, incorporating 42 U.S.C. 404(b), and the Social Security Administration uses them in its adjudication of overpayments arising under title II of the Social Security Act. Thus, Social Security's current interpretation of these criteria is found in Social Security regulations governing title II claims, 20 CFR 404.506 through 404.512, not in their regulations governing Part B claims filed under the Black Lung Benefits Act, 20 CFR 410.561 through 410.561h. In order to make the standards for waiver of recovery of a black lung overpayment more current, the Department proposes to amend section 725.543 to incorporate Social Security's title II standards, rather than its Part B regulations.

Definition of Pneumoconiosis and Establishing Total Disability Due to Pneumoconiosis

The Department has suggested no further change to its initial proposal defining pneumoconiosis, § 718.201, and no significant change to its regulation defining total disability and disability causation, § 718.204. The miner retains the burden of proving each of these required elements of entitlement.

The Department received widely divergent comments from medical professionals on its proposed definition of pneumoconiosis. Some commenters argued that the proposal lacked a sound medical basis and would therefore unjustifiably increase the number of claims approved. Other physicians, also with expertise in pulmonary medicine, supported the proposal. As a result, the Department sought additional guidance on this issue from the National Institute for Occupational Safety and Health (NIOSH). The Department forwarded to NIOSH all of the comments and testimony it had received relevant to § 718.201 and requested that NIOSH advise the Department whether any of the material altered that agency's original opinion, submitted during the comment period, which supported the Department's proposal. NIOSH concluded that the unfavorable comments and testimony did not alter its previous position: NIOSH scientific analysis supports the proposed definitional changes.

The Department also received numerous comments on its proposed regulation defining total disability and disability causation, and setting out the criteria for establishing total disability. The Department has proposed no significant change to § 718.204. It has proposed, however, a change in the methodology by which pulmonary function tests are administered. § 718.103(a) and Appendix B to Part 718. This proposal would require that pulmonary function testing be administered by means of a flow-volume loop, a more reliable method of ensuring valid, verifiable results in pulmonary function testing. The Department invites comment on these proposed changes.

True Doubt

The ''true doubt'' rule was an evidentiary weighing principle under which an issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. In its first notice of proposed rulemaking, the Department proposed deleting subsection (c) of the current regulation at § 718.3, because the Supreme Court held that this language failed to define the ''true doubt'' rule effectively. 62 FR 3341 (Jan. 22, 1997). Although the Department received a number of comments urging the proposal of a ''true doubt'' rule, the Department has not done so in this second notice of proposed rulemaking.

The Department believes that evaluation of conflicting medical evidence requires careful consideration of a wide variety of disparate factors, making the applicability of any true doubt rule extremely limited. The availability of these factors makes it unlikely that a factfinder will be able to conclude that the evidence, although in conflict, is equally probative. Thus, the Department does not believe that promulgation of a true doubt rule will enhance decision-making under the Act.

Federal Coal Mine Health and Safety Act Endorsement

Section 726.203 was not among the regulations the Department opened for comment in its previous notice of proposed rulemaking. Representatives of the insurance industry commented, however, that a different version of the endorsement contained in § 726.203(a) has been in use since 1984, with the Department's knowledge and consent. The Department is now opening § 726.203 for comment. Although this proposal does not suggest alternative language for the endorsement, the

preamble does contain the version of the endorsement which the industry provided. The Department invites comment on its possible use, but urges commenters to bear in mind the requirement in § 726.205 that endorsements other than those provided by § 726.203 may be used only if they do not ''materially alter or attempt [] to alter an operator's liability for the payment of any benefits under the Act.* * *'' The Department also requests that the insurance industry submit for the record any document it might possess from the Department authorizing use of the different endorsement.

Medical Benefits

Since the Department's initial proposal, the U.S. Court of Appeals for the Sixth Circuit has issued a decision addressing the compensability of medical expenses incurred as a result of treatment for totally disabling pneumoconiosis. *Glen Coal Co.* v. *Seals,* 147 F.3d 502 (6th Cir. 1998). A majority of that panel held that the Benefits Review Board had erred by applying the Fourth Circuit's presumption to a miner whose coal mine employment took place within the jurisdiction of the Sixth Circuit. In the Fourth Circuit, if a miner entitled to monthly black lung benefits receives treatment for a pulmonary disorder, it is presumed that that disorder is caused or aggravated by the miner's pneumoconiosis. *Doris Coal Co.* v. *Director, OWCP,* 938 F.2d 492 (4th Cir. 1991); *Gulf & Western Indus.* v. *Ling,* __ F.3d __, 1999 WL 148851 (4th Cir. Mar. 19, 1999).

The Department believes that black lung benefit claims adjudication should vary as little as possible from circuit to circuit, and consequently continues to propose a regulatory presumption, based on the Fourth Circuit's approach, that would apply nationwide. The Sixth Circuit's opinion would allow such a result, given the separate views expressed by each of the three judges sitting on that panel. The Department also believes that a regulatory presumption governing the compensability of medical expenses for the treatment of totally disabling pneumoconiosis is appropriate given the rational connection between the facts proven and the facts presumed.

Explanation of Proposed Changes

Open Regulations

The Department invites comments from interested parties on the following regulations: § 718.3, § 718.101, § 718.102, § 718.103, § 718.104, § 718.105, § 718.106, § 718.107, § 718.201, § 718.202, § 718.204, § 718.205, § 718.301, § 718.307, § 718.401, § 718.402, § 718.403, § 718.404, Appendix B to part 718, Appendix C to Part 718, part 722 (entire), § 725.1, § 725.2, § 725.4, § 725.101, § 725.103, § 725.202, § 725.203, § 725.204, § 725.209, § 725.212, § 725.213, § 725.214, § 725.215, § 725.219, § 725.221, § 725.222, § 725.223, § 725.306, § 725.309, § 725.310, § 725.311, § 725.351, § 725.362, § 725.367, § 725.403, § 725.405, § 725.406, § 725.407, § 725.408, § 725.409, § 725.410, § 725.411, § 725.412, § 725.413, § 725.414, § 725.415, § 725.416, § 725.417, § 725.418, § 725.421, § 725.423, § 725.452, § 725.454, § 725.456, § 725.457, § 725.458, § 725.459, § 725.465, § 725.478, § 725.479, § 725.490, § 725.491, § 725.492, § 725.493, § 725.494, § 725.495, § 725.502, § 725.503, § 725.515, § 725.522, § 725.530, § 725.533, § 725.537, § 725.543, § 725.544, § 725.547, § 725.548, § 725.606, § 725.608, § 725.609, § 725.620, § 725.621, § 725.701, § 725.706, § 726.2, § 726.8, § 726.101, § 726.104, § 726.105, § 726.106, § 726.109, § 726.110, § 726.111, § 726.114, § 726.203, § 726.300, § 726.301, § 726.302, § 726.303, § 726.304, § 726.305, § 726.306, § 726.307, § 726.308, § 726.309, § 726.310, § 726.311, § 726.312, § 726.313, § 726.314, § 726.315, § 726.316, § 726.317, § 726.318, § 726.319, § 726.320, and part 727 (entire).

New Regulations Open for Comment

The Department's initial notice of proposed rulemaking contained a list of regulations, entitled ''Substantive Revisions,'' that the Department proposed to revise. 62 FR at 3340 (Jan. 22, 1997). That list of regulations is reproduced above with six additions. The Department is now proposing changes to ten regulations that were not open for comment previously: § 725.351, § 725.403, § 725.465, § 725.515, § 725.533, § 725.543, § 725.544, § 725.548, § 726.3, and § 726.203. Although the Department has not proposed any specific changes to section 726.203, the Department seeks comment from interested parties on the changes to that regulation suggested by the insurance industry. Accordingly, the Department now invites comment from all interested parties on the regulations listed above as Open Regulations.

Additional Technical changes

The Department's first proposal identified a number of regulations to which the Department was proposing to make technical revisions. *See* 62 FR 3340–41 (Jan. 22, 1997). The Department is now proposing additional technical revisions. Among other things, these proposed changes delete references to the control numbers used by the Office of Management and Budget to approve revisions to the regulations in 1984 because the inclusion of these numbers is neither necessary nor helpful to understanding the Department's regulations. *See, e.g.,* 20 CFR 718.102 (1999). In addition, at the request of the Office of the Federal Register, the Department is proposing to change references to various components of title 20 of the Code of Federal Regulations and to various statutory provisions and to add a colon to § 726.1. The following regulations should be added to the list of regulations to which the Department is making only technical revisions: Appendix A to Part 718, § 725.201, § 725.218, § 725.220, § 725.531, § 725.536, § 726.1, § 726.103, § 726.207, § 726.208, § 726.209, § 726.210, § 726.211, § 726.212, and § 726.213.

Complete List of Technical Revisions

The complete list of regulations to which the Department is making technical changes is as follows: § 718.1, § 718.2, § 718.4, § 718.303, Appendix A to Part 718, § 725.102, § 725.201, § 725.216, § 725.217, § 725.218, § 725.220, § 725.301, § 725.302, § 725.350, § 725.360, § 725.366, § 725.401, § 725.402, § 725.404, § 725.419, § 725.420, § 725.450, § 725.451, § 725.453A, § 725.455, § 725.459A, § 725.462, § 725.463, § 725.466, § 725.480, § 725.496, § 725.501, § 725.503A, § 725.504, § 725.505, § 725.506, § 725.507, § 725.510, § 725.513, § 725.514, § 725.521, § 725.531, § 725.532, § 725.536, § 725.603, § 725.604, § 725.605, § 725.607, § 725.701A, § 725.702, § 725.703, § 725.704, § 725.705, § 725.707, § 725.708, § 725.711, § 726.1, § 726.4, § 726.103, § 726.207, § 726.208, § 726.209, § 726.210, § 726.211, § 726.212, and § 726.213. Pursuant to the authority set forth in 5 U.S.C. 552(b)(3)(A), which allows federal agencies to alter ''rules of agency organization, procedure, or practice'' without notice and comment, the Department is not accepting comments on any of these regulations.

Unchanged Regulations

Certain regulations are merely being re-promulgated without alteration and are also not open for public comment. To the extent appropriate, the Department's previous explanations of

these regulations, set forth in the **Federal Register**, *see* 43 FR 36772–36831, Aug. 18, 1978; 48 FR 24272–24294, May 31, 1983, remain applicable. The same is true of those regulations to which the Department is making only technical changes. The following regulations are being re-promulgated for the convenience and readers: § 718.203, § 718.206, § 718.302, § 718.304, § 718.305, § 718.306, § 725.3, § 725.205, § 725.206, § 725.207, § 725.208, § 725.210, § 725.211, § 725.224, § 725.225, § 725.226, § 725.227, § 725.228, § 725.229, § 725.230, § 725.231, § 725.232, § 725.233, § 725.303, § 725.304, § 725.305, § 725.307, § 725.308, § 725.352, § 725.361, § 725.363, § 725.364, § 725.365, § 725.422, § 725.453, § 725.460, § 725.461, § 725.464, § 725.475, § 725.476, § 725.477, § 725.481, § 725.482, § 725.483, § 725.497, § 725.511, § 725.512, § 725.520, § 725.534, § 725.535, § 725.538, § 725.539, § 725.540, § 725.541, § 725.542, § 725.545, § 725.546, § 725.601, § 725.602, § 725.710, § 726.5, § 726.6, § 726.7, § 726.102, § 726.107, § 726.108, § 726.112, § 726.113, § 726.115, § 726.201, § 726.202, § 726.204, § 726.205, and § 726.206.

Changes in the Department's Second Proposal

The Department's second proposal contains substantive changes, either in the regulation or the preamble language, or both, to the following regulations: § 718.3, § 718.101, § 718.103, § 718.104, § 718.105, § 718.106, § 718.107, § 718.201, § 718.204, § 718.205, Part 718, Appendix B, § 725.2, § 725.101, § 725.209, § 725.223, § 725.309, § 725.310, § 725.351, § 725.367, § 725.403, § 725.406, § 725.407, § 725.408, § 725.409, § 725.411, § 725.414, § 725.416, § 725.456, § 725.457, § 725.459, § 725.465, § 725.491, § 725.492, § 725.493, § 725.494, § 725.495, § 725.502, § 725.503, § 725.515, § 725.533, § 725.543, § 725.544, § 725.547, § 725.548, § 725.606, § 725.701, § 726.3, § 726.8 and § 726.203. The Department has carefully considered all of the comments that it has received to date with regard to the regulations. The preamble contains an explanation of the Department's proposed changes as well as its reason for rejecting other suggestions.

In particular, the Department invites comment from small businesses that may not have been aware of the potential impact of the Department's proposed rule. In order to ensure that small businesses have adequate information, the Department intends to mail a copy of this proposal to each coal mine operator who is identified in current records maintained by the Mine Safety and Health Administration.

Several commenters suggest that the Department lacks the authority to revise the regulations governing claims filed under the Black Lung Benefits Act. Although some of these objections are limited to individual regulations, such as the definition of ''pneumoconiosis,'' and will be addressed in the discussion of those regulations, two of the objections apply to a substantial number of the revisions made by the Department. They are: first, that the Department lacks the authority to promulgate regulations covering matters that were the subject of an unsuccessful attempt to amend the Act in 1994; and, second, that the Supreme Court's decision in *Director,* OWCP v. *Greenwich Collieries*, 512 U.S. 267 (1994), prohibits the Department from adopting any regulation that requires coal mine operators to bear a burden of proof.

Regulatory Authority

In 1994, the 104th Congress considered legislation that would have amended the Black Lung Benefits Act by, among other things, limiting the amount of evidence parties may submit, providing claimants with overpayment relief, and allowing previously denied applicants to seek *de novo* review of their claims. The House passed a version of this legislation, H.R. 2108, on May 19, 1994, but the Senate adjourned in September, 1994 without acting on several similar bills. Numerous commenters have argued that in ''rejecting'' H.R. 2108, the Congress has already disapproved certain of the revisions now proposed by the Department. This argument fails on two grounds. First, Congress' failure to act does not deprive the Department of the authority to promulgate regulations otherwise conferred by the Black Lung Benefits Act. Second, Congress did not reject the legislation. Instead, the Senate adjourned without considering its version of the bill passed by the House.

The starting point for determining the validity of any regulation is the legislation authorizing the agency to issue binding rules. As a general matter, ''[t]he power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'' *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974). ''If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'' *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837, 843–44 (1984).

In *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680 (1991), the Supreme Court recognized the applicability of the *Chevron* analysis to regulations implementing the Black Lung Benefits Act:

> It is precisely this recognition that informs our determination that deference to the Secretary is appropriate here. The Black Lung Benefits Act has produced a complex and highly technical regulatory program. The identification and classification of medical eligibility criteria necessarily require significant expertise, and entail the exercise of judgment grounded in policy concerns. In those circumstances, courts appropriately defer to the agency entrusted by Congress to make such policy determinations.

Id. at 696. In addition to providing this general authority, the Black Lung Benefits Act contains several explicit provisions authorizing rule-making by the Department of Labor. Section 422(a) of the Act provides that ''[i]n administering this part [Part C of the Act], the Secretary is authorized to prescribe in the **Federal Register** such additional provisions * * * as [s]he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.'' 30 U.S.C. 932(a). Section 426(a) of the Act similarly authorizes the Secretary to ''issue such regulations as [she] deems appropriate to carry out the provisions of this title.'' 30 U.S.C. 936(a). As the Fourth Circuit has pointed out, these two provisions represent a ''broad grant of rulemaking authority.'' *Harman Mining Co.* v. *Director,* OWCP, 826 F.2d 1388, 1390 (4th Cir. 1987). Finally, the Act contains several other provisions authorizing the Secretary to promulgate regulations on specific subjects. *See, e.g.*, 30 U.S.C. 902(f)(1)(D) (criteria for medical tests which accurately reflect total disability), 932(h) (standards for assigning liability to operators), and 933(b)(3) (required insurance contract provisions).

The Secretary's rulemaking authority is not unlimited. For example, section 422(a) prohibits the Department from promulgating regulations that are inconsistent with Congress's decision to exclude certain provisions of the Longshore and Harbor Workers' Compensation Act from those

incorporated into the Black Lung Benefits Act. Moreover, under *Chevron*, the Department clearly has no authority to issue regulations on a subject which Congress has addressed unambiguously. *Pittston Coal Group* v. *Sebben*, 488 U.S. 105 (1988). For example, in 1981, Congress amended the Act to limit the eligibility of surviving spouses of deceased coal miners who filed claims on or after January 1, 1982. Congress provided that such a spouse would be entitled to survivors' benefits only if [s]he could establish that the miner had died due to pneumoconiosis. Pub. L. 97–119, 95 Stat. 1635, § 203(a)(2), (3). The bill passed by the House in 1994 would have reinstated so-called unrelated death benefits so as to allow a surviving spouse to collect benefits, no matter the miner's cause of death, so long as the miner was totally disabled due to pneumoconiosis at the time of death. Because that bill did not become law, however, the 1981 requirement remains in effect, and quite obviously limits the Department's ability to regulate in this area.

The mere fact that Congress considered legislation affecting some of the same subjects addressed by the Department's regulatory proposal, however, cannot be construed as a similar limitation. ''Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation.'' *Bob Jones University* v. *United States*, 461 U.S. 574, 600 (1983). In particular, the Department is not aware of any case holding that the failure of a previous Congress to enact legislation prevents an administrative agency from promulgating regulations on similar topics.

Moreover, the regulations proposed by the Department are, for the most part, quite different in content from the provisions of either the bill that was passed by the House or the bills that were under consideration by the Senate when it adjourned. The Department's proposed revision of the definition of ''pneumoconiosis'' is similar in one respect to a provision in H.R. 2108 (recognizing that both obstructive and restrictive lung disease may be caused by exposure to coal mine dust). Other provisions, however, are significantly different. For example, H.R. 2108 would have completely relieved claimants of the obligation to repay overpaid amounts. In contrast, the Department's proposal would ensure only that the rules governing waiver of overpayments are applied without regard to whether the overpayment was made by the Black Lung Disability Trust Fund or a responsible operator. In fact, the Department has specifically rejected comments urging it to use certain provisions incorporated from the Longshore and Harbor Workers' Compensation Act that would bar the recoupment of overpayments by employers, an approach similar to that considered by the 104th Congress. Although the Department is not proposing the widespread overpayment relief that was contained in H.R. 2108 and was sought by these commenters, the Department also does not believe that Congress intended that claimants who receive payment from the Trust Fund be treated differently than claimants who receive payments from liable coal mine operators. The Department's proposal would simply guarantee the equitable treatment of both claimant groups.

The Department's proposed evidentiary limitation is also significantly different from the limitation set forth in H.R. 2108. Under the bill passed by the House, claimants would have been allowed to submit three medical opinions, and responsible operators or the Trust Fund would have been allowed only one. The Department agrees that evidentiary limitations are needed to level the playing field between operators and claimants, but does not believe that the playing field should be tilted in favor of one party. Rather, the Department's proposal treats all parties equally and encourages them to rely on the quality of their medical evidence rather than its quantity. Hopefully, the proposal's evidentiary limitations will improve the decisionmaking process in black lung benefit claims.

Finally, the Department's treatment of denied claims also differs significantly from that proposed in the legislation. H.R. 2108 would have allowed any claimant denied benefits based on a claim filed on or after January 1, 1982 to seek readjudication of that claim without regard to the previous denial. The Department's proposed revision of § 725.309, on the other hand, specifically forbids the parties from seeking readjudication of the earlier denial of benefits. § 725.309(d). Instead, the Department has proposed the codification of a solution that has already been accepted by five courts of appeals with jurisdiction over more than 90 percent of black lung claims filed. That solution requires a claimant to establish, with new evidence, at least one of the elements previously resolved against him before a new claim may even be considered on the merits. Even if a claimant establishes his entitlement to benefits based on a subsequent claim, benefits will be paid based only on that application and not for time periods covered by the earlier, final denial.

The Department therefore cannot accept the argument that Congress' failure to enact legislation in 1994 prevents the Department from revising regulations that have not been amended since 1983. In many cases, the Department is simply proposing to codify the decisions of a majority of the appellate courts. In other cases, the Department's proposed revisions represent reasonable methods of dealing with problems that have arisen since the black lung benefits regulations were first promulgated in 1978. The Department's ability to address those problems in regulations is independent of any Congressional effort to reform the Black Lung Benefits Act, and should be judged according to the standards set forth in *Chevron*. For the reasons set forth in its initial notice of proposed rulemaking, 62 FR 3337 (Jan. 22, 1997) and in this notice, the Department believes that its proposed revisions meet those standards.

Administrative Procedure Act

A number of commenters also suggest that the Department's ability to create regulatory presumptions is constrained by the Administrative Procedure Act and the Supreme Court's decision in *Greenwich Collieries*. In *Greenwich Collieries*, the Supreme Court invalidated the use of the ''true doubt'' rule, an evidentiary principle that effectively shifted the risk of non-persuasion from black lung applicants to coal mine operators. Under the ''true doubt'' rule, fact-finders were required to resolve any issue in favor of the claimant if the evidence for and against entitlement was equally probative. In contrast, section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. 556(d), states that ''[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'' The Court held that, even assuming that the Department could displace the APA through regulation, the Department's existing regulation, 20 CFR 718.403, was insufficient to do so. Finally, the Court determined that the party assigned the ''burden of proof'' by the APA bore the risk of non-persuasion. As a result, the court held the APA required that the Department resolve cases of equally probative evidence against the claimant, the party seeking an order compelling the payment of benefits.

The commenters argue that the Court's decision effectively prohibits the Department from imposing any burden of proof on an operator under the Black Lung Benefits Act. The Department does

not believe that *Greenwich Collieries* requires such a result. At the outset, it should be clear that the Court's decision did not address the relationship between the Department's rulemaking authority and the APA. Section 956 of the Federal Mine Safety and Health Act (FMSHA) provides as follows:

> Except as otherwise provided in this chapter, the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 shall not apply to the making of any order, notice, or decision made pursuant to this chapter, or to any proceeding for the review thereof.

30 U.S.C. 956. ''This chapter'' is a reference to chapter 22 of Title 30, United States Code, which codifies the FMSHA. Because the Black Lung Benefits Act is subchapter IV of the FMSHA, section 956 generally exempts the Act from the requirements of the section 7(c) of the APA. Similarly, although section 19 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919, incorporated into the BLBA by 30 U.S.C. 932(a), makes the APA applicable to the adjudication of claims under the LHWCA, that provision is incorporated into the Black Lung Benefits Act only ''except as otherwise provided * * * by regulations of the Secretary.'' The clear language of the FMSHA and the BLBA thus authorize the Secretary to depart from the dictates of section 7(c) when she determines it is in the best interest of the black lung benefits program.

Moreover, the Court's decision in *Greenwich Collieries* did not purport to decide the issues on which a particular party bears the burden of persuasion. Rather, the Court merely decided that with respect to two issues on which the claimant bears the burden of proof under the Secretary's existing regulations (the existence of pneumoconiosis and the cause of that disease), the claimant must prevail by a preponderance of the evidence. As the Court observed in its subsequent decision in *Metropolitan Stevedore Co.* v. *Rambo*, 117 S. Ct. 1953, 1963 (1997), ''the preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it before that fact may be found, but does not determine what facts must be proven as a substantive part of a claim or defense.''

Under *Greenwich Collieries*, then, the Department remains free to assign burdens of proof to parties as necessary to accomplish the purposes of the Black Lung Benefits Act. The Department has historically used regulatory presumptions where they were appropriate. For example, current 20 CFR 725.492(c), presumes that each employee of a coal mine operator was regularly and continuously exposed to coal dust during the course of his employment. In promulgating this regulation, the Department noted that such a showing required evidence that was not generally available to the Department; rather such evidence was within the control of the employer. 43 FR 36802–03 (Aug. 18, 1978). Current 20 CFR 725.493(a)(6) presumes that a miner's pneumoconiosis arose in whole or in part out of employment with the employer that meets the conditions for designation as the responsible operator. Unless the presumption is rebutted, the regulation requires the responsible operator to pay benefits to the claimant on account of the miner's total disability or death. One commenter objected to this presumption, set forth in revised § 725.494(a), as a violation of *Greenwich Collieries*, notwithstanding the Act's specific provision authorizing the use of presumptions with respect to assignment of liability to a miner's former employers. 30 U.S.C. 932(h).

Even where the BLBA is silent, the Act grants the Secretary sufficiently broad rulemaking authority to authorize the adoption of other presumptions. In *American Hospital Association* v. *NLRB*, 499 U.S. 606 (1991), the Court considered the ability of the National Labor Relations Board, using similarly broad regulatory authority, to define an appropriate bargaining unit by rulemaking even though the statute required the Board to decide the appropriate bargaining unit ''in each case.'' Citing a series of previous decisions, the Court held that ''even if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority.'' *Id.* at 612. The Court expanded on the NLRB's rulemaking authority in *Allentown Mack Sales and Service, Inc.* v. *NLRB*, 118 S. Ct. 818 (1998). In *dicta*, the Court concluded as follows:

> The Board can, of course, forthrightly and explicitly adopt counterfactual evidentiary presumptions (which are in effect substantive rules of law) as a way of furthering legal or policy goals—for example, the Board's irrebuttable presumption of majority support for the union during the year following certification, *see, e.g., Station KKHI*, 284 N.L.R.B. 1339, 1340, 1987 WL 89811 (1987), *enf'd*, 891 F.2d 230 (C.A.9 1989). The Board might also be justified in forthrightly and explicitly adopting a rule of evidence that categorically excludes certain testimony on policy grounds, without regard to its inherent probative value. (Such clearly announced rules of law or of evidentiary exclusion would of course by subject to judicial review for their reasonableness and their compatibility with the Act.)

Id. at 828.

The NLRB's rulemaking authority in this regard is not unique. The federal courts have upheld the use of presumptions by agencies as diverse as the Department of Transportation, *see Chemical Manufacturers Association* v. *Department of Transportation*, 105 F.3d 702, 705 (D.C. Cir. 1997) (''It is well settled that an administrative agency may establish evidentiary presumptions''); the Interstate Commerce Commission, *see Western Resources, Inc.* v. *Surface Transportation Board*, 109 F.3d 782, 788 (D.C. Cir. 1997); the Nuclear Regulatory Commission, *see New England Coalition on Nuclear Pollution* v. *NRC*, 727 F.2d 1127, 1129 (D.C.Cir.1984) (Scalia, J.) (even a statutory mandate requiring consideration of a specific issue ''does not preclude the adoption of appropriate generalized criteria that would render some case-by-case evaluations unnecessary''); and the Department of Education, *see Atlanta College of Medical and Dental Careers, Inc.* v. *Riley*, 987 F.2d 821, 830 (D.C. Cir. 1993) (''* * * under the circumstances, it would seem quite reasonable for the Secretary to adopt regulations or even adjudicatory presumptions—bright-line rules—as to what a school must show * * *''). To the extent that the Department, like any other administrative agency, uses rulemaking to establish a presumption, that presumption must be based on a rational nexus between the proven facts and the presumed facts. *Chemical Manufacturers Association*, 105 F.3d at 705; *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 787 (1979).

The Department's proposed regulations include provisions that adjust burdens of proof among the parties. Section 725.495(c)(2), for example, provides that the potentially liable operator designated as the responsible operator by the Office of Workers' Compensation Programs bears the burden of establishing that another operator that employed the miner more recently is financially capable of assuming liability for the payment of benefits. Section 726.312 specifically allocates various burdens of proof between the Department and a coal mine operator against which the Department is seeking a civil money penalty for failure to secure the payment of benefits.

In its initial notice of proposed rulemaking, 62 FR 3337 (Jan. 22, 1997) and in this notice, the Department has demonstrated that such assignments of

burdens of proof have been carefully tailored to meet the specific needs of the black lung benefits program. Accordingly, the Department does not agree with those commenters who argue that the Supreme Court's decision in *Greenwich Collieries* prohibits the Department from requiring responsible operators and their insurers to meet any burden of proof in adjudications under the Act.

20 CFR Part 718—Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis

Subpart A—General

20 CFR 718.3

(a) In its earlier proposal, the Department proposed to delete subsection (c) of § 718.3, which the Department had cited to the Supreme Court in support of its argument in favor of a ''true doubt'' rule. Under the ''true doubt'' rule, an evidentiary issue was resolved in favor of the claimant if the probative evidence for and against the claimant was in equipoise. In *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994), the Court held that an administrative law judge's use of the rule violated the Administrative Procedure Act, and that § 718.3 was an ambiguous regulation that could not be read as authorizing such a rule.

A number of commenters argue that the Supreme Court held any ''true doubt'' rule improper. Other comments urge the Department to reinstate the ''true doubt'' rule by promulgating a regulation that clearly authorizes fact-finders to use the rule in evaluating evidence in black lung benefits claims. Throughout this rulemaking, however, the Department has consistently stressed the need for factfinders to conduct in-depth analyses of the evidence based on its quality rather than quantity. Moreover, opinions by the courts of appeals and the Benefits Review Board over the past twenty years have firmly established that the evaluation of conflicting medical evidence includes consideration of a wide variety of disparate factors, thus making the applicability of any true doubt rule extremely limited. In the case of a medical report, for example, the factfinder must examine the report's documentation, its reasoning, its relationship to the other medical reports of record, and the physician's qualifications or other special status. The availability of all of these factors makes it unlikely that a factfinder will be able to conclude that the evidence, although in conflict, is equally probative. Accordingly, the Department does not believe that the promulgation of a revised ''true doubt'' rule will enhance decision-making under the Black Lung Benefits Act.

(b) Several comments urge the Department to retain subsection (c) of the current version of § 718.3. They argue that even if the language does not explicitly provide a ''true doubt'' rule, it is a useful reminder to factfinders of the purposes of the Black Lung Benefits Act. In particular, they point to the Department's quality standards for medical evidence and issues in which medical science does not provide a definitive answer. The Department recognizes that the adjudication of black lung benefits claims requires recognition of the difficulties faced by claimants in establishing their entitlement to benefits. Revised § 718.101, for example, will require ''substantial compliance'' with all of the quality standards applicable to medical evidence, rather than strict adherence. Requiring ''substantial compliance'' with the quality standards will give the fact-finder sufficient flexibility to determine whether a particular piece of evidence is probative of the claimant's condition notwithstanding its failure to meet a relatively minor quality standard provision. The Department does not agree, however, that section 718.3 should contain a separate, and wholly unenforceable, statement of general principles. Subsection (c) simply restates Congressional intent reflected in the legislative history of the 1972 and 1978 amendments to the Black Lung Benefits Act, *see* S. Rep. No. 743, 92nd Cong., 2nd Sess. 11, 1972 U.S.C.C.A.N. 2305; S. Rep. No. 95–209, 95th Cong., 2nd Sess. 13, 1978 U.S.C.C.A.N. 237. That legislative history may be used to support a party's argument regardless of whether it is repeated in the Secretary's regulations.

