is responsible, each of which is worth approximately $175,000, could become the responsibility of the Black Lung Disability Trust Fund. The Department has a duty to protect the assets of the Trust Fund, and thus intends to enforce the post-award security provision incorporated into the Black Lung Benefits Act from section 14(i) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914(i), as incorporated by 30 U.S.C. 932(a).

(c) One comment states that coal transportation employers are generally unaware of their potential liability for black lung benefits, and are surprised when they are identified as a responsible operator in the adjudication of an individual claim for benefits. At that point, the commenter maintains, any insurance that they are able to purchase will not cover benefits owed to the former employee who has already filed a claim. The commenter requests that the proposed regulations prohibit the case-by-case adjudication of issues of coverage involving coal transportation employers.

The Department does not believe that it is necessary to revise the regulations to provide further guidance to coal transportation employers. Neither does the Department deem it advisable to limit the authority of adjudication officers to apply the pertinent statutory and regulatory definitions to claims for benefits filed by employees of transportation employers. Congress amended the Federal Mine Safety and Health Act in 1977 to include ''any independent contractor performing services or construction'' at the Nation's coal mines.'' 30 U.S.C. 802(d); Pub. L. 95–164, 91 Stat. 1290, § 102(b)(2) (1977). When it amended the Black Lung Benefits Act several months later, Congress specifically recognized, in two separate provisions, that coal transportation companies were now liable for the payment of benefits. First, Congress amended the definition of the term ''miner'' to include ''an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.'' 30 U.S.C. 902(d); Pub. L. 95–239, 92 Stat. 95, § 2(b) (1978). In addition, Congress added language to section 422(b) that exempted coal transportation employers, as well as coal mine construction employers, from the requirement that they generally secure the payment of benefits by purchasing insurance or seeking the Department's approval to self-insure their obligations. 30 U.S.C. 932(b); Pub. L. 95–239, 92 Stat. 95, § 7(b) (1978). Congress provided, however, that coal transportation and coal mine construction employers may be required to post a bond or otherwise guarantee the payment of benefits in any awarded claim for which they have been determined liable. *Ibid.* The regulations promulgated by the Department to implement the 1978 amendments also specifically recognized the liability of coal transportation employers. *See* 20 CFR 725.491(a)(1979); 43 FR 36801–02 (Aug. 18, 1978).

Thus, since 1978, both the statute and the regulations have put coal mine transportation employers on notice that they could be held liable for the payment of any benefits owed to their former employees. *See Norfolk & Western Railway Co.* v. *Roberson,* 918 F.2d 1144, 1149–50 (4th Cir. 1990), *cert. denied,* 500 U.S. 916. Accordingly, the Department does not believe that such an employer should be surprised when it receives notification of a claim filed by one of its employees. *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947) (''Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the **Federal Register** gives legal notice of their contents.'') Finally, even though a transportation employer is not required to obtain insurance to secure its black lung liability, it remains free to purchase such insurance in order to ensure that its assets are not depleted by the defense and payment of black lung claims.

(d) No other comments were received concerning this section. The Department has corrected one error in the proposed regulation, replacing the phrase ''the United States Treasurer'' in subsection (f) with the term ''a Federal Reserve Bank.'' The Department explained in its initial proposal that the funds will be deposited with the appropriate Federal Reserve Bank rather than the United States Treasurer and had changed similar language in subsection (c). *See* 62 FR 3367 (Jan. 22, 1997).

20 CFR 725.608

(a) The Department proposed revising § 725.608 in its initial notice of proposed rulemaking in order to simplify the regulation, and to allow all parties to a claim to ascertain their obligations and rights with respect to the payment of interest. The proposal recognized that black lung beneficiaries were entitled to the payment of interest on retroactive benefits, additional compensation, and medical benefits. Interest on retroactive benefits starts to accrue 30 days after the first date on which the claimant was determined to be entitled to such benefits. Interest on additional compensation starts to accrue on the date that the beneficiary becomes entitled to additional compensation, while interest on medical benefits starts to accrue on the date that the miner received the medical service or 30 days after the date on which the miner was first determined to be generally eligible for black lung benefits, whichever date is later. 62 FR 3368 (Jan. 22, 1997)

In addition, the proposal specifically required the payment of interest by responsible operators on attorneys' fee awards. 62 FR 3368 (Jan. 22, 1997). In some cases, those awards may be issued long before the award of claimant's benefits becomes final, the first point at which the attorney is able to collect his fee under § 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). The Department did not discuss this regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has replaced the term ''beneficiary'' with the phrase ''beneficiary or medical provider'' in two places in the last sentence of subsection (a)(4). This revision is intended to conform that sentence with the first sentence of subsection (a)(4), which clearly reflects the Department's intention that medical providers as well as beneficiaries are eligible for interest to compensate them for any delays in the payment of medical benefits.

(c) A number of comments oppose the allowance of interest on attorneys' fees in general, and the computation of that interest from the date the fee is awarded until it is paid. In its first notice of proposed rulemaking, 62 FR 3368 (Jan. 22, 1997), the Department explained that the payment of such interest is necessary to buttress the economic value of fees which may take years to become due because of the duration of the underlying litigation of claimant entitlement. Although the Black Lung Disability Trust Fund is not liable for the payment of interest in any event, *Shaffer* v. *Director, OWCP,* 21 Black Lung Rep. (MB) 1–98, 1–99 (Ben. Rev. Bd. 1998), a responsible operator is not obliged to pay attorney's fees until the claimant successfully establishes entitlement to benefits in a final award. Because appeals may delay an award's finality for years, the attorney's fees awarded at earlier stages of the litigation will diminish in real value as a result of inflation. Interest from the date of a fee award, however, will reduce the inroads made by inflation. An award of interest will therefore encourage attorneys to

represent claimants because the value of their fees will be protected, notwithstanding delays in actual payment. The Department wishes to encourage attorney representation of claimants, believing it a means to enhance the fairness of the adjudication process. The Department therefore rejects the commenters' objection to the allowance of interest on attorneys' fees in principle.

With respect to the computation of interest from the date of the attorney fee award, the Department notes that any other date would not afford an attorney maximum protection of the fee's value. Although the operator is under no obligation to pay the fee at the time it is awarded, the primary purpose of subsection (c) is to protect the value of the attorney's fee from its inception. Moreover, an operator who is able to postpone the payment of an attorney's fee by appealing the underlying award of benefits is not entitled to profit from its decision to appeal unless it succeeds in overturning the award. The operator retains the money, and the use of the money, while the appeal is pending. If the award of benefits is ultimately affirmed, the operator should not reasonably expect to be able to retain any of the profits it earned on that money during the appellate proceeding. Instead, those profits, in the form of interest designed to compensate an attorney for delay, rightfully belong to the attorney who had to wait to receive payment of his fee. Consequently, the date of the fee award is the logical date from which to calculate the interest owed.

The same commenters also argue that the Department has no statutory authority to require the payment of interest on attorneys' fees. The award of fees is governed by 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 authorizes the payment of a ''reasonable'' attorney's fee by an employer if, after the employer controverts a claimant's entitlement, the claimant obtains an award of benefits. No fee must be paid until the award is final. The Supreme Court has held that ''[a]n adjustment for delay in payment is * * * an appropriate factor in the determination of what constitutes a reasonable attorney's fee'' under a fee-shifting statute. *Missouri* v. *Jenkins,* 491 U.S. 274, 284 (1989) (decided under Civil Rights Attorney's Fees Award Act); *see also Pennsylvania* v. *Delaware Valley Citizens' Council,* 483 U.S. 711, 716 (1987) (dicta, decided under Clean Air Act); *Goodloe* v. *Peabody Coal Co.,* 19 Black Lung Rep. 1–91, 1–101–102 (1995), *vac. on other grounds sub nom Peabody Coal Co.* v. *Director, OWCP,* 116 F.3d 207 (7th Cir. 1997) (overruling prior decisions prohibiting augmentation of attorney fee for delay, citing *Jenkins*). Consequently, interest on an attorney's fee may be awarded consistent with section 28 to compensate an attorney for delay in receiving his fees.

The Court of Appeals for the Fourth Circuit recently addressed this issue in *Kerns* v. *Consolidation Coal Co.,* 176 F.3d 802 (4th Cir. 1999). A claimant's attorney was awarded fees by an administrative law judge in 1984, but was not able to collect those fees until the award became final in 1990. He then filed a motion for supplemental attorneys' fees based on the six-year delay between the award and its payment. The ALJ denied the motion, and the Benefits Review Board affirmed. In reversing the Board, the court noted that a 1995 decision of the Board, *Nelson* v. *Stevedoring Services of America,* 29 BRBS 90 (1995), had authorized the enhancement of an attorney's fee for delay under the Longshore and Harbor Workers' Compensation Act. The court concluded that ''current law'' thus required enhancement for delay, and remanded the case to allow the ALJ to consider the merits of the attorney's supplemental fee request. 176 F.3d at 805. Section 725.608 simply provides a mechanism for ensuring that claimants' attorneys receive this enhancement in each case involving a responsible operator.