Subpart B

20 CFR 718.101

(a) The Department's proposed revision is intended to make clear its disagreement with Benefits Review Board case law holding that the Department's quality standards are applicable only to evidence developed by the Director, OWCP. *See Gorzalka* v. *Big Horn Coal Co.,* 16 Black Lung Rep. 1–48, 1–51 (Ben. Rev. Bd. 1990). Accordingly, the Department proposed to amend the regulations to ensure that all evidence developed in connection with black lung benefits claims meets certain minimal quality standards. One comment observes that, as drafted, the Department's revisions would allow factfinders to invalidate medical evidence in claims already pending before the Department although that evidence was valid under Board precedent when it was developed. The Department agrees that upsetting settled expectations regarding the applicability of the quality standards may work a substantial hardship in some cases, particularly those involving unrepresented claimants. Consequently, the Department has revised the language in section 718.101(b) to clarify that the mandatory nature and general applicability of the quality standards is prospective only. Once a final rule takes effect, any testing or examination conducted thereafter in connection with a black lung benefits claim that does not substantially comply with the applicable quality standard will be insufficient to establish the fact for which it is proffered.

(b) Four comments oppose the general requirement in § 718.101(b) that all evidence developed by any party in conjunction with a claim for black lung benefits must be in substantial compliance with the quality standards contained in subpart B. One comment notes the special hardship imposed on miners in trying to generate conforming evidence. Three comments assert that exclusion of nonconforming evidence violates the statutory mandate that ''all relevant evidence'' be considered in determining whether a claimant is entitled to benefits. 30 U.S.C. 923(b). The Department disagrees. The quality standards have been an integral part of claims development and adjudication since the Part 718 regulations were first promulgated in 1980. The Department has also consistently taken the position that the standards apply to all evidence developed by any party for purposes of prosecuting, or defending against, a claim for benefits. The proposed change simply makes this position clear. Finally, employing quality standards to ensure the use of reliable and technically accurate evidence is consistent with section 923(b). Evidence which fails the ''substantial compliance'' standard is inherently unreliable and thus necessarily inadequate to prove or disprove entitlement issues, and therefore is not ''relevant'' to the adjudication of the claim.

(c) One comment asks that the Department clarify that the quality standards represent the only basis on which the reliability of a medical opinion or test may be challenged. As an example, the comment states that physicians cite the correlation between the one-second Forced Expiratory Volume and the Maximum Voluntary Ventilation as a basis for invalidating a

pulmonary function test, even though the MVV is not a required part of the test. In the Department's view, the quality standards provide factfinders with flexibility in their examination of the medical evidence of record. If an alleged flaw in medical evidence is not relevant to the necessary test results, the factfinder may properly ignore that flaw. The Department's quality standards, however, are not intended to serve as the sole basis upon which medical evidence may be evaluated. Instead, parties are free to develop any evidence that pertains to the validity of the medical evidence in order to provide the factfinder with the best evidence upon which to base a finding regarding the miner's physical condition.

(d) Two comments are concerned that the quality standards could result in the exclusion of a miner's hospitalization and/or medical treatment records, or a report of biopsy or autopsy. Section 718.101, however, makes the quality standards applicable only to evidence ''developed * * * in connection with a claim for benefits'' governed by 20 CFR Parts 725 and 727. Therefore, the quality standards are inapplicable to evidence, such as hospitalization reports or treatment records, that is not developed for the purpose of establishing, or defeating, entitlement to black lung benefits.

(e) One comment advocates permitting consideration of nonconforming tests which produce clinical results comparable to conforming tests. This suggestion is rejected for the reasons expressed in paragraph (b): failure to comply with the applicable quality standards deprives the evidence of its probative worth. Moreover, a nonconforming test which produces results similar to a conforming test does not significantly enhance the fact-finding process, given the availability of the technically accurate results.

(f) One comment would require the Department to notify a party who submits nonconforming evidence, and afford an opportunity to rehabilitate the evidence. This requirement is unnecessary. Each party is responsible for developing evidence in support of its position which complies with the quality standards. Moreover, proposed § 725.406 does impose a duty on the district director to ensure that the medical examination sponsored by the Department is valid and conforming. If the district director identifies any deficiency in that examination, he must notify the physician and the miner, and take reasonable steps to correct that deficiency. Finally, evidence may be submitted up to twenty days before the formal hearing up to the limits provided in proposed § 725.414. If the opposing party submits evidence in rebuttal, proposed § 725.414 will permit the party that proffered the original evidence to attempt to rehabilitate evidence by submitting an additional report from the preparer of the original report.

(g) Other comments oppose the use of quality standards in general terms. For the reasons expressed in the preamble to the proposed regulations, 62 FR 3341–42 (Jan. 22, 1997), the Department believes that such standards are necessary to ensure the development of reliable and technically accurate evidence for the adjudication of claims. Several comments express general support for requiring all parties to develop their medical evidence in conformance with the relevant quality standards.

20 CFR 718.103

(a) One physician who testified at the Department's Washington, D.C. hearing objected to the proposal, set forth in Appendix B to Part 718, that would have precluded miners undergoing pulmonary function testing from taking an initial inspiration from room air and instead would have required an initial inspiration from the spirometer. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), p. 306 (testimony of Dr. David James). Under questioning by the Department's medical consultant, Dr. Leon Cander, Dr. James stated that use of the flow-volume loop would be more widely acceptable than the Department's proposal prohibiting an initial open-air inspiration. Transcript, pp. 319–320. After careful consideration, the Department agrees that the flow-volume loop may offer a more reliable method of ensuring valid, verifiable results in pulmonary function testing, and proposes to revise § 718.103 in order to require that the flow-volume loop be used for every pulmonary function test administered to establish or defeat entitlement under the Black Lung Benefits Act. Spirometers capable of producing a flow-volume loop, and of electronically deriving a set of tracings showing volume versus time, are in use in a number of clinics and facilities specializing in the treatment of pulmonary conditions. While this notice of proposed rulemaking is open for public comment, the Department intends to conduct a survey of those clinics and facilities. Among the information the Department will seek is the extent to which they already use spirometers capable of producing flow-volume loops. The Department further notes that for clinics that do not already possess such a spirometer, the cost is less than $2,000. Because the use of flow-volume loops will increase the reliability of the pulmonary function study evidence submitted in black lung claims with only minimal cost, the Department proposes that all pulmonary function tests conducted after the effective date of the final rule be submitted in this form. Proposed changes have been made to subsections (a) and (b), as well as Appendix B, to accomplish this result. The Department invites comment on these changes.

(b) Dr. James also observed that the language of subsection (a) is misleading in suggesting that pulmonary function testing may produce either a Forced Vital Capacity (FVC) or a Maximum Voluntary Ventilation (MVV) value. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), pp. 304–5 (testimony of Dr. David James). Dr. James noted that a test must produce an FVC value in order to obtain a Forced Expiratory Volume for one second (FEV1), which is required by the regulation. The Department agrees, and has proposed revising subsection (a) accordingly.

(c) The Department also proposes to revise subsection (b) in order to conform the regulation to the requirements of Appendix B. Currently, section 718.103(b) requires that three tracings of the MVV be performed unless the largest two values of the MVV are within 5 percent of each other. 20 CFR 718.103(b). Appendix B, however, provides that MVV results will be considered to have excessive variability if the two largest values vary by more than 10 percent. The Department proposes to adopt the 10 percent standard uniformly.

(d) Two comments request the Department to amend section 718.103 to ensure that a miner's failure to produce a valid MVV value will not affect the validity of the FEV1 and FVC values. The Department agrees that the validity of the two tests should be assessed independently. The proposed change to subsection (a) will highlight the optional nature of the MVV test. Both comments also suggest that the failure of a test report to meet all of the requirements of subsection (b), such as the DOL claim number, should not wholly invalidate a test. Like other medical evidence, pulmonary function tests will be subject to the requirement of proposed § 718.101 that they be in ''substantial compliance'' with the Department's quality standards. In a particular case, the parties remain free

to argue that a report's failure to meet certain technical requirements contained in the quality standards should not necessarily invalidate the report. The Department does not believe, however, that it would be appropriate to wholly remove these requirements from its quality standards.

(e) One commenter observes that pulmonary function tests are not appropriate in all cases, noting that such testing may pose a danger to the health of some claimants. Section 718.103 does not affirmatively require the performance of pulmonary function tests, but merely sets forth the standards applicable to such studies, if performed. The Department agrees, however, that there may be cases in which performance of a pulmonary function test may be medically contraindicated. As a result, the Department has proposed revising § 718.104(a)(6) to recognize that a medical report may not be excluded from consideration simply because the claimant's condition does not allow a physician to administer a pulmonary function test. The Department has also proposed reinstating language in § 718.204(b)(2)(iv) that was inadvertently deleted from its initial proposal, 62 FR 3377 (Jan. 22, 1997).

20 CFR 718.104

(a) One commenter objects to the requirement in subsection (a)(6) that all medical reports contain the results of pulmonary function testing. The commenter notes that in some cases, a miner may be physically unable to perform a pulmonary function test, or such a test may be medically contraindicated. The Department agrees, and has proposed revising subsection (a)(6) in order to recognize this possibility. When a miner cannot take a pulmonary function test, a physician writing a medical report must substantiate his conclusion(s) with other medically acceptable clinical and laboratory diagnostic techniques. This proposed addition merely recognizes the Department's longstanding position that pulmonary function tests may be medically contraindicated. The current regulation at 20 CFR 718.204(c)(4), which provides that a reasoned medical judgment may establish the presence of a totally disabling respiratory or pulmonary impairment, expressly recognizes that pulmonary function tests may be contraindicated. Similarly, the 1980 discussion accompanying promulgation of 20 CFR 718.103 acknowledged the same point: ''If the physician believes that pulmonary function testing would impose a risk to the patient's well-being, the physician should so state and refuse to have the patient perform the pulmonary function tests.'' 45 FR 13682 (Feb. 29, 1980).

(b) Several commenters request that the regulation recognize that a treating physician's opinion may be used to establish all elements of a miner's entitlement to benefits. Although the proposed regulation was not intended to restrict the use of such a report, the Department has revised subsection (d) to explicitly list the elements of entitlement which a treating physician's opinion may establish.

(c) Several commenters suggest that the Department accept a physician's statement as to the nature and duration of his relationship with the miner, and the frequency and extent of his treatment of the miner. The Department agrees that a claimant should not have to produce additional proof documenting these factors beyond that provided in the four corners of the physician's report unless the opposing party supplies credible evidence that demonstrates that the physician's statement is mistaken. The Department has therefore proposed an addition to subsection (d)(5) to make its intent clear.

(d) Proposed paragraph (d), which would allow a fact-finder to give controlling weight to the opinion of a treating physician provided certain conditions are met, elicited a great deal of comment. Many commenters supported the proposal, noting that a treating physician has a greater familiarity with the miner's physical condition than a doctor who has only seen him once. Others opposed giving special credence to ''small-town'' doctors without special expertise or training in respiratory or pulmonary disorders. Others simply expressed general opposition to the proposal. In the preamble accompanying its initial proposal, the Department explained that the proposed regulation attempted to codify existing case law and drew on a similar regulation adopted by the Social Security Administration, 20 CFR 404.1527(d)(2). *See* 62 FR 3338, 3342 (Jan. 22, 1997). The Department specifically invites comment on alternative methods for determining when a treating physician's opinion is entitled to controlling weight, including whether to adopt the Social Security Administration's rule.

(e) Several commenters suggest that the proposed subsection (d)(5) is unnecessary and undermines any Departmental attempt to give a treating physician's opinion controlling weight. They request that the Department delete certain language in subsection (d)(5), which requires the factfinder to consider not only the treating physician's documentation and reasoning but also the other relevant evidence of record in determining whether the treating physician's opinion is entitled to controlling weight. These commenters would have the finder of fact credit a treating physician's opinion which meets the criteria in (d)(1)–(4) and is documented and reasoned without regard to the other relevant evidence of record. Another comment suggests that the Department has already accomplished this result, in violation of section 413(b) of the Act, 30 U.S.C. 923(b). The Department does not accept either suggestion. The purpose of the regulation is not to limit a factfinder's consideration of any properly admitted medical or other relevant evidence. Indeed, to do so might result in a mechanistic crediting of a treating physician's opinion which the courts have cautioned the Department to avoid. *See Sterling Smokeless Coal Co.* v. *Akers*, 131 F.3d 438, 441 (4th Cir. 1997); 62 FR at 3342 (Jan. 22, 1997). Rather, the proposed regulation would mandate only that the factfinder recognize that a physician's long-term treatment of the miner may give that physician additional insight into the miner's respiratory or pulmonary condition.

(f) Several commenters oppose any rule suggesting treating physicians' opinions may be given controlling weight. They argue that a factfinder's evaluation of a medical opinion should be based solely on the documentation and reasoning of that opinion as well as the qualifications of the physician. As the Department noted in its initial notice of proposed rulemaking, 62 FR 3342 (Jan. 22, 1997), special weight may be given a treating physician's opinion because that physician has been able to observe the miner over a period of time, and therefore may have a better understanding of the miner's physical condition. Although the factfinder must still evaluate the treating physician's report in light of all of the other relevant evidence of record, he should nevertheless be aware of the additional insight that a treating physician may bring to bear on the miner's respiratory or pulmonary condition.

(g) Some commenters suggest that the ''treating physician'' rule should be removed from § 718.104 and made a separate regulation. One suggests that its current placement appears to require that the treating physician's opinion must conform to the quality standards applicable to a report of physical examination. The Department intends that all reports of physical examination, including a report submitted by the

miner's treating physician, conform to the quality standards set forth in § 718.104 if they are to be sufficient to establish or refute entitlement. The Department thus does not agree that subsection (d), governing treating physicians' opinions, should be made a separate regulation.

(h) Several commenters state that the miner should be able to submit his treating physician's opinion without regard to the limitation on the amount of evidence each party would be able to submit under § 725.414. These commenters argue that claimants, who are often unrepresented at the earliest stages of claims processing, will submit opinions from their treating physicians that do not conform to the Department's quality standards. The Department recognizes that the limitation on documentary medical evidence could have a substantial impact on unrepresented claimants who submit reports prematurely. Although the Department cannot agree to provide claimants with the opportunity to submit additional reports, the Department takes very seriously its obligation to inform all claimants of the evidentiary limitations in language that is clear and easily understood. In addition, as set forth in the proposed revision of § 725.406, the Department intends to make the objective test results from each miner's section 413(b) pulmonary evaluation available to his treating physician at the miner's request. By providing these test results to the treating physician, the Department hopes to ensure that the ensuing opinion is as well documented as the other medical opinions of record and meets the § 718.104 quality standard.

(i) Several commenters argue that the terms ''treating physician'' and ''controlling weight'' are not defined. The intent of subsection (d), however, is not to create a strict rule to determine the outcome of a factfinder's evaluation of the medical evidence. Instead, the Department's goal is simply to require the factfinder to recognize the additional weight to which a physician's opinion may be entitled, in light of all of the other relevant evidence of record, where that physician has observed and treated the claimant over a period of time.

(j) Several commenters object to certain language the Department used in the preamble of its initial notice of proposed rulemaking to explain its proposed revisions to § 718.104. In the ''Summary of Noteworthy Proposed Changes,'' 62 FR 3339 (Jan. 22, 1997), the Department indicated that in evaluating a treating physician's opinion, a factfinder ''must'' consider, among other things, the physician's training and specialization. The Department did not intend to suggest that a factfinder's failure to consider such factors would necessarily represent reversible error. Only when a party raises the issue, for example, in the context of comparing the credentials of physicians offering contrary opinions, would the factfinder be required to consider such a factor. Moreover, even under such circumstances, a physician's training and specialization are only one factor for the factfinder to weigh in his evaluation of this evidence.

(k) One commenter states that the quality standard applicable to medical reports should not require that the report include a chest X-ray. The Department disagrees. A chest X-ray, administered and read in accordance with § 718.102, is an important component of any evaluation for pneumoconiosis. Although a physician remains free to explain an opinion contrary to the medical testing that he conducted or reviewed, he must nevertheless have the benefit of that testing and account for its results. The requirement set forth in § 718.101, that all evidence must be in ''substantial compliance'' with the applicable quality standards, affords all parties the opportunity to establish the reliability of any evidence notwithstanding its failure to strictly conform to the quality standards.

(l) Two commenters request that the Department remove the clause from subsection (c) that limits the factfinder's use of non-conforming evidence in cases in which the miner is deceased and the physician is unavailable to clarify or correct his report. In such cases, the factfinder may consider a non-conforming medical report only if the record does not contain another conforming report. In this way, the Department hopes to ensure that entitlement determinations are based on the best quality medical evidence possible.

(m) One comment requests that the Department include ''cardio-pulmonary exercise testing'' as an ''other procedure[]'' under subsection (b). The Department does not intend that subsection (b) contain an exclusive list of medically acceptable procedures that may be used by a physician in the course of a physical examination. A physician is free to use any test, including cardio-pulmonary exercise testing, if he believes that it would aid in his evaluation of the miner.

20 CFR 718.105

(a) One comment directed toward Appendix C is also relevant to paragraph (c)(6). The comment notes that the correct nomenclature for partial pressure of oxygen and carbon dioxide is an upper-case ''P'', not the lower-case ''p'' currently in use. The comment is correct, and the reference to the partial pressures will be changed.

(b) Four comments oppose proposed paragraph (d), which requires the claimant to obtain a physician's opinion that a qualifying blood gas study conducted during a miner's terminal illness reflects a chronic respiratory or pulmonary condition caused by coal dust exposure. The comments suggest that qualifying scores should be presumed indicative of a totally disabling respiratory impairment unless the party opposing the claim produces evidence linking the test results to some other condition. While recognizing the concerns expressed by the comments, the Department nevertheless believes that paragraph (d) imposes an appropriate evidentiary burden on the claimant. Arterial blood gas studies conducted during a terminal illness hospitalization may be especially susceptible to producing low values unrelated to chronic respiratory or pulmonary disease. Consequently, reliance on such studies should be predicated on an additional showing that the qualifying (or abnormal) test results can be medically linked to chronic lung disease. One comment supported this proposal.

(c) Two comments object to the requirement in paragraph (d) that the chronic respiratory or pulmonary impairment demonstrated by the ''deathbed'' blood gas study must also be ''related to coal mine dust exposure.'' The Department agrees. The primary objective behind paragraph (d) is to ensure a connection between the qualifying blood gas values and a chronic respiratory or pulmonary impairment, rather than some other acute pathologic cause incidental to the miner's terminal illness. Thus, paragraph (d) addresses only the existence of a chronic respiratory or pulmonary impairment itself, not its cause. Including a requirement linking the chronic impairment to coal mine dust exposure is therefore inappropriate for purposes of § 718.105. The claimant must still prove that any totally disabling respiratory or pulmonary impairment demonstrated by these blood gas study results arose out of coal mine employment in order to receive benefits, 20 CFR 718.204(c)(1). Paragraph (d) has been revised to delete

the phrase ''related to coal mine dust exposure.''

20 CFR 718.106

(a) Five comments urge the Department to restore the current paragraph (c), 20 CFR 718.106(c), which was omitted from the proposed regulation. This paragraph provides that the negative findings on a biopsy are not conclusive evidence that pneumoconiosis is absent, while positive findings do constitute evidence of the disease. The omission was inadvertent, and paragraph (c) will be restored in the final rule.

(b) Two comments oppose the requirement in paragraph (a) that the autopsy protocol must include a gross macroscopic inspection of the lungs. The comments suggest that the requirement would implicitly preclude a pathologist from submitting an opinion based exclusively on a review of microscopic tissue samples. Paragraph (a) was not altered when the Department proposed changes to § 718.106. This provision only requires macroscopic findings for purposes of the autopsy itself; no such findings are required for a reviewing physician. Consequently, a physician other than the autopsy prosector may submit an opinion based exclusively on the microscopic tissue samples. No change is necessary to permit such opinions.

(c) Several comments urge the Department to adopt the criteria for diagnosing pneumoconiosis by autopsy or biopsy generated by the American College of Pathologists and Public Health Service in 1979. The Department has previously declined to promulgate specific pathological standards for diagnosing pneumoconiosis by autopsy or biopsy. 45 FR at 13684 (Feb. 29, 1980); 48 FR at 24273 (May 31, 1983). Furthermore, the record does not contain any evidence addressing, or establishing, a consensus in the medical community about the accepted standards for diagnosing pneumoconiosis by autopsy or biopsy. Although the comment refers to Kleinerman *et al.*, ''Pathologic Criteria for Assessing Coal Workers' Pneumoconiosis,'' in the *Archives of Pathology and Laboratory Medicine* (June 1979), the record does not establish whether this article reflects the current prevailing standards for diagnosing pneumoconiosis. The recommendation is therefore rejected.

20 CFR 718.107

(a) One comment suggests modifying the reference to ''respiratory impairment'' in paragraph (a) to ''respiratory or pulmonary impairment.'' The Department accepts this suggestion because the current paragraph (a) refers to ''respiratory or pulmonary impairment,'' and the omission of ''pulmonary'' was inadvertent. Another comment recommended adding disability and disability causation to the list of issues for which a party may submit ''other medical evidence.'' Paragraph (a) is unchanged from the current provision, except as described in the previous discussion, and satisfactorily sets forth the general purposes for which ''other medical evidence'' may be offered. The suggested change is therefore unnecessary.

(b) One comment supports the addition of proposed paragraph (b).

Subpart C

20 CFR 718.201

(a) In its initial notice of proposed rulemaking, 62 FR 3343, 3376 (Jan. 22, 1997), the Department proposed revising the definition of the term ''pneumoconiosis'' to recognize the progressive nature of the disease. The Department also proposed clarifying the existing definition to make clear that obstructive lung disease may fall within the definition of pneumoconiosis if it is shown to have arisen from coal mine employment. The proposal would not alter the current regulations' requirement that each miner bear the burden of proving that he has pneumoconiosis, 20 CFR 718.403, 725.202(b); proposed §§ 725.103, 725.202(d)(2)(i). Thus, notwithstanding the proposed revision, in order to demonstrate that he has pneumoconiosis, each miner would be required to prove that his lung disease arose out of coal mine employment. If a miner's chest X-rays, autopsy or biopsy demonstrate the presence of the disease, and the miner has at least ten years of coal mine employment, he is aided by a statutory presumption that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. 921(c)(1). If, however, the miner fails to demonstrate the existence of pneumoconiosis by means of X-ray, biopsy or autopsy, he must prove that his lung disease arose out of coal mine employment in order to carry his burden of proof and establish that he has pneumoconiosis.

A number of commenters representing coal mine operators and the insurance industry object strongly to both revisions, arguing that the Department lacks the authority to elaborate on the statute's definition of pneumoconiosis, and that, in any event, the Department had violated the statute by failing to consult with the National Institute for Occupational Safety and Health (NIOSH) before proposing the changes. 30 U.S.C. 902(f)(1)(D). The commenters also argue that the Department's proposed revision lacks a sound medical basis and would therefore unjustifiably increase the number of claims approved. In support of their arguments, these commenters presented testimony at the Department's Washington, DC, hearing from a panel of physicians with expertise in pulmonary medicine. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), pp. 19–83.

The Department also received comments, as well as testimony, supporting the proposed changes from black lung associations, miners, and several physicians with expertise in pulmonary medicine. Among the favorable comments was one from NIOSH, which approved both aspects of the Department's proposed revision to § 718.201. In so doing, NIOSH referenced its own 1995 publication, the same document that the Department had cited in its initial notice of proposed rulemaking, ''National Institute for Occupational Safety and Health, Occupational Exposure to Respirable Coal Mine Dust,'' §§ 4.1.2, 4.2.2 *et seq.* (1995). 62 FR 3343 (Jan. 22, 1997).

NIOSH was created by the Occupational Safety and Health Act ''in order to carry out the policy set forth in section 651'' of that Act as well as to perform certain functions in support of the Occupational Safety and Health Administration. 29 U.S.C. 671. Among its other provisions, section 651 encourages the Occupational Safety and Health Administration to ''explor[e] ways to discover latent diseases, establish [] causal connections between diseases and work in environmental conditions, and conduct [] other research relating to health problems.'' 29 U.S.C. 651(b)(6). Accordingly, Congress created NIOSH as a source of expertise in occupational disease and as an expert in the analysis of occupational disease research. Given the widely divergent comments received from medical professionals on this proposed regulation, the Department sought additional guidance from NIOSH by providing it with all of the comments and testimony the Department had received relevant to the proposed revisions to § 718.201. The Department requested that NIOSH advise it whether any of the material altered that agency's original opinion.

NIOSH concluded as follows:

The unfavorable comments received by DOL do not alter our previous position: NIOSH scientific analysis supports the proposed definitional changes. Research indicates that the proposed changes are reasonable and could be incorporated to further refine the definition of pneumoconiosis in the BLBA regulations.

Letter from Dr. Paul Schulte, Director, Education and Information Division (Dec. 7, 1998). In addition to the 1995 NIOSH publication, Dr. Schulte cited several recent studies and other sources: ''Coal mining and chronic obstructive pulmonary disease: a review of the evidence'' [Coggon and Newman-Taylor 1998]; ''The British Coal Respiratory Disease Litigation'' [Judgment of Mr. Justice Turner]; ''Progression of simple pneumoconiosis in ex-coalminers after cessation of exposure to coalmine dust'' [Donnan et al. 1997]; ''Adverse effects of crystalline silica exposure'' [American Thoracic Society (ATS) 1997]; ''Risk of silicosis in a Colorado mining community'' [Kriess and Zehn 1996]; and ''Risk of silicosis in a cohort of white South African gold miners'' [Hnizdo and Sluis-Cremer 1993]. He concluded as follows:

These publications provide additional support for the NIOSH position stated in the August 20, 1997 letter: ''NIOSH continues to support the proposed amendment to Section 718.201 to include chronic obstructive pulmonary disease in the definition of pneumoconiosis; NIOSH also supports the revision of the definition of pneumoconiosis to reflect the scientific evidence that pneumoconiosis is an irreversible, progressive condition that may become detectable only after cessation of coal mine employment, in some cases.''

Given this NIOSH review and conclusion, the Department sees no scientific or legal basis upon which to alter its original proposal. To the extent that the Department was required to consult with NIOSH, it has now done so. Finally, as addressed elsewhere in this proposal, the Department believes that it possesses the statutory authority to promulgate a legislative regulation defining the term ''pneumoconiosis.'' *See Old Ben Coal Co.* v. *Scott*, 144 F.3d 1045, 1048 (7th Cir. 1998), citing *Peabody Coal Co.* v. *Spese*, 117 F.3d 1001, 1009–1010 (7th Cir. 1997) (*en banc*).

(b) One commenter objects to the proposed definition of ''legal pneumoconiosis'' on the ground that § 718.202(a)(2) does not contain the requirement that the covered disease must be a ''dust'' disease of the lung. The commenter also believes that this definition would include all obstructive pulmonary disease. The Department disagrees with both points. Section 718.201 begins in paragraph (a) with the statutory definition of pneumoconiosis, stating that pneumoconiosis means a chronic ''dust'' disease of the lung and its sequelae. Paragraph (a)(2) is a subdivision of the introductory paragraph and in no way contradicts it. In fact, by its very terms, the proposed definition of pneumoconiosis would cover only that lung disease arising out of coal mine employment, *i.e.*, lung disease significantly related to, or substantially aggravated by, dust exposure in coal mine employment. § 718.201(b).

(c) Two commenters argue that Congress rejected an amendment to the definition of pneumoconiosis that would have included obstructive lung disorders, and that the Department therefore lacks the authority to make such a change. Above, the Department explained that Congress's consideration of, but failure to enact, legislation on particular subjects does not bar the Department from promulgating regulations on those subjects, provided the Department is acting within the scope of Congress's grant of regulatory authority. Thus, the Department does not agree that Congressional inaction renders invalid its proposed amendment of the definition of ''pneumoconiosis.''

20 CFR 718.204

(a) In reviewing the comments submitted in response to the initial notice of proposed rulemaking, the Department realized that it had inadvertently omitted language from the current version of 20 CFR 718.204(c)(4) setting out circumstances under which a claimant may establish total disability by means of a medical report. The Department intended no change in the regulation's meaning and has restored the omitted language to proposed § 718.204(b)(2)(iv).

(b) A number of commenters object to the Department's proposed amendment to subsection (a), while others support it. That revision is intended to ensure that disabling nonrespiratory conditions are not considered a bar to entitlement when the miner also suffers from totally disabling pneumoconiosis. As the Department explained in its initial notice of proposed rulemaking, the revision announces the Department's preference for the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co.* v. *McAngues*, 996 F.2d 130 (6th Cir. 1993), *cert. den.*, 510 U.S. 1040 (1994), over the Seventh Circuit's decision in *Peabody Coal Co.* v. *Vigna*, 22 F.3d 1388 (7th Cir. 1994). 62 FR 3344–45 (Jan. 22, 1997). After preparation of the Department's proposal, the Sixth Circuit held, for the first time in a Part 718 case, that a miner may not be denied black lung benefits simply because he may also be totally disabled by a coexisting non-respiratory impairment. *Cross Mountain Coal Co., Inc.* v. *Ward*, 93 F.3d 211, 216–217 (6th Cir. 1996). The commenters have provided no basis upon which to alter the Department's original proposal.

(c) A number of commenters object to the Department's proposal to revise subsection (b)(1) to codify the Department's position that a miner is entitled to benefits only if his respiratory or pulmonary impairment is totally disabling. The commenters urge that the Department adopt a ''whole person'' approach, allowing an award of benefits if pneumoconiosis contributed at least in part to the miner's overall disability, considering both respiratory and nonrespiratory impairments. Although the commenters argue that the Department's position violates the statute, the Third and Fourth Circuits have reached a contrary conclusion. *Beatty* v. *Danri Corp. & Triangle Enterprises*, 49 F.3d 993 (3d Cir. 1995); *Jewell Smokeless Coal Corp.* v. *Street*, 21 F.3d 241 (4th Cir. 1994). Because the commenters offer no other basis upon which to amend the Department's proposal, subsection (b)(1) has not been changed.