The interest on a fee award provided by section 725.608, of course, provides compensation only for part of the delay that an attorney may face in collecting his fee, *i.e.,* the time between the fee award and the actual payment. It is not intended to compensate the attorney for any delay between the performance of his work and the award of fees by the appropriate adjudicator. If, for example, a claimant filed his application in 1995, and was not awarded benefits by an administrative law judge until 1999, § 725.608 will require only that interest be paid to the attorney from the date the ALJ approves the fee petition until the date that the attorney collects that amount. It will not provide interest from the date on which the attorney performed the work. In such cases, it is the responsibility of the attorney who submits a fee request to ensure that the request reflects any necessary enhancement for the delay between the performance of the work and the award of the fee. There are several methods by which an attorney may seek enhancement of his fee award to cover this delay. For example, the attorney could request the adjudication officer to use the attorney's current rate (his rate at the time he applies for the fee), rather than his historical rate (the rate at the time he performed the work), to calculate the fee to which he is entitled. Thus, the attorney in the example above, who performed 20 hours of work in 1995 but did not submit his fee petition until benefits were awarded in 1999, might use the $125 hourly rate he customarily charged in 1999 rather than the $100 hourly rate he charged in 1995. Using the current rate would permit the attorney to claim an additional $500, and would compensate him for the delay between the time he performed the work and date of the fee award. Another method of attaining the same result would be to calculate a ''lodestar'' amount by multiplying the number of hours the attorney worked by his historical rate, and then requesting the adjudication officer to augment that figure by an additional amount intended to compensate the attorney for the delay. Thus, the attorney in the example might request that the adjudication officer multiply the lodestar amount by an additional 25 percent. In either case, the fee awarded by the adjudicator, in concert with the interest provided by § 725.608, will ensure that when the attorney finally receives payment, he is fully compensated for the work he performed.

(d) One comment supports the allowance of interest on attorney fees and on medical benefits. No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.609

(a) The Department proposed revising section 725.609 in its first notice of proposed rulemaking. In the revised regulation, the Department clarified its intent and authority to enforce a final award of benefits against other parties in the event the named operator is no longer capable of assuming its liability for benefits. The revised regulation outlined the other parties against which such an award might be enforced, including corporate officers and successor operators. The regulation also outlined the circumstances under which the Department may impose liability on these parties. In proposing this regulation, the Department relied on Congress' explicit determination that such entities may be held liable for these awards. 62 FR 3368–69 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment objects to subsection (b)'s imposition of personal liability on corporate officers of companies which provide services at mine sites. The commenter suggests that liability is inappropriate because the officers have never had notice that their employees could be considered miners, and have not previously had knowledge of an obligation to obtain insurance to cover their employees' potential benefit entitlement. The Department rejects this suggestion. Congress amended the statutory definition of ''operator'' in 1977 to include ''any independent contractor performing services or construction at such mine[.]'' 30 U.S.C. 802(d). The current regulations also recognize that an independent contractor may be held liable as a ''responsible operator'' with respect to any employee who performs covered services at a coal mine site. 20 CFR 725.491(c)(1). The Black Lung Benefits Act requires an operator to secure its potential benefits liability by obtaining insurance or qualifying as a self-insurer. 30 U.S.C. 932(b), 933(a). Section 423(d)(1) of the Act authorizes the Department to impose personal liability on certain officers of a corporation if the operator is a corporation that has failed to satisfy its insurance obligations. 30 U.S.C. 933(d)(1). The Department therefore disagrees that application of these provisions to employers engaged as independent contractors providing covered services at mine sites is unfair. Such corporate entities are coal mine operators under the Act, and are liable to their employees when covered employment causes them to become totally disabled by pneumoconiosis. Any such entity is required to anticipate its obligations and take adequate measures to satisfy those obligations as a cost of doing business. Moreover, since 1977, the officers of an independent contractor who meets the Act's definition of the term ''operator'' have been subject to the Act's imposition of liability on the officers of a corporation that fails to meet its security obligations. The revised regulation does not alter the obligation of these officers to obtain the appropriate security, nor does it impose any additional consequences for failing to comply with that obligation. Instead, it simply provides more explicit notice of those consequences.

(c) One comment approves in general terms of the enforcement provisions.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.620

(a) In its first notice of proposed rulemaking, the Department proposed amending the cross-reference in subsection (a) from § 725.495 to subpart D of part 726. This amendment reflected a move to part 726 of the regulations governing the obligations of coal mine operators to secure the payment of benefits. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss § 725.620 in its second notice of proposed rulemaking. *See* Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Two comments urge the Department to revise its regulations to allow parties to settle black lung benefits claims. These comments were listed as relevant to § 725.620(d) in the Department's listing of comments by issue. *See, e.g.,* Exhibit 71 in the Rulemaking Record. They do not directly affect § 725.620, however. Subsection (d) of the regulation implements section 15(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 915, as incorporated by 30 U.S.C. 932(a), rather than section 16, 33 U.S.C. 916, as incorporated by 30 U.S.C. 932(a), the statutory provision governing settlements. The Department has responded to the comments concerning settlement of black lung claims in its Final Regulatory Flexibility Analysis.

(c) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.621

In its first notice of proposed rulemaking, the Department proposed increasing subsection (d)'s maximum penalty amount from $500 to $550 for failing to file a required report after the date on which the regulations became effective. This revision implements the Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss § 725.621 in its second notice of proposed rulemaking. *See* Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). No comments were received concerning this section. The Department has removed an unnecessary comma from subsection (b) in order to make the regulation easier to understand, but no other changes have been made in it.

Subpart J

20 CFR 725.701

(a) After a miner has been found totally disabled by pneumoconiosis arising out of coal mine employment, (s)he receives fixed monthly benefits for that condition. The miner is also entitled to medical benefits, *i.e.,* treatment, supplies and other medical services for the disabling pneumoconiosis. In its initial notice of proposed rulemaking, the Department proposed amending § 725.701 to establish a presumption of medical benefits coverage for the treatment of any pulmonary disorder. 62 FR 3423 (Jan. 22, 1997). This presumption derived from a judicially-created presumption first announced by the Court of Appeals for the Fourth Circuit in *Doris Coal Co.* v. *Director, OWCP [Stiltner,]* 938 F.2d 492 (4th Cir. 1991). The Department explained the means by which the presumption could be rebutted, and limited the type of evidence relevant to rebuttal by excluding any medical opinion premised on the absence of disabling pneumoconiosis. The Department based its exclusion of certain medical evidence in rebuttal on the fact that the existence of the miner's totally disabling pneumoconiosis had already been established in the underlying claim for monthly benefits. 62 FR 3369, 3423 (Jan. 22, 1997). The Department received a number of comments critical of the presumption. Some comments alleged the presumption would effectively compensate miners for disorders caused by smoking cigarettes and raise the operators' health care costs. Other comments contended the presumption did not have a sound medical basis. 64 FR 55003 (Oct. 8, 1999).

After considering the public's comments and intervening judicial decisions, the Department proposed additional changes to the regulation in its second notice of proposed rulemaking. 64 FR 55060 (Oct. 8, 1999). The Department reviewed the decisions in *Glen Coal Co.* v. *Seals,* 147 F.3d 502 (6th Cir. 1998), and *Gulf & Western Indus.* v. *Ling,* 176 F.3d 226 (4th Cir. 1999). 64 FR 55003–04 (Oct. 8, 1999). The Department noted both decisions agreed that the *Doris Coal* presumption shifted only the burden of production to the party opposing benefits, and was therefore valid under the Administrative Procedure Act (APA), 5 U.S.C. § 556(d) (proponent of rule bears burden of persuasion) and *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). The Department also pointed out that the majority in *Seals* rested on a relatively narrow point: that the administrative law judge and Benefits Review Board erroneously applied Fourth Circuit precedent when Sixth Circuit law controlled and was inconsistent with *Doris Coal.* 147 F.3d

at 514 (Dowd, D.C.J), 515 (Boggs, J.). Citing the need for a uniform standard of national applicability, the Department proposed several changes to § 725.701. 64 FR 55004 (Oct. 8, 1999). The Department eliminated the reference to ''ancillary pulmonary conditions'' in subsection (b) because the phrase was unnecessary and arguably confusing. 64 FR 55004 (Oct. 8, 1999). The Department also changed the language of subsection (e) to clarify the specific facts which might rebut the presumption that a particular medical expense is compensable. Subsection (e) contains a rebuttable presumption that a pulmonary disorder for which the miner receives a medical service or supply is caused or aggravated by pneumoconiosis. 64 FR 55060 (Oct. 8, 1999). In the second proposal, the Department also clarified subsection (f) to ensure that the party opposing benefits does not attempt to relitigate established facts by using medical evidence for rebuttal which is premised on the absence of totally disabling pneumoconiosis. Finally, the Department acknowledged the controlling weight a report from a treating physician may receive in determining the compensability of a service or supply. 64 FR 55004 (Oct. 8, 1999).