(d) A number of commenters take issue with the Department's proposal to define disability causation in subsection (c). Several commenters state that the Department has no authority to issue such a regulation, suggesting that the statutory language is clear. The Department disagrees. The statute authorizes the payment of benefits ''[i]n the case of total disability of a miner due to pneumoconiosis,'' 30 U.S.C. 922(a)(1), and explicitly provides that ''[t]he term ''total disability'' has the meaning given it by regulations * * * of the Secretary of Labor under part C of this title * * *.'' 30 U.S.C. 902(f)(1). Even absent such an explicit grant of rulemaking authority, Congress' use of the broad phrase ''due to'' leaves significant questions in resolving the issue of disability causation. In *Atlanta College of Medical and Dental Careers, Inc.* v. *Riley*, 987 F.2d 821 (1993), the D.C. Circuit noted that the Secretary of Education was authorized to promulgate interpretative regulations under the Student Loan Default Prevention Initiative Act. That statute authorized the Secretary to calculate a default rate from participating schools, but required him to exclude loans which ''due to improper servicing or collection, would result in an inaccurate or incomplete calculation.'' Addressing Congress' use of the phrase ''due to,'' the court held:

And must the school show ''but for'' causation, proximate causation or merely some reasonable link? The statute itself provides no answers to these riddles; accordingly, under Chevron's second step, we would defer to any reasonable interpretation of the ''due to'' language that the Secretary proffered. *See also* Jerry Mashaw, A Comment on Causation, Law Reform, and Guerilla Warfare, 73 Geo. L. Rev. 1393, 1396 (1985) (identifying the ''cause'' of something necessarily implicates a policy choice).

Id. at 830. The Department's definition of disability causation under the Black Lung Benefits Act is similarly necessary and well within the scope of its regulatory authority.

Other commenters argue that the Department has selected the wrong definition. Several commenters suggest that the Department delete the word ''substantially'' from paragraph (c)(1). Another asks that the standard be ''due at least in part.'' One commenter requests that the Department add the word ''substantially'' to paragraphs (c)(1)(i) and (c)(1)(ii). Several comments suggest that the term ''substantially contributing'' is undefined, and urge that the Department set a percentage of disability as the threshold, while another commenter asks that the Department use the term ''actual contributing cause'' in order to bar the award of benefits where pneumoconiosis has made only a *de minimis* contribution to total disability.

The Department discussed its selection of the ''substantially contributing cause'' standard in its initial notice of proposed rulemaking. 62 FR 3345 (Jan. 22, 1997). The Department explained that its selection was intended to codify a body of caselaw from various federal appellate courts that differed very little in determining disability causation. In addition, the proposal paralleled the standard used by the Department to determine whether a miner's death was caused by pneumoconiosis. Because the language of the death standard is a direct reflection of Congressional intent, *see* 48 FR 24275–24278 (May 31, 1983), the Department believes that it should be used for disability causation as well. Finally, the Department does not agree that a percentage threshold is appropriate. As the Department previously explained, the ''substantially contributing cause'' standard requires that pneumoconiosis make a tangible and actual contribution to a miner's disability. The standard is also further defined in the proposed regulation. It requires that pneumoconiosis must either have an adverse effect on the miner's respiratory or pulmonary condition or worsen an already totally disabling respiratory or pulmonary impairment. Whether a particular miner meets the ''substantially contributing cause'' standard is a matter to be resolved based on the medical evidence submitted in each case.

Finally, several commenters suggest that the Department's proposal will allow compensation where a miner's totally disabling respiratory impairment has been caused by cigarette smoking. Neither the Black Lung Benefits Act, nor the court of appeals decisions, nor the Department's proposed regulation allows benefits to be awarded where a miner's totally disabling respiratory impairment is caused solely by cigarette smoking. The courts have held irrelevant, however, the existence of causes of a miner's total respiratory or pulmonary disability in addition to pneumoconiosis. *See Jonida Trucking, Inc.* v. *Hunt*, 124 F.3d 739, 744 (6th Cir. 1997) (coexisting heart disease). In such a case, the miner meets the statutory and regulatory criteria for an award of benefits.

20 CFR 718.205

(a) Several comments request that the Department reinstate unrelated death benefits, that is, benefits to surviving spouses of miners who were totally disabled due to pneumoconiosis at the time of their death but who did not die due to pneumoconiosis. Although such benefits were formerly available, Congress amended the Act in 1981 to require that a surviving spouse who filed her claim on or after January 1, 1982 establish that the miner died due to pneumoconiosis. Pub. L. 97–119, 95 Stat. 1635, § 203(a)(2), (3). The Department cannot issue regulations contrary to the expressed will of Congress.

Another comment, however, suggests that the Department has done just that by proposing that a surviving spouse may establish death due to pneumoconiosis by proving that pneumoconiosis hastened the miner's death. The Department disagrees. Rather, the Department has simply proposed codifying a standard that has been unanimously adopted by the federal courts of appeals, a fact recognized by other commenters. In addition to the Third, Fourth, Sixth, and Seventh Circuit decisions cited in the initial notice of proposed rulemaking, 62 FR 3345–3346 (Jan. 22, 1997), the Tenth and Eleventh Circuits have also deferred to the Director's interpretation of the current regulation, and announced their support for the standard that the Department is proposing to codify. *Northern Coal Co.* v. *Director, Office of Workers' Compensation Programs*, 100 F.3d 871, 874 (10th Cir.1996); *Bradberry*, v. *Director, Office of Workers' Compensation Programs*, 117 F.3d 1361, 1365–1366 (11th Cir. 1997). The Department's proposal thus does no more than recognize the decisions of appellate courts with jurisdiction over more than 90 percent of the claims filed under the Black Lung Benefits Act. The suggestion that the Department has violated Congressional intent is simply incorrect.

(b) One commenter asks the Department to apply the standard set forth in subsection (b)(2) to claims filed on or after January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981. Subsection (b)(2) permits an award of benefits in a survivor's claim filed before January 1, 1982 if death was due to multiple causes, including pneumoconiosis, and it is not medically feasible to distinguish which disease caused death or the extent to which pneumoconiosis contributed to the miner's death. This provision is derived in substantial part from the presumption set forth in section 411(c)(2) of the Act, 30 U.S.C. 921(c)(2), and implemented by 20 CFR 718.304. Under section 411(c)(2), a deceased miner with ten or more years of coal mine employment, who died from a respirable disease, is presumed to have died due to pneumoconiosis. In implementing this provision, the Secretary added § 718.303(a)(1) to the regulations, allowing death to be found due to a respirable disease if such disease was one of several causes of the miner's death and it is not feasible to determine which disease caused death or the extent to which the respirable disease contributed to the cause of death. Section 718.205(b)(2) permitted an award under similar circumstances in cases in which the miner had less than 10 years of coal mine employment, but the survivor had established that pneumoconiosis was one of the multiple causes of death. In 1981, Congress eliminated the section 411(c)(2) presumption for survivors' claims filed on or after January 1, 1982. Pub. L. 97–119, § 202(b)(1). In promulgating regulations to effectuate Congress's intent, the Department applied the same limitation to subsection (b)(2). *See* comment (p), 48 FR 24278 (May 31, 1983). Because subsection (b)(2) is so closely connected with the section 411(c)(2) presumption, the Department continues to believe that it may not apply this regulatory provision to claims filed on or after January 1, 1982.

Appendix B to Part 718

(a) The proposed changes to Appendix B are designed to implement the Department's proposed requirement that physicians use the flow-volume loop in reporting the results of pulmonary function tests. *See* Explanation of proposed § 718.103. The Department invites comment on these changes.

(b) A number of commenters suggest that one Appendix provision is unnecessarily restrictive. It requires that the two highest FEV1 results of the three acceptable tracings agree within 5 percent or 100 ml, whichever is greater. Appendix B(2)(ii)(G). They suggest that the standard either be eliminated entirely, or that it be replaced with a variability limit of 10 percent or 200 ml. One comment recommends that the Department should have a separate standard for ensuring the reliability of FVC results. As proposed, Appendix B limits the variability only of FEV1 and MVV results.

The Department is reluctant to eliminate the Appendix B(2)(ii)(G) standard entirely; the standard provides a baseline measurement which serves to guarantee the reproducibility, and thus the validity, of each conforming pulmonary function study. However, the Department recognizes that there may be individuals who are physically unable to produce results that fall within the 5 percent limit, but whose results are, in the opinion of the physician administering the test, a valid reflection of the individual's best effort to perform the test. Accordingly, the Department invites comment as to how to maintain a standard that guarantees the reproducibility of the FEV1 and FVC values, but also allows consideration of valid FEV1 results in excess of the current 5 percent requirement.

(c) Several commenters argue that the Appendix B tables are too stringent and should be revised. These tables set forth pulmonary function test results which may establish that a miner's respiratory or pulmonary impairment is totally disabling. The Black Lung Benefits Reform Act of 1977 required the Department to consult with the National Institute for Occupational Safety and Health in the development of criteria for medical tests that accurately reflect total disability in coal miners. 30 U.S.C. 902(f)(1)(D). On April 25, 1978, the Department proposed the pulmonary function test criteria set forth in Appendix B, setting the ''qualifying'' values for the FEV1 and MVV test at 60 percent of normal pulmonary function, as adjusted for sex, height, and age. 43 FR 17730–31 (Apr. 25, 1978). When the Department published the final Part 718 rules on February 29, 1980, it added tables for the FVC test. 45 FR 13703–06 (Feb. 29, 1980). The Department also responded to comments urging that the qualifying values be reduced, observing that although there was no consensus on the correct values, the record contained substantial support from experts for the 60 percent figure. *Id.* at 13711. The Department did not re-propose the Appendix B tables in its initial notice of proposed rulemaking, *see* 62 FR 3373 (Jan. 22, 1997) (noting that the tables in Appendix B remain unchanged), and the commenters offer no medical support for the request that they be revised. Consequently, the Department has not proposed any revision of the table values.

20 CFR Part 725—Claims for Benefits Under Part C of Title IV of the Federal Mine Safety and Health Act, As Amended

Subpart A—General

20 CFR 725.2

(a) The Department has made several technical changes to the language of the proposed regulation to make the regulation easier to read.

(b) This proposal changes § 725.2(c) to add § 725.351 to the list of amended regulations which will apply only to claims filed after the effective date of the final rule. The Department's proposal requires the district director's development of a complete evidentiary record identifying the proper responsible operator. Once a case is referred to the Office of Administrative Law Judges, neither the Director, OWCP, nor a potentially liable operator identified by the district director will be able to submit any additional evidence on issues relevant to the responsible operator question. For example, only while a claim is pending before the district director may a potentially liable operator contest that it was an operator after June 30, 1973, that it employed the miner for one year, or that the miner's employment included at least one working day after December 31, 1969, § 725.408. Accordingly, the district director must be able to obtain all of the information necessary to meet the Department's burden of proof under § 725.495.

To aid the district director in gathering such information, this proposal revises and streamlines § 725.351, which grants district directors the power to issue subpoenas duces tecum. A district director will no longer be required to seek written approval from the Director, OWCP, prior to issuing such a subpoena. *See* explanation of § 725.351. Because the revised regulations governing the identification of responsible operators, §§ 725.407–.408, will apply only to newly filed claims, however, the district director's new authority under § 725.351 must be similarly limited. Accordingly, § 725.351 is added to the list of amended regulations which will not be effective with respect to claims pending on the effective date of the final rule.

(c) A number of comments request that the Department make the final rule applicable to all pending claims. As the Department explained in its original proposal, 62 FR 3347–48 (Jan. 22, 1997), however, it lacks the statutory authority to make many changes retroactive. In addition, certain changes, such as the limitation on the quantity of medical evidence, would seriously disrupt the adjudication of currently pending claims if they were made universally applicable.

(d) A number of commenters believe that the Department lacks the authority to make any of the changes retroactive, particularly because those changes will apply to subsequent claims filed by miners who have previously been denied benefits. They argue that subsequent claims are typically based on employment that ended many years ago, and that the insurance industry is not permitted to charge additional premiums in order to cover the increased liability that will result under the Department's proposal. In support of their argument that the Department is not permitted to effect such a change, they cite the Contract Clause of the United States Constitution. The Contract Clause is in Section 10 of Article I, which is a series of prohibitions against actions by state governments. In relevant part, it states that ''[n]o State shall * * * pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.'' The Supreme Court has observed that ''[i]t could not justifiably be claimed that the Contract Clause applies, either by its own terms or by convincing historical evidence, to actions of the National Government.'' *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 732, n. 9 (1984). Thus, the Contract Clause does not bar Congress from enacting any legislation. Similarly, the Contract Clause is inapplicable to the Secretary's rulemaking by its very terms, and the comment has cited no precedent to the contrary.

Moreover, the Department does not agree that its proposed rulemaking results in the impairment of any contracts. At the hearing held in Washington, D.C., on July 22–23, 1997,

the Department heard testimony suggesting that the Supreme Court's recent decision in *United States* v. *Winstar*, 518 U.S. 839 (1996), prohibits the Department's regulatory efforts. At issue in *Winstar* was Congress's enactment of legislation that effectively revoked promises made by the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation to induce three thrift institutions to acquire financially distressed savings and loans. Although the case did not produce a majority opinion, a majority of the Justices concurred in the holding that the United States was liable to the thrift institutions for breach of contract. Justice Souter's plurality opinion observed that the promises at issue were central to the institutions' agreement to acquire the troubled savings and loans; absent the government's promise, ''the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed.'' 518 U.S. at 910.

The Department's regulatory revisions present a fundamentally different case. Initially, the Department notes that Justice Souter stated that the government's regulatory authority was unaffected by the contracts: ''the agreements [at issue in that case] do not purport to bind the Congress from enacting regulatory measures.'' 518 U.S. at 881. Instead, the Court held, the agreements obligated the government to assume the risk of loss, and thus be liable for damages, if the regulations were changed. By contrast, the contracts purchased by the coal mining industry to insure themselves against black lung claims contain no provision requiring the Department to assume any risk of loss. Although the Department prescribes the form of such contracts, and the Black Lung Disability Trust Fund may be considered a beneficiary of them, these are not contracts between the government and a private party. Moreover, as reflected in the endorsement authorized by the Department, § 726.203, the contracts specifically recognize the possibility that the Act may be amended while the policy is in force, and place the risk of those amendments on the insurer. *See National Independent Coal Operators Association* v. *Old Republic Insurance Company*, 544 F. Supp. 520 (W.D. Va. 1982). The Department has explained above that its rulemaking is fully consistent with, and authorized by, the provisions of the Black Lung Benefits Act. Accordingly, the Court's decision in *Winstar* presents no bar to the Department's promulgation of regulations, and does not obligate the Department to pay damages to the insurance industry.

(e) One comment urges the Department to adopt a bright-line test making all of the revisions applicable only to claims filed after the final rule becomes effective. In particular, the commenter points to changes in Part 726 which will unfairly prejudice coal mine operators that have purchased insurance in compliance with the existing regulations. As the Department explained in its earlier notice of proposed rulemaking, the only revisions which will apply to pending claims are those which clarify the Department's longstanding interpretation of the Act and the current regulations. 62 FR 3348 (Jan. 22, 1997). Those revisions are not considered retroactive. *See Pope* v. *Shalala*, 998 F.2d 473, 483 (7th Cir. 1993). The Department believes that they should be applied to all pending claims to ensure the claims' uniform treatment. Moreover, the Department does not believe that the changes to Part 726 will result in the imposition of any additional liability on the part of coal mine operators in compliance with the Act's insurance requirements.

20 CFR 725.101

(a) Several written comments and hearing statements oppose amending the definition of ''benefits'' in § 725.101(a)(6) to include the cost of the medical examination of the claimant authorized under § 725.406 and subsidized by the Trust Fund. The opponents suggest that the amended definition would impose the cost of the examination on the claimant if he later decides to withdraw the claim or becomes liable for the repayment of overpaid benefits. The Department acknowledges the commenters' concerns, but assures them that the cost of the examination, although a ''benefit'', cannot be shifted to the claimant. In the preamble accompanying the proposed revision of § 725.306, the Department stated it ''will not require reimbursement of the amount spent on the claimant's complete pulmonary evaluation as a condition for withdrawing a claim.'' 62 FR 3351 (Jan. 22, 1997). Similarly, a claimant who must repay overpaid ''benefits'' is not liable for reimbursing the Trust Fund for the medical examination. An overpayment encompasses payments to which the individual is ultimately not entitled, 20 CFR 725.540, while each applicant for benefits is entitled by virtue of the Black Lung Benefits Act to the complete pulmonary examination. 30 U.S.C. 923(b). In addition, § 725.522 contemplates that only payments made pursuant to an initial determination of eligibility by the district director or pursuant to an ''effective order by a district director, administrative law judge, Benefits Review Board, or court'' may be treated as an overpayment pursuant to § 725.540 in the event the claimant is ultimately found ineligible for benefits. The cost of the initial pulmonary evaluation is not such a payment. Consequently, the claimant cannot be required to repay the cost of that examination whatever the outcome of the adjudication of the claim.

(b) One comment opposes the revised definition of ''benefits'' in subsection (a)(6) because it imposes liability for the examination on the responsible operator if the claimant ultimately secures benefits. The comment argues that the cost-shifting is not authorized by the Black Lung Benefits Act. The Department, however, has consistently taken the position that an operator found liable for the payment of the claimant's benefits is also liable to the Trust Fund for the cost of the initial pulmonary evaluation authorized by 30 U.S.C. 923(b). This requirement is in the current regulations at 20 CFR 725.406(c). The revision of § 725.101(a)(6) merely makes this language consistent with § 725.406.

(c) The Department proposes to revise subsection (a)(6) in order to include a cross-reference to § 725.520(c), which defines the term ''augmented benefits.'' Because regulations that precede § 725.520, such as § 725.210, also use the term ''augmented benefits,'' the Department believes that the parties seeking a definition of that term should be able to find an appropriate reference in § 725.101.

(d) Three comments support the revised definitions of ''coal preparation'' (§ 725.101(a)(13)) and ''miner'' (§ 725.101(a)(19)), which exclude coke oven workers from coverage of the Black Lung Benefits Act.

(e) Two comments oppose the proposed revision of § 725.101(a)(31), which would exclude certain benefits paid from a state's general revenues from the definition of ''workers' compensation law.'' One comment supported the change. The opposing comments broadly suggest the proposed change would adversely affect the Trust Fund by making certain state benefits ineligible for offset against federal benefits, creating uncertainty in benefits funding, and contradicting the holding in *Director, OWCP* v. *Eastern Associated Coal Corp.*, 54 F.3d 141 (3d Cir. 1995). The Department disagrees. The Black Lung Benefits Act requires federal black lung benefits to be offset by any amount of compensation received under state or

federal workers' compensation laws for disability or death due to pneumoconiosis. In *Eastern Associated Coal,* the Third Circuit held that the BLBA is ambiguous as to the meaning of a ''workers' compensation law.'' The Court also held that the Director's long-standing practice of excluding state-funded benefits from the ambit of ''workers' compensation law'' was inconsistent with the plain meaning of the implementing regulations. Finally, the Court suggested the agency ''has the means and obligation to amend its regulations to provide for [an] exception'' for state benefits funded through general revenues. 54 F.3d at 150. The Department has therefore proposed to exercise its regulatory authority and eliminate any perceived inconsistency between the agency's position and the black lung program's implementing regulations. The Department's position is entirely consistent with the decision in *Eastern Associated Coal;* the Court held only that the agency's practice was inconsistent with existing regulations, and not that it was prohibited by the statute. Moreover, the Court invited the Department to undertake the present course of action.

(f) One comment opposes the revised definition of ''year'' in § 725.101(a)(32) because it includes approved absences from work in computing the length of time the miner worked for the coal company. Case law has established the validity of including certain periods of time when the miner is not working in establishing the duration of the miner's work relationship with a coal company. *Northern Coal Co.* v. *Director, OWCP [Pickup],* 100 F.3d 871, 876–877 (10th Cir. 1996); *Boyd* v. *Island Creek Coal Co.,* 8 Black Lung Rep. 1–458, 1–460 (1986); *Verdi* v. *Price River Coal Co.,* 6 Black Lung Rep. 1–1067, 1–1069/1–1070 (1984); *cf. Thomas* v. *BethEnergy Mines, Inc.,* 21 Black Lung Rep. 1–10, 1–16/1–17 (1997) (upholding inclusion of sick leave in determining length of miner's employment with operator, but rejecting Director's position that sick leave cannot be counted in determining whether miner was ''regularly'' employed during the year of employment with operator). No reason for deviating from this precedent has been offered.

(g) One comment broadly opposes the definition of the term ''year'' in subsection (a)(32), but identifies only one specific objection: the commenter contends that use of the 125-day exposure standard is invalid because of the reduced incidence of pneumoconiosis in current miners. A current reduction in the occurrence of pneumoconiosis, assuming that such a decline has occurred, is not a sufficient basis for revisiting the exposure standard. The pool of potential claimants who may apply for benefits under these regulations is not restricted to those individuals mining coal over the recent past. Consequently, a decline in the current incidence of the disease does not necessarily undermine the 125-day standard.

(h) One comment objects to the use of wages, compared to annual average wage rates, to calculate the miner's employment history for purposes of determining a ''year'' of coal mine employment under subsection (a)(32); two other comments generally support the definition, but express concern over the undue reliance on Social Security itemized wage earning records. All three comments emphasize the potentially inaccurate information contained in the itemized earnings records. No changes in the proposed definition are necessary to alleviate these concerns. Section 725.101(a)(32) does not accord special deference to any particular type of record for determining when a miner worked or how much he earned during any given period of time. In any specific case, a party may provide testimony or other evidence as to the length of coal mine employment, amount of wages, or accuracy or inaccuracy of any particular record.

(i) The Department is proposing one additional change to subsection (a)(32). In order to account for leap years, which have 366 days instead of 365, the Department proposes to use the larger figure in computing a ''year'' when one of the days in the period at issue is February 29.

Subpart B

20 CFR 725.209

The Department proposed a change to § 725.209(a)(2)(ii) in its initial notice of proposed rulemaking by adding a requirement that a dependent child who is at least 18 years of age and not a student must be under a disability which began before the age of 22 for purposes of augmenting the benefits of a miner or surviving spouse. 62 FR 3390 (Jan. 22, 1997). This proposal changes § 725.209(a)(2)(ii) to eliminate the age requirement. The change implements the statutory definition of ''dependent,'' as it pertains to a child. Section 402(a) of the Black Lung Benefits Act (BLBA) defines a ''dependent child'' to mean ''a child as defined in subsection (g) without regard to subparagraph (2)(B)(ii) thereof[.]'' 30 U.S.C. 902(a)(1). The reference to section 402(g)(2)(B)(ii) is the statutory requirement that a child be disabled before the age of 22. By removing the reference to age for purposes of a dependent child, Congress allowed any disabled child who meets the remaining statutory criteria to be considered a dependent of the miner or his widow without regard to when the child's disability began. A miner or his widow may receive augmented benefits for up to three dependents. 30 U.S.C. 922(a)(4). The Benefits Review Board has reached the same conclusion concerning the intended operation of 30 U.S.C. 902(a)(1). *See Hite* v. *Eastern Associated Coal Co.,* 21 Black Lung Rep. 1–46 (1997); *Wallen* v. *Director, OWCP,* 13 Black Lung Rep. 1–64 (1989). Finally, the change in the regulation effectuates a distinction between classes of dependent children drawn by the statute. In order for a child to establish dependency on a deceased miner as a condition to receipt of benefits in his own right, the BLBA requires the ''child'' to meet all the requirements of 30 U.S.C. 902(g). 30 U.S.C. 922(a)(3). These requirements include a deadline for the onset of disability: either age 22 or, in the case of a student, before the individual ceases to be a student. *See also* § 725.221. A child/beneficiary therefore must meet the age requirement for disability while the child/augmentee is relieved of this burden under the BLBA and the regulations. *Hite,* 21 Black Lung Rep. at 1–49; *Wallen,* 13 Black Lung Rep. at 1–67–68. Accordingly, the proposed version of § 725.209 is revised to reflect the statutory definition of ''dependent child'' and the distinction between a child/beneficiary and child/augmentee.

20 CFR 725.223

The Department proposed paragraph (d) in the initial notice of rulemaking to create a vehicle for reentitling a miner's dependent brother or sister whose eligibility terminates upon marriage, if that marriage ends and the individual again meets all the criteria for entitlement. 62 FR 3393 (Jan. 22, 1997). Upon further consideration, the Department has concluded that permitting reentitlement in such circumstances is contrary to longstanding and consistent agency policy. 20 CFR 725.223(c) (DOL regulation); 410.215(c), (d) (SSA regulation). The only situation in which reentitlement is allowed involves a surviving spouse or surviving divorced spouse who remarries after the death of, or divorce from, the miner, but later regains single status and satisfies the remaining criteria for eligibility. *See* response to comments, § 725.213. The Department has declined to extend similar treatment to children who marry

because marriage is a permanent bar to their entitlement under the statute. No reason exists to accord preferential treatment to the miner's surviving dependent siblings. Once an otherwise eligible brother or sister marries or remarries, entitlement terminates, and the marriage operates as a bar to future entitlement. If the brother or sister is already married when he or she becomes a dependent of the miner, the fact of marriage does not preclude entitlement if the brother or sister has not received any amount of support from his or her spouse. Once support is provided, then the married brother or sister loses eligibility. In either case, the termination of entitlement is justified by the reasonable assumption that the individual will receive financial support from the spouse during the marriage, and rely on savings or other benefits acquired during the marriage should it terminate. The Department therefore proposes to remove paragraph (d) from § 725.223.

Subpart C

20 CFR 725.309

(a) Numerous comments support this proposal, which simply reflects the nearly unanimous holdings of the federal courts of appeals affirming the Department's treatment of subsequent claims. The proposal also brought responses from a number of commenters, however, who generally oppose allowing claimants to file subsequent claims, and argue that the Department's proposal would further expand the right to file subsequent applications. Subsequent applications are filed more than one year after the denial of a previous claim. They may be awarded only if the claimant demonstrates that an applicable condition of entitlement has changed in the interim. As the Department explained in its initial proposal, the subsequent claims provision represents a recognition of the progressive nature of pneumoconiosis. *See* 62 FR 3351–3353 (Jan. 22, 1997).

The limited nature of the Department's proposed revisions cannot be overemphasized. The Third, Fourth, Sixth, and Eighth Circuits have adopted the Department's position. *Lovilia Coal Co.* v. *Harvey,* 109 F.3d 445 (8th Cir. 1997), *cert. denied,* 118 S. Ct. 1385 (1998); *Lisa Lee Mines* v. *Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996); *LaBelle Processing Co.* v. *Swarrow,* 72 F.3d 308 (3d Cir. 1995); *Sharondale Coal Co.* v. *Ross,* 42 F.3d 993 (6th Cir. 1994). The Seventh Circuit's view is substantially similar. *Peabody Coal Co.* v. *Spese,* 117 F.3d 1001 (1997). Only the Tenth Circuit has adopted a contrary view. *Wyoming Fuel Co.* v. *Director, OWCP,* 90 F.3d 1502 (10th Cir. 1996). The Department's proposed regulation thus merely codifies caselaw that is already applicable to more than 90 percent of the claimants who apply for black lung benefits. In addition, as discussed earlier in this document, the Department's revisions will not result in the automatic reopening of claims, as was required by the Black Lung Benefits Reform Act of 1977, or the *de novo* adjudication of claims, as would have been required by H.R. 2108, the 1994 legislative initiative discussed in more detail above. The 1977 Reform Act resulted in the reopening of over 100,000 claims. The Department estimated that H.R. 2108 would have resulted in a substantial number of refilings based on its promise of *de novo* adjudication, that is, adjudication without the need to establish that the miner's condition has changed. By contrast, between January 1, 1982 and July 16, 1998, the Department received only 30,964 claims filed by claimants who had previously been denied. Because the revised regulations will offer no assistance to claimants whose condition has not changed, it is not likely to encourage the filing of a large number of additional subsequent claims.

Moreover, the Department's experience with subsequent claims clearly demonstrates the need for allowing miners to file them. Of the 49,971 first-time claims filed by living miners between January 1, 1982 (the date upon which the Black Lung Benefits Amendments of 1981 took effect) and July 16, 1998, 3,731, or 7.47 percent, were ultimately awarded. In that same time period, the Department received 30,964 subsequent claims from miners who had previously been denied benefits under the Act. Of those claims, 3,269, or 10.56 percent, were awarded. These figures suggest that many miners file applications for benefits before they are truly disabled. Elsewhere in this reproposal, the Department has outlined the steps it intends to take in order to provide claimants with a realistic view of their possible entitlement, including better initial pulmonary evaluations and better reasoned explanations of the denial of their claims. As a result of these steps, the Department hopes that claimants will be able to assess more accurately the strength of their applications throughout the process. To automatically deny those who previously filed claims, however, would unfairly penalize those miners who have truly become totally disabled due to pneumoconiosis and would deprive them of the benefits to which they may be entitled.

One commenter suggested that the Department's subsequent claims provision allows unsuccessful claimants to file multiple times, resulting in the waste of considerable resources by companies required to defend against them. The Department's experience with the current subsequent claims regulation, which has not been substantially changed, indicates that the provision has not led to widespread misuse. Approximately 107,000 claims were filed between January 1, 1982 and July, 1998. Approximately 1,400 of these were from individuals who had previously been denied benefits three or more times. This represents only 1.3 percent of the total. While the Department hopes to discourage filings by individuals who are not totally disabled due to pneumoconiosis by providing more information about the process to the potential claimant population, the Department does not believe that a strict rule requiring the denial of all subsequent claims is appropriate in a program intended to compensate the victims of a progressive disease.

(b) The Department's first proposal created a rebuttable presumption that the miner's physical condition had changed if the miner proved with new medical evidence one of the applicable conditions of entitlement. The regulation also included a provision allowing a miner to establish a serious deterioration in his physical condition whether or not the presumption was rebutted. The Department now believes that this regulatory presumption is unnecessary and would lead to considerable litigation. One commenter suggested its deletion. Accordingly, the revised proposal eliminates the presumption in favor of a simple threshold test: If the miner produces new evidence concerning his physical condition that establishes any of the elements of entitlement previously resolved against him, he is entitled to litigate his entitlement to benefits without regard to findings made in the earlier adjudication. The only exception is an issue resolved earlier by stipulation or by a failure to contest.

The Department's subsequent claims provision gives full effect to the Fourth Circuit's decision in *Lisa Lee Mines* v. *Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996), *cert. denied,* 117 S.Ct. 763 (1997). In *Lisa Lee,* the *en banc* Fourth Circuit affirmed an award of benefits on a subsequent claim despite the operator's objections that the miner should have been awarded benefits in the prior claim

based on evidence of complicated pneumoconiosis. The court held that while the previous denial represented a final adjudication of the miner's condition at that time, that denial should not bar the miner from establishing his entitlement to benefits where his condition has clearly changed. The court's emphasis on accepting the correctness of the first adjudication, as well as the factual findings underlying that result, was echoed by Judge Niemeyer in his concurring opinion: ''This test avoids improper review of the first decision denying benefits.'' 86 F.3d at 1365 (Niemeyer, J., concurring).

(c) Several comments argue that the Department has incorrectly eliminated the requirement in the current regulations that a subsequent survivor's claim be automatically denied. That requirement is based on the common-sense premise that a miner's physical condition cannot change after his death, a premise with which the Department continues to agree. Thus, where the denial of a prior survivor's claim is based solely on the survivor's failure to establish that the miner suffered from pneumoconiosis, that the pneumoconiosis was caused by the miner's coal mine employment, or that the pneumoconiosis contributed to the miner's death, the Department agrees that a subsequent survivor's claim must be denied absent waiver by the liable party. Subsection (d)(3) is amended to clarify that intent. Where the earlier denial was based in whole or in part on a finding that is subject to change, however, for example, that the survivor had remarried, or a child has left school, it is inconsistent with the basic tenets of issue preclusion to prohibit that survivor from establishing entitlement to benefits. *See* 62 FR 3352 (Jan. 22, 1997). Accordingly, the Department has eliminated the automatic denial of all subsequent survivor's claims, and replaced it with a more equitable assessment of the survivor's right to assert entitlement. One comment suggests that allowing waiver of the provision requiring denial of a survivor's claim is inconsistent with the Secretary of Labor's fiduciary responsibility toward the Black Lung Disability Trust Fund. The Department is fully cognizant of its duty to protect the fund against non-meritorious claims. In exercising its responsibilities, however, the Department also believes that it should not deny meritorious claims on technical legal grounds where, for example, a surviving spouse was unable to obtain legal representation in the earlier proceeding.

(d) Several comments suggest that section 725.309 is impermissible in light of the one-year limitation for seeking reconsideration based on a change in conditions set forth in section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922. The Department disagrees. A section 22 reconsideration request asks that the existing denial be modified. A subsequent claim, however, does not allow reopening, or require relitigation, of the existing denial. Instead, it constitutes a new cause of action adjudicating the miner's entitlement at a later time. Thus, section 22 is not implicated by the subsequent claims provision. Moreover, even assuming that section 22 could be read to preclude subsequent claims under the Longshore and Harbor Workers' Compensation Act, the Department's authority to depart from the Longshore Act in order to administer the Black Lung Benefits Act is well established. *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977). The Department believes that a departure in this instance is fully justified. Unlike Longshore Act claims, the majority of which involve discrete, traumatic injuries, all claims filed under the Black Lung Benefits Act seek compensation for a latent, progressive disease. Moreover, the Supreme Court has construed the Longshore Act, in cases involving similar types of conditions, to allow the entry of nominal benefit awards which may be subject to later and repeated modification if the employee's condition worsens. *Metropolitan Stevedore Co.* v. *Rambo,* 117 S. Ct. 1953, 1963 (1997). Under the BLBA, however, entry of a nominal benefit award is not possible. Awards are permissible only in a case of total disability. Thus, the Department allows subsequent claims as an acknowledgment that the miner's condition may worsen.

(e) One comment argues that claimants should not have to relitigate elements of entitlement that they established in earlier litigation. For example, if the miner established that he suffers from pneumoconiosis, but failed to prove that he was totally disabled, he should not be required to re-prove the existence of the disease in a subsequent claim. The Department disagrees. Just as the rules of issue preclusion would not allow a coal mine operator to rely on the miner's previous inability to prove one element of entitlement when the miner's condition with respect to another element has changed, those rules also prohibit a miner from relying on a previous finding which the opposing party did not have an opportunity to fully litigate. Where a miner's claim was denied, and the miner did not file an appeal, the party opposing entitlement had no opportunity to seek to overturn findings that were favorable to the miner. Consequently, those findings may not have any preclusive effect.

(f) One comment suggests that the Department should clarify the date from which benefits are payable in subsequent claims. The date for commencing payment in subsequent claims is governed by the same rules applicable to any other claim, *see* 20 CFR 725.503, with the proviso that no benefits may be awarded for any period prior to the date on which the order denying the prior claim became final. This rule, spelled out in subsection (d)(5), gives effect to the language of the Fourth Circuit in *Lisa Lee,* that parties ''must accept the correctness of [the denial's] legal conclusion—[the claimant] was not eligible for benefits at that time—and that determination is as off-limits to criticism by the respondent as by the claimant.'' 86 F.3d at 1361.

(g) One comment argues that the Department's treatment of subsequent claims violates section 413(d) of the Act, 30 U.S.C. 923(d), which allows working miners who have been determined eligible for benefits to receive those benefits only if they terminate their employment within one year after the determination becomes final. The Department disagrees. Section 725.504, to which only technical changes were proposed, *see* 62 FR 3341 (Jan. 22, 1997), implements the Act's working miner provisions. The regulation currently allows individuals whose claims are denied as a result of continued coal mine employment for more than one year to file new applications after that employment ends. This regulation was first promulgated (as § 725.503A) in 1978, *see* 43 FR 36806 (Aug. 18, 1978), and the Department sees no need to revise it in light of the treatment afforded subsequent claims filed by individuals who do not continue to work. In neither case would the factfinder be permitted to look behind the denial of the earlier application. Moreover, miners who continue to work, and thus continue to be exposed to coal mine dust, present an even more compelling justification for being allowed to file subsequent claims than in the case of non-working miners.

20 CFR 725.310

(a) The Department is re-proposing section 725.310 in order to make two specific changes. The first, set forth in the third and fourth sentences of

subsection (d), would allow the Department or responsible operator, as appropriate, to recoup amounts paid erroneously to a claimant where the claimant is at fault in incurring the overpayment. For example, an overpayment may occur if a claimant in award status fails to timely notify the Department or responsible operator of an event requiring a reduction in the amount of monthly benefits paid. Such events might include an award of state workers' compensation benefits, a child's withdrawal from an educational institution, or a surviving spouse's remarriage. The second change, set forth in the fifth and sixth sentences of subsection (d), conforms the language of the regulation to the Department's intention, set forth in the Department's earlier proposal at 62 FR 3354 (Jan. 22, 1997). By making this change, the Department recognizes that those claimants whose awards have become final have a heightened expectation that they will be able to keep the monthly benefits they receive. Thus, if a final award is terminated after modification, those benefits paid pursuant to the award before modification commenced are not subject to recoupment. By contrast, those claimants whose awards are modified to denials while still on appeal may be the subject of recoupment proceedings. The two sentences at the end of subsection (d), as originally proposed, have been further divided in order to clarify the regulation's meaning.

(b) One comment objects that the revised regulation would prohibit an administrative law judge from denying a claimant's request for modification based on the claimant's failure to present any additional evidence. This comment is apparently based on the mistaken belief that the current regulations authorize such a denial. However, it is clear that any party has the right to seek modification under section 22 of the Longshore Act based ''merely on further reflection on the evidence initially submitted.'' *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 92 S. Ct. 405, 407 (1971). The Department's current black lung regulations do not depart from this authority. Thus, current law prohibits an ALJ from denying a claimant's modification request based on a claimant's failure to submit new evidence. It is also well-established that a claimant who requests modification, whether or not he submits new evidence, is entitled to a *de novo* adjudication of his entitlement to benefits and, if requested, to a formal hearing before an administrative law judge. *Robbins* v. *Cyprus Cumberland Coal Co.*, 146 F.3d 425, 430 (6th Cir. 1998); *Cunningham* v. *Island Creek Coal Co.*, 144 F.3d 388, 390 (6th Cir. 1998). The revisions to subsection (c) merely restate these basic holdings. A similar comment suggests that the changes to subsection (c) create opportunities for claimants to file repeated requests for modification and thus avoid the one-year time limitation. Current law, however, does not permit a fact-finder to deny a modification request simply because a previous modification request has been denied. The one-year time limitation, in fact, commences to run anew when an earlier denial has become final. Subsection (c) does not alter the current state of the law.

(c) Two comments argue that the district director should not be permitted to initiate modification in any case in which a coal mine operator is liable for the payment of benefits to the claimant. The Department does not agree that such a limitation would be appropriate. Although coal mine operators are generally able to represent their own interests effectively, and thus to request modification when they believe it appropriate, section 22 of the Longshore Act specifically authorizes the district director to initiate modification on his own initiative. The Department sees no need to modify this Longshore Act provision in order to properly administer the Black Lung Benefits Act. In addition, there exists a group of awards in which a coal mine operator is nominally liable for the payment of benefits but, because of bankruptcy, dissolution, or other events, can no longer pay benefits. In such cases, the Trust Fund, pursuant to 26 U.S.C. 9501(d), must assume responsibility for paying benefits. The limitation urged by this comment would effectively prohibit the Department from initiating modification in those cases, a limitation that the Department considers unacceptable. For example, the Department must remain free to adjust the terms of an award of benefits to reflect changes in the number and status of the claimant's dependents, such as when a previously eligible child becomes ineligible for augmented benefits. Another comment suggests that parties should be able to initiate modification proceedings before an administrative law judge. The Department disagrees. Section 22 explicitly requires that modification proceedings under the LHWCA be commenced before the district director, and there is no need to alter this provision to meet the needs of the black lung benefits program. In fact, filing a modification request before the district director allows him to administratively process the request, develop the appropriate evidence, and attempt an informal resolution of the claim. *See Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1282 (6th Cir.1987) (discussing the policy reasons supporting the regulation requiring modification proceedings to be commenced before the district director).

(d) The Department has extensively revised § 725.414 in order to define more precisely the quantitative limits on documentary medical evidence that the parties may submit. *See* explanation to § 725.414. Subsection (b) of § 725.310, which limits the amount of additional documentary medical evidence that parties may submit in cases involving requests for modification, contained language similar to the language deleted from § 725.414. In order to clarify the amount of evidence admissible in a modification case, the Department has made a corresponding change to subsection (b). Each party will be entitled to submit one additional chest X-ray interpretation, pulmonary function test, arterial blood gas study, and medical report. The opposing party may introduce one opposing interpretation of each objective test, in accordance with the rules set forth in § 725.414. Finally, the party that originally offered the evidence may seek to rehabilitate its evidence by introducing an additional statement from the physician who administered the test.

Subpart D

20 CFR 725.351

Section 725.351 was not among the provisions which the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997), and the Department did not receive any comments specifically directed to this section. In the course of reviewing the procedures to be used in the identification and notification of potentially liable operators, however, the Department has identified one aspect of this regulation which might benefit from change. The Department's proposal requires the submission to the district director of all evidence relevant to the identification of the liable responsible operator. §§ 725.408, 725.414(b). The Department must have access to this evidence while a claim is pending before the district director because it will be unable to identify additional responsible operators after a case is referred to the Office of Administrative Law Judges, § 725.407(d). It will therefore be the

district director's responsibility to develop the evidence necessary to meet the Director's evidentiary burden under the responsible operator regulations, Subpart G of Part 725.

In order to allow district directors to exercise their responsibilities more efficiently, and in a manner which does not unduly delay the adjudication of a claimant's entitlement, the Department proposes to eliminate the requirement that district directors obtain approval from the Director, OWCP, prior to the issuance and enforcement of subpoenas duces tecum. The authority to issue subpoenas requiring the production of documents is a well-recognized investigative tool of administrative agencies, *see* Comment, ''Administrative Subpoenas for Private Financial Records: What Protection for Privacy does the Fourth Amendment Afford?,'' 1996 Wisc. L. Rev. 1075, 1076–77 (1996), and the Department believes that the current additional layer of internal review is unnecessary. Instead, the Department fully expects that the district directors, working in cooperation with the appropriate officials of the Office of the Solicitor, will issue subpoenas that comply with the standards established by the Supreme Court in United States v. Morton Salt Co., 338 U.S. 632, 652 (1950). Those standards require that the information sought must be relevant to the district director's investigation and the subpoena must not be ''too indefinite.'' The latter requirement ensures that the district director's request not be excessively burdensome, *i.e.,* that compliance does not threaten the normal operation of the recipient's business. *See EEOC* v. B*ay Shipbuilding Corp.,* 668 F.2d 304, 313 (7th Cir. 1981).

20 CFR 725.367

(a) Several comments urge the Department to allow successful claimants' attorneys to collect reasonable fees for all necessary work they perform in a case rather than only the work performed after the liable operator first contested the claimant's eligibility or the fund first denied the claim. The Department agrees that such a change is appropriate. Since the revised version of section 725.367 was proposed on January 22, 1997, the Department has spent considerable time weighing how to adequately compensate claimants' attorneys under the Black Lung Benefits Act. The issue was raised in part by the Benefits Review Board's June 30, 1997 decision in *Jackson* v. *Jewell Ridge Coal Corp.,* 21 Black Lung Rep. (MB) 1–27 (en banc). In *Jackson,* the Board, by a 3–2 majority, held that successful claimants' attorneys in black lung cases are entitled to fees for all the work they perform, regardless of whether it is performed before or after the employer controverts the claimant's entitlement. The Fourth Circuit subsequently affirmed the Board's decision but disavowed its reasoning. *Clinchfield Coal Co.* v. *Harris,* 149 F.3d 407 (4th Cir. 1998). Faced with three seemingly reasonable interpretations of the statutory language and regulations, the Fourth Circuit deferred to the existing interpretation of the Director, Office of Workers' Compensation Programs. Under that interpretation, a claimant's attorney's fees are limited to those services performed after the agency's initial denial of the claim or the operator's rejection of the agency's initial approval. The court noted that the Director's interpretation was based on the agency's reasonable identification of the point in time at which a claimant would have reason to seek the assistance of an attorney. 149 F.3d at 310.

The evidentiary limitations now proposed by the Department, however, significantly alter the circumstances under which a claimant may be expected to seek representation. For example, although the Department now proposes the elimination of the requirement in the initial notice of proposed rulemaking that all medical evidence be submitted while a case is pending before the district director, these proposed regulations nevertheless still limit the amount of evidence each party may submit. Attorneys could play an important role in ensuring that this evidence, including evidence submitted before the Department's initial approval or denial of the claim for benefits, complies with the Department's quality standards and effectively presents the claimant's case. In addition, the Department is proposing significant changes in connection with the complete pulmonary evaluation afforded claimants under § 413(b) of the Act. As detailed in the explanation of these changes at § 725.406, the Department intends to send to the claimant a copy of the results of the objective tests obtained in the Department's evaluation, so that the claimant may in turn give those results to his treating physician. Obviously, the choice of whether or not to submit a report from that physician is important, in light of the regulations' evidentiary limitations. The Department intends to recommend that claimants seek legal advice before making that choice.

In light of the significant changes proposed by the Department, the commenters' suggestion is well-taken. Allowing successful attorneys to collect reasonable fees for all of the necessary work they perform, rather than only the work performed after creation of an adversarial relationship, hopefully will encourage early attorney involvement in these cases. Because such involvement can only improve the quality of evidence submitted, and thus the quality of decision-making in all claims for benefits, the Department proposes to amend section 725.367 to accomplish this result. Although the creation of an adversarial relationship and the ultimately successful prosecution of a claim are still necessary to trigger employer or fund liability for attorney's fees, the date on which the adversarial relationship commenced will no longer serve as the starting point for such liability.

(b) One comment suggests that lay representatives should be entitled to collect fees from responsible coal mine operators or the fund. The Department explained in 1978, when it rejected the same suggestion, that the statute does not require operators to pay the fees of representatives who are not attorneys. 43 FR 36789 (Aug. 18, 1978). It is the Department's intention in this regulation to make the trust fund's attorney's fee liability coextensive with a liable operator's, 62 FR 3354 (Jan. 22, 1997).

(c) One comment suggests that the Department erred in preferring the Third Circuit's decision in *Bethenergy Mines* v. *Director, OWCP,* 854 F.2d 632 (3d Cir. 1988) over the Sixth Circuit's decisions in *Director, OWCP* v. *Bivens,* 757 F.2d 781 (6th Cir. 1985) and *Director, OWCP* v. *Poyner,* 810 F.2d 99 (6th Cir. 1987). The Department's proposal, however, reflects no such preference. Both *Bivens* and *Poyner* stand for the proposition that the fund is liable for attorney's fees only when the Director, OWCP, unsuccessfully contests the claimant's entitlement to benefits. In *Bethenergy,* the Third Circuit held that a coal mine operator became liable for the payment of attorney's fees when it failed to accept liability for the claimant's entitlement within 30 days of the Department's initial finding that the claimant was not eligible for benefits. The Department's proposal is consistent with all three decisions. As in *Poyner* and *Bivens,* the regulations allow fees to be awarded against the trust fund only if the Department has denied the claimant's eligibility. In addition, the revisions follow *Bethenergy* in imposing liability on employers based either on their failure to respond to the Department's initial finding or their contest of it, whether or not the Department finds that the claimant is eligible for benefits.

In each case, the proposal allows the responsible party time to collect and evaluate medical evidence before determining whether to create the type of adversarial relationship that would result in liability for attorney's fees if the claimant ultimately proves successful.

(d) One comment states that the Department has ignored Supreme Court case law governing attorney's fee liability. The comment contains no citation to specific precedent and no further explanation. This sparse comment affords the Department an insufficient basis for altering its original proposal.

Subpart E

20 CFR 725.403

Section 725.403 was not among the regulations which the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The regulation is applicable only to claims filed under section 415 of the Black Lung Benefits Act, 30 U.S.C. 925, between July 1 and December 31, 1973. Such claims were filed with the Department of Health, Education, and Welfare, but administered by the Department of Labor. Section 413(c) of the Act, 30 U.S.C. 923(c), provides that no benefits could be paid on any claim filed on or before December 31, 1973 unless the miner filed a claim for benefits under the applicable state workers' compensation law. Section 725.403 implemented this prohibition for purposes of section 415 claims. Because the deadline for filing section 415 claims expired over 25 years ago, the Department proposes to delete section 725.403. The Department does not intend to alter the rules applicable to any section 415 claim that may still be in litigation, and section 725.403 will remain applicable to any such claim. Parties interested in reviewing section 725.403 may consult earlier editions of the Code of Federal Regulations or the **Federal Register** in which the regulation was originally published. The Department invites comment on whether section 725.403 should be retained in the Code of Federal Regulations.

20 CFR 725.406

(a) The Department received a number of comments, from coal mine operators and miners alike, criticizing its initial proposal for providing claimants with the complete pulmonary evaluation required by 30 U.S.C. 923(b). Section 413(b) of the Act, 30 U.S.C. 923(b), requires the Department to afford each miner who applies for benefits an opportunity to substantiate his claim by means of a complete pulmonary evaluation. Under the Department's original proposal, a miner could either be examined by a physician selected by the Department or by a physician of his choosing. If the miner selected the physician, however, the report of that examination would count as one of the two pulmonary evaluations the miner was entitled to submit into evidence. § 725.414.

One comment suggested that the Department's proposal, in combination with the proposed limits on the quantity of documentary medical evidence each party may submit, would interfere with a miner's statutory right to have a complete pulmonary evaluation performed by a physician of his choice. Many miners, the commenter argued, would make a selection of the physician to perform the examination without the benefit of counsel, and would be able to submit only one additional medical report when they did secure counsel. Another comment suggested that the responsible operator be permitted to choose the physician, while a third comment suggested that the Department take steps to ensure that the facilities and physicians it uses to perform the complete pulmonary evaluation are impartial and of the highest quality.

The Department does not agree that the Black Lung Benefits Act guarantees claimants the right to have the Department pay for a pulmonary evaluation performed by a physician selected by the claimant. The statute obligates the Department only to provide a miner who applies for benefits ''an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.'' 30 U.S.C. 923(b). In the past, when the regulations allowed parties to submit unlimited amounts of evidence in claims, the Department did allow miners to request a specific physician or facility to perform the complete pulmonary evaluation and to have the examination and/or testing done there as long as the miner's request was approved by the district director. 20 CFR 725.406(a).

The Department's proposal, however, now sets forth limitations on the quantity of evidence each side may submit. As a result, allowing a claimant to choose the physician to perform the initial pulmonary evaluation without the benefit of counsel could have an adverse effect on his case. Such a claimant might not obtain the best quality report, and would be able to submit only one more. The Department has considered a number of options to address this problem, and believes that the purposes of the Black Lung Benefits Act will best be served if the complete pulmonary evaluation authorized by 30 U.S.C. 923(b) is performed by an impartial and highly qualified physician, a solution proposed by one of the commenters. The Department will therefore maintain a list of physicians and facilities authorized to perform pulmonary evaluations. The Department will provide each miner with a list of authorized physicians and facilities in the state of the miner's residence as well as the states contiguous to that state. For example, a miner living in Ohio may choose from among authorized physicians and facilities in Ohio, Pennsylvania, West Virginia, Kentucky, Indiana, and Michigan. The Department will further inform the miner that the designated responsible operator may require him to travel 100 miles, or a distance comparable to the distance traveled for the section 413(b) examination, whichever is greater, in order to submit to additional medical examinations and testing. *See* discussion accompanying § 725.414.

Another suggestion, exempting the complete pulmonary evaluation performed by a doctor of the claimant's choosing from the evidentiary limitations, would be unfair to the party opposing entitlement. In that case, the claimant would effectively have the opportunity to submit three medical opinions, while the operator or fund would be limited to two. The Department also does not believe that it would be appropriate, as one commenter suggests, to allow the responsible operator to select the physician or facility. The purpose of the section 413(b) examination is to provide the claimant with an opportunity to have his physical condition assessed in a non-adversarial setting in an attempt to substantiate his application for benefits.

Using a smaller group of physicians to perform the complete pulmonary evaluation will also allow the Department to meet one of its primary goals in the initial processing stage: providing applicants with the best respiratory and pulmonary evaluation possible. A thorough examination, performed in compliance with the applicable quality standards, will provide each claimant with a realistic appraisal of his condition and will also provide a sound evidentiary basis for the district director's initial finding. Developing the best quality medical evidence possible will benefit all the parties. The Department intends therefore to develop more rigorous standards for physicians who perform complete pulmonary evaluations at the

Department's request. These standards may include: (1) The physician should be qualified in internal or pulmonary medicine so that he is better able to analyze respiratory and pulmonary conditions (a request of one commenter); (2) the facility must be able to perform each of the tests that the Department considers appropriate to an inquiry into a miner's respiratory or pulmonary condition, *see* § 718.104; (3) the physician must be able to schedule the claimant promptly for a pulmonary evaluation; (4) the physician must be able to produce a timely report, which includes a comprehensive narrative addressing each of the elements of entitlement; and (5) the physician must make himself available to answer follow-up questions from the district director, and must be willing to explain and defend his conclusions upon questioning by opposing parties. The Department specifically seeks comment as to these and any other standards which may be used to select physicians and facilities to perform complete pulmonary evaluations. The Department intends to consider all suggestions carefully, with the goal of improving the quality and credibility of the ensuing reports. A list of the standards ultimately selected will be included in the Black Lung Program Manual prepared and used by the Department in its administration of the program. This document is open to the public and is available in each district office. Finally, in order to ensure a pool of physicians who meet these high standards, the Department intends to re-evaluate the fees that it pays physicians, both to perform and explain the results of the pulmonary evaluation and to participate in depositions and/or other forms of cross-examination. The Department intends to provide physicians with compensation at the rates prevailing in their communities for performing similar services. Information available to the Department, for example, indicates that, as of June, 1999, the West Virginia Occupational Pneumoconiosis Board paid facilities $270.43 per claimant for performing pulmonary testing, and paid physicians $300 per hour for testifying before administrative law judges. The survey of clinics and facilities which the Department will conduct while this notice is open for public comment will also solicit information on the fees needed to attract highly qualified physicians to perform the testing and evaluation required by the Department.

The Department recognizes that this proposed revision would significantly change the manner in which it administers the complete pulmonary evaluation required by the Black Lung Benefits Act. By raising the quality of these evaluations, the Department hopes to provide each miner with the best possible medical assessment of his respiratory and pulmonary condition early in the processing of his application. Where a miner meets the Department's eligibility standards, the higher quality evidence produced by these evaluations will further Congress's intent that miners be given an opportunity to substantiate their claims. In the case of miners who do not meet those standards, the increased credibility of the initial pulmonary evaluation may reduce litigation before the Office of Administrative Law Judges, the Benefits Review Board, and the federal appellate courts.

The Department is aware of difficulties that claimants may encounter in generating legally sufficient medical evidence in support of their applications. Two commenters state that claimants must be given the right to select the physician who performs the complete pulmonary evaluation because they often cannot afford to obtain their own medical evidence. Developing medical evidence relevant to the evaluation of a claimant's respiratory and pulmonary condition, including the objective medical testing required by the Department's quality standards, § 718.104, can involve costs that are beyond the reach of some claimants. Accordingly, the Department proposes to add a provision (subsection (d)) requiring the district director to inform the claimant that he may have the results of the Department's initial objective testing sent to his treating physician for use in the preparation of a medical report that complies with the Department's quality standards. Such objective test results would include a chest X-ray reading, § 718.104(a)(5), the results of a pulmonary function test, § 718.104(a)(1), and the results of an electrocardiogram, blood gas studies, and other blood analyses, if conducted, § 718.104(b). In addition, the district director will inform the claimant that, if submitted, a report from his treating physician will count as one of the two reports that he is entitled to submit under § 725.414, and that he may wish to seek advice, from a lawyer or other qualified representative, before requesting his treating physician to supply such a report. By providing the miner's treating physician with the results of objective testing that the miner might not otherwise be able to obtain, the Department will assist claimants who may not be able to afford to pay for a complete pulmonary evaluation on their own.

(b) Two commenters state that the Department should impose limitations on the district director's ability to clarify ''unresolved medical issues'' under subsection (e). Both suggest that the district director should be required to ask the physician who performed the complete pulmonary evaluation whether he is aware of unresolved issues, and both commenters also object to any attempt on the part of the district director to question the credibility of the medical evidence obtained as part of the complete pulmonary evaluation. The Department does not agree. District directors must be allowed considerable discretion in fulfilling their responsibility to develop the medical evidence relevant to the claimant's respiratory and pulmonary condition. They must develop complete evidence of the best possible quality to allow them an adequate evidentiary basis to determine whether the claimant is initially entitled to benefits. Limiting district director discretion in the manner suggested by the commenters could result in evaluating a miner's entitlement with medical evidence that is neither complete nor credible. If the district director selects a different physician or facility to re-examine the miner under subsection (e), however, he will be limited to selecting that physician or facility from the same list available to the claimant. The district director may use a physician who is not on the approved list only under subsection (c), which allows the district director to seek a review of objective testing. For example, this provision allows a district director to have a chest X-ray reread by a qualified radiologist who meets the requirements for a ''B'' reader, *see* 20 CFR 718.202(a)(1)(ii)(E), but who is not qualified to perform a complete pulmonary evaluation. The Department also notes that the district director's use of the authority granted by subsection (e) should decrease under the revisions proposed in this notice. Under this proposal, the district director will be seeking an initial evaluation from a qualified physician with the ability to perform a complete evaluation in a timely manner, and likely will not have to seek a miner reexamination as provided by subsection (e). Finally, the Department has added language to subsection (e) to clarify that any additional report obtained by the district director shall not count against the limits on medical evidence imposed on parties other than the Director by § 725.414. Instead, where the district director requests merely that the

physician supplement his original report, the supplement shall be considered a part of that original report. Where the district director orders additional tests, however, the previous tests may not be admitted into the record at the hearing.

(c) Two commenters object to the contents of subsection (d), as originally proposed, now in subsection (c), which outlines the Department's obligation to evaluate each examination and objective test performed as part of the Department's section 413(b) pulmonary evaluation. The subsection allows the Department to determine whether all parts of the section 413(b) examination are in substantial compliance with the Department's quality standards. The Department's original proposal authorized the district director to seek additional tests where substantial compliance was lacking, except where the deficiencies in the testing were the result of a lack of effort on the part of the miner. The commenters argue that a miner whose test is considered invalid due to a lack of effort should be given an additional opportunity to obtain satisfactory results. The Department agrees. A number of factors may influence a miner's lack of effort on objective testing, including a failure to fully understand the test procedures. Accordingly, the Department proposes to revise this subsection to afford such miners one additional opportunity to produce results in compliance with the quality standards.

(d) Several comments argue that the Department should not provide complete pulmonary evaluations if the claim represents a request for modification or a subsequent claim. The Department does not provide an additional pulmonary evaluation if a claim is filed within one year of the date on which the claimant's previous application was finally denied. In such cases, the application is treated as a request for modification, *see Fireman's Fund Insurance Co.* v. *Bergeron*, 493 F.2d 545, 547 (5th Cir.1974), and has the effect of extending the processing and adjudication of the original claim. The Department has already satisfied its responsibilities under section 413(b) with respect to that claim, and does not provide an additional evaluation. By contrast, a subsequent claim is an entirely new assertion of entitlement to benefits, which covers a later period of time and is limited only by the requirement that the parties must accept as final the outcome of any earlier claims filed by the claimant. In such a case, the Department believes that section 413(b) requires that the claimant receive a new evaluation of his respiratory and pulmonary condition.

(e) The Department has made several technical changes to the language of proposed subsection (e) to make that provision easier to read.

20 CFR 725.407

(a) The Department has proposed to revise section 725.409 to require administrative law judges to remand cases in which they reverse a district director's determination that a claim should be denied by reason of abandonment. Because these cases will be returned to the district director for further administrative processing, the Department has revised section 725.407(d) to ensure that the district director retains the authority to notify additional potentially liable operators under such circumstances. Absent this revision, subsection (d) could have been read to prohibit further notification of operators on remand.

(b) One comment suggests that the Department provide guidelines limiting the circumstances under which it can identify more than one potentially liable operator in a claim. The commenter questions the Department's need to name multiple potentially liable operators in every case, citing the increased litigation costs which will be incurred by the operators named. The Department does not intend to name multiple operators in every case. The Department also does not believe, however, that guidelines are appropriate. A dispute over the identity of a liable responsible operator may present a variety of issues, such as the financial assets of a miner's employers, whether the claimant was employed as ''miner,'' and the consequences of various successor operator transactions. The Department's purpose is to ensure that liability for a miner's black lung benefits is borne by a miner's previous employer to the maximum extent possible. In light of the wide range of potential issues surrounding the naming of a responsible operator, the Department does not believe that guidelines are feasible.

(c) One comment supports this proposal, provided that when multiple potentially liable operators are named, they are collectively subject to the same limits on the quantity of documentary medical evidence as a single operator may submit. The Department has retained and applied the same limitation on the amount of documentary medical evidence that may be submitted in cases involving either one or multiple potentially liable operators. § 725.414(a)(3)(i), (ii). Two other comments offer similar support for the Department's proposal.

20 CFR 725.408

(a) Several comments suggest that the time allowed for submitting evidence regarding the identity of the responsible operator should be expanded, and that the Department should incorporate some provision for submitting later discovered evidence. Another comment similarly argues that the time frames in the proposed rules are unrealistic in light of the difficulties in obtaining necessary evidence. The comment points out that by the time miners file applications for benefits, their former employers may no longer be in operation, and necessary personnel records may have been lost, destroyed, or put into storage. At the Washington, D.C. hearing, representatives of the insurance and claims servicing industries suggested that the Department needed to provide more time, perhaps up to a year, within which to develop this evidence. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), pp. 190 (testimony of Margo Hoovel), 193 (testimony of Betsy Sellers).