(b) The Department has revised the rebuttal provisions set forth in § 725.701(e) in light of a decision from the Court of Appeals for the Fourth Circuit issued after the second notice of proposed rulemaking entered the final stage of administrative clearance. In *General Trucking Corp.* v. *Salyers,* 175 F.3d 322 (4th Cir. 1999), the Court reviewed the various means of rebutting the *Doris Coal* presumption as presented in *Ling:*

> It is certainly true that if the treatment at issue is found to be 'beyond that necessary to effectively treat a covered disorder, or is not for a pulmonary disorder at all,' then the presumption 'shall not carry the day.' *Ling,* 176 F3d at 233. It does not follow, however, that proof of these two circumstances is the exclusive means of rebutting the presumption.
>
> An employer contesting an award of medical benefits may also rebut the presumption by adducing sufficient credible evidence that the claimant was treated for 'a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability,' or for 'a preexisting pulmonary condition adjudged not to have contributed to his disability.' *Ling,* 176 F.3d at 232.

175 F.3d at 324. The *Salyers* decision emphasizes the importance of affording the party liable for medical benefits an opportunity to rebut the presumption with evidence that the service provided treated a condition which became manifest after the underlying adjudication of entitlement, or that it treated a preexisting pulmonary condition adjudged not to have contributed to disability. It is the Department's intent merely to codify the Court's coverage presumption and its rebuttal methods as outlined in Fourth Circuit precedent. In light of *Salyers* and *Ling,* the Department has revised § 725.701(e) to conform the regulation's rebuttal provisions to the decisions issued by the Fourth Circuit since *Doris Coal.* Accordingly, the Department has replaced the phrase ''was not for a covered pulmonary disorder as defined in § 718.201 of this subchapter,'' with ''was for a pulmonary disorder apart from those previously associated with the miner's disability[.]'' The foregoing explanation also responds to one comment which faulted the Department for omitting any discussion of *Salyers* in the second notice of proposed rulemaking.

(c) In response to its second notice of rulemaking, the Department received numerous comments opposing the medical benefits program in general or the § 725.701(e) presumption in particular because, in the commenters' view, coal mine operators would be forced to pay for medical treatment unrelated to pneumoconiosis, especially respiratory disorders caused by cigarette smoking. These same objections were made to the version of § 725.701(e) contained in the Department's initial notice of proposed rulemaking. 64 FR 55003 (Oct. 8, 1999). In response, the Department noted that operators may submit ''appropriate medical evidence'' showing the particular medical service or supply relates to the miner's smoking-related disease and not his pneumoconiosis. 64 FR 55004 (Oct. 8, 1999). An operator may still make such a showing, although the Department has revised the rebuttal provisions of § 725.701(e) in the final rule. The nexus between the miner's pneumoconiosis and the disorder under treatment is only presumed, and therefore subject to being disproved. The operator may produce evidence showing the treatment was for a particular pulmonary disorder apart from those conditions previously associated with the miner's disability, or exceeds the effective level of treatment for a covered disorder, or did not involve a pulmonary disorder at all. As with the *Doris Coal* presumption, invocation shifts only the burden of production, not persuasion. The operator must confront the presumption by submitting evidence which, if credited, establishes one of the means of rebuttal. Section 725.701(f), however, does preclude one defense: the operator cannot escape liability by trying to prove the medical service cannot pertain to disabling pneumoconiosis because the miner was disabled *solely* from smoking or some other non-occupational cause. Once the miner establishes (s)he is entitled to disability benefits, no element of entitlement can be relitigated or otherwise questioned via the medical benefits litigation. Consequently, the operator and its physician must accept that the miner has a totally disabling respiratory or pulmonary impairment, and that pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of that impairment. *See Ling,* 176 F.3d at 232 and n.13, *citing Doris Coal,* 938 F.2d at 497 (operator cannot rebut presumption of benefits coverage by showing miner's pneumoconiosis did not at least aggravate pulmonary condition because ''[t]he time for that argument had passed with the prior adjudication of disability'').

(d) Two comments state without explanation that the medical benefits program implemented by these regulations will force the coal industry to ''subsidize'' other private health plans and insurance as well as the Medicare program. The Department interprets this contention to mean that the industry and its insurers will be forced to financially assist other health care programs by paying for treatment expenses which are not actually related to the miner's pneumoconiosis, and should be paid by the other programs. The Department disagrees. Congress created the black lung medical benefits program as the primary payor for the treatment of miners afflicted with disabling pneumoconiosis. The program covers the costs of treatment, services and supplies only for that purpose. Consequently, the operator may avoid liability for any expense which is not for the treatment of totally disabling pneumoconiosis, and which therefore should be paid by some other health care program.

(e) One comment contends the Department misinterpreted *Seals* and *Ling* in its analysis of those cases. 64 FR 55003–04 (Oct. 8, 1999). The commenter also states the Department cannot ''overrule'' *Seals* by regulation because that decision is based on an interpretation of the APA. The Department rejects both arguments. The commenter does not identify any specific mischaracterization or other error in the Department's interpretation of either decision. The Department believes its analysis is correct, and declines to change its position on the meaning of those decisions except to the

extent reflected in changes to the rebuttal provisions contained in § 725.701(e). As for departing from the APA analysis of the majority in *Seals,* the comment is simply incorrect. The specific majority holding of *Seals* reversed the decisions of the administrative law judge and Benefits Review Board because of an incorrect application of Fourth Circuit law to a case arising in the Sixth Circuit. Judge Boggs (concurring), however, agreed with Judge Moore (dissenting) ''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.*'' 147 F.3d at 517. Consequently, the majority holding does not rest on any APA considerations, and a majority of the panel, albeit in *dicta,* acknowledges the Department's authority under *Greenwich Collieries* (and, by extension, the APA) to promulgate regulatory presumptions which reallocate burdens among parties. The Department therefore rejects this comment.

(f) One comment contends the presumption of coverage for pulmonary treatment is not supported by any scientific or medical information. The commenter relies largely on a report prepared by a physician for purposes of the rulemaking proceedings; the physician addresses several of the regulations from a medical standpoint and reviews the medical literature compiled during the rulemaking. With respect to § 725.701(e), the physician challenges the reasonableness of presuming a connection between the miner's pneumoconiosis and any pulmonary disorder for which (s)he seeks treatment. The physician notes that many pulmonary disorders bear no relationship to pneumoconiosis, and their treatment is unaffected by the presence of pneumoconiosis. The physician further contends that each patient encounter must be amply documented by evidence that the treatment is necessary for the miner's pneumoconiosis, and should include medical testing, physical examinations, etc. The Department acknowledges the concerns expressed by the comment and accompanying medical views, but does not consider any change in the regulation to be necessary.

As an initial matter, the fact that a physician might view the presumption as *medically* unwarranted does not necessarily undermine its validity as a *legal,* or evidentiary, presumption. The Department understands the physician's objection to mean a physician would not rely on such a presumption as a basis for treating a patient. Most of the statutory and regulatory presumptions in the black lung benefits program, however, draw factual inferences from a combination of medical and non-medical facts for purposes other than patient care. *See* 30 U.S.C. § 921(c)(1) (miner's pneumoconiosis presumed caused by coal mine employment if miner worked ten years); (c)(3) (miner who has complicated pneumoconiosis irrebuttably presumed totally disabled); 20 CFR. § 727.203(a)(1)–(4) (proof of one of enumerated medical facts about miner's pulmonary condition invokes presumption of all remaining elements of entitlement); 20 CFR. § 725.309 (material change in miner's medical condition presumed if miner proves one element of entitlement in duplicate claim previously not proven). ''Like all rules of evidence that permit the inference of an ultimate fact from a predicate one, black lung benefits presumptions rest on a judgment that the relationship between the ultimate and the predicate facts has a basis in the logic of common understanding.'' *Mullins Coal Co.* v. *Director, OWCP,* 484 U.S. 135, 157 n. 30 (1987), *reh'g den.* 484 U.S. 1047 (1988). The Department explained the logical basis and administrative purpose for the presumption in the notice of reproposed rulemaking. *See generally* 64 FR 55004 (Oct. 8, 1999). A miner who is entitled to disability benefits has proven three basic medical facts: (s)he has pneumoconiosis as that disease is defined by § 718.201; (s)he has a totally disabling respiratory or pulmonary impairment; and the pneumoconiosis significantly contributes to that respiratory or pulmonary impairment. Consequently, the miner has established a connection between the compensable disease and the disabling lung condition. From those proven facts, § 725.701(e) draws a rational inference that the need for treating the miner's compromised respiratory condition at any given time is necessitated, directly or indirectly, by the presence of pneumoconiosis. This inference is rebuttable, and the operator may submit evidence showing the treatment is for a particular pulmonary disorder apart from those conditions previously associated with the miner's disability, or exceeds the effective level of treatment for a covered disorder, or did not involve a pulmonary disorder at all. The Fourth Circuit endorsed the same general line of reasoning in *Ling* when it upheld the validity of the *Doris Coal* presumption. 176 F.3d at 233–34. The Department therefore disagrees with the commenter that § 725.701(e) does not have a supportable basis which satisfies the legal test for a rational presumption.

The physician-commenter also urges the Department to require rigorous medical documentation for each medical treatment service, including contemporaneous objective testing, examinations, etc., to impose quality controls on the treatment program. The Department indirectly addressed this concern in the notice of reproposed rulemaking. 64 FR 55004 (Oct. 8, 1999). The Department noted that it receives 12,000 to 15,000 bills weekly for treatment services, most of which involve relatively minor amounts in the $25.00 to $75.00 range. The Department cited cost effectiveness and promptness as practical reasons for using a presumption of coverage to expedite the administrative process. The presumption supplants the need for more elaborate medical proof that the particular service or expense involves the miner's pneumoconiosis, at least until the operator challenges the expense with credible medical evidence. The Fourth Circuit reached the same conclusion in *Ling:*

> Hence, rather than compel the miner to exhaustively document his claim for medical benefits, *i.e.,* requiring him to again laboriously obtain all the evidence that he can that his shortness of breath, wheezing, and coughing are *still* the result of his pneumoconiosis, we have fashioned the *Doris Coal* presumption as a shorthand method of proving the same thing. The proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or associated symptoms.

176 F.3d at 233 (emphasis in original). Section 725.701(e) does not eliminate the need for medical documentation for treatment and services. The presumption merely provides a short-hand means of identifying expenses which are likely to be legitimate unless the liable party opposes payment of particular expenses.

(g) One comment states generally that the medical benefits program, as reproposed, will promote fraud. Another comment contends that reliance on the miner's treating physician under § 725.701(f) will promote fraudulent payments because the doctor has a financial incentive to attribute the miner's pulmonary problems to pneumoconiosis. The commenter also alludes to a long-standing pattern of abuse of the black lung program by treating physicians who mix compensable and non-compensable services when billing the Trust Fund and operators as documented in *Doris Coal Co.* v. *Director, OWCP,* 938 F.2d 492, 497–98 (4th Cir. 1991). Finally, the comment

objects to the basic concept of special deference to a treating physician's opinion as proposed in § 718.104(d). With respect to allegations of fraud, the professional integrity of any physician should be accepted until particular acts of malfeasance are established in the appropriate forum. The comment's allegations that particular physicians are motivated by financial incentives can as easily be directed toward any party-affiliated physician, or group of such physicians, who may benefit by tailoring conclusions to fit the interests of the party paying for the medical opinion. As for the commenter's specific suggestion that there is no cost containment in the program and that health care providers routinely seek payment from the program for unrelated charges, the Department accepts the holding in *Doris Coal.* In this decision, the Court refused to sanction the practice of submitting an unitemized bill for multiple services because such a practice could impose liability on the insurer for services unrelated to the treatment of the miner's pneumoconiosis and encourage fraud. 938 F.2d at 497–98. The Court, however, only alluded to the potential for fraud if unitemized billing were permitted. It did not address the practice as an historical reality or beyond the facts involving the one treating physician involved in the case. The Department therefore rejects the position that miners' treating physicians should be viewed with special suspicion as a group because of a motive for fraudulent diagnoses and/or treatment. The Department responds to the objections concerning special deference to the treating physician's opinion, as proposed in § 718.104(d), in the preamble to that subsection.

(h) One comment urges the Department to join the lawsuit filed by the Department of Justice to recover money from the tobacco industry for costs incurred by the black lung program in treating sick cigarette smokers. The comment is not directed to any regulatory proposal, and no response is therefore warranted.

(i) The Department received several comments which approve of § 725.701.

(j) No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.706

The Department proposed changing the no-approval dollar amount in § 725.706(b) from $100.00 to $300.00 in the initial notice of proposed rulemaking. 62 FR 3424 (Jan. 22, 1997). No comments were received concerning this section, and no other changes have been made in it.

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

The Department has received one comment relevant to Part 726 in its entirety. The Department proposed revising only specific regulations in Part 726, and invited comment only on those regulations, see 62 FR 3340 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). The Department either made only technical revisions to the remaining regulations in Part 726, or made no changes, *see* 62 FR 3340–41 (Jan. 22, 1997) (lists of technical revisions and unchanged regulations); 64 FR 54970–71 (Oct. 8, 1999) (same). Therefore, no changes are being made to Part 726 in its entirety.

Subpart A

20 CFR 726.2

In its initial notice of proposed rulemaking, the Department proposed adding subsection (e) to this regulation in order to recognize the addition of subpart D, implementing the civil money penalty provision of 30 U.S.C. 933, to part 726. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has capitalized the word ''subpart'' in subsection (b) to be consistent with the use of that word in subparts (c), (d), and (e). In subsection (d), the Department has replaced the phrase ''coal operator'' with the phrase ''coal mine operator'' to be consistent with subsections (c) and (e). No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.3

This regulation was not opened for comment in the Department's first notice of proposed rulemaking. *See* list of Unchanged Regulations, 62 FR 3341 (Jan. 22, 1997). The Department proposed a revision to subsection (b) in its second notice of proposed rulemaking at the request of the Office of **Federal Register** to clarify the treatment of cases in which the regulations in Part 726 appear to conflict with the regulations incorporated from Part 725. 64 FR 55005 (Oct. 8, 1999). In subsection (a), the Department has replaced the phrase ''coal operator'' with the phrase ''coal mine operator'' to be consistent with subsection (b). No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.8

(a) The Department proposed adding § 726.8 in its first notice of proposed rulemaking in order to define certain terms including ''employ'' and ''employment.'' The definition of ''employ'' and ''employment'' proposed in subsection (d), was identical to that in proposed § 725.493(a)(1). 62 FR 3369 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department incorporated into subsection (d) a change to the definition of the term ''employment'' that it had also made to § 725.493. 64 FR 55005 (Oct. 8, 1999). The Department also responded to comments concerning the retroactive effect of the proposal and the scope of the definitions. The Department stated its belief that the proposal was neither improperly retroactive nor an instrument for creating additional insurer liability. Neither did the proposal intrude on insurance functions reserved to the states. The Department noted the Court of Appeals for the Seventh Circuit's holding 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 Department also justified the scope of the proposed definition as well within the rulemaking authority granted the Department by Congress.

(b) One comment objects to the Department's definitions of the terms ''employ'' and ''employment.'' The commenter argues that the Department is improperly interfering with existing employment relationships by adopting regulations that differ from those provided by state employment and insurance laws. The Department provided a detailed explanation of both its authority and its reasoning for proposing this regulation in its October 8, 1999 proposal. *See* 64 Fed. Reg. 55005 (Oct. 8, 1999). The Department does not agree that the regulations it issues to implement the Black Lung Benefits Act interfere with employment relationships recognized by the various states. The Black Lung Benefits Act requires that a coal mine operator's liability for a miner's black lung benefits be based on that operator's employment of the miner. *See* 30 U.S.C. 932(a) (making the operator of a coal mine liable for benefits based on ''death or total disability due to pneumoconiosis arising out of employment in such

mine''). Congress did not specifically define the term ''employment,'' however. In such cases, an administrative agency is authorized to promulgate regulations to fill the gaps Congress left in the statute. *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974). In addition, the Department is authorized to promulgate regulations to ensure sufficient insurance coverage for all of the liabilities borne by operators under the Act. 30 U.S.C. 933(b)(3) (permitting the Secretary to promulgate regulations governing the content of insurance policies issued to cover liability under the Black Lung Benefits Act). The Department's definition of the terms ''employ'' and ''employment'' is intended to meet its responsibility to properly administer the Black Lung Benefits Act. The Department does not believe that its definitions will in any way affect the application of state law to the relationships between coal mine operators and the miners they employ.

(c) The same commenter also argues that the Department's regulation will eliminate the ability of a coal mine operator to enter into an employee leasing arrangement with an employee leasing company. The commenter observes that the current model employee leasing rule of the National Association of Insurance Commissioners requires the employee leasing company to provide workers' compensation coverage, including federal black lung benefits coverage, for its employees. According to the commenter, the Department's proposal, which would hold lessors responsible for the insurance of their leased employees, will make employee leasing a less viable option.

The Department does not believe that its proposal will interfere with an employer's economic decision to use leased employees in its coal mine operations. Moreover, the Department does not intend to force coal mine operators to secure the payment of benefits for leased employees when the leasing company has already obtained the necessary insurance. In such cases, the operator will be considered to have met the security requirements of the Act with respect to those employees. Such a practice is sound from the point of view of both the traditional coal mine operator and the employee leasing company. Although the commenter suggests that leasing companies are not mine operators, that is not entirely clear under the Black Lung Benefits Act. Section 423(a) of the Act, 30 U.S.C. § 933(a), requires ''each operator of a coal mine'' to secure the payment of benefits by qualifying as a self-insurer or purchasing insurance. The term ''operator,'' as used in section 423(a), includes ''independent contractors who perform services or construction at such mines.'' 30 U.S.C. § 802(d). This definition of ''operator'' thus includes companies that provide employees under a leasing arrangement. The Department therefore does not agree that employee leasing companies should not be considered ''operators'' under the Black Lung Benefits Act. The Department's ability to monitor the use of temporary contractual arrangements by the coal mining industry, however, is limited. In addition, the commenter's different interpretation of the term ''operator'' suggests that any effort to impose civil money penalties on a leasing company under Part 726, or to assign liability to such an entity under Part 725, would be vigorously contested. Accordingly, the Department has defined the terms ''employ'' and ''employment'' in a manner which maximizes its ability to ensure the insurance coverage of leased employees.