The Department appreciates the difficulty which may be faced by the insurance and claims servicing industries in developing employment information. Accordingly, the Department has extended the time under § 725.408 within which an operator must submit evidence from 60 days to 90 days following its receipt of notice of a claim pursuant to § 725.407. Because the Department hopes to streamline the processing and adjudication of claims for benefits under the Act, the Department declines to make this period longer. A longer time period could result in significant delays in the adjudication of an applicant's entitlement to benefits. Moreover, many applications for benefits under the Act are filed within a relatively short period of time after the miner leaves coal mine employment. In fact, one comment received on behalf of several coal companies indicated that the 60-day time limitation was inadequate only in the minority of cases. Finally, in cases in which even the 90-day period may not afford a potentially liable operator sufficient time to obtain employment evidence, this time period may be extended for good cause pursuant to the general authority for extensions of time contained in proposed § 725.423.

(b) One comment objects to the Department's proposal on the ground that it would require operator development of evidence in non-

meritorious claims. The Department recognizes that coal mine operators may currently ignore most claims of which they receive notice, because many claimants do not proceed after receiving an initial denial of benefits. The Department has been severely handicapped by this practice, however, because it did not know operators' positions with respect to their potential liability for benefits in cases that did proceed, and the Department was therefore unable to develop responsive evidence. See 62 FR 3355–3356 (Jan. 22, 1997) (discussing the proposed revision of section 725.408 set forth in the Department's previous notice of proposed rulemaking). The Department does not believe that it places an undue burden on potentially liable operators to request certain information at this early stage. The proposal would require them to submit only information regarding their status as a coal mine operator, their employment of the miner and their financial capacity to pay benefits. Contrary to the understanding of some commenters, information relevant to the identity of other potentially liable responsible operators need not be developed until after the issuance of an initial finding of the claimant's eligibility or, if the district director finds that the claimant is not eligible for benefits, after the claimant indicates his dissatisfaction with that result. Consequently, the Department does not believe that requiring the submission of a limited amount of evidence in every case would significantly increase the burden on coal mine operators.

(c) Several comments suggest that the Department provide a bifurcated hearing process to allow administrative law judges to resolve responsible operator issues prior to hearing the merits of entitlement. Although a bifurcated hearing would produce initial fact-finding on the issue, the Department cannot eliminate the possibility that an aggrieved party might appeal the ALJ's decision to the Benefits Review Board and the appropriate court of appeals. If the regulations authorized an immediate appeal of the responsible operator issue, there would be a substantial likelihood of significant delay in the adjudication of the claimant's entitlement. If, on the other hand, coal mine operators could appeal their responsible operator status only after an award of benefits, the proposed suggestion would not accomplish its purpose; the Department would still be required to keep each potentially liable operator as a party to the case to protect the Black Lung Disability Trust Fund in the event the liability determination was overturned on appeal. The Department thus cannot fashion a process which bifurcates the issues of liability and entitlement, but nevertheless serves the Department's purpose of ensuring a prompt adjudication of claimant entitlement involving all potentially liable parties.

20 CFR 725.409

(a) Several comments argue that the penalty for a claimant's failure to attend an informal conference without good cause, denial of the claim, is disproportionately harsh in comparison with the penalty imposed on an employer, waiver of the right to contest potential liability for an award. *See* § 725.416(c). The Department agrees that the proposed regulation may impose severe consequences on a claimant who fails to attend a scheduled informal conference without good cause. Unlike the situation involving potentially liable operators, however, the statute constrains the Department's ability to impose lesser sanctions on claimants. Requiring an operator to concede one of the issues being contested, such as its status as a responsible operator, limits that operator's ability to contest the claim without entirely foreclosing it. Requiring a claimant to concede an issue, however, is usually tantamount to a denial of benefits. The Department believes that a denial by reason of abandonment represents the only valid sanction for a claimant's failure to participate at each stage of the claims adjudication process, including the informal conference.

The Department could adjust the disproportionate effect of the penalty by imposing an equally severe sanction on an employer who fails to attend an informal conference without good cause. In general, however, the Department would prefer not to finally resolve a claim for benefits based solely on a party's failure to attend an informal conference. Where such a sanction is the only one available, as is the case with claimants, the Department has no alternative. In order to mitigate the disparity, however, and in recognition of the fact that, as several commenters point out, most claimants are unrepresented at this point in the proceedings, the Department proposes to add a new subsection, requiring the district director to affirmatively request that the claimant explain why he failed to attend the conference, and to evaluate the claimant's explanation in light of the claimant's age, education, and health as well as the distance of the conference from his residence. Elsewhere in this proposal, see proposed revisions to § 725.416, the Department has further required the district director to explain why he believes that an informal conference would assist in the voluntary resolution of issues in the case. The Department hopes that these revisions will lead to a better understanding of the informal conference process on the part of all parties, and that unjustified absences will be unusual.

(b) One comment urges that, in any case in which an administrative law judge finds that the district director erred in denying the claim by reason of abandonment, he should have the discretion to proceed to adjudicate the merits of the claimant's entitlement. The Department does not agree. A claim may be denied by reason of abandonment at several stages during the initial processing of that claim. For example, a claimant's unjustified failure to attend the required medical examination scheduled by the Department may result in a denial by reason of abandonment. At this stage, none of the evidence regarding issues such as potential operator liability would be in the administrative record, and it would be inappropriate for the administrative law judge to adjudicate the claim on its merits. Even when administrative processing is substantially complete before issuance of a denial by reason of abandonment, such as when a claimant refuses to attend an informal conference, a conference may nevertheless be appropriate. For example, the conference provides the district director with a final opportunity to question the claimant concerning his coal mine employment, and thus to ensure that all potentially liable operators are identified before the case is referred for a formal hearing on the merits. A conference also allows the district director to ensure that the claimant understands the requirements for establishing his entitlement to benefits. Consequently, the Department has added a sentence to subsection (c) to clarify the intent of the regulation and require that an administrative law judge remand a claim to a district director even if he finds that the district director erred in denying the claim by reason of abandonment.

(c) One comment suggests that the proposal will result in the filing of additional claims by applicants whose previous claims were denied by reason of abandonment. The Department does not believe that authorizing the dismissal of a claim based on the applicant's unexcused failure to attend an informal conference will result in a significant number of additional filings. In the Department's experience, the vast majority of informal conferences are attended by representatives of both parties. As a result, the authority set

forth in this section is not apt to be invoked frequently. The Department also believes, however, that the consequences of a claimant's unexcused failure to attend should be clearly explained. The commenter also states that the dismissal of a claim imposes additional burdens and costs on parties to the claim other than the claimant. Although this observation may be true when a claimant does file an additional claim, or further litigates the abandonment finding, the failure of one party to attend an informal conference also imposes significant costs on the parties who did attend and on the Department, whose officials scheduled the conference and set aside the time necessary to hold it. In order to reduce the possibility of needlessly incurring these costs, the Department has proposed a sanction which should ensure that all parties attend an informal conference that has been scheduled in accordance with § 725.416.

20 CFR 725.411

(a) Although the Department is not proposing any further revision to § 725.411, the Department wants interested parties to be aware that it intends to substantially rewrite the documents it uses in connection with an initial finding under § 725.411, in particular to assist unrepresented claimants who are denied benefits. The new letter will contain a detailed explanation, in clear language, of why the evidence developed up to that point fails to establish all of the necessary elements of entitlement. Revision of the initial finding letter is an important part of the Department's commitment to improve the quality of the information it provides parties to the adjudication of claims for black lung benefits. The Department hopes that this improved communication will accomplish two goals: (1) to make the processing of black lung claims by the Department's district offices easier to understand; and (2) to give claimants a clear picture of the medical evidence developed in connection with their claims so that they are able to make more informed decisions as to how to proceed.

(b)(i) Four comments express concern that subsection (a) prohibits treating a claimant's request for a hearing before an administrative law judge as a ''request for further adjudication'' if made within one year of the denial of a claim. The Department disagrees with this interpretation. The proposed regulation states explicitly that any expression of an intent to pursue a denied claim amounts to a ''request for further adjudication.'' An untimely hearing request would constitute a valid request for further adjudication by the district director.

(ii) Three comments also state that a claimant who responds to a denial by requesting a hearing should receive one. Paragraph (a) only precludes the claimant from receiving the hearing immediately as the next stage in the adjudication of the claim. Having invoked a continuation of the claims process by requesting ''further adjudication,'' the claimant must wait for the district director to issue a proposed decision and order. Once the district director issues such a decision, the claimant may pursue any available remedies, including a hearing, with an appropriate request. By invalidating premature hearing requests, the Department intends to ensure the orderly adjudication of claims through each sequential step in the process, and avoid the uncertainty engendered by case law such as *Plesh* v. *Director, OWCP*, 71 F.3d 103 (3d Cir. 1995) (holding that claimant's hearing request made before district director completed processing of claim and issued decision must nevertheless be honored after decision was issued, although not renewed by claimant). The Department has therefore made explicit that a hearing request is effective only when made within 30 days after the district director issues a proposed decision and order under § 725.419(a) or a denial by reason of abandonment under § 725.409(b). Any premature request will be ineffective as a request for a hearing before an administrative law judge.

(c) One comment contends the one-year period for requesting further adjudication in subsection (a) represents an impermissible extension of the one-year period for seeking modification of a claim under § 725.310 and § 922 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). The commenter contends a claimant would have one year under paragraph (a) to request further adjudication of a denied claim, and one additional year to request modification of the claim. This interpretation, in effect, treats the two types of proceedings as mutually exclusive. The Department rejects this contention because it misinterprets the operation of, and relationship between, §§ 725.411 and 725.310.

Under modification, a claimant who has been denied benefits has one year in which to reopen the denied claim. The generally recognized standard for invoking the modification process is an intent to pursue the claim. *See generally Eifler* v. *Director, OWCP*, 926 F.2d 663, 667 (7th Cir. 1991). In its initial notice of proposed rulemaking, the Department explained at length that the one-year period for responding to a denial of benefits under § 725.411 merely reflects an incorporation of the one-year period for requesting modification. 62 FR 3356 (Jan. 22, 1997). By eliminating the hierarchy of response times in the current regulations, the Department has simplified the adjudication procedures for claimants. Under the current regulations, a claimant has 30 days, 60 days or one year in which to pursue a claim after the denial, depending on the type of decision and the options available. Proposed § 725.411 would replace this process with a single time period (one year) and a single action which the claimant may take: by indicating any intent to pursue the claim within one year, the claimant reopens the adjudication process and receives a new decision (a proposed decision and order) based on new evidence (if proffered) or reconsideration of the existing record. If the claimant is dissatisfied with that decision, (s)he may request a hearing before an administrative law judge. If, however, the claimant takes no action within one year of a denial, then the claim is finally denied and not subject to modification. The regulations specifically state that any submission by the claimant after the one-year time limit in § 725.411(a)(1)(i) will be treated as an intent to file a subsequent claim. *See* §§ 725.411(a)(1)(ii), 725.309. Consequently, § 725.411 does not violate the one-year modification period or expand the right of a claimant to reopen a denied claim.

(d) One comment offered in connection with proposed § 725.423 recommends permitting extension of the one-year period for requesting further adjudication in paragraph (a)(1)(i). The Department addressed this idea in its initial notice of proposed rulemaking. 62 FR 3361 (Jan. 22, 1997). The Department concluded that allowing an extension of the one-year period would not be appropriate because one year is an adequate response period, and any response within that period demonstrating an intent to pursue a claim is sufficient to reactivate the adjudication process. For those reasons, no change has been proposed in response to this comment.

20 CFR 725.414

(a) Numerous commenters criticized the Department's initial proposal which required the parties to submit all documentary medical evidence to the district director in the absence of extraordinary circumstances. A number

of commenters observed that claimants often are unable to obtain legal representation until after a case is referred to the Office of Administrative Law Judges. Thus, under the initial proposal, a claimant would often be making critical evidentiary decisions without the benefit of counsel. These commenters also stated that a miner should not be required to undergo five medical examinations (the section 413(b) pulmonary evaluation and the two examinations permitted each side) within the relatively short period from the date the claim is filed to the district director's conclusion of administrative processing. Other commenters stated that the Department's proposal would significantly increase operators' litigation costs by requiring them to develop medical evidence in all cases. Currently, operators have no need to develop medical evidence in cases in which the claimant does not take further action after the district director issues an initial denial of benefits. Statistics maintained by the Department indicate that in more than 60 percent of the black lung claims filed, adjudication ceases after a district director's decision.

The Department agrees that the required submission of all documentary medical evidence to the district director should be revised in light of the many valid objections received. Accordingly, the Department proposes instead to retain the current process for submitting documentary medical evidence into the record. Under this proposal, parties may continue to submit documentary medical evidence to the district director in accordance with the schedule issued under § 725.413. To the extent that those submissions do not reach the numerical limitations imposed on each side by § 725.414, the parties may submit additional documentary medical evidence into the record up to 20 days before an ALJ hearing, and even thereafter, if good cause is shown. The only other limitation on the submission of documentary medical evidence to the administrative law judge is found in the current regulations. The Department proposes to add subsection (e) to the revised version of this section in order to retain the requirement, set forth in the Department's current regulations at 20 CFR 725.414(e), that parties may not withhold evidence they develop while a case is pending before the district director. Such evidence will be admissible in further proceedings only if the party establishes extraordinary circumstances or obtains the consent of the other parties to the claim. *See Doss* v. *Director*, OWCP, 53 F.3d 654, 658 (4th Cir. 1995).

Although the Department now proposes to allow the submission of new documentary medical evidence while a case is pending before the Office of Administrative Law Judges, it has not altered the proposal with respect to the required submission to the district director of all evidence relating to potentially liable operators and the responsible operator. The Department explained in its previous notice of proposed rulemaking that this requirement is intended to provide the district director with all of the evidence relevant to the identification of the responsible operator liable for the payment of benefits, in the absence of extraordinary circumstances. 62 FR 3355–3356 (Jan. 22, 1997). The proposal was intended to accomodate two interests that may conflict in some cases: a claimant's interest in the prompt adjudication of his entitlement; and the Department's interest in protecting the Black Lung Disability Trust Fund from unwarranted liability. Under the Department's current regulations, the Director, OWCP, may seek to have a case remanded from the Office of Administrative Law Judges where evidence not previously submitted to the district director suggests that liability for a claim should be imposed on an operator that was not notified of its potential liability. Such remands necessarily delay the adjudication of the claimant's entitlement to benefits. Under the Department's proposed revision, the Director may not seek, and an Administrative Law Judge may not order, remand of a case to the district director's office in order to identify additional potentially liable operators. If the Department has failed to notify the correct operator of at least its potential liability, the Black Lung Disability Trust Fund will pay the claimant's benefits in the event of an award. The Department thus assumes the risk that its initial operator identification is flawed. This risk can be justified only if the Department is able to require the early submission of evidence relevant to the responsible operator issue.

Under proposed § 725.408, a potentially liable operator identified by the district director has 90 days from the date on which it is notified of that identification to submit evidence demonstrating that it does not meet the § 725.494 definition of a potentially liable operator with respect to a claim. For example, a potentially liable operator may submit evidence demonstrating that it did not employ the miner for at least one year, or that it was not an operator for any period after June 30, 1973. Following the district director's issuance of an initial finding, and a decision by a party aggrieved by that finding to seek further review, the operator designated as the responsible operator must develop and submit any evidence needed to support a contention that it is not the responsible operator liable pursuant to § 725.495 for the benefits payable to the claimant. This evidence, showing, for example, that a more recent employer should be liable for benefits, must be submitted to the district director in accordance with the schedule established under § 725.413. An administrative law judge may admit additional evidence on any issue regarding either potentially liable operators or the responsible operator only if the party submitting the evidence demonstrates extraordinary circumstances justifying its admission. The Department has also proposed revising subsection (c) to extend the extraordinary circumstances exception to testimony regarding such issues by a witness whose identity was not disclosed to the district director.

(b) Several commenters request that the Department further define a number of terms used in the initial proposal, such as ''rebuttal evidence,'' ''consultative report,'' and ''interpretive opinion.'' The Department agrees that some of the terms used in the proposal were ambiguous, and believes that the regulation would better serve all interested parties by describing the applicable evidentiary limitations in terms of the evidence needed to establish a claimant's entitlement to benefits under §§ 718.202 and 718.204. Accordingly, the Department is proposing extensive revisions to this section to ensure that the intended evidentiary limitations are clearly defined. Each party may submit two chest X-ray interpretations (of the same X-ray or two different X-rays, at the option of the party), the results of two pulmonary function tests and two arterial blood gas studies, and two medical reports. The medical reports may include a review of any other evidence of record. Each party may also submit one piece of evidence in rebuttal of each piece of evidence submitted by the opposing party, and may submit one piece of evidence challenging each component of the Department's complete pulmonary evaluation authorized by § 725.406. Thus, a party may have each chest X-ray submitted by the opposing party reread once, and may submit one report challenging the validity of each pulmonary function study or blood gas test submitted by the opposing party. In addition, one

commenter asked that the Department permit a party to rehabilitate evidence that has been the subject of rebuttal by the opposing party. For example, where a party submits a physician's opinion stating that the results of a pulmonary function study are invalid because the miner expended less than maximal effort in performing the test, the party submitting the test should be able to introduce a contrary statement from the physician who administered it. The Department agrees, and has revised paragraphs (a)(2)(ii) and (a)(3)(ii) accordingly.

(c) A large number of commenters favor the proposed limitation on the quantity of medical evidence each side may submit. A number of other commenters object to the proposed limitation on the amount of medical evidence. They argue: (1) That the limitation is unnecessary; (2) that the exclusion of evidence will decrease the quality of factfinding under the Black Lung Benefits Act; (3) that the limitation violates section 413(b) of the Act, 30 U.S.C. 923(b); (4) that the limitation violates the Administrative Procedure Act, 5 U.S.C. 551 et seq.; and (5) that the limitation violates employers' due process rights. The Department anticipated most of these criticisms in the explanation of § 725.414 contained in its initial notice of proposed rulemaking, 62 FR 3356–61 (Jan. 22, 1997), and the arguments advanced by the commenters provide no basis upon which to alter the regulation's proposed limitation as to the quantity of admissible evidence.

The Department continues to believe that the limitation represents a reasonable means of focusing the fact-finder's attention on the quality of the medical evidence in the record before him. In particular, the limitation ensures that the claimant will undergo no more than five pulmonary evaluations (two claimant evaluations, two responsible operator evaluations, and the initial pulmonary evaluation provided by the Department under 30 U.S.C. 923(b)) for purposes of assessing claimant's entitlement to benefits. In light of the strenuous nature of pulmonary testing, including both pulmonary function tests and arterial blood gas tests, no claimant should have to undergo repeated evaluations simply to create a numerically superior evidentiary record for one side or the other. Instead, five evaluations should be sufficient in most cases to allow the fact-finder to assess the miner's pulmonary condition. In the Department's view, additional evaluations would be of only marginal utility.

The Department's initial notice did not explicitly address, however, the extent to which a party's due process rights might be compromised by the Department's limitation on the amount of evidence that party may submit. The due process clause of the Fifth Amendment of the Constitution precludes governmental deprivations of life, liberty, or property without due process of law. Due process ''is not a technical conception with a fixed content unrelated to time, place and circumstances,'' but rather, a ''flexible'' doctrine that requires ''such procedural protections as the particular situation demands.'' *Mathews* v. *Eldridge,* 424 U.S. 319, 334 (1976). At a minimum, it requires an opportunity to be heard ''at a meaningful time and in a meaningful manner.'' *Id.* at 333. A meaningful administrative hearing does not require the ''wholesale transplantation'' of judicial rules and procedures. *Id.* at 348. Nonetheless, the judicial model is a guide for assuring ''fairness.'' *Id.* In the end, due process cases turn on ''the procedure's integrity and fundamental fairness.'' *Richardson* v. *Perales,* 402 U.S. 389, 410 (1971).

In determining whether an administrative practice satisfies due process, the courts balance three distinct factors:

> the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews, 424 U.S. at 335.

The Department recognizes that both operators and claimants have significant, albeit competing, private interests at stake. Operators and their insurers have a monetary interest in each claim (involving an average payout over the life of the claimant of $175,000) and an interest in not being required to pay benefits in nonmeritorious cases. Claimants, on the other hand, are interested in the financial benefit of an award and in the opportunity to substantiate their claims without being overwhelmed by the superior economic resources of their adversaries.

As a general rule, the Department does not believe that there is a significant risk of the erroneous deprivation of private interests on either side if both the claimant and the party opposing entitlement are subject to similar limitations on the quantity of the evidence that they may develop. Applicants with non-meritorious claims will find it difficult to generate two favorable medical reports, accompanied by supportive objective testing, from well-credentialed physicians. Faced with well-documented reports from an equal number of physicians retained by operators and their insurers, claimants will be unable to meet their burden of establishing each element of entitlement. Consequently, there is no increased risk of an erroneous deprivation of the interests of parties opposing entitlement. Similarly, the Department does not believe that the proposed evidentiary limitations will result in the denial of meritorious claims that are currently being awarded. Awards are typically issued in cases containing qualifying objective testing, or a reasoned and documented medical report by a physician with in-depth knowledge of both the miner's respiratory and pulmonary condition and the exertional requirements of the miner's usual coal mine work. Moreover, the overwhelming support for this proposal from claimant groups and attorneys suggests that they also do not believe that it will erroneously deprive meritorious claimants of benefit awards.

In order to allow for the more careful consideration of the unique facts and circumstances of each case, however, and to provide an additional procedural safeguard, the Department has revised § 725.456 as initially proposed to permit an administrative law judge to admit medical evidence into the record in excess of the limits outlined in § 725.414 upon a showing of good cause. The Department's prior proposal would have permitted the admission of such evidence only if a moving party could demonstrate extraordinary circumstances. By adopting the more permissive good cause standard, the Department recognizes that a rigid rule prohibiting additional evidence may increase the risk of an erroneous deprivation of private interests in particular cases. For example, one commenter states that hearings in the Western states are frequently rescheduled due to weather conditions and rescheduling requests of the parties. In light of the time which elapses between the hearing request and the actual hearing, and the progressive nature of pneumoconiosis, the commenter argues that parties must be able to obtain and submit into the record more recent medical evidence. The commenter suggests that if a party has already submitted the maximum amount of evidence long before a case is heard, the record will be devoid of any evidence regarding the miner's

current medical condition. The Department agrees that in such a case, an administrative law judge may authorize the development of additional medical evidence in a manner that is equitable to all parties. Thus, to the extent that the evidentiary limits might heighten the risk of the erroneous deprivation of a private interest, the Department seeks to limit that result by allowing the submission of additional medical evidence upon a showing of good cause.

The Department continues to believe that the amount of medical evidence admissible under this provision will generally be adequate to guarantee a full and fair adjudication of the miner's entitlement to benefits. The government also has an interest in maintaining that guarantee, and in improving the public's perception of the fairness of the process. The government's interest represents the third factor to be balanced under the Supreme Court's due process analysis. The additional flexibility contained in the Department's revised proposal, requiring that a party seeking to submit additional medical evidence in any individual case must establish good cause justifying its admission, will not impair the government's interest. Moreover, the Department's proposal will provide additional safeguards to ensure that the adjudication process properly balances the interests of all parties to a black lung claim. Accordingly, the Department does not believe that the evidentiary limitations contained in this provision will be considered a violation of the due process clause.

(d) One comment objects to the Department's proposal to limit claimants' travel for responsible operator testing and/or examination to 100 miles from their homes. The Department's initial proposal contained the same restriction as does its current regulation (current 20 CFR 725.414(a); proposed § 725.414(a)(3)(i), limiting the ability of coal mine operators to compel miners to travel more than 100 miles to undergo an evaluation). The commenter argues that such a travel restriction on operators is not justified absent a comparable restriction on claimants. The Department does not believe that it would be appropriate to impose such a limitation on miners. The Department's proposed revision to § 725.406, however, allows a miner to select the physician or facility to perform the complete pulmonary evaluation guaranteed under section 413(b) of the Act, 30 U.S.C. 923(b), from among authorized physicians or facilities in the state of his residence or any contiguous state. The limitation in the current regulations and the Department's initial proposal was intended to ensure that a coal mine operator not be able to subject a miner to undue hardship in traveling to the site of a physical examination. Where the miner selects a facility or physician more than 100 miles from his residence, however, he has demonstrated his willingness to undertake additional travel. In such cases, absent a change in the miner's health, the designated responsible operator should be entitled to compel the miner to travel an equivalent distance. Where the miner selects a physician within a 100-mile radius of his residence, the original rule should remain in effect. In order to effectuate these changes, the Department proposes revising subsection (a)(3)(i).

(e) Several comments have asked the Department to alter the evidentiary limitations set forth in this section. One commenter urges the Department to exempt the report of a claimant's treating physician from the limitations while another feels that one examination per side is adequate. Another commenter suggests that the Department permit the responsible operator to submit only as much evidence as the claimant submits, thus allowing the claimant to determine the size of the evidentiary record. A fourth commenter suggests limiting responsible operators to no more than one medical report authored by a physician who examined the miner. The Department does not believe that any of these suggestions would be appropriate. The evidentiary limitations should not be skewed to allow one party to submit more evidence than another, or evidence of a different quality. Instead, each party must remain free to tailor the presentation of its case to the facts while functioning within the same evidentiary limitations applicable to other parties. The Department also notes that, to the extent these suggestions are based on a well-founded concern over requiring the miner to undergo up to five physical examinations within a short time, a specific concern of one commenter, the Department's proposal allowing parties to submit evidence to the OALJ will extend the period within which the parties may seek to have the miner examined.

(f) One commenter urges the Department to allow a physician who prepared a medical report to rely on the opinion of the miner's treating physician in the course of preparing his report. The Department's proposal permits physicians to consider other physicians' opinions only if the medical reports of those physicians are independently admitted into the record in accordance with the regulation's evidentiary limitations. In addition, physicians preparing medical reports may rely on any treatment or hospitalization record that is admitted into the record under subsection (a)(4). The Department does not believe, however, that the regulations need contain any special treatment of the opinion of a miner's treating physician other than is provided in § 718.104(d).

(g) The Department has revised subsection (c) in order to clarify its intent and prevent parties from exceeding the evidentiary limitations by designating additional physicians as hearing witnesses. As revised, subsection (c) will permit testimony, either at the formal hearing or by deposition, by physicians who prepared medical reports. Other physicians may testify only to the extent that the party offering their testimony has not reached the limitation imposed by the regulation on the number of admissible medical reports, or if the administrative law judge finds good cause for allowing a party to exceed that limitation. In effect, testimony by a physician who did not prepare a documentary report will be considered a medical report for purposes of the evidentiary limitations. Thus, if a party has submitted only one documentary medical report, it may offer the testimony of one additional physician. If a party has not submitted any documentary medical reports, it may offer the testimony of two physicians.

(h) Several commenters believe that each potentially liable operator should be entitled to obtain its own medical evidence. In its initial notice of proposed rulemaking, the Department explained that the limitation on the submission of medical evidence in cases involving more than one potentially liable operator is necessary to ensure that claimants are not subject to multiple examinations simply because they have an employment history that leaves the identity of the responsible operator in some doubt. 62 FR 3360–61 (Jan. 22, 1997). The comments offer no basis upon which to revise this provision. One comment supports the Department's proposal as in accord with the Federal Judicial Center's *Manual for Complex Litigation, 3d* (1995), § 20.22–20.222. Another comment states that district directors should never permit a potentially liable operator, other than the designated responsible operator, to submit evidence. The Department disagrees. Even in multiple operator cases, the proposed regulations allow all of the potentially liable operators to collectively submit no more evidence than that permitted the claimant. In the

event the designated responsible operator fails to develop the evidence, however, the district director must have the authority to permit the submission of medical evidence by another potentially liable party. Ultimately, of course, it will be the responsibility of the administrative law judge to ensure that the adjudication of the miner's entitlement is fair.

(i) Several commenters generally request the Department to clarify the admissibility of hospital records, and the results of autopsies and biopsies as proposed in § 725.414(a)(4). The Department believes that proposed subsection (a)(4) would require the admission of any medical record relating to the miner's respiratory or pulmonary condition without regard to the limitations set forth elsewhere in § 725.414. To be sufficient to establish an element of entitlement, however, a report of autopsy or biopsy must substantially comply with the applicable quality standards, § 718.106. *See* § 718.101(b). The Department has not included an independent provision governing rebuttal of this evidence. As a general rule, this evidence is not developed in connection with a party's affirmative case for or against entitlement, and therefore the Department does not believe that independent rebuttal provisions are appropriate. Any evidence that predates the miner's claim for benefits may be addressed in the two medical reports permitted each side by the regulation. If additional evidence is generated as the result of a hospitalization or treatment that takes place after the parties have completed their evidentiary submission, the ALJ has the discretion to permit the development of additional evidence under the ''good cause'' provision of § 725.456.

20 CFR 725.416

A number of commenters, including representatives of claimants, coal mine operators and their insurers, urge the Department to eliminate informal conferences altogether. They argue that informal conferences seldom accomplish any purpose, and thus waste considerable time and resources. The Department disagrees. In the explanation of § 725.416 that appeared in its initial notice of proposed rulemaking, 62 FR 3361 (Jan. 22, 1997), the Department explained that informal conferences serve a variety of useful purposes, including narrowing issues, achieving stipulations, and crystallizing positions. The comments received by the Department provide no reason to alter this view. In order to increase acceptance of the informal conference procedure, however, the Department believes that the district director should be able to articulate, in each case, why he believes that an informal conference would be helpful in the processing of the claim. Accordingly, the Department proposes to revise subsection (b) in order to require the district director to provide the parties with a statement articulating specific reasons why an informal conference would assist in the voluntary resolution of issues. The reasons must be tailored to the specific facts of that case. The district director's failure to include such a statement in his notification of conference will foreclose the use of sanctions set forth in paragraph (c). In addition, in order to reduce the parties' costs in participating in an informal conference, the Department proposes to formally recognize the district offices' current practice of allowing parties to participate by telephone in appropriate cases. Although the decision to allow telephone participation is committed to the discretion of the district director, the Department's regulations should explicitly acknowledge the availability of this option, and allow the parties to request its use by filing a request with the district director.

(b) One comment states that the proposed sanctions set forth in subsection (c) will lead to further litigation and/or refilings. The Department has previously addressed this comment. *See* discussion of § 725.409.

Subpart F

20 CFR 725.456

(a) The Department proposes to retain the current rules governing time periods for submitting documentary medical evidence into the record. A change has been made to paragraph (b)(1) to reflect this decision, and new paragraphs (b)(2)–(4) and (c) have been added to the proposal from the Department's current rules (20 CFR 725.456(b)(1)–(3), (c), (d)). These revisions are fully explained above.

(b) Paragraph (f) has been revised to take into account changes to section 725.406. Since the proposal would now require that the § 725.406 pulmonary evaluation be performed by a facility or physician selected from a list maintained by the Office, language in subsection (f) that contemplated examination and/or testing by a facility or physician not approved by the Office has been deleted. *See* discussion accompanying § 725.406.