By contrast, the application of both Parts 725 and 726 to traditional coal mine operators is quite clear. The Act authorizes the Department to ensure that all of the individuals performing mining work under that operator's direction are covered by appropriate security. In addition, those coal mine operators who use leased employees are in the best position to ensure that those employees are covered by the necessary insurance. The Department does not intend to require that the traditional coal mine operator purchase insurance when the leasing company has done so, but it does intend the regulations to provide an incentive for the coal mine operator to deal only with those leasing companies that have purchased insurance meeting federal standards for black lung benefits coverage. *See* 20 CFR 726.203 (1999). Contrary to the commenter's suggestion, the rule thus does not make insurers and state funds the enforcement officers of the Department. Rather, the traditional coal mine operator is simply on notice that it may be held liable for the benefits of leased employees if the leasing company fails to procure the necessary insurance coverage, or for any civil money penalties arising as a result of that failure.

(d) Finally, the same comment objects that the Department's regulation is impermissibly retroactive. The Department has discussed the retroactive effect of its regulations in considerable detail in both its first and second notices of proposed rulemaking. *See* discussions of § 725.2 at 62 Fed. Reg. 3347–48 (Jan. 22, 1997) and 64 Fed. Reg. 54981–82 (Oct. 8, 1999). In those discussions, the Department recognized that it lacks the authority to make substantive changes to the regulations in a manner that applies retroactively. For example, if the previous civil money penalty regulation, 20 CFR 725.495 (1999), did not permit the assessment of penalties against an operator for its failure to secure the benefits payable to its leased employees, the Department may not assess a penalty against that operator under the revised regulations for any period prior to the effective date of these regulations. Although the Department believes that the previous regulation is broad enough to permit the assessment of civil money penalties in these cases, it also recognizes that the issue must be resolved on a case-by-case basis in the context of litigating penalty assessments.

It is also important to note that the revised regulation does not affect the liability of insurers for claims filed prior to the effective date of the regulations. Under the insurance endorsement set forth at § 726.203, an insurer is already liable for all of the miners employed by its insured. *See Lovilia Coal Co.* v. *Williams,* 143 F.3d 317, 322 (7th Cir. 1998). An employer's liability, in turn, is determined by the regulations set forth at 20 CFR §§ 725.491–.495. The Department has stated explicitly that the revised version of those regulations will not be applied retroactively. *See* § 725.2. Accordingly, if the prior regulations did not permit the imposition of liability against a coal mine operator for benefits owed to a miner whose services were obtained from a leasing company, they will not permit imposition of liability against that operator's insurer. The Department thus does not agree that the revised regulation is impermissively retroactive.

(e) No other comments were received concerning this section, and no changes have been made in it.

Subpart B

20 CFR 726.101

In its initial notice of proposed rulemaking, the Department proposed revising this regulation to delete the formula used in 1974 to establish the amount and types of security required for an operator to be authorized to self-insure. The proposal also removed the reference in subsection (a) to indemnity bonds and negotiable securities as the only forms of acceptable security. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised

subsections (b)(1), (2), and (3), and subsection (c) in order to clarify the meaning of the regulation. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.104

In its initial notice of proposed rulemaking, the Department proposed revising subsection (b) to recognize two additional forms of security available to an authorized self-insurer: Letters of credit and tax-exempt trusts. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised subsections (a) and (d) to clarify the meaning of those provisions. The Department received one comment concerning this regulation; that comment is addressed under § 726.106. No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.105

In its initial notice of proposed rulemaking, the Department proposed deleting the reference to the formula contained in 20 CFR 725.101(1999), in favor of a non-exclusive list of factors to be considered by the Department in determining the appropriate amount of security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the first and third sentences of the regulation in order to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.106

(a) In its initial notice of proposed rulemaking, the Department proposed deleting an incorrect reference to specific sections in Title 31 of the Code of Federal Regulations and replacing the reference with a citation to the appropriate regulatory part governing deposits with the United States. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) One comment urges the Department to include language in this regulation confirming the sole liability of a surety company which writes the most recent indemnity bond for a responsible operator, and the exoneration of all previous sureties. No change in the regulation is necessary. In *United States of America* v. *Insurance Co. of North America,* 83 F.3d 1507 (D.C. Cir. 1996), the Department argued that a surety assumes liability for all of an operator's existing obligations when the bond is written and continuing until the termination of the bond. The Court rejected this argument. It held that a surety is liable only for those obligations which actually accrue to the responsible operator during the lifetime of the bond, and not for all outstanding liabilities of the insured entity. 83 F.3d at 1511. The Court also rejected the notion that each successive bond exonerates any previous surety to which liability has attached. 83 F.3d at 1512–13. The Court based these holdings on its interpretation of the bond language itself. Consequently, the commenter's recommendation can be accomplished only by further specifying in the bond's language, as prescribed by the Department, the scope of the bond's coverage and its terms of release. The Department has yet to determine whether revision of the bond form is appropriate. In any event, the commenter's suggestion does not require changing the language of the regulation.

(c) The Department has revised the first sentences of subsections (b) and (c) to clarify the meaning of these provisions. No other comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.109

In its initial notice of proposed rulemaking, the Department proposed deleting specific references to indemnity bonds and negotiable securities in favor of more general references to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the second and third sentences of the regulation in order to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.110

In its initial notice of proposed rulemaking, the Department proposed deleting references to indemnity bonds and negotiable securities in subsections (a)(3) and (b) in favor of more general references to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the regulation to clarify its meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.111

In its initial notice of proposed rulemaking, the Department proposed deleting a reference to indemnity bonds and negotiable securities in favor of a more general reference to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department has revised the regulation to clarify its meaning. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 726.114

In its initial notice of proposed rulemaking, the Department proposed adding subsection (c) to codify the Department's position that self-insured coal mine operators who cease mining coal nevertheless have a continuing responsibility to maintain adequate security to cover their potential liability under the Black Lung Benefits Act. The Department also replaced a specific reference to negotiable securities and indemnity bonds in subsection (b) with a more general reference to the security required to be provided by a self-insured operator. 62 FR 3369 (Jan. 22, 1997). The Department did not discuss the regulation in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). In the third sentence of subsection (a), the Department has replaced the word ''have'' with the word ''has'' to make the sentence grammatically correct. The Department has also revised subsections (a) and (c) to clarify their meaning. No comments were received concerning this section, and no other changes have been made in it.

Subpart C

20 CFR 726.203

(a) The Department made technical revisions to § 726.203 in its first notice of proposed rulemaking, but did not open the regulation for comment. *See*

list of Technical revisions, 62 FR 3340–41 (Jan. 22, 1997). At the Department's July 22, 1997 hearing in Washington, D.C., however, the Department heard testimony indicating that, since 1984, the insurance industry had used an endorsement for black lung insurance that differed from the endorsement set forth in § 726.203. 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 industry stated that the Department had approved use of the new endorsement. Because the Department's records contained no document authorizing use of a different endorsement, the Department opened the regulation for comment, and invited the industry to produce proof that the Department had approved the change. In addition, the Department invited comment on the endorsement language that the insurance industry had supplied. 64 FR 55005–06 (Oct. 8, 1999).

(b) In response to the second notice of proposed rulemaking, the insurance industry submitted two affidavits. Rulemaking Record, Exhibit 89–37, Appendix G. One, from a former vice president and general counsel of the National Council on Compensation Insurance (NCCI), states that ''NCCI was informed by officials of the Office of Workers' Compensation Programs, in writing, that the agency had no objection to the changes.'' The affidavit also states that the changes were put into use. The other affidavit, from NCCI's current general counsel, states that NCCI's schedule for the retention of records requires the council to maintain correspondence for 10 years, and that correspondence more than 10 years old is destroyed in accordance with established policy. Accordingly, the affiant stated, NCCI was unable to produce a copy of the Department's ''acknowledgment'' of the revised insurance endorsement.

The Department has conducted a second thorough search of its files, including files in the Office of Workers' Compensation Programs, the Employment Standards Administration, and the Office of the Solicitor. Although the Department's files contain correspondence with NCCI dating back to 1984, the Department's search failed to produce any correspondence in which the Department approved NCCI's revised insurance endorsement. Moreover, the Department does not believe that it would have approved the proposed revision. The revision differs in two material respects from the endorsement set forth in § 726.203. First, the revision limits an insurer's liability for claims that are based on employment that ended before an operator first obtained insurance to secure its liability under the Act. Second, the revision limits an insurer's liability for claims that are approved as a result of amendments to the Black Lung Benefits Act.

The current black lung insurance endorsement obligates an insurer to provide coverage to an operator in two different types of claims. First, the insurer is liable when the miner's last exposure to coal mine dust in the employment of the insured ''occurs during the policy period.'' Thus, if a miner is last employed by XYZ Coal Company on March 1, 1990, and XYZ Coal Company is the coal mine operator responsible for the payment of that miner's benefits, the insurer whose policy covered XYZ on March 1, 1990 will be liable for the payment of those benefits. In addition, however, the endorsement covers a second type of claim. Prior to the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Act obligated employers to pay benefits to former employees who were totally disabled due to pneumoconiosis arising out of coal mine employment, no matter when their employment ended. *See Usery* v. *Turner Elkhorn Mining Co.,* 428 U.S. 1, 15–16 (1976) (observing that the Act has ''some retrospective effect''). Because operators were not required to purchase insurance until January 1, 1974, however, the endorsement contained a second clause providing coverage if the miner's last exposure in the employment of the insured operator ''occurred prior to (effective date) and claim based on such disease is first filed against the insured during the policy period.'' Thus, if a miner last worked for XYZ Coal Company in 1972, but did not file a claim until July 1, 1978, the insurer whose policy covered XYZ on the 1978 filing date would be liable for the miner's benefits.