(c) All of the comments related to the Department's proposed revision of § 725.456 are discussed under § 725.414.

20 CFR 725.457

(a) The Department has explained its proposal to retain the current rules governing the timely submission of medical evidence in connection with its explanation of changes to § 725.414. The § 725.414 revision requires a corresponding change in the rule governing the identification of witnesses in proceedings before the Office of Administrative Law Judges. The revised regulation allows the testimony of witnesses relevant to the liability of a potentially liable operator and/or the identification of the responsible operator only if the identity of that witness was disclosed to the district director or the administrative law judge finds extraordinary circumstances. A physician may testify only if he prepared a medical report admitted into the record by the district director or administrative law judge. Alternatively, a physician may testify if his testimony, when considered as a medical report, does not result in a violation of the limitations on the quantity of evidence permitted by § 725.414, or if the administrative law judge finds good cause for allowing the party offering the testimony to exceed those limitations.

(b) A number of commenters objected to the Department's proposal limiting the scope of a physician's testimony. They argued that physicians who testify must be allowed to address all of the medical evidence of record in order to explain their conclusions, and that cross-examination of those physicians will depend on reference to objective testing and medical conclusions contained in other reports. The Department agrees that the original proposal's limitation was inappropriate, and has revised paragraph (d) accordingly. As revised, the regulation will only prevent a physician from testifying with respect to medical evidence relevant to the miner's condition that is not admitted into the record.

20 CFR 725.459

One commenter suggests that the Black Lung Disability Trust Fund should be liable for witness fees incurred by an indigent claimant when cross-examining an adverse witness. Another commenter argues that the Department's original proposal, under which the party seeking to cross-examine a witness must pay the necessary fees to secure that witness, violates section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, as incorporated by 30 U.S.C. 932(a). Section 28 generally requires that employers pay the reasonable costs

of successful claimants. In light of these comments, the Department has reconsidered its approach to the payment of expenses associated with cross-examination.

The Department now proposes that the costs of cross-examination be borne by the party relying on the affirmative testimony of that witness. For example, where an employer submits a report by a physician, and the claimant seeks to summon the physician to the hearing for cross-examination, the employer must bear the costs of reimbursing its own physician. Under the regulation, the employer may request that the administrative law judge authorize a less intrusive method of cross-examination, including a deposition, telephone deposition, or interrogatories, provided that the method authorized will produce a full and true disclosure of the facts.

The only exception to this general rule is in the case of an indigent claimant. The Department agrees that a claimant's medical evidence should not be excluded based on a claimant's financial inability to make a physician available for cross-examination. Accordingly, the Department proposes to revise paragraph (b) to allow an administrative law judge to apportion the costs of cross-examination where the claimant demonstrates his indigence. The Department does not agree, however, that the trust fund may be held liable for such fees in every case. Although the statutory provision governing the disbursement of monies from the fund, 26 U.S.C. 9501, permits the fund to pay administrative expenses associated with the black lung benefits program, the Department does not believe that the expenses of cross-examination should necessarily be included in this category. Rather, the responsible operator seeking to cross-examine claimant's witness should bear liability for such fees, an expense which the operator may easily control. The fund will be liable for such witness fees in cases in which there is no coal mine operator liable for the payment of benefits. *See, e.g., Republic Steel Corp.* v. *U.S. Department of Labor,* 590 F.2d 77 (3d Cir. 1978) (holding the fund liable for the payment of attorney's fees because the fund, the party liable for the payment of claimant's benefits, stood in the shoes of a responsible operator). Accordingly, in a case in which the claimant is indigent and a party seeks to cross-examine a witness of claimant's, the administrative law judge must apportion the costs among the claimant and the party opposing the claimant's entitlement. Where that party is an operator, the operator may be asked to bear all or part of the costs of cross-examination, as appropriate. Where that party is the fund, the fund is subject to the same apportionment rules. In addition, the fund will bear liability for the costs of cross-examining the doctor who administered the section 413(b) pulmonary evaluation. *See* § 725.406.

The Department's proposal has several advantages. First, it avoids potential due process problems associated with the Department's previous proposal because no financial burden is placed on parties who wish to exercise their right to cross-examination except in the case of a claimant who is unable to pay the associated costs. At the same time, requiring the parties to show the necessity of a specific means of cross-examination, and allowing the administrative law judge to exercise sound discretion in addressing requests for cross-examination, protects witnesses from undue burdens and parties from undue expense. Under this proposal, operators would be required to bear the cost of witness fees only for their own witnesses, indigent claimants' witnesses, and for claimants who are ultimately successful in establishing their entitlement to benefits.

20 CFR 725.465

Section 725.465 sets forth the conditions under which an administrative law judge may dismiss a claim, and also authorizes the administrative law judge to dismiss a party who is not a proper party to the claim under § 725.360. The regulation was not among the provisions the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997), and the Department did not receive any comments directed to this section. The Department now proposes to revise this regulation, however, to ensure that all potentially liable operators remain parties to proceedings before the administrative law judge in the absence of the Director's agreement to their dismissal. In proposing new regulations governing the identification of responsible operators, the Department intends that all potentially liable operators named by the district director have the opportunity to participate in the adjudication of the claimant's entitlement both before the administrative law judge and on appeal. Thus, under this proposed change, even if an administrative law judge concludes that one of the potentially liable operators is the responsible operator as defined by Subpart G of Part 725, he may not dismiss the other potentially liable operators absent the Director's consent. In the event that his responsible operator finding is reversed or vacated by either the Benefits Review Board or a federal court of appeals, the dismissal of other potentially liable operators before or simultaneously with adjudication of the claimant's entitlement would adversely impact the financial interests of the Black Lung Disability Trust Fund. Given the absence of the correct potentially liable operator as a party to a case, liability might well be imposed on the fund, especially since the proposal prohibits the re-naming of potentially liable operators after a case is referred to the Office of Administrative Law Judges, § 725.407(d).

Subpart G

20 CFR 725.491

(a) One commenter objects to the Department's attempt to clarify the liability of independent contractors under the Black Lung Benefits Act. The commenter argues that in imposing liability on independent contractors who do not have a ''continuing presence'' at the mine, the Department is exceeding its statutory mandate. Specifically, the commenter objects to the Department's decision to codify the D.C. Circuit's decision in *Otis Elevator Co.* v. *Secretary of Labor,* 921 F.2d 1285 (D.C. Cir. 1990), instead of the Fourth Circuit's decision in *Old Dominion Power Co.* v. *Donovan,* 772 F.2d 92 (4th Cir. 1985). The Department has consistently advocated a broad interpretation of the statutory provision defining ''operator'' and its application to independent contractors, both in the context of litigation under subchapters 1 through 3 of the Federal Coal Mine Health and Safety Act and under the Black Lung Benefits Act. The D.C. Circuit accepted the Department's views in *Otis Elevator* while the Fourth Circuit rejected the Department's position in *Old Dominion Power.* In addition, while the Department was preparing its initial notice of proposed rulemaking, the Tenth Circuit announced its agreement with *Otis Elevator*: ''Although Congress may have been specially concerned with contractors who are engaged in the extraction process and who have a continuing presence at the mine, * * * section 3(d) by its terms is not limited to these contractors.'' *Joy Technologies* v. *Secretary of Labor,* 99 F.3d 991, 999 (10th Cir. 1996), *cert. denied,* 117 S. Ct. 1691 (1997).

The commenter cites the Third Circuit's decision in *National Industrial Sand Ass'n* v. *Marshall,* 601 F.2d 689 (3d Cir. 1979), in support of its position that the term ''operator'' should be narrowly construed. In *National*

Industrial Sand, however, the Third Circuit recognized that, as of the date of the court's opinion, the Department of Labor had not yet promulgated regulations under the Federal Mine Health and Safety Act defining the degree to which independent contractors were subject to that Act's health and safety provisions. The *dicta* cited by the commenter thus does not constitute a rejection of the Department's position on coverage. Given the adoption of its position by the D.C. and Tenth Circuits, and its rejection by only the Fourth Circuit, there appears to be no reason for the Department to adopt in its regulations a decision at odds with its consistent interpretation, and the commenter provides none.

The same commenter suggests that the Department's interpretation would result in the coverage of food and beverage workers who serve lunch to coal miners. The Act requires that those who contract pneumoconiosis as a result of work in the Nation's coal mines receive compensation for the totally disabling effects of that disease. Although it is difficult to imagine that food and beverage workers will be sufficiently exposed to coal mine dust to contract pneumoconiosis, those individuals who are totally disabled as a result of that exposure, and who meet the definition of ''miner'' (''* * * any individual who * * * has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal,'' 30 U.S.C. 902(d)), are no less entitled to compensation than are other miners. The employer of such individuals must assume liability for the payment of any benefits to which they are entitled, provided that the employer meets the criteria for a potentially liable operator set forth in § 725.494.

(b) One commenter argues that the Department's exclusion in § 725.491(f) of both state and federal governments from potential liability under the Act is inappropriate. The commenter suggests that the Department's proposal excluding the United States will cause federal employees to file claims under the Black Lung Benefits Act rather than the Federal Employees Compensation Act (FECA). The Department disagrees; the proposed regulation merely codifies the holding of the Fourth Circuit in *Eastern Associated Coal Corp.* v. *Director, OWCP*, 791 F.2d 1129 (4th Cir.1986). The court in that case held that the United States could not be considered a responsible operator based on the miner's most recent employment as a federal coal mine inspector. To the extent that such employees develop pneumoconiosis as a result of previous coal mine employment, they must be permitted to file claims under the Act. To the extent that they are injured during the course of their federal employment, FECA provides the appropriate remedy. The Department does not agree that its adoption of the Fourth Circuit's decision in *Eastern Associated Coal* will result in an increase in unwarranted claims under the Act.

The same commenter argues that the Department cannot relieve state governments of their liability under the Act, and that the Department's approach under the Black Lung Benefits Act is inconsistent with its approach under the Fair Labor Standards Act. The comment, however, fails to recognize a fundamental difference between the two statutes: the Black Lung Benefits Act contains no mention of states as employers subject to potential liability for black lung benefits, while the Fair Labor Standards Act explicitly lists state governments among the ''public agencies'' that may be considered employers for FLSA purposes. Supreme Court caselaw illustrates the importance of this distinction. In *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), the Court considered the applicability of the Age Discrimination in Employment Act to judges employed by the State of Missouri. The Court observed that, although the Tenth Amendment to the United States Constitution did not prohibit Congress from exercising the power derived from the Commerce Clause with respect to state governments, ''we must be absolutely certain that Congress intended such an exercise.'' 501 U.S. at 464. The Fair Labor Standards Act meets this test; Congress clearly intended that the FLSA apply to public agencies, including state governments. In the absence of similar language in the Black Lung Benefits Act, however, the Department cannot seek to hold states liable for the payment of black lung benefits.

(c) One comment states that the rebuttable presumption of exposure to ''coal dust'' set forth in subsection (d) is inconsistent with the presumption set forth in § 725.202 of this part. The Department agrees that the two provisions should be harmonized. Both the Third and Eleventh Circuits have agreed that the Department's use of the term ''coal mine dust'' in § 725.202 represents a permissible reading of the Black Lung Benefits Act. *Williamson Shaft Contracting Co.* v. *Phillips*, 794 F.2d 865, 870 (3d Cir. 1986); *William Brothers, Inc.* v. *Pate*, 833 F.2d 261, 264 (11th Cir. 1987). Congress intended that the Black Lung Benefits Act provide compensation for any ''chronic dust disease of the lung * * * arising out of coal mine employment.'' 30 U.S.C. 902(b). The Department has consistently interpreted this mandate broadly, by including diseases such as silicosis in the definition of the term ''pneumoconiosis,'' provided they arise out of coal mine employment. *See* 43 FR 36825 (Aug. 18, 1978). The Department accordingly proposes to revise subsection (d) to make it conform with § 725.202, and to revise subsection (a)(2)(i) to ensure the consistent use of the phrase ''coal mine dust.''

20 CFR 725.492

(a) One commenter suggests that the Department's proposed regulations would require the purchaser of a coal mine company's assets in a bankruptcy proceeding to assume the bankrupt company's black lung benefits liabilities, and that this provision would destroy the coal mining industry in Maryland. The Secretary's regulations merely repeat the language of the statute, which provides that successor operator liability may arise from ''corporate reorganizations'' and ''liquidations,'' among other listed transactions. 30 U.S.C. 932(i)(3)(A). The Department is not free to disregard Congress' explicit intent to cover a wide variety of transactions in which coal mine assets may be sold. The Act and regulations generally impose potential liability on a successor operator, however, only after the transfer of coal mine assets from a seller that has failed to secure its potential liability in violation of the statutory mandate at 30 U.S.C. 933(a); if the seller obtained black lung insurance, a purchaser of its coal mine assets will probably not face any black lung liabilities arising from the seller's previous operation of the mine.

(b) Another commenter observes that the Department's regulations would shift liability to a successor operator, notwithstanding the fact that a prior operator that had gone out of business had insurance to cover a given claim. The Department disagrees that the proposed regulations would produce this outcome. The Department's first notice of proposed rulemaking contained an example in an attempt to make the intent of the regulation clear. *See* 62 FR 3365 (Jan. 22, 1997). Indeed, the regulations specifically provide that a prior operator shall remain liable if it meets the requirements of § 725.494, § 725.492(d). *See also* § 725.493(b)(1). One of § 725.494's requirements is that the prior operator must remain financially capable of assuming liability for the payment of benefits. An operator is deemed capable of assuming liability

for a claim if it obtained insurance and the insurance company is not insolvent, § 725.494(e)(1). Section 725.495 assigns liability to the operator that most recently employed the miner. Thus, if a miner's most recent employer obtained insurance and subsequently sold its assets or dissolved into a parent corporation, section 725.495 would require the most recent employer's insurer to assume liability for any benefits payable to the claimant. Only if that insurer is no longer solvent will the Department seek to impose liability on a successor or parent corporation. Because the Department believes that the regulations are clear on this point, no changes have been made.

20 CFR 725.493

(a) The Department has made a technical change to the language of subsection (a)(2) to make the regulation easier to read.

(b) One comment objects to subsection (a)(1) as an attempt to redefine independent contractors and sole proprietors as employees, in order to force coal mine operators to assume liability for any benefits payable to those individuals. In administering the Black Lung Benefits Act for the past 25 years, the Department has seen coal mine companies use a variety of financial arrangements in an effort to avoid liability for black lung benefits. These have included the designation of all miners as partners, the use of 11-month employment contracts with an operator's subsidiaries, and the establishment of separate, underfunded companies to provide labor to a coal mine operator. Subsection (a)(1) is intended to foreclose those efforts by recognizing a broad range of employment relationships between coal mine companies and those individuals who actually mine coal. By proposing more specific language defining an ''employment relationship,'' the Department hopes to ensure that coal mine operators provide compensation to all their employees with totally disabling pneumoconiosis. It is not the Department's intent, however, to redefine ''independent contractor'' or ''sole proprietor'' simply to make coal mine operators liable for those individuals' benefits. The Department has added language to subsection (a)(1) to clarify its purpose, and invites comment on whether the proposed language accomplishes the Department's intent.

(c) One comment suggests that the ''control'' test of subsection (a)(2) is unconstitutional insofar as it creates federal common law. The comment contains no citation to specific precedent and no further explanation. The comment therefore provides the Department with an insufficient basis for altering the proposal.

20 CFR 725.494

(a) The Department has made several technical changes to the language of the proposed regulation to make the regulation easier to read.

(b) One comment suggests that the presumptions set forth in subsections (a) and (e) are illegal and violate the Supreme Court's decision in *Greenwich Collieries.* The Department's authority to create regulatory presumptions is discussed in detail elsewhere in this preamble. The Department notes that the presumption set forth in the proposed version of subsection (a) merely reflects the presumption currently contained in § 725.493(a)(6). Subsection (e) is not a presumption at all, but merely a recitation of the evidence that will support a finding that a coal mine operator is financially capable of assuming liability for the payment of benefits, one of the Secretary's prerequisites for naming a company a potentially liable operator.

(c) One miner comments that the only coal mining company he worked for after 1969 is now bankrupt, so that the § 725.494(d) requirement is not met in his case. He asks where that leaves miners like him. A miner's failure to meet this requirement has no impact on his potential entitlement to benefits. It merely means that if he is found entitled, his benefits will be paid by the Black Lung Disability Trust Fund rather than a coal miner operator or its insurer.

20 CFR 725.495

Several commenters argue that § 725.495 impermissibly shifts the burden of proof as to the identity of a responsible operator from the Department to employers. The commenters state that the proposed language does not codify current law, but rather the unsuccessful litigation position advanced by the Department in *Director, OWCP* v. *Trace Fork Coal Co.*, 67 F.3d 503 (4th Cir. 1995). In its explanation of the proposed revision of § 725.495, the Department acknowledged that its proposal addressed issues not resolved by the current regulations. 62 FR 3364–65 (Jan. 22, 1997). The commenters' implication that the proposal violates the Fourth Circuit's decision, however, is mistaken. In *Trace Fork*, the court explicitly observed that ''[t]he Black Lung Benefits Act and its accompanying regulations do not specifically address who has the burden of proving the responsible operator issue.'' 67 F.3d at 507. In the absence of specific guidance, the court concluded that the Secretary bore this burden. In proposing these regulations, the Department is not violating *Trace Fork*, but rather filling the void noted by the court. The Department's prior explanation in its original proposal, 62 FR 3363–65 (Jan. 22, 1997), contains a full explanation of the Department's proposed changes.

Subpart H

20 CFR 725.502

(a) Paragraph (b)(1), as originally proposed, made monthly benefits due on the ''first business day of the month following the month for which the benefits are payable.'' 62 FR 3412 (Jan. 22, 1997). Although no comments were received concerning this provision, the Department has determined that paragraph (b)(1) should be changed to make monthly benefits due on the fifteenth calendar day of the month. This change reflects current departmental practice with respect to the payment of benefits by the Trust Fund. The change will promote consistency on the part of the Trust Fund and operators by requiring the payment of monthly benefits on the same schedule. Thus, the change will allow uniform claimant expectation as to the regular date of payment, notwithstanding the identity of the payor.

The proposed change also affects the example of hypothetical due dates for the payment of benefits contained in the initial notice of proposed rulemaking, 62 FR 3366 (Jan. 22, 1997). In that example, an administrative law judge's order awarding benefits issues on August 15, 1996. Under paragraph (b)(1), as originally proposed, the operator must pay the monthly benefits due for August within ten days after the first business day of September (*i.e.*, September 10, 1996) to avoid a penalty; September is the ''month following the month for which the benefits are payable.'' Paragraph (b)(1), as reproposed, would require the operator to pay the monthly benefits for August within ten days after the fifteenth of September to avoid the late-payment penalty (*i.e.*, September 25, 1996). As discussed in the January 1997 preamble, retroactive benefits covering the period before the ALJ's August 15, 1996, award, will not be due until the district director completes the computation of these amounts and notifies the parties. Such notification will be completed within 30 days of August 15, 1996.

(b) Several comments state that imposition of the twenty percent penalty for failure to commence the

timely payment of benefits after entry of an effective award is unfair and punitive when the penalty applies to an award which is still in litigation. The Department disagrees. The Black Lung Benefits Act incorporates the twenty percent penalty provision of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914(f), as incorporated by 30 U.S.C. 932(a). The purpose of the penalty is to ensure prompt compliance by an employer with its benefits obligations under the terms of an award, and without regard to further proceedings involving the claim. *See* 43 FR 36815 (Aug. 18, 1978), § 725.607, Discussion and changes (a). The existence of the Black Lung Disability Trust Fund does not change that purpose. As discussed in the first notice of proposed rulemaking, 62 FR 3365–66 (Jan. 22, 1997), only some responsible operators commence the payment of benefits upon entry of an award when further proceedings are pending; even fewer pay retroactive benefits. Noncompliance shifts the burden of paying interim monthly benefits to the Trust Fund to ensure the claimant receives benefits until compliance ensues, or the litigation terminates with affirmation of the award or its reversal. Operators therefore routinely use the Trust Fund as a surrogate to defer liabilities or reduce the risk of losing interim payments in the event an award is reversed, and the beneficiary cannot repay the interim benefits. The Department recognizes the fiscal reasoning behind this practice. Congress, however, imposed primary responsibility for paying benefits on the coal mining industry, and intended individual operators to assume liability to the maximum extent possible. *See generally Old Ben Coal Co.* v. *Luker*, 826 F.2d 688, 693 (7th Cir. 1987), *quoting* S. Rep. No. 209, 95th Cong., 1st Sess. 9 (1977). Congress created the Trust Fund to fulfill two limited roles: pay claims for which no individual operator could be held liable, and assume temporary liability if the responsible operator fails or refuses to pay. 26 U.S.C. 9501(d). With respect to the latter role, the Fund acts to protect the claimant by ensuring the continuous and timely receipt of benefits until the operator pays or the award is overturned. This objective does not extend to insulating the responsible operator from the economic risks of paying benefits on an award which might ultimately be reversed. Moreover, requiring payment of benefits on a non-final award does not infringe the operator's right to challenge the award. Section 725.502 simply shifts the economic risk that the initial award is incorrect from the Trust Fund to the operator. The operator receives adequate protection of its interests through its right to develop evidence and participate in the adjudication process. Such participation gives the operator a voice in the merits of the award and the opportunity to challenge an award if it disagrees with it. Consequently, the Department believes that the availability of penalties to foster *prompt* compliance with the terms of an award is warranted, even if the operator pursues an appeal. Section 725.502 implements the Congressional mandate that individual coal mine operators bear the burden of paying benefits whenever liability exists.

(c) One comment objects that Congress never intended to require a responsible operator to pay retroactive benefits before an award becomes final in claims filed after 1981. In general, the party liable for the payment of a claim must pay all benefits due under the terms of an award when that award becomes effective. Congress has permitted one exception. Under 26 U.S.C. 9501(d)(1)(A), the Trust Fund will pay benefits on a claim filed after January 1, 1982 ''only for benefits accruing after the date of such initial determination'' if the Fund is paying interim benefits on behalf of an operator who has not made a payment which is due. This statutory exception, by its language, applies only to the Fund, and only to interim benefits payments. In all other situations, the claimant is entitled to the full payment of benefits authorized by the award even if litigation continues. If payments are withheld by the operator until the award becomes final in a post-1981 claim, the operator must pay interest as well. 30 U.S.C. 932(d). Contrary to the commenter's view, Congress clearly intended responsible operators to pay retroactive benefits as well as monthly benefits immediately when a claimant's entitlement is established by an effective benefits award.

(d) One comment objects to the requirement in paragraph (b)(2) that an operator must pay retroactive benefits despite continuing litigation over the propriety of the award itself. The commenter argues that an operator has no realistic chance of recovering the benefits if the award is ultimately reversed, and suggests the Trust Fund should reimburse an operator who pays retroactive benefits. A right to benefits established by an award, however, cannot be conditioned on the likelihood the operator will recover the benefits if the claimant is ultimately found ineligible. If the claimant has a present right to receive benefits, then the operator must pay according to the terms of the award without regard to the possibility of a later reversal. The terms of the award include all benefits to which the miner is entitled, including retroactive benefits. The Department also rejects the suggestion that the Fund reimburse any operator who pays retroactive benefits but thereafter defeats the claim. The Fund is not authorized to reimburse operators except for those claims for which liability has transferred to the Fund pursuant to law. *See* 26 U.S.C. 9501(d)(6), (7).

(e) One comment suggests three additions to this section: (i) a requirement that the Trust Fund pay interim benefits if a responsible operator obtains a stay of payments pursuant to 33 U.S.C. 921(c), as incorporated by 30 U.S.C. 932(a), until the stay is dissolved; (ii) clarification that a responsible operator must pay benefits during the pendency of its modification petition until the petition is granted; and (iii) language stating that an administrative law judge's award becomes final despite any order leaving the computation of benefits to the district director. No changes are necessary in response to the commenter's suggestion. (i) The Department agrees that the Trust Fund must pay benefits on an interim basis if the operator obtains a stay of payments. This obligation derives from Section 9501 of the Internal Revenue Code, which defines the Fund's operation and payment obligations. 26 U.S.C. 9501. The expenditures which the Fund may undertake include the payment of benefits when the operator liable for benefits ''has not made a payment within 30 days after that payment is due[.]'' 26 U.S.C. 9501(d)(1)(A)(ii). If an operator obtains a stay and a benefit payment comes due during the pendency of the stay, the Trust Fund will make the payment. (ii) Clarification of an operator's benefits obligation during modification proceedings is unnecessary. Section 725.502(a)(1) is unambiguous: ''An effective order shall remain in effect unless it * * * is superseded by an *effective* order issued pursuant to § 725.310'' (regulation implementing modification). Once an effective order exists requiring an operator to pay benefits, the operator must pay until that order is overturned. Filing a modification petition does not supersede an otherwise effective award. The petition merely initiates the process to reopen the award. During the pendency of the modification proceedings and prior to entry of an effective decision on modification, the terms of the existing decision prevail,

and the operator must pay benefits in compliance with that decision. (iii) The commenter cites *Keen* v. *Exxon Corp.*, 35 F.3d 226 (5th Cir. 1994), as a potential loophole to the finality of administrative law judge decisions. In *Keen*, an administrative law judge approved a claim under the Longshore and Harbor Workers' Compensation Act, but ordered the district director to calculate the amount of compensation due. The employer paid the benefits within ten days of the district director's order rather than the administrative law judge's decision. The Court acknowledged that the employer possessed sufficient information to determine for itself the amount of benefits due, rather than wait for the district director's findings. The Court, however, stressed that the administrative law judge's decision was not ''final'' precisely because it required the district director to make the actual computation. No change in the regulations is necessary to account for the practice followed by the administrative law judge in *Keen*. Section 725.502(a)(2) states that an administrative law judge's order becomes ''effective'' when it is filed in the office of the district director. Once an administrative law judge's order is effective, benefits are due under § 725.502(a)(1) and ''shall be paid.'' In any event, orders akin to the one issued in *Keen* are rarely, if ever, used in the black lung program. Awards by administrative law judges ordinarily identify the number of beneficiaries and the onset date(s) for payment. The amount of the prospective benefits to be paid within these parameters is fixed by law; no independent computation by the district director is therefore needed. Moreover, the Department has already placed the burden of computing the retroactive benefits on the district director in § 725.502(b)(2), and made clear that those benefits are not due until the district director issues an order setting the amount. Since § 725.502(b)(1) is unambiguous that prospective benefits must commence by a date certain once an award is effective, the operator cannot use the corollary order for retroactive benefits as a pretext to avoid paying the prospective benefits.

20 CFR 725.503

Several comments take issue with the Department's treatment of the date from which benefits are payable in cases in which a factfinder grants modification on the ground of a change in conditions. One comment urges the Department to require that when the evidence does not establish the specific month in which the miner became totally disabled due to pneumoconiosis, benefits be made retroactive to the date of the adverse decision that was the subject of modification. Another comment states that the revised proposal permits the payment of benefits before the onset of the miner's totally disabling pneumoconiosis, in violation of incorporated provisions of the Longshore Act.

The Department's initial proposal could have led to considerable litigation as to the date from which benefits should be paid in change of condition cases. The Department now proposes a different method to determine this commencement date, one which will give preclusive effect to an earlier factfinder's denial, but will also be relatively easy to apply. In all other successful miners' claims, benefits are awarded as of the month of onset of the miner's totally disabling pneumoconiosis. If that month cannot be established, benefits are payable from the month in which the miner filed his application, based on the logical premise that the filing date would be relatively close to the date on which the miner believed that he was entitled to benefits. This method has worked well in the adjudication of black lung claims in general, and the Department is therefore proposing a similar method for determining the commencement date in change of condition cases. Although every effort will be made to determine the precise date on which the miner became totally disabled due to pneumoconiosis, the date on which the miner requested modification of a previous denial represents an equitable fallback in cases in which the evidence is insufficient to resolve the issue. In determining the commencement date, a factfinder may award benefits prior to the date of the modification request only where credible medical evidence demonstrates that the miner's pneumoconiosis became totally disabling prior to that date. In no event may such evidence be used to justify an award which predates the effective date of the most recent factfinder's denial of the claim. Conversely, a factfinder may not award benefits retroactive to the date of the request where more recent credible evidence demonstrates that the miner did not become totally disabled until a later date.

20 CFR 725.515

The Department did not propose revisions to § 725.515 in its initial notice of proposed rulemaking, 62 FR 3338 (Jan. 22, 1997). The Department has since determined that the regulation should be amended to conform it to applicable law. Section 16 of the Longshore and Harbor Workers' Compensation Act prohibits the garnishment of benefits, 33 U.S.C. 916; this provision is incorporated into the Black Lung Benefits Act. 30 U.S.C. 932(a). Section 725.515 implements section 16. 20 CFR 725.515. In 1975, Congress enacted section 459 of the Social Security Act, 42 U.S.C. 659, to permit the garnishment of federal pay and benefits for alimony and child support obligations. Congress thereafter amended the garnishment provisions in 1977 to clarify their applicability to benefits payments made by the federal government; black lung benefits were specifically excluded from coverage. Congress removed the exclusion, however, in 1996 legislation, which became effective on February 22, 1997. Pub. L. No. 104–193, § 362(d), 110 Stat. 2247. Thus, black lung benefits paid by the Black Lung Disability Trust Fund are subject to garnishment for child support and alimony. The Office of Personnel Management (OPM) is authorized to issue garnishment regulations for the Executive Branch implementing 42 U.S.C. 659. Exec. Order No. 12,105, 43 FR 59,465 (Dec. 19, 1978). OPM recently amended its regulations to conform to the 1996 amendments and permit garnishment of federal black lung benefits paid by the Trust Fund. 63 FR 14,756, 14,758 (March 26, 1998) (to be codified at 5 CFR 581.103(c)(6)). Because 42 U.S.C. 659 is a waiver of sovereign immunity, however, it does not alter any anti-alienation provision governing payments by private parties. *See generally Moyle* v. *Director, OWCP*, 147 F.3d 1116 (9th Cir. 1998), *pet. for cert. filed*, No. 98–927 (Dec. 3, 1998) (holding that 42 U.S.C. 659 authorizes garnishment of longshore benefits payable by the Special Fund to satisfy beneficiary's obligation to pay alimony despite 33 U.S.C. 916, which applies only to private employers or insurers). Consequently, 20 CFR 725.515 must be amended to reflect the limitations on the coverage of section 16: benefits payments by a responsible operator cannot be garnished to satisfy alimony or child support obligations, while payments which are the liability of the Trust Fund can be garnished.