The regulations define the term ''effective date'' in the endorsement as the effective date of the operator's first insurance policy providing coverage for the operator's federal black lung benefits liability. 20 CFR 726.203(b) (1999). Thus, if the operator did not obtain its first policy until January 1, 1974, that policy would cover any claims based on employment that ended prior to that date. The revised endorsement offered by the insurance industry replaces the term ''effective date'' with the date ''July 1, 1973.'' Although a number of operators did purchase insurance before January 1, 1974, none did so until after July 1, 1973. Accordingly, the industry's revised endorsement would potentially leave coal mine operators uninsured for certain claims. For example, if an operator did not purchase insurance until November 1, 1973, the revised endorsement would cover the miner's last exposure in the employment of the insured operator only if it ''occurred prior to July 1, 1973,'' and therefore would not cover any claims based on employment that ended between July 1, 1973 and November 1, 1973. If the coal company is still in business, the claim would be the responsibility of that company. If the coal company is no longer in business, the claim would become the responsibility of the Black Lung Disability Trust Fund. Either result is unacceptable. Although the Department recognizes that this change would not affect a significant number of claims, it could materially alter the liability of the insurance industry in some cases. Thus, the Department does not believe that the revision is appropriate.

The second material change in the endorsement is potentially more serious. The current endorsement obligates an insurer for liability that arises under the Black Lung Benefits Act and ''any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force.'' Following the Black Lung Benefits Reform Act of 1977, several Virginia coal mine operators sued two insurers in federal district court to obtain a declaratory judgment regarding the coverage of claims that were subject to approval under the new criteria. The court agreed with the operators and held that, under the Department's endorsement, a policy was ''in force'' as long as claims could be filed against it. *National Independent Coal Operators Association, Inc.* v. *Old Republic Insurance Co.,* 544 F. Supp. 520, 527–8 (W.D.Va. 1982). The court accordingly rejected the argument of the insurers that the term ''in force'' was synonymous with the term ''policy period,'' and that an insurer was liable only to the extent of amendatory or supplementary laws enacted during the one-year period covered by each policy. *See* 20 CFR 726.206 (a policy shall be issued for the term of one year from the date on which it becomes effective). The court stated that if the insurers had intended that meaning ''it should have been made clear to the plaintiffs [operators] by either using 'policy period' where the words 'in force' appear, or by defining 'in force' somewhere in the contract.'' *National Independent Coal Operators Association* at 528.

The court's decision was issued in 1982, and the insurance industry quickly accepted the court's invitation.

The revised endorsement, apparently submitted to the Department in 1983, replaces the language in the current endorsement that obligates the insurer to cover liability resulting from amendments while the policy is ''in force'' with a phrase obligating the insurer to cover liability resulting from ''any amendment to the law that is in effect during the policy period.'' This altered language would permit the insurance industry to accomplish what it failed to win in the 1982 litigation, *i.e.,* an exemption from liability resulting from any future amendments. Like the other proposed change, this revision would increase the exposure of coal mine operators and the Black Lung Disability Trust Fund, and is therefore unacceptable to the Department.

Because the revised black lung endorsement offered by the insurance industry materially alters the obligations and coverage provided by the insurance industry under the Black Lung Benefits Act, the Department must reject that endorsement. Accordingly, no changes are made to § 726.203.

(c) One comment urges the Department to add a sentence to subsection (d) of the regulation. The sentence, which the commenter states would conform the regulation to state regulatory regimes, would read as follows: ''The requirements of this section shall be construed to the extent possible, harmoniously with the workers' compensation rules and practices of the state is [sic] when the coverage is provided.'' Rulemaking Record, Exhibit 89–37, pp. 177–178. The commenter does not suggest any problem in the current regulations that this sentence is intended to correct, and the Department declines to add a sentence whose intent is unclear. To the extent that this sentence could be interpreted to require a result different from that reached in *Lovilia Coal Co.* v. *Williams,* 143 F.3d 317 (7th Cir. 1998), in which the Court of Appeals for the Seventh Circuit held that the federal black lung insurance endorsement was not subject to exclusions available under state law, the Department also does not believe that it would be appropriate.

The commenter also renews a suggestion, made in response to the first notice of proposed rulemaking, that subsections (b) and (c)(2) of § 726.203 should be eliminated. The commenter's first suggestion is premised on the Department's acceptance of the insurance industry's revised endorsement. As discussed above, the Department does not believe that the revised endorsement provides necessary coverage and therefore has refused to accept it. The commenter's second suggestion states that the addition of subsections (b)(1) and (b)(2) to § 725.493 have created a conflict with § 726.203(c)(2), and made the latter provision redundant. The Department disagrees because the two regulations serve wholly different purposes. Section 725.493(b)(1) governs the liability of prior and successor operators in two cases: (1) Where the miner was employed by the successor after the sale giving rise to successor liability; and (2) where the miner was never employed by the successor operator. Subsection (b)(2) governs the successor liability of companies whose relationship to the prior operator is as a parent company, as members of joint ventures, a partner, or a company that substantially owned or controlled the prior operator. Section 726.203(c)(2) governs the interpretation of the insurance contract in a case where the insured company is liable as a successor operator. Because the sections 725.493 and 726.203 govern different subjects, the Department does not believe that the regulations are in conflict, or that subsection (c)(2) is redundant.

(d) No other comments were received concerning this section, and no changes have been made in it.

20 CFR 726.208

Although the Department received comments under this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54970 (Oct. 8, 1999). The Department made only a technical change to the regulation in the second notice of proposed rulemaking. Accordingly, no changes are being made in this section.

20 CFR 726.211

Although the Department received comments under this section, the regulation was not open for comment, see 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54970 (Oct. 8, 1999). The Department made only a technical change in the regulation. Accordingly, no changes are being made in this section.

Subpart D

20 CFR 726.300–726.320

(a) In its first notice of proposed rulemaking, the Department proposed a complete revision of the procedural and substantive regulations governing the imposition of civil money penalties against operators that fail to secure the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. 933(d)(1). 62 FR 3370 (Jan. 22, 1997). These revisions included a series of graduated penalties based on the number of the operator's employees, the length of time the operator's uninsured status continues following notification, and its constructive and actual notice of its obligation to secure. In addition, the Department proposed allowing the initial assessment of penalties by the Office of Workers' Compensation Programs to become final if neither the operator nor its officers filed a timely notice of contest. The proposal also subjected decisions of administrative law judges on penalty issues to discretionary review by the Secretary. The Department did not discuss these regulations in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has made several minor changes to the regulations in Subpart D of Part 726. In § 726.302(c)(3) and (4), the Department replaced a reference to subsection (b) with a reference to subsection (c)(2)(i) to correctly identify the applicable provision. In § 726.308, the Department corrected the address of the Black Lung Benefits Division of the Office of the Solicitor and added a reference to § 725.311, which lists federal holidays. In § 726.313(f), the Department replaced the word ''will'' with the word ''shall'' to clarify the Department's intent. The Department has made minor revisions to §§ 726.300, 726.301, 726.302, and 726.305 to clarify their meanings.

(c) One comment is critical of the Department's failure to enforce its current requirement (20 CFR § 725.495 (1999)) that coal mine operators either purchase commercial insurance or qualify as self-insured entities. The commenter argues that if § 725.495 was enforced to its fullest extent, the Department would not find it necessary to alter the methods used to identify responsible operators. The Department provided a detailed explanation of the purpose behind its proposed revision of the civil money penalty regulations in its initial notice of proposed rulemaking. 62 FR 3370–71 (Jan. 22, 1997). Subpart D of part 726 replaces § 725.495 with a comprehensive scheme for the imposition of graduated penalties on those operators who fail to secure their liability for benefits. The previous regulation required only that an administrative law judge levy the maximum penalty possible in the absence of ''mitigating circumstances,'' and provided no guidance or criteria for determining an appropriate assessment. The revised regulations fill this void. The Department thus disagrees with the commenter's view that vigorous enforcement of penalties under 20 CFR

§ 725.495 (1999) would eliminate the need to revisit the Department's method of identifying responsible operators. Consequently, the revised regulations represent a necessary exercise of the Department's rulemaking authority.

(d) One comment generally characterizes this revision as adding ''onerous'' penalties to the current program, but makes no specific criticism of them. The revised Subpart D of part 726 does not add any penalty not specifically authorized by 30 U.S.C. § 933(d), and not contained in the previous regulations. Moreover, the graduated scale of penalties contained in the revision provides specific guidelines for computing penalties and may result in a lesser penalty being imposed than the former regulation would have required. This comment does not provide any other basis for a substantive response by the Department.