20 CFR 725.533

Section 725.533 was not among the provisions which the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). In connection with the proposed deletion of section 725.403, however, which governs claims filed under section 415 of the Act, 30 U.S.C. 925, the Department proposes

corresponding deletions to paragraphs (b) and (c) of section 725.533. These paragraphs govern the payment of benefits in section 415 claims. Paragraphs (d)–(g) have been redesignated paragraphs (b)–(e). The Department does not intend to alter the rules applicable to any section 415 claim that may still be in litigation, and 20 CFR 725.533(b), (c) will remain applicable to any such claim. Parties interested in reviewing section 725.533 may consult earlier editions of the Code of Federal Regulations or the **Federal Register** in which the regulation was originally published. The Department invites comment on whether section 725.533 should be retained in the Code of Federal Regulations.

20 CFR 725.543

Section 725.543 was not among the provisions which the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997), and the Department did not receive any comments specifically directed to this section. The Department did receive a number of general comments critical of the application of the criteria used to determine whether recoupment of an overpayment would defeat the purposes of title IV of the Federal Coal Mine Health and Safety Act or would be against equity and good conscience. Although the Black Lung Benefits Act incorporates these waiver criteria from the Social Security Act, 30 U.S.C. 923(b), 940, incorporating 42 U.S.C. 404(b), § 725.543 currently incorporates the regulations promulgated by the Social Security Administration under its administration of Part B of the Black Lung Benefits Act. Because virtually no new applications for benefits are filed under Part B, it is unlikely that the Part B regulations will be amended to reflect new interpretations of the statutory criteria by the Social Security Administration and the federal courts. In fact, the Part B regulations currently incorporated in § 725.543 which define ''fault,'' ''defeat the purpose of title IV,'' and ''against equity and good conscience,'' §§ 410.561b, 410.561c, and 410.561d, were last published in the **Federal Register** in 1972. By contrast, the regulations governing claims under Title II of the Social Security Act, contained in 20 CFR Part 404, have been amended to keep pace with current law. Accordingly, the Department proposes to amend section 725.543 to incorporate Social Security's more current standards for establishing waiver of recovery of an overpayment.

20 CFR 725.544

Section 725.544 was not among the regulations which the Department opened for comment in its previous notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). One comment pointed out, however, that current law allows agencies of the United States to compromise claims of the United States government of not more than $100,000. The Department proposes to amend the regulation to reflect this change, and to delete the reference to the Federal Claims Collection Act of 1966, which has been repealed. The relevant provision governing compromise of claims by the United States is now codified in the United States Code at 31 U.S.C. 3711.

20 CFR 725.547

(a) The original proposal extended the right to seek waiver of recovery of an overpayment to all claimants, without regard to whether recovery was sought by a responsible operator or the Black Lung Disability Trust Fund. Many commenters urge the Department to promulgate rules governing recovery of overpayments based on the incorporated provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914(j), 922, as incorporated by 30 U.S.C. 932(a). Pursuant to these provisions, overpaid amounts may be recovered only by withholding future benefit payments. Other commenters object to the proposal on the ground that it will make more difficult operator recovery of overpayments. The policy considerations governing this regulatory revision were fully discussed in the Department's original proposal, 62 FR at 3366–3367 (Jan. 22, 1997), and the comments suggest no new basis for further change.

(b) Several comments state that this rule would unconstitutionally deprive operators of property rights, while other comments argue that it would deprive operators of an effective right of appeal. The process used to adjudicate applications for black lung benefits provides coal mine operators with the right to notice and the opportunity for a hearing before the issuance of an effective award, the only award which mandates payment by a coal mine operator. Federal courts have considered similar allegations with respect to the entitlement adjudication scheme used under the Longshore Act, a scheme identical to that used to adjudicate claims for black lung benefits, and have unanimously concluded that the Longshore Act does not violate employers' constitutional rights. *Schmitt* v. *ITT Federal Electric Int'l.*, 986 F.2d 1103 (7th Cir. 1993); *Abbott* v. *Louisiana Insurance Guaranty Ass'n.*, 889 F.2d 626 (5th Cir. 1989), *cert. denied*, 494 U.S. 1082 (1990). Because the Longshore Act is even more restrictive regarding an employer's right to recover an overpayment than the Department's proposed black lung benefits regulations, *see* 62 FR 3366 (Jan. 22, 1997), the Department does not agree that the proposed scheme is unconstitutional. Similarly, there is no constitutionally recognized right of appeal. As under the Longshore and Harbor Workers' Compensation Act, operators may appeal in order to reduce their future benefit obligations, but success on appeal does not necessarily mandate the repayment of all previously paid benefits. Moreover, notwithstanding the proposal, coal mine operators may seek recoupment of any overpaid amounts. In fact, they are entitled to repayment provided the claimant is not entitled to waiver. These waiver provisions have been used by the Department throughout its administration of Part C of the Act to determine whether an overpaid claimant must repay amounts owed the Black Lung Disability Trust Fund. The Department's experience clearly demonstrates that application of these waiver criteria does not wholly foreclose the recoupment of overpaid amounts.

(c) One comment states that the Department's legal analysis of the overpayment issue neglected § 430 of the Black Lung Benefits Act, 30 U.S.C. 940. Section 430 provides that the provisions of the Black Lung Benefits Act of 1972, the Black Lung Benefits Reform Act of 1977, and the Black Lung Benefits Amendments of 1981 applicable to Part B of the Black Lung Benefits Act shall also apply, as appropriate, to Part C of the Act. None of these statutory enactments prohibits the Department from applying the same waiver criteria to the recoupment of overpaid amounts by both operators and the Black Lung Disability Trust Fund.

(d) Several comments address the test used to determine whether or not claimants are entitled to waiver of recoupment, §§ 725.542, 725.543. The Department also heard considerable testimony at both hearings on the overpayment issue. The Department does not contemplate changing the legal test for waiver since it is based on statutory language incorporated into the BLBA from the Social Security Act, 30 U.S.C. 923(b), 940, incorporating 42 U.S.C. 404(b). The Department has altered § 725.543 to make the Department's interpretation of these criteria consistent with the current

Social Security Administration standards.

20 CFR 725.548

In both its current version and the Department's proposed revision, section 725.547 is titled ''Applicability of overpayment and underpayment provisions to operator or carrier.'' Despite this title, the regulation contains two paragraphs, (c) and (d), that are intended to apply to overpayment and underpayment issues regardless of whether the Black Lung Disability Trust Fund or a responsible operator is liable for the payment of benefits. These paragraphs authorize the district director to enter appropriate orders to protect the rights of the parties with regard to overpayments or underpayments, and provide that disputes arising out of such orders are to be resolved using the same procedures used to resolve entitlement and liability issues. In reviewing its proposed revision to section 725.547, the Department realized that the title of the regulation might mislead parties into believing that paragraphs (c) and (d) are applicable only in cases involving responsible operator liability. Because the Department intends that the same procedures be used to adjudicate overpayment and underpayment issues regardless of the liable party, the Department proposes that paragraphs (c) and (d) be relocated in a separate regulation with a more general title. Consequently, the Department proposes the addition of section 725.548, titled ''Procedures applicable to overpayments and underpayments.''

Subpart I

20 CFR 725.606

(a) Paragraph (c), as originally proposed, contains a typographical error. In the first sentence, the second reference to paragraph (a) should be a reference to paragraph (b). Paragraph (b) describes the amount of negotiable securities which an employer must deposit with a Federal Reserve Bank to secure the payment of benefits.

(b) One comment disagrees generally with the requirement for post-award security by coal mine construction employers, and the imposition of personal benefits liability on certain corporate officers if the employer fails to obtain security. The objection to post-award security is unfounded because the Black Lung Benefits Act authorizes it. Any operator of a coal mine, as defined by 30 U.S.C. 802(d), is required to obtain insurance or qualify as a self-insurer to ensure its financial ability to meet its potential benefits liabilities. 30 U.S.C. 933(a). Section 422(b) excepts certain employers engaged in coal mine construction or transportation from these requirements, provided they are not also operators of coal mines. 30 U.S.C. 932(b). The exception effectively permits these employers to confront their liabilities as they occur on a claim-by-claim basis, rather than anticipate funding for their liabilities through insurance or self-insuring. Section 422(b), however, further states: ''Upon determination by the Secretary of the eligibility of the employee, the Secretary may require [a coal mine construction or transportation] employer to secure a bond or otherwise guarantee the payment of such benefits to the employee.'' 30 U.S.C. 932(b). Although these employers need not insure themselves against prospective liability, they may be required to secure benefits once a claim is awarded. If the employer fails or refuses to obtain security for an existing award after being ordered to do so, that employer is no different than a coal mine operator who does not fulfill its legal obligation to insure or self-insure its potential liability for future awards. While the statute provides several coercive remedies against such employers, section 423(d)(1) also authorizes the Department to impose liability, in the case of a corporation, on its president, secretary and treasurer for any benefits which accrue during the period of the corporation's dereliction. No reason exists to treat corporate officers of a construction or transportation firm differently from corporate officers of a coal mine operator. In either case, the employer is legally required (by the statute or Secretary's order) to secure its liability, and has failed to satisfy that requirement. Section 423(d)(1) simply provides the Department with one tool to enforce the liable employer's obligation.

The same commenter also states that proposed § 725.606 addresses a nonexistent problem because the construction industry already complies with its obligations. The commenter's observation does not provide a legal basis for excluding construction companies from the employer community subject to security requirements imposed by statute. The original notice of proposed rulemaking, 62 FR 3367–3368 (Jan. 22, 1997), describes the Department's objectives for improving and clarifying the operation of the security provisions. The possible absence of a significant problem does not relieve the Department of its responsibility to identify all parties' obligations under the Black Lung Benefits Act and to set forth more efficient procedures to enforce them.

(c) One comment supports requiring the posting of security for the payment of benefits by coal mine construction and transportation employers.

Subpart J

20 CFR 725.701

(a) A number of commenters objected to the Department's initial proposal governing the compensability of medical benefits, because it included a rebuttable presumption that if a miner receives treatment for a pulmonary disorder, that disorder is caused or aggravated by the miner's pneumoconiosis. 62 FR 3423 (Jan. 22, 1997). Several commenters argued that this presumption would impose significantly greater costs on responsible operators and result in the payment of medical bills related to smoking. Others argued that the Department had no authority to promulgate such a presumption and that the presumption was medically unsound. The Department disagrees and believes that the proposed presumption is both appropriate and necessary.

In its initial notice of proposed rulemaking, the Department cited the Fourth Circuit's decision in *Doris Coal Co.* v. *Director, OWCP,* 938 F.2d 492 (4th Cir. 1991), in support of its proposal to codify a rebuttable presumption that treatment that a miner receives for a pulmonary condition, as described in § 725.701, represents treatment for the miner's pneumoconiosis and therefore is compensable. As proposed, this presumption would be available only to miners who have established their total disability due to pneumoconiosis arising out of coal mine employment and are therefore already entitled to monthly cash benefits. The presumption would also apply only to treatment, enumerated in the regulation, for a pulmonary disorder. The presumption could be rebutted by evidence demonstrating that the condition for which the miner received treatment was unrelated to, and was not aggravated by, the miner's pneumoconiosis.

Since publication of the Department's initial notice of proposed rulemaking, the Sixth Circuit has also issued a decision addressing the compensability of medical expenses incurred as a result of treatment for totally disabling pneumoconiosis. In *Glen Coal Co.* v. *Seals,* 147 F.3d 502 (6th Cir. 1998), a majority of the panel (Judges Dowd and Boggs) held that the administrative law judge and the Benefits Review Board

had erred in applying the *Doris Coal* presumption to a miner whose coal mine employment took place within the jurisdiction of the Sixth Circuit. Although Judge Dowd's majority opinion would have invalidated the presumption on a number of grounds, including its inconsistency with Congressional intent underlying the BLBA, *see* 147 F.3d at 513, Judge Boggs's concurrence (necessary for the majority's holding) did not extend so far. Instead, Judge Boggs specifically noted that he would ''agree with the dissent (and disagree with Judge Dowd) that it would not necessarily contravene *Greenwich Collieries* for the Secretary to adopt a regulation shifting the burden of production in the manner of *Doris Coal*.'' *Id.* at 517. Finally, Judge Moore's concurring and dissenting opinion would have upheld the *Doris Coal* presumption on deference grounds.

Recently, the Fourth Circuit clarified the presumption it created in *Doris Coal.* In *Gulf & Western Indus.* v. *Ling,* __F.3d__, 1999 WL 149851 (4th Cir. Mar. 19, 1999), the court held that the *Doris Coal* presumption does not shift the burden of persuasion to the employer to prove that the miner's respiratory or pulmonary treatment was not related to black lung disease. Rather, the burden of proving that the medical expense is covered by the black lung benefits award remains always on the miner. The *Doris Coal* presumption simply eases the miner's initial burden by allowing the miner to present a bill for treatment of his respiratory or pulmonary disorder or related symptoms. If the employer then

> produces credible evidence that the treatment is rendered for a pulmonary disorder apart from those previously associated with the miner's disability, or is beyond that necessary to effectively treat a covered disorder, or is not for a pulmonary disorder at all, the mere existence of a medical bill, without more, shall not carry the day. The burden of persuading the factfinder of the validity of the claim remains at all times with the miner.

1999 WL 149851 at *5.

The Department believes that black lung benefit claims adjudication should vary as little as possible from circuit to circuit, and consequently has proposed a regulatory presumption that would apply nationwide. Like any agency, however, the Department may only promulgate a regulatory presumption when there exists a rational connection between the proven facts and the presumed facts. *Chemical Manufacturers Association* v. *Department of Transportation,* 105 F.3d 702, 705 (D.C. Cir. 1997); *NLRB* v. *Baptist Hosp., Inc.,* 442 U.S. 773, 787 (1979). The proposed § 725.701 presumption would arise only after the miner establishes that he suffers from totally disabling pneumoconiosis arising out of coal mine employment, a fact that must be considered conclusively proven absent a successful request for modification from the responsible operator or fund. In addition, before invocation of the presumption, the miner must show that he received medical treatment within the scope of § 725.701 for a respiratory or pulmonary condition. Thus, prior to invocation of this presumption, the miner has demonstrated by means of credible medical evidence that he suffers from a compensable total disability. In addition, the miner has established that he received treatment covered by the proposed regulation for a pulmonary disorder. The Department's proposal would presume only one fact: that the pulmonary treatment for which the miner seeks payment was for his already-established totally disabling pneumoconiosis.

The Department's proposed definition of pneumoconiosis demonstrates the rational connection between the facts the miner must prove and the resulting presumption. Pursuant to proposed § 718.201, which has been endorsed by the National Institute of Occupational Safety and Health, a miner who has established the existence of pneumoconiosis has necessarily established that he suffers from a ''chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'' § 718.201(b); *see also* 20 CFR 718.201 (1998). Consequently, any treatment for the miner's compromised respiratory or pulmonary condition suggests, even if it does not conclusively demonstrate, that the miner's previous dust exposure has contributed to the need for that treatment. In addition, the miner's proof that he is totally disabled due to pneumoconiosis establishes that his pneumoconiosis is a substantially contributing cause of his total disability. § 718.204(c). This fact also suggests that the treatment of the miner's respiratory or pulmonary system is made necessary by his pneumoconiosis. Finally, the Department notes that it receives 12,000 to 15,000 medical bills per week, most of which are for relatively small amounts, $25.00 to $75.00. The Department must process these claims in a cost effective and prompt manner. The Department believes that it would be unreasonable to require miners to prove that each treatment expense is for pneumoconiosis when: (1) Each miner has already proven that he is totally disabled by pneumoconiosis arising out of coal mine employment; (2) the bills are for treatment of a pulmonary disorder, and (3) the bills are generally for relatively small amounts. In such circumstances, the Department believes it appropriate to presume that the miner's treatment for a pulmonary disorder is treatment for pneumoconiosis. The Department also believes it appropriate to require coal mine operators to produce credible evidence that the disorder being treated is neither related to nor aggravated by pneumoconiosis in order to escape liability. The Department does not agree, however, that the presumption will require operators to pay for medical treatment attributable to smoking alone. Operators remain free to rebut the presumption in such cases with appropriate medical evidence.

(b) The Department proposes to delete the reference in subsection (b) to ''ancillary pulmonary conditions.'' In light of the confusion reflected in Judge Dowd's majority opinion in *Seals,* and given the broad statutory and regulatory definition of the term ''pneumoconiosis,'' the Department does not believe that this language is necessary. The proposed revision is not intended to narrow the scope of medical benefits available under the Black Lung Benefits Act. Under subsections (b) and (c), a broad range of medical services and supplies will be considered necessary for the treatment of a miner's pneumoconiosis. The proposed presumption in subsection (e) will further ensure that miners who have been determined to be totally disabled due to pneumoconiosis are compensated for any medical service or supply necessary for the treatment of a pulmonary condition unless the responsible operator or fund can prove that the medical service or supply was not for a covered pulmonary disorder as defined in § 718.201. In order to further clarify the Department's intent, the Department proposes to revise the language in subsection (e) by replacing the word ''treatment'' with the phrase, ''medical service or supply.'' This change is intended to ensure that the subsection (e) presumption covers any medical supply or service that may be considered necessary under subsections (b) and (c).

The Department also proposes to amend the language in subsection (f) to clarify its intent. Evidence which is inconsistent with the established facts underlying the miner's entitlement to benefits cannot be used to show that the treatment is not compensable. An

attempt to use such evidence in this context would amount to impermissible relitigation of facts which have been finally determined. In determining whether the treatment is compensable, a treating physician's opinion may be entitled to controlling weight pursuant to § 718.104(d). In addition, a finding that a particular medical service or supply is not compensable shall not otherwise affect the miner's entitlement to benefits.

20 CFR Part 726—Black Lung Benefits; Requirements for Coal Mine Operators' Insurance

Subpart A—General

20 CFR 726.8

(a) In the initial notice of proposed rulemaking, the Department proposed new definitions of ''employ'' and ''employment'' which apply to both Part 725 and 726. *See* 62 FR 3410 (§ 725.493(a)(1)), 3426 (§ 726.8(d)) (Jan. 22, 1997). The definitions were identical. For the reasons set forth in the response to comments concerning § 725.493(a)(1), the Department has determined that more specific language defining ''employment'' is appropriate to clarify its purpose. The same change is incorporated into § 726.(8)(d) for the same reason.

(b) One comment contends that section 726.8(d) is ''illegally'' retroactive in operation and creates unfunded liabilities for insurance carriers by expanding coverage. For the reasons set forth in the response to comments concerning § 725.2, the Department does not believe that the retroactive application of regulatory changes is prohibited, or the instrument for the creation of additional liability.

The same commenter also states that the proposed regulatory definitions intrude on insurance functions reserved for the states. Because the commenter does not cite any legal authority or identify which state functions the proposed regulation affects, the Department is unable to determine the commenter's precise concerns. Moreover, the Seventh Circuit has held that the Black Lung Benefits Act ''specifically relates to the business of insurance and therefore does not implicate the McCarran-Ferguson Act,'' 15 U.S.C. 1012, which confers primacy on state law for the regulation of the insurance industry unless a conflicting federal statute specifically provides otherwise. *Lovilia Coal Co.* v. *Williams,* 143 F.3d 317, 325 (7th Cir. 1998). The commenter's objection therefore provides no basis for the further revision of this regulation.

(c) Two comments state that the proposed definitions are overbroad and make impossible the identification of which employees are covered by an insurance policy. The Department disagrees. The definition of ''employee'' must be read in context with the definition of ''miner'' in § 725.202. Only coal miners (and their survivors) are entitled to benefits under the Black Lung Benefits Act, and only those individuals are of concern to an insurance carrier writing a policy under the Act. In determining whether a particular employee is covered by the insurance policy, the insurer must determine whether the individual is a ''miner'' as defined by the Act and § 725.202. The insurer therefore must conduct a thorough investigation of the employer's business, the nature of the contacts with the coal mining industry, and the type of work each employee performs. This information will provide the basis for calculating the premium necessary for full coverage of the employer's potential liabilities. The burden of covering the responsible operator's liability and obtaining an appropriate premium rests on the insurer. *See Lovilia Coal Co.* v. *Williams,* 143 F.3d 317, 323 (7th Cir. 1998) (holding that insurance carrier must cover operator's entire liability under the Act and ''bears the burden of collecting proper premiums for all covered miners.''). Finally, the Department notes that the goal of broad insurance coverage for employees implements Congress' express intent to hold the coal mine operator community liable for individual claims to the maximum extent possible. *See* S. Rep. No. 95–209, *reprinted in* Comm. On Education and Labor, House of Representatives, 96th Cong., ''Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977'' (Comm. Print) at 612. Section 726.8(d) reflects the Department's policy to vigorously effectuate that intent. Because an insurance carrier assumes the responsibility for benefits ascribed to its insured operator, that responsibility must encompass every employee of the operator who qualifies as an eligible miner under the Act. *Williams,* 143 F.3d at 323; *see also National Mines Corp.* v. *Carroll,* 64 F.3d 135, 140 (3d Cir. 1995); *Tazco, Inc.* v. *Director, OWCP,* 895 F.2d 949, 951 (4th Cir. 1990).

Subpart C

20 CFR 726.3

Section 726.3 was not among the regulations which the Department opened for comment in its previous notice of proposed rulemaking. 62 FR 3350 (Jan. 22, 197). In reviewing the current proposal for publication, the Office of the Federal Register requested that the Department revise paragraph (b) in order to clarify how cases will be treated when the regulation in Part 726 appear to conflict with regulations incorporated from 725. This revision is not intended to make any substantive change in the regulation. In addition, the Department is removing references to Parts 715 and 720 from paragraph (a). Those parts were repealed in 1978, 43 FR 36772 (Aug. 18, 1978), and the regulations they contained should no longer be considered applicable to Part 726.

Subpart C

20 CFR 726.203

Section 726.203 was not among the regulations which the Department opened for comment in its previous notice of proposed rulemaking. 62 FR 3341 (Jan. 22, 1997). At the Washington, D.C. hearing, however, the Department heard testimony indicating that the insurance industry has used a different version of the endorsement contained in subsection (a) since 1984. An insurance industry representative testified that the change was ''acknowledged by the department as language acceptable for securing workers compensation under the federal Act.'' Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations,* July 22, 1997, p. 127 (testimony of Robert Dorsey). In its written comments, the insurance industry noted that after notification of changes in the insurance policy language, ''the Department agreed that the new endorsements were acceptable.'' The version provided by the insurance industry states as follows:

This endorsement applies only to work in a state shown in the Schedule and subject to the Federal Coal Mine Health and Safety Act of 1969 (30 USC Sections 931–942). Part One (Workers Compensation Insurance) applies to that work as though that state were shown in item 3.A. of the Information Page.

The definition of workers compensation law includes the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. Sections 931–942) and any amendment to that law that is in effect during the policy period.

Part One (Workers Compensation Insurance), section A.2., How This Insurance Applies, is replaced by the following:

Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period or, when the last exposure occurred prior to July 1, 1973, a claim based on that disease must be

first filed against you during the policy period shown in item 2 of the Information Page.

Schedule
State

Following the hearing, the Department searched its records. Although those records reflect a meeting with a representative of the insurance industry in 1984, the Department was unable to find any document authorizing the use of the different endorsement. If the insurance industry has such a document in its files, the Department requests that it send it to James L. DeMarce at the address listed in this notice. In addition, to allow thorough evaluation of the endorsement the industry now suggests, the insurance industry should supply the Department with a copy of the insurance policy to which the endorsement is attached. Finally, although it is not currently proposing revision of § 726.203, the Department requests comment on the possible use of this endorsement. In preparing those comments, individuals should take note of the Department's requirement in § 726.205 that endorsements other than those provided by § 726.203 may be used provided they do not ''materially alter or attempt[] to alter an operator's liability for the payment of any benefits under the Act * * *'' 20 CFR 726.205.

Drafting Information, this document was prepared under the direction and supervision of Bernard Anderson, Assistant Secretary of Labor for Employment Standards.

The principal authors of this document are Rae Ellen James, Deputy Associate Solicitor; Richard Seid, Counsel for Administrative Litigation and Legal Advice; and Michael Denney, Counsel for Enforcement, Black Lung Benefits Division, Office of the Solicitor, U.S. Department of Labor. Personnel from the Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, assisted in the preparation of the document.

Executive Order 12866

The Office of Information and Regulatory Affairs of the Office of Management and Budget has determined that the Department's proposed rule represents a ''significant regulatory action'' under section 3(f)(4) of Executive Order 12866 and has reviewed the rule.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, as well as E.O. 12875, this rule does not include any federal mandate that may result in increased expenditures by State, local and tribal governments, or increased expenditures by the private sector of more than $100 million.

Paperwork Reduction Act

The proposed changes would establish no new record keeping requirements. Moreover, they seek to reduce the volume of medical examination and consultants' reports which are currently created solely for the purpose of litigation by limiting the amount of such medical evidence which will be admissible in black lung proceedings.

Regulatory Flexibility Act, as Amended

The Regulatory Flexibility Act (''RFA'') was enacted by Congress in 1980 ''to encourage administrative agencies to consider the potential impact of nascent federal regulations on small businesses.'' *Associated Fisheries of Maine, Inc.* v. *Daley*, 127 F.3d 104, 111 (1st Cir. 1997). Unless the agency is able to certify that the rule will not have ''a significant economic effect on a substantial number of small entities,'' 5 U.S.C. 605, each agency that publishes a notice of proposed rulemaking must prepare an ''initial regulatory flexibility analysis'' describing the impact of the proposed rule on small entities. 5 U.S.C. 603(a). That analysis, or a summary of the analysis, must be published in the **Federal Register** when the notice of proposed rulemaking is published, and a copy of the analysis must be sent to the Chief Counsel for Advocacy of the Small Business Administration.

In its initial notice of proposed rulemaking, the Department certified that the proposed revisions would not have a significant effect on a substantial number of small businesses. 62 FR 3371–73 (Jan. 22, 1997). The Department's certification was criticized by both the coal mining industry and the Small Business Administration's Office of Advocacy. Industry argued that the Department had grossly underestimated the effect of the proposed rule. The Office of Advocacy observed that the Department had not used the size standards established by the Small Business Administration, and that the Department did not provide a factual basis for its certification. In particular, the Office of Advocacy took issue with the Department's interpretation of the term ''significant economic effect.''

In light of the concerns raised by the commenters, the Department has determined that an initial regulatory flexibility analysis is appropriate. The RFA mandates that each analysis contain certain components: (1) a statement of the reasons for issuing the proposed rule; (2) a statement of the objectives of, and legal basis for, the proposed rule; (3) a description and, where feasible, an estimate of the number of small businesses to which the rule will apply; (4) a description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification of any rules that overlap, duplicate, or conflict with the proposed rule. 5 U.S.C. 603(a). Finally, the analysis must contain a description of significant alternatives to the rule that accomplish the stated objectives and minimize the significant economic impact on small businesses, including the establishment of different compliance requirements or exemptions for small businesses. 5 U.S.C. 603(b). In determining the effects of a proposed rule, or alternatives to the proposed rule, ''an agency may provide either a quantifiable or numerical description of the effects * * * or more general descriptive statements if quantification is not practicable or reliable.'' 5 U.S.C. 607. Once the analysis has been published in the **Federal Register**, either in full or in summary form, the RFA also requires administrative agencies to assure that small businesses have a full opportunity to participate in the rulemaking by providing them with additional notification. 5 U.S.C. 609.

Reasons for, and Objectives of, the Proposed Rule

The Department's proposal is intended to update the regulations that implement that Black Lung Benefits Act. The Act provides both monetary and medical benefits to miners who are totally disabled by pneumoconiosis arising out of coal mine employment, and monthly monetary benefits to the survivors of miners who die as a result of the disease. These regulations establish: (1) the procedures used to process and adjudicate benefit applications (Part 725); (2) the criteria used to determine whether applicants are eligible for benefits (Parts 718 and 727); (3) the requirements for coal mine operators who must secure the payment of benefits (Part 726); and (4) the standards for approving state workers' compensation programs (Part 722). The Department has proposed revising these regulations in order to accomplish several goals:

(1) A substantial number of the proposed rules would simply codify decisions by the courts of appeals and the Benefits Review Board. In many cases, these decisions were issued by courts with jurisdiction over the states

in which most of the country's coal mining takes place, and thus already govern the adjudication of a majority of claims. In order to make sure all interested parties are aware of these decisions, and in particular to ensure that claimants who are not represented by counsel are not disadvantaged by being unaware of these decisions, the Department is proposing to codify these decisions in its implementing regulations. Codification of court decisions in rules of nationwide applicability will ensure uniform treatment of the parties. The Department's proposed revisions also codify changes to statutes other than the Black Lung Benefits Act which affect the Department's administration of the Act, including changes to the Social Security Act governing garnishment, and the statute governing the collection of debts owed the federal government.

(2) In addition, the Department is proposing these revisions to make the adjudication of claims a more equitable process, and to ensure that the affected public perceives the process as fair. For example, the Department has proposed limiting the amount of documentary medical evidence parties to a claim may submit in order to encourage the parties to focus on the quality of the medical evidence they develop instead of its quantity. The Department has also proposed requiring that the factfinder recognize certain factors that may make the opinion of the miner's treating physician worthy of more weight. Similarly, the proposal would ensure that claimants who receive overpayments are treated equally regardless of whether the overpayment was made by the Black Lung Disability Trust Fund or a coal mine operator. Finally, the Department has proposed revisions to the rules governing attorneys' fees in an effort to make attorneys more willing to represent black lung claimants.

(3) Several of the proposed revisions are designed to simplify the regulatory language and clarify the Department's original intent when the regulations were first promulgated. These proposals include ensuring the uniform application of the quality standards to medical evidence developed in connection with a black lung benefits claim and refining the definitions of key terms such as ''miner'' and ''one year.'' The Department has also proposed revisions to the regulations governing the eligibility of dependents and survivors in order to clarify the statute and insure implementation of Congressional intent.

(4) The Department has proposed several measures designed to protect the Black Lung Disability Trust Fund, which pays claimants benefits when no coal mine operator or insurer may be held liable. Specifically, the Department proposes to revise the regulations governing the imposition of civil money penalties on coal mine operators that fail to secure the payment of benefits as required by the Act, either by purchasing commercial insurance or by qualifying as a self-insurer. The Department has also proposed revisions to the process used to identify the party responsible for the payment of benefits, including changes to regulations governing the submission of evidence relevant to operator liability and the substantive criteria used to determine such liability. Finally, the Department has proposed revising the process by which uninsured coal mine operators, including coal mine construction and transportation companies, may be compelled to post security once they have been found liable for the payment of an individual claim.

(5) A number of the regulatory proposals are designed to improve the services the Department provides to parties to black lung benefits claims. These proposals include revisions that streamline the adjudication of claims, for example, by defining the parties' obligation to attend an informal conference. They also include revisions intended to ensure that beneficiaries receive all of the benefits to which they are entitled in a timely manner. The Department has proposed eliminating or replacing outdated regulations, such as those governing the Department's certification of state workers' compensation programs.

(6) Finally, the Department is proposing revisions that take into account changes that have occurred over the past 20 years in the diagnosis and treatment of pneumoconiosis. For example, the Department has proposed revising the definition of pneumoconiosis to recognize the progressive nature of the disease and the possibility that a miner's coal mine dust exposure may have contributed to the development of either obstructive or restrictive lung disease. The Department has also proposed revisions in the standards for administering pulmonary function tests and in the adjudication of the compensability of medical expenses.

Legal Basis for the Proposed Rule

The Black Lung Benefits Act grants the Secretary broad authority to issue regulations. Section 422(a) of the Act provides that ''[i]n administering this part [Part C of the Act], the Secretary is authorized to prescribe in the **Federal Register** such additional provisions * * * as [s]he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.'' 30 U.S.C. 932(a). Section 426(a) of the Act similarly authorizes the Secretary to ''issue such regulations as [she] deems appropriate to carry out the provisions of this title.'' 30 U.S.C. 936(a). The Act also authorizes the Secretary to promulgate regulations on specific subjects, such as criteria for medical tests, 30 U.S.C. 902(f)(1)(D), standards for assigning liability to coal mine operators, 30 U.S.C. 932(h), and regulations governing insurance contracts, 30 U.S.C. 933(b)(3). In addition, the Department, like any other administrative agency, possesses the inherent authority to promulgate regulations in order to fill gaps in the legislation that it is responsible for administering. *Chevron* v. *Natural Resources Defense Council,* 467 U.S. 837, 843–44 (1984); *Pauley* v. *Bethenergy Mines, Inc.,* 501 U.S. 680, 696 (1991).

Small Businesses to which the Rule will Apply

The Regulatory Flexibility Act requires an administrative agency to describe and, where feasible, estimate the number of small entities to which a proposed rule will apply. 5 U.S.C. 603(b)(5). Small entities include small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(6). The Black Lung Benefits Act, however, does not seek to regulate small organizations or small governmental jurisdictions. Accordingly, this analysis is limited to the effect of the proposed rule on small businesses. By its terms, the Black Lung Benefits Act imposes obligations on coal mine operators. 30 U.S.C. 932(b) (''each such operator shall be liable for and shall secure the payment of benefits * * *.''). An operator is defined, for purposes of the black lung benefits program, as ''any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine.'' § 725.491(a)(1); 30 U.S.C. 802(d).

In assessing the impact of the proposed rule on operators that may be considered small businesses, the RFA requires an agency to use the definitions of the term ''small business'' used by the Small Business Administration unless the agency, after consultation with SBA's Office of Advocacy and opportunity for public comment, establishes its own definition. 5 U.S.C. 601(3). SBA's definitions, set forth in 13

CFR 121.201, are grouped according to Standard Industrial Codes (SICs) used by the Bureau of the Census. For purposes of identifying the small businesses to which the Black Lung Benefits Act and its implementing regulations apply, two categories are applicable: Coal Mining (SIC Codes 1220, 1221, 1222, 1230, and 1231) and Coal Mining Services (SIC Codes 1240 and 1241). SBA defines a small business in the coal mining industry as one with fewer than 500 employees, and a small business in the coal mining services industry as one with less than $5 million annually in receipts.

The Department has prepared an extensive economic analysis of the effect of the proposed rule on small businesses in the coal mining industry. A copy of that analysis is available on request from James L. DeMarce, Director, Division of Coal Mine Workers' Compensation, Room C–3520, Frances Perkins Building, 200 Constitution Ave., N.W., Washington, DC 20210. In the analysis, the Department specifically requests comments on a number of the assumptions underlying its conclusion. These include the relationship between increases in the claims approval rate and increases in insurance premiums; the relationship between increased medical costs and increases in insurance premiums; and the extent to which promulgation of these revisions will result in an increase in the number of claims filed.

The Department's analysis, using data maintained by the Mine Safety and Health Administration, indicates that, in 1995, 2,811 of 2,822 establishments, consisting of mines and preparation plants, employed less than 500 people (Exhibit C, total of all establishments employing less than 500 people). Of these establishments, 1,581 were associated with mining bituminous coal at a surface mine, 1009 mined bituminous coal underground, and 221 mined anthracite coal. When individual establishments are aggregated into parent companies, the Department found that 898 of 933 companies employed less than 500 people, and thus meet SBA's definition of a small business (Exhibit D).

It is not feasible to estimate precisely the number of independent contractors engaged in coal-mine related activities that meet SBA's definition, for example, those involved in coal mine construction and coal transportation. Data provided the Department by SBA (also available at http://www.sba.gov/ADVO/) with respect to firms in the coal mining services industry does not permit the direct identification of specific firms with less than $5 million annually in receipts. The data lists firms in categories according to the number of employees (*e.g.,* 1–4, 5–9), and provides the total estimated annual receipts for all of the firms in each category. Thus, at best, the data allows only an estimate of the average annual receipts of each firm within a given category. In the case of firms engaged in coal mining services, SBA data suggests that firms with 20 or more employees have average annual receipts that exceed the SBA cutoff. For example, 9 firms with between 20 and 24 employees had total annual estimated receipts in 1994 of $48,240,000. Thus, the average annual receipts of each firm in this category exceeds $5 million. Because 209 of the 275 firms engaged in coal mining services have fewer than 20 employees, the Department estimates that no more than 209 coal mining services firms will be affected by the proposed rule. The Department notes that this estimate may not include all coal mine construction and coal transportation companies. Because coal mine construction or coal transportation may not be the primary source of income for these companies, they may not appear in the SBA's data under the SIC Code covering coal mining services. The Department cannot estimate the number of firms that are excluded from SBA's data.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule

The revisions proposed by the Department to its black lung regulations will not impose any additional reporting or recordkeeping requirements on small businesses. The analysis of additional costs that follows is derived from the Department's extensive economic analysis of the effect of the proposed rule on small businesses in the coal mining industry. References are to exhibits that accompany that report. The costs associated with the proposed rule involve possible increases in benefit payments, including monetary disability benefits and medical benefits, and increases in transaction costs incurred in the defense of claims under the Act. These costs will be imposed on coal mine operators either directly, in the case of coal mine operators that self-insure their obligations under the Act, or indirectly, in the case of coal mine operators that purchase commercial insurance. The latter group will absorb the increased costs through increases in insurance premiums. Because self-insurers are required to have a net worth of more than $10 million, and are able to take advantage of economies of scale in absorbing these costs, the Department's economic analysis focused on companies with commercial insurance. Increased costs on commercially insured operators will be higher than those imposed on self-insurers (which would have purchased commercial insurance if it were less expensive) and thus will overstate the costs to the coal mining industry as a whole.

The Department has concluded that insurance rates, typically between $.56 (for bituminous coal operators in Pennsylvania) and $5.38 (for anthracite coal operators in Pennsylvania) per $100 of payroll (Exhibit F), may be expected to rise by a total of 41.7 percent in the first two years and 39.3 percent in the long term. The Department has calculated the percentage increase in price that operators in a representative sample of states will need to charge in order to cover increased cost of the Department's proposed revisions. That cost ranges from .35 % (for West Virginia operators with 50 to 100 employees) to 3.3 % (for anthracite operators) (Exhibit O). The Department concludes that these price increases will fall most heavily on coal mine operators with less than 20 employees. The increases will clearly be significant, and although a number of small mine operators will be able to recoup their costs, less well-positioned bituminous operators and contract mine operators will face the greatest difficulty in doing so. As a result, some operators in those groups may be forced to suspend operations.

In addition, the proposed rule requires several specific actions on the part of coal mine operators. Operators that do not purchase commercial insurance to secure their liability for black lung benefits, including both operators that are authorized to self-insure and operators that are not required to obtain insurance, will be required to respond more promptly to notice from the Department that a claim has been filed by one of their former employees. *See* § 725.407. Specifically, they will have 90 days from receipt of notice to supply the Department with information relevant to their employment of the miner. Operators that have not secured their liability will also be required to post security in the event that they are held liable for the payment of benefits on an individual claim. *See* § 725.606. Operators that have been authorized to self-insure their liability under the Act will be required to maintain security for their claims even after they leave the coal mining business. *See* § 726.114. Finally, the Department's revisions are intended to enhance its ability to enforce civil

money penalties against operators that fail to comply with the Act's security requirements, and thus may impose additional costs on operators that are not currently in compliance with the Act's requirements. *See* Part 726, Subpart D. The remaining revisions do not impose on operators any additional compliance requirements beyond those in the Department's current regulations.

Rules that Overlap, Duplicate, or Conflict with the Proposed Rule

There are no other rules of which the Department is aware that overlap, duplicate, or conflict with the Department's proposed rule.

Significant Alternatives to the Rule

The Regulatory Flexibility Act requires the Department to consider alternatives to the rule that would minimize any significant economic impact on small businesses without sacrificing the stated objectives of the rule. 5 U.S.C. 603(b). The Black Lung Benefits Act places severe constraints on the Department's ability to target its proposed rule in order to minimize its impact on small business. The use of SBA's size standard would require the Department to seek ways of protecting more than 96 percent of the companies in the coal mining industry (898 of the 933 companies). Even using a 20-employee size standard, and thus focusing attention on the operators most likely to face significant additional costs, the Department's ability to reduce the economic impact of the proposal is limited.

Most of the revisions proposed by the Department affect the criteria used to determine a claimant's entitlement to benefits. The Black Lung Benefits Act requires that benefits be paid to each miner who is totally disabled as a result of pneumoconiosis arising out of coal mine employment, 30 U.S.C. 922(a)(1), and each dependent survivor of a miner who died due to pneumoconiosis or, if the claim was filed before January 1, 1982, was totally disabled at the time of death by the disease. 30 U.S.C. 922(a)(2), (3), (5). As an initial matter, then, the Act simply does not permit the Department to adjust its entitlement regulations based on the size of the miner's former employer. In effect, the Department cannot deny a claim because the miner was employed by a small business.

The Department has proposed revisions to the regulations governing the identity of the party liable for the payment of benefits. Like the current regulations, the Department's proposal would impose liability on the coal mine operator that most recently employed the miner for a period of not less than one year, provided that the operator meets other specified criteria. Among these criteria is the operator's financial ability to assume responsibility for the payment of benefits. *See* § 725.494(e). Because coal mine operators are required to secure their liability under the Act by purchasing commercial insurance or by self-insuring, however, this condition typically affects only two classes of operators: those that have failed to comply with the Act's security requirement, and those construction and transportation employers that are not subject to the security requirement. Such a company may avoid liability for a particular claim by demonstrating that it is financially incapable of assuming the payment of monthly and retroactive benefits.

Although the use of a financial capability standard might be considered a benefit to small businesses, using either SBA's definition or the 20-employee cutoff, the Department does not believe that it can provide any other similar benefit. In theory, of course, the Department could specifically limit liability under the Act in cases involving operators below a certain size. To do so, however, the Department would have to increase the obligations borne by larger coal mine operators (who may be the miner's second or third most recent employer) or the Black Lung Disability Trust Fund. Such a result, however, would violate Congress's clear intent: ''It is further the intention of this section, with respect to claims related to which the miner worked on or after January 1, 1970, to ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operator's mines, to the maximum extent feasible.'' S. Rep. 209, 95th Cong., 1st Sess. 9 (1977), reprinted in House Comm. On Educ. And Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, 612 (Comm. Print 1979).

One area in which the Department may appropriately impose lesser costs on small businesses is the assessment of civil money penalties for failure to secure the payment of benefits. The Act merely provides that operators that fail to secure their liability are subject to a civil money penalty of up to $1,000 a day. The current regulations authorize the imposition of the ''maximum penalty allowed'' in the absence of mitigating circumstances. 20 CFR 725.495(d). By contrast, the Department's proposed regulations recognize that smaller companies may cause less harm by failing to secure the payment of benefits. The Department's proposal therefore establishes different base penalty amounts for operators who fail to insure, depending on the number of their employees. Thus, where the Act permits the Department to exercise flexibility with regard to small business, the Department has done so.

The Department invites comment from interested parties, particularly coal mine operators that are considered small businesses, as to other possible means of reducing the financial impact of the proposed rules on the small business community. Commenters should bear in mind that the fundamental purpose of the Black Lung Benefits Act is to provide benefits to disabled miners and their survivors, and that all applicants and beneficiaries must be treated fairly.

List of Subjects in 20 CFR Parts 718, 722, 725, 726, 727.

Black lung benefits, Lung disease, Miners, Mines, Workers' compensation, X-rays.

Signed at Washington, D.C., this 15th day of September, 1999.

Bernard Anderson,

Assistant Secretary for Employment Standards.

For the reasons set forth in the preamble, 20 CFR Chapter VI is proposed to be amended as follows:

1. The authority citation for part 718 continues to read as follows:

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq., 42 U.S.C. 405, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

2. Part 718 is proposed to be amended by removing subpart E, revising subparts A through D, revising Appendices A and C, and revising the text of Appendix B (the tables, B1 through B6, in Appendix B remain unchanged):

PART 718—STANDARDS FOR DETERMINING COAL MINERS' TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS

Subpart A—General

Sec.
718.1 Statutory provisions.
718.2 Applicability of this part.
718.3 Scope and intent of this part.
718.4 Definitions and use of terms.

Subpart B—Criteria for the Development of Medical Evidence

718.101 General.
718.102 Chest roentgenograms (X-rays).
718.103 Pulmonary function tests.
718.104 Report of physical examinations.
718.105 Arterial blood-gas studies.
718.106 Autopsy; biopsy.

718.107 Other medical evidence.

Subpart C—Determining Entitlement to Benefits

718.201 Definition of pneumoconiosis.
718.202 Determining the existence of pneumoconiosis.
718.203 Establishing relationship of pneumoconiosis to coal mine employment.
718.204 Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis.
718.205 Death due to pneumoconiosis.
718.206 Effect of findings by persons or agencies.

Subpart D—Presumptions Applicable to Eligibility Determinations

718.301 Establishing length of employment as a miner.
718.302 Relationship of pneumoconiosis to coal mine employment.
718.303 Death from a respirable disease.
718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.
718.305 Presumption of pneumoconiosis.
718.306 Presumption of entitlement applicable to certain death claims.
Appendix A to Part 718—Standards for Administration and Interpretation of Chest Roentgenograms (X-rays)
Appendix B to Part 718—Standards for Administration and Interpretation of Pulmonary Function Tests. Tables B1, B2, B3, B4, B5, B6
Appendix C to Part 718—Blood Gas Tables

Subpart A—General

§ 718.1 Statutory provisions.

(a) Under title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Amendments of 1981, and the Black Lung Benefits Revenue Act of 1981, benefits are provided to miners who are totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally or partially disabled by pneumoconiosis. However, unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on or after January 1, 1982, only when the miner's death was due to pneumoconiosis, except where the survivor's entitlement is established pursuant to § 718.306 on a claim filed prior to June 30, 1982. Before the enactment of the Black Lung Benefits Reform Act of 1977, the authority for establishing standards of eligibility for miners and their survivors was placed with the Secretary of Health, Education, and Welfare. These standards were set forth by the Secretary of Health, Education, and Welfare in subpart D of part 410 of this title, and adopted by the Secretary of Labor for application to all claims filed with the Secretary of Labor (see 20 CFR 718.2, contained in the 20 CFR, part 500 to end, edition revised as of April 1, 1979). Amendments made to section 402(f) of the Act by the Black Lung Benefits Reform Act of 1977 authorize the Secretary of Labor to establish criteria for determining total or partial disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under part C of title IV of the Act. Section 402(f) of the Act further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques to be used to take chest roentgenograms (X-rays) in connection with a claim for benefits under the Act.

(b) The Black Lung Benefits Reform Act of 1977 provided that with respect to a claim filed prior to April 1, 1980, or reviewed under section 435 of the Act, the standards to be applied in the adjudication of such claim shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with the Social Security Administration, whether or not the final disposition of the claim occurs after March 31, 1980. All such claims shall be reviewed under the criteria set forth in part 727 of this title (see 20 CFR 725.4(d)).

§ 718.2 Applicability of this part.

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

§ 718.3 Scope and intent of this part.

(a) This part sets forth the standards to be applied in determining whether a coal miner is or was totally, or in the case of a claim subject to § 718.306 partially, disabled due to pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

(b) This part is designed to interpret the presumptions contained in section 411(c) of the Act, evidentiary standards and criteria contained in section 413(b) of the Act and definitional requirements and standards contained in section 402(f) of the Act within a coherent framework for the adjudication of claims. It is intended that these enumerated provisions of the Act be construed as provided in this part.

§ 718.4 Definitions and use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in § 725.101 of subpart A of part 725 of this title shall be applicable to this part.

Subpart B—Criteria for the Development of Medical Evidence

§ 718.101 General.

(a) The Office of Workers' Compensation Programs (hereinafter OWCP or the Office) shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who files a claim for benefits under the Act shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.

(b) The standards for the administration of clinical tests and examinations contained in this subpart shall apply to all evidence developed by any party after [the effective date of the final rule] in connection with a claim governed by this part (see §§ 725.406(b), 725.414(a), 725.456(d)). These standards shall also apply to claims governed by part 727 (see 20 CFR 725.4(d)), but only for clinical tests or examinations conducted after [the effective date of the final rule]. Any clinical test or examination subject to these standards shall be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. Unless otherwise provided, any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered.

§ 718.102 Chest roentgenograms (X-rays).

(a) A chest roentgenogram (X-ray) shall be of suitable quality for proper classification of pneumoconiosis and shall conform to the standards for administration and interpretation of chest X-rays as described in Appendix A to this part.

(b) A chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO–U/C 1971), or subsequent revisions thereof. A chest X-ray classified as Category Z under the ILO Classification (1958) or Short Form (1968) shall be reclassified as Category O or Category 1 as appropriate, and only the latter accepted as evidence of pneumoconiosis. A chest X-ray classified under any of the foregoing classifications as Category O, including sub-categories 0—, 0/0, or 0/1 under the UICC/Cincinnati (1968) Classification or the ILO–U/C 1971 Classification does not constitute evidence of pneumoconiosis.

(c) A description and interpretation of the findings in terms of the classifications described in paragraph (b) of this section shall be submitted by the examining physician along with the film. The report shall specify the name and qualifications of the person who took the film and the name and qualifications of the physician interpreting the film. If the physician interpreting the film is a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.202), he or she shall so indicate. The report shall further specify that the film was interpreted in compliance with this paragraph.

(d) The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties. Where the chest X-ray of a deceased miner has been lost, destroyed or is otherwise unavailable, a report of a chest X-ray submitted by any party shall be considered in connection with the claim.

(e) No chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is conducted and reported in accordance with the requirements of this section and Appendix A. In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. In the case of a deceased miner where the only available X-ray does not substantially comply with this subpart, such X-ray shall be considered and shall be accorded appropriate weight in light of all relevant evidence if it is of sufficient quality for determining the presence or absence of pneumoconiosis and such X-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified ''B'' reader (see § 718.202).

§ 718.103 Pulmonary function tests.

(a) Any report of pulmonary function tests submitted in connection with a claim for benefits shall record the results of flow versus volume (flow-volume loop). The instrument shall simultaneously provide records of volume versus time (spirometric tracing). The report shall provide the results of the forced expiratory volume in one second (FEV1) and the forced vital capacity (FVC). The report shall also provide the FEV1/FVC ratio, expressed as a percentage. If the maximum voluntary ventilation (MVV) is reported, the results of such test shall be obtained independently rather than calculated from the results of the FEV1.

(b) All pulmonary function test results submitted in connection with a claim for benefits shall be accompanied by three tracings of the flow versus volume and the electronically derived volume versus time tracings. If the MVV is reported, two tracings of the MVV whose values are within 10% of each other shall be sufficient. Pulmonary function test results submitted in connection with a claim for benefits shall also include a statement signed by the physician or technician conducting the test setting forth the following:

(1) Date and time of test;

(2) Name, DOL claim number, age, height, and weight of claimant at the time of the test;

(3) Name of technician;

(4) Name and signature of physician supervising the test;

(5) Claimant's ability to understand the instructions, ability to follow directions and degree of cooperation in performing the tests. If the claimant is unable to complete the test, the person executing the report shall set forth the reasons for such failure;

(6) Paper speed of the instrument used;

(7) Name of the instrument used;

(8) Whether a bronchodilator was administered. If a bronchodilator is administered, the physician's report must detail values obtained both before and after administration of the bronchodilator and explain the significance of the results obtained; and

(9) That the requirements of paragraphs (b) and (c) of this section have been complied with.

(c) No results of a pulmonary function study shall constitute evidence of the presence or absence of a respiratory or pulmonary impairment unless it is conducted and reported in accordance with the requirements of this section and Appendix B to this part. In the absence of evidence to the contrary, compliance with the requirements of Appendix B shall be presumed. In the case of a deceased miner, special consideration shall be given to noncomplying tests if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results obtained with good cooperation of the miner.

§ 718.104 Report of physical examinations.

(a) A report of any physical examination conducted in connection with a claim shall be prepared on a medical report form supplied by the Office or in a manner containing substantially the same information. Any such report shall include the following information and test results:

(1) The miner's medical and employment history;

(2) All manifestations of chronic respiratory disease;

(3) Any pertinent findings not specifically listed on the form;

(4) If heart disease secondary to lung disease is found, all symptoms and significant findings;

(5) The results of a chest X-ray conducted and interpreted as required by § 718.102; and

(6) The results of a pulmonary function test conducted and reported as required by § 718.103. If the miner is physically unable to perform a pulmonary function test or if the test is medically contraindicated, in the absence of evidence establishing total disability pursuant to § 718.304, the report must be based on other medically acceptable clinical and laboratory diagnostic techniques, such as a blood gas study.

(b) In addition to the requirements of paragraph (a) of this section, a report of physical examination may be based on any other procedures such as electrocardiogram, blood-gas studies conducted and reported as required by § 718.105, and other blood analyses which, in the physician's opinion, aid in his or her evaluation of the miner.

(c) In the case of a deceased miner, a report prepared by a physician who is unavailable, which fails to meet the criteria of paragraph (a), may be given appropriate consideration and weight by the adjudicator in light of all relevant

evidence provided no report which does comply with this section is available.

(d) *Treating physician.* The adjudication officer may give the medical opinion of the miner's treating physician controlling weight in weighing the medical evidence of record relevant to whether the miner suffers, or suffered, from pneumoconiosis, whether the pneumoconiosis arose out of coal mine employment, and whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis. The adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician:

(1) *Nature of relationship.* The opinion of a physician who has treated the miner for respiratory or pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;

(2) *Duration of relationship.* The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to obtain a superior understanding of his or her condition;

(3) *Frequency of treatment.* The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and

(4) *Extent of treatment.* The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.

(5) In the absence of contrary probative evidence, the adjudication officer shall accept the statement of a physician with regard to the factors listed in paragraphs (d)(1) through (4) of this section. Whether controlling weight is given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.

§ 718.105 Arterial blood-gas studies.

(a) Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. No blood-gas study shall be performed if medically contraindicated.

(b) A blood-gas study shall initially be administered at rest and in a sitting position. If the results of the blood-gas test at rest do not satisfy the requirements of Appendix C to this part, an exercise blood-gas test shall be offered to the miner unless medically contraindicated. If an exercise blood-gas test is administered, blood shall be drawn during exercise.

(c) Any report of a blood-gas study submitted in connection with a claim shall specify:

(1) Date and time of test;

(2) Altitude and barometric pressure at which the test was conducted;

(3) Name and DOL claim number of the claimant;

(4) Name of technician;

(5) Name and signature of physician supervising the study;

(6) The recorded values for PCO2, PO2, and PH, which have been collected simultaneously (specify values at rest and, if performed, during exercise);

(7) Duration and type of exercise;

(8) Pulse rate at the time the blood sample was drawn;

(9) Time between drawing of sample and analysis of sample; and

(10) Whether equipment was calibrated before and after each test.

(d) If one or more blood-gas studies producing results which meet the appropriate table in Appendix C is administered during a hospitalization which ends in the miner's death, then any such study must be accompanied by a physician's report establishing that the test results were produced by a chronic respiratory or pulmonary condition. Failure to produce such a report will prevent reliance on the blood-gas study as evidence that the miner was totally disabled at death.

§ 718.106 Autopsy; biopsy.

(a) A report of an autopsy or biopsy submitted in connection with a claim shall include a detailed gross macroscopic and microscopic description of the lungs or visualized portion of a lung. If a surgical procedure has been performed to obtain a portion of a lung, the evidence shall include a copy of the surgical note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, a complete copy of the autopsy report shall be submitted to the Office.

(b) In the case of a miner who died prior to March 31, 1980, an autopsy or biopsy report shall be considered even when the report does not substantially comply with the requirements of this section. A noncomplying report concerning a miner who died prior to March 31, 1980, shall be accorded the appropriate weight in light of all relevant evidence.

(c) A negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis. However, where positive findings are obtained on biopsy, the results will constitute evidence of the presence of pneumoconiosis.

§ 718.107 Other medical evidence.

(a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.

(b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

Subpart C—Determining Entitlement to Benefits

§ 718.201 Definition of pneumoconiosis.

(a) For the purpose of the Act, ''pneumoconiosis'' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or ''clinical'', pneumoconiosis and statutory, or ''legal'', pneumoconiosis.

(1) *Clinical pneumoconiosis.* ''Clinical pneumoconiosis'' consists of those diseases, recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal pneumoconiosis.* ''Legal pneumoconiosis'' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For purposes of this section, a disease ''arising out of coal mine employment'' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated

by, dust exposure in coal mine employment.

(c) For purposes of this definition, ''pneumoconiosis'' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§ 718.202 Determining the existence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may be made as follows:

(1) A chest X-ray conducted and classified in accordance with § 718.102 may form the basis for a finding of the existence of pneumoconiosis. Except as otherwise provided in this section, where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

(i) In all claims filed before January 1, 1982, where there is other evidence of pulmonary or respiratory impairment, a Board-certified or Board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 718.102 and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudulently represented. However, these limitations shall not apply to any claim filed on or after January 1, 1982.

(ii) The following definitions shall apply when making a finding in accordance with this paragraph.

(A) The term *other evidence* means medical tests such as blood-gas studies, pulmonary function studies or physical examinations or medical histories which establish the presence of a chronic pulmonary, respiratory or cardio-pulmonary condition, and in the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition.

(B) *Pulmonary or respiratory impairment* means inability of the human respiratory apparatus to perform in a normal manner one or more of the three components of respiration, namely, ventilation, perfusion and diffusion.

(C) *Board-certified* means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(D) *Board-eligible* means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(E) *Certified 'B' reader* or *'B' reader* means a physician who has demonstrated proficiency in evaluating chest roentgenograms for roentgenographic quality and in the use of the ILO–U/C classification for interpreting chest roentgenograms for pneumoconiosis and other diseases by taking and passing a specially designed proficiency examination given on behalf of or by the Appalachian Laboratory for Occupational Safety and Health. See 42 CFR 37.51(b)(2).

(F) *Qualified radiologic technologist or technician* means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a state licensing board.

(2) A biopsy or autopsy conducted and reported in compliance with § 718.106 may be the basis for a finding of the existence of pneumoconiosis. A finding in an autopsy or biopsy of anthracotic pigmentation, however, shall not be sufficient, by itself, to establish the existence of pneumoconiosis. A report of autopsy shall be accepted unless there is evidence that the report is not accurate or that the claim has been fraudulently represented.

(3) If the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis.

(4) A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

(b) No claim for benefits shall be denied solely on the basis of a negative chest X-ray.

(c) A determination of the existence of pneumoconiosis shall not be made solely on the basis of a living miner's statements or testimony. Nor shall such a determination be made upon a claim involving a deceased miner filed on or after January 1, 1982, solely based upon the affidavit(s) (or equivalent sworn testimony) of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

§ 718.203 Establishing relationship of pneumoconiosis to coal mine employment.

(a) In order for a claimant to be found eligible for benefits under the Act, it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment. The provisions in this section set forth the criteria to be applied in making such a determination.

(b) 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 the pneumoconiosis arose out of such employment.

(c) If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

§ 718.204 Total disability and disability causation defined; criteria for determining total disability and total disability due to pneumoconiosis.

(a) *General.* Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

(b)(1) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption described in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

(i) From performing his or her usual coal mine work; and

(ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged

with some regularity over a substantial period of time.

(2) *Medical criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:

(i) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV1 test; if, in addition, such tests also reveal the values specified in either paragraph (b)(2)(i)(A) or (B) or (C) of this section:

(A) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(B) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(C) A percentage of 55 or less when the results of the FEV1 test are divided by the results of the FVC test (FEV1/FVC equal to or less than 55%), or

(ii) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(iii) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right-sided congestive heart failure, or

(iv) Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b)(1) of this section.

(c)(1) *Total disability due to pneumoconiosis defined.* A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a ''substantially contributing cause'' of the miner's disability if it:

(i) Has an adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

(2) Except as provided in § 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

(d) *Lay evidence.* In establishing total disability, lay evidence may be used in the following cases:

(1) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition.

(2) In a case involving a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, which is subject to § 718.306, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total or partial disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of the claimant and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved.

(3) In a case involving a deceased miner whose claim was filed on or after January 1, 1982, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability due to pneumoconiosis if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination shall not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved.

(4) Statements made before death by a deceased miner about his or her physical condition are relevant and shall be considered in making a determination as to whether the miner was totally disabled at the time of death.

(5) In the case of a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony.

(e) In determining total disability to perform usual coal mine work, the following shall apply in evaluating the miner's employment activities:

(1) In the case of a deceased miner, employment in a mine at the time of death shall not be conclusive evidence that the miner was not totally disabled. To disprove total disability, it must be shown that at the time the miner died, there were no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(2) In the case of a living miner, proof of current employment in a coal mine shall not be conclusive evidence that the miner is not totally disabled unless it can be shown that there are no changed circumstances of employment indicative of his or her reduced ability to perform his or her usual coal mine work.

(3) Changed circumstances of employment indicative of a miner's reduced ability to perform his or her usual coal mine work may include but are not limited to:

(i) The miner's reduced ability to perform his or her customary duties without help; or

(ii) The miner's reduced ability to perform his or her customary duties at his or her usual levels of rapidity, continuity or efficiency; or

(iii) The miner's transfer by request or assignment to less vigorous duties or to duties in a less dusty part of the mine.

§ 718.205 Death due to pneumoconiosis.

(a) Benefits are provided to eligible survivors of a miner whose death was due to pneumoconiosis. In order to receive benefits, the claimant must prove that:

(1) The miner had pneumoconiosis (see § 718.202);

(2) The miner's pneumoconiosis arose out of coal mine employment (see § 718.203); and

(3) The miner's death was due to pneumoconiosis as provided by this section.

(b) For the purpose of adjudicating survivors' claims filed prior to January 1, 1982, death will be considered due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence established that the miner's death was due to pneumoconiosis, or