(e) One comment observes that the prospect of civil money penalties may encourage an unsecured operator to pass on its liabilities to an insured successor whose carrier has not collected a premium reflecting the additional liability. To the extent that such a possibility exists in cases where the prior operator subsequently becomes unable to pay benefits to its former employees, it implicates business considerations, not legal questions. An insured operator should weigh the potential effect of acquiring an entity with unsecured benefits liability as a factor in the financial soundness of making the acquisition. The possibility of adverse economic effects on some future mergers or acquisitions, however, does not excuse the Department's obligation to enforce compliance with the Act's insurance requirements and to penalize a failure to comply.

(f) Two comments approve of the proposed civil money penalties. No other comments were received concerning this subpart, and no other changes have been made in it.

20 CFR Part 727

(a) In its first notice of proposed rulemaking, the Department proposed deleting Part 727 from title 20 of the Code of Federal Regulations. 62 FR 3371, 3435 (Jan. 22, 1997). The Department explained that the Part 727 regulations, which govern black lung benefits claims filed prior to April 1, 1980, are relevant only to a small minority of the claims currently pending. Because the parties to those claims are already familiar with the standards in Part 727, the Department proposed to discontinue the annual publication of that part. In lieu of continued publication, section 725.4(d), as revised, will refer individuals to the 1999 version of title 20 of the Code of Federal Regulations for a copy of the regulations. *See* discussion of § 725.4, above; 62 FR 3348, 3386 (Jan. 22, 1997). The Department did not discuss Part 727 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Three comments urge the Department not to discontinue its annual publication of Part 727 because the part governs claims still pending in various stages of adjudication. Although the Department recognizes that the Part 727 regulations are applicable to some pending claims, the Department does not believe that the existence of this relatively small number of cases justifies the continued publication of the part in the Code of Federal Regulations. The parties to these claims are already familiar with the regulations, and have received sufficient notice of the Department's intention to cease publication to allow them to retain their current copies of the Code. Accordingly, the Department has discontinued the annual publication of Part 727.

(c) No other comments were received concerning this part, and no changes have been made in it.

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, 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 in any one year.

Executive Order 13132

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ''federalism implications.'' The rule does not have ''substantial effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Paperwork Reduction Act

The changes establish no new record keeping requirements. Moreover, they reduce the volume of medical examination and consultants' reports which currently are created solely for 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). The preamble to the RFA provides in part as follows:

> It is the purpose of this Act to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

Pub. L. 96–354, 94 Stat. 1165 (1980).

The RFA outlines in some detail the analysis required for compliance. Unless the agency certifies that the rule will not have ''a significant economic impact 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 impact.''

In light of the comments the Department received in response to the first notice of proposed rulemaking, the Department included in its second notice of proposed rulemaking an initial regulatory flexibility analysis. That analysis included each of the components identified by the RFA: (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 would apply; (4) a description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule; and (5) an identification of any rules that would overlap, duplicate, or conflict with the proposed rule. 5 U.S.C. 603(b). Finally, as is also required by the RFA, the analysis contained a description of alternatives to the rule. 5 U.S.C. 603(c). 64 FR 55006–09 (Oct. 8, 1999).

The Regulatory Flexibility Act ''plainly does not require economic analysis.'' *Alenco Communications, Inc.* v. *FCC,* 201 F.3d 608, 625 (5th Cir. 2000). Because of the serious concerns raised in the comments to its initial notice of proposed rulemaking, however, the Department undertook an extensive analysis of the effect of its proposed rule on the coal mining industry in general and on small businesses, as defined by the Small Business Administration, in particular. Rulemaking Record, Exhibit 80. That analysis determined that the potential costs of the Department's rule would be imposed on most coal mine operators through higher insurance premiums, and that, in the long term, those insurance premiums could be expected to rise by 39.3 percent. Exhibit 80 at p. 44. The analysis assumed that all coal mine operators purchased insurance to cover their obligations, although it noted that this assumption probably overstated costs with respect to operators that are authorized to self-insure. Logically, operators self-insure only if they may do so at a lower cost. Exhibit 80 at p. 44. The analysis calculated that an increase in premiums of this magnitude would result in a total annual cost to the industry between $32.22 million and $88.32 million, with a point estimate of $57.56 million. Exhibit 80 at p. 46. The Department believes that these figures contain substantial upward biases, and that they therefore overstate, by a considerable amount, the total cost to industry. Specifically, the Department estimated the costs based on the insurance premiums paid by underground coal mine operators. The insurance premiums paid by surface mine operators, which employ a substantial percentage of the people working in coal mine employment, are significantly lower. (See the economic analysis prepared by Milliman & Robertson, Inc., at p. 6, Table 4; Rulemaking Record Exhibit 89–37, Appendix A.) In addition, coal mine operators who self-insure their liabilities under the Black Lung Benefits Act may be assumed to do so because their costs are lower than the costs of commercial insurance. Although it is conservatively high, the Department believes the $57.56 million point estimate to be the most useful indicator of industry costs. The analysis concluded that the effects of this rise in insurance costs would be most heavily felt by underground bituminous coal mine operators with less than 20 employees, who would be in a poorer position to recoup those costs. Some of those operators, the analysis observed, might be forced to suspend operations. Exhibit 80 at pp. 56–59.

The RFA also requires that agencies assure that small businesses have an opportunity to participate in the rulemaking ''through the reasonable use of techniques such as—* * * 3) the direct notification of interested small entities; * * *'' 5 U.S.C. 609(a)(3). Accordingly, the Department mailed a copy of its second notice of proposed rulemaking, including its initial regulatory flexibility analysis, to each coal mine operator identified in a database maintained by the Mine Safety and Health Administration. In addition, the Department made a copy of its economic analysis available to any interested party that requested it and posted it on the Internet. 64 FR 55008 (Oct. 8, 1999). Finally, because the Department did not complete its mailing of the proposal until November 5, 1999, it extended the comment period through January 6, 2000 to ensure that each small business was given no less than 60 days to submit comments, the length of the original comment period in the second notice of proposed rulemaking. 64 FR 62997 (Nov. 18, 1999).

Finally, the Regulatory Flexibility Act requires that when an agency promulgates a final rule after having been required to publish a notice of proposed rulemaking, the agency must prepare a final regulatory flexibility analysis. That analysis must contain:

(1) a succinct statement of the need for, and objectives of, the rule;

(2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and

(5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. 604(a). The agency must make a copy of its final regulatory flexibility analysis available to the public, and must publish its analysis or a summary of its analysis in the **Federal Register**. 5 U.S.C. 604(b). The Department's final regulatory flexibility analysis is published below.

Need for, and Objectives of, the Rule

The Department discussed its need to revise the black lung regulations in its initial regulatory flexibility analysis. 64 FR 55006–07 (Oct. 8, 1999). In that analysis, the Department observed that the revisions satisfied a number of different objectives. First, many of the revisions simply updated the regulations implementing the Black

Lung Benefits Act. The Department's initial analysis provided examples of much needed regulatory updates such as those needed to reflect decisions of the courts of appeals and to clarify the Department's original intent when certain regulations were promulgated. Similarly, the Department noted the proposed regulatory revisions reflected changes that had occurred over the previous 20 years in the diagnosis and treatment of pneumoconiosis. Paragraphs (1), (3), (4), and (6) of the section entitled ''Reasons for, and Objectives of, the Proposed Rule,'' discussed areas in which the Department sought to update its regulations.

The black lung program regulations were in need of significant revision to make them current. The Department last made substantive revisions to certain regulations in 1983, *see* 48 FR 24272 (May 31, 1983), and those revisions reflected only substantive changes made to the Black Lung Benefits Act by the Black Lung Benefits Revenue Act of 1981, Pub. L. 97–119, Title I, 95 Stat. 1635 (1981) and the Black Lung Benefits Amendments of 1981, Pub. L. 97–119, Title II, 95 Stat. 1644 (1981), both of which became effective on January 1, 1982. Most of the regulations have not been revised since they were originally promulgated: Part 718 in 1980, Part 722 in 1973, and Parts 725 and 727 in 1978. *See* 45 FR 13678 (Feb. 29, 1980); 38 FR 8328 (March 30, 1973); 43 FR 36772 (Aug. 18, 1978). Some regulations, however, did not reflect the amendments to the Black Lung Benefits Act enacted over the last quarter century. For example, Part 722 sets forth criteria states must meet when seeking certification from the Secretary that their workers' compensation programs provide ''adequate coverage'' for occupational pneumoconiosis. These regulations were never revised in light of either the Black Lung Benefits Reform Act of 1977, Pub. L. 95–239, 92 Stat. 95 (1978), or the Black Lung Benefits Amendments of 1981. Similarly, the Secretary's Part 725 regulations required revision in order to reflect amendments to other statutes. For example, revised § 725.621 reflected the Debt Collection Improvement Act of 1996, Pub. L. 104–334, 110 Stat. 1358 (1996), *see* preamble to first notice of proposed rulemaking, § 725.621, 62 FR 3369 (Jan. 22, 1997). Section 725.515 was revised to reflect amendments to the Social Security Act, *see* preamble to second notice of proposed rulemaking, § 725.515, 64 FR 55001 (Oct. 8, 1999). Section 725.544 was amended to reflect the statutory increase in the dollar amount of claims which may be compromised by the United States and to reflect the repeal of the Federal Claims Collection Act, *see* preamble to second notice of proposed rulemaking, § 725.544, 64 FR 55002 (Oct. 8, 1999).

In addition, over the last two decades, many of the regulations in Parts 718 and 725 have been interpreted by both the Benefits Review Board and the federal appellate courts. The Department strongly believes that, where these interpretations represent a consensus of opinion as to the meaning and correct application of particular regulations, that consensus should be embodied in the Department's regulations. One commenter correctly observes that none of these courts specifically ordered the Department to revise its regulations. The Department believes, however, that the interests of all parties to the adjudication of a claim—coal mine operators and their insurers as well as claimants—will be better served if a judicial consensus is reflected in the explicit language of the Department's regulations. Incorporating such a consensus will allow both the parties and the adjudication officer to use a current version of the regulation that does not require constant recourse to databases of federal case law. Moreover, the black lung program serves a population of applicants—individuals who spent their working lives in the Nation's coal mines—who cannot be expected to be aware of all of the judicial decisions bearing on their eligibility for benefits, and who thus cannot be expected to bring them to the attention of the administrative law judges who conduct formal hearings on applications for benefits under the Act.

For example, the substantive criteria governing a claimant's eligibility for benefits, set forth in Part 718, have been the subject of numerous appellate decisions. The Department's preamble discussion of § 718.201 contains citations to a considerable body of case law recognizing that pneumoconiosis, as defined by the Act and the Department's regulations, includes obstructive lung disease arising from coal mine dust exposure. Similarly, the preamble discussion of § 725.309 references those decisions noting that pneumoconiosis is a latent, progressive disease. *See* preamble to § 718.201, paragraph (f), preamble to § 725.309, paragraph (b). The Department's revised definition of ''pneumoconiosis'' in § 718.201 explicitly incorporates both of these principles. The Department's revisions of §§ 718.204 (criteria for establishing that a miner suffers from total disability due to pneumoconiosis) and 718.205 (criteria for establishing that a miner died due to pneumoconiosis) codify nearly unanimous case law interpreting the Department's prior regulations. *See* preamble to § 718.204, paragraph (d), explaining that the definition of ''total disability'' requires proof of a totally disabling respiratory or pulmonary impairment, preamble to § 718.205, paragraph (d), providing practical meaning to the regulatory standard that death is due to pneumoconiosis when pneumoconiosis is a substantially contributing cause of death; *see also* 62 FR 3345 (Jan. 22, 1997) (citing cases defining when total disability is due to pneumoconiosis under 20 CFR 718.204 (1999)). Similarly, revised sections 725.309, governing subsequent claims filed by the same individual, and 725.310, governing requests for modification of a claim, reflect a body of decisional law that has developed since these regulations were promulgated in 1978. *See* preamble discussions of § 725.309, 62 FR 3351–52 (Jan. 22, 1997), 64 FR 54984–85 (Oct. 8, 1999), and above; and preamble discussions of § 725.310, 62 FR 3353–54 (Jan. 22, 1997), 64 FR 54985–86 (Oct. 8, 1999), and above.

The Department also believes that, where the Board or the appellate courts have identified issues which the regulations do not adequately address, regulatory action is appropriate to correct that omission. Thus, section 725.495 addresses a problem observed by the Fourth Circuit Court of Appeals in *Director, OWCP* v. *Trace Fork Coal Co.*, 67 F.3d 503, 507 (4th Cir. 1995), *viz.*, 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.'' Similarly, where the Board or the appellate courts have interpreted a regulation in a manner different from that intended by the Department, the only way to ensure that the Department's intent is fulfilled is to amend the regulations. *See*, *e.g.*, preamble to first notice of proposed rulemaking, § 718.101, 62 FR 3341 (Jan. 22, 1997) (noting intent that standards for ensuring the quality of medical evidence be made uniformly applicable to all new evidence developed in the claims adjudication process).

Finally, in order to update its regulations, the Department also needed to revise certain provisions in light of its experience administering the program for over 25 years. This experience had demonstrated that the regulations did not adequately address certain issues. For example, the former regulations provided little guidance as to when a claimant could reasonably expect the payment of monthly and retroactive

benefits from coal mine operators, *see* preamble to first notice of proposed rulemaking, § 725.502, 62 FR 3365–66 (Jan. 22, 1997). Similarly, the Department had learned that the rules governing overpayments and their possible waiver varied depending on whether the overpayment was made by the Black Lung Disability Trust Fund or a coal mine operator, *see* preamble to first notice of proposed rulemaking, § 725.547, 62 FR 3366 (Jan. 22, 1997).

In addition to making its regulations current, the Department intended to revise its regulations to streamline the adjudication of claims under the Act. 62 FR 3338 (Jan. 22, 1997). The Department felt this need was critical and hoped to ensure that the resulting process for determining a claimant's eligibility was both simple and equitable. For example, the Department had been widely criticized for delays in the adjudication process. In response, the Department has made considerable changes in the initial processing of claims. The Department's revisions begin with the manner in which each miner who files an application for benefits is afforded a complete pulmonary evaluation, *see* 30 U.S.C. 923(b). The Department's revisions will allow each miner to select a highly qualified physician to perform his evaluation from a list of authorized providers maintained by the Department. *See* preamble discussion of § 725.406, 64 FR 54988–90 (Oct. 8, 1999). The Department hopes thereby to provide each claimant with a realistic appraisal of his condition and to provide each claim with a sound evidentiary basis. The regulations governing the additional development and submission of evidence will ensure that the parties to a claim receive fewer documents to which they need to file a response than was formerly the case. Thus, rather than issue initial findings and a memorandum of conference, formerly provided for in the regulations (20 CFR 725.410, 725.411, 725.417 (1999)), the district director will issue only one decisional document at the conclusion of his processing: a proposed decision and order. *See* preamble discussion of §§ 725.410–725.413. In addition, the revised regulations will allow the Department to generate documents that provide a clearer and better reasoned explanation of any evidentiary evaluation made by the district director and a better understanding by the parties of their rights and responsibilities. Thus, the district director will issue a schedule for the submission of additional evidence which explains his preliminary analysis of the results of the miner's complete pulmonary evaluation. It will notify all parties of their right to submit additional evidence and to obtain further adjudication of the claim. *See* preamble discussion of §§ 725.410–725.413. One of the most important revisions made by the Department will limit the parties' submission of documentary medical evidence. This revision will require that the factfinder evaluate a claimant's eligibility based on the quality of medical evidence that the parties submit, rather than the numerical superiority of the evidence on either side. *See* preamble discussion of § 725.414, 64 FR 54994 (Oct. 8, 1999); 62 FR 3356–57 (Jan. 22, 1997).

Significant Issues Raised by Public Comments in Response to Initial Regulatory Flexibility Analysis

The comments in response to the Department's initial regulatory flexibility analysis fall into three categories: (1) Those comments urging the Department not to promulgate regulations having any adverse economic effect on the coal mining industry, or on one or more segments of that industry; (2) comments contending that the assumptions underlying the economic analysis on which the Department's initial regulatory flexibility analysis was based were flawed, and that the analysis thus underestimates the effect on small businesses subject to regulation by the rule; and (3) comments suggesting regulatory alternatives that the Department allegedly failed to consider in its initial regulatory flexibility analysis. The Department discusses those comments suggesting regulatory alternatives below, in the section entitled ''Description of Steps the Agency has taken to Minimize the Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes.'' The Department responds to comments in the first two categories in this section.

Several commenters argue that, in light of the costs identified by the Department in its initial regulatory flexibility analysis, the Department should not promulgate any revised regulations. The Department disagrees. The regulations implementing the Black Lung Benefits Act are badly in need of revision to reflect more than two decades of judicial interpretation and administrative experience. In addition, the Department believes that the process used to determine a claimant's eligibility for benefits, and an operator's liability for those benefits, needs to be made faster, fairer, and more credible. No parties have benefitted from the delays that the courts of appeals have identified in the program, *see, e.g., Venicassa* v. *Consolidation Coal Co.,* 137 F.3d 197, 198 n.2 (3d Cir. 1998) (noting ''a disturbing record of delay in processing claims for black lung benefits in prior cases''). The Department's regulations are intended to eliminate that delay by, *inter alia,* reducing the number of steps in the district director's processing of a claim, requiring the timely development of evidence relevant to the issue of operator liability and eliminating the possibility of remands from the Office of Administrative Law Judges for the development of additional evidence as to the identity of the liable party. The Department's revised regulations promote fairness and credibility in claims adjudications by providing each miner with a quality medical evaluation of his pulmonary condition when he first applies, by explaining the Department's initial assessment of that evidence and by informing all parties of their rights to submit additional evidence and to request further adjudication of the claim.

One comment suggests that ''a reasonable interpretation of the Department's own economic analysis leads to the inescapable conclusion that the proposed rule will have a significant economic impact on a substantial number of small entities.'' Rulemaking Record, Exhibit 89–37, p. 24. The Department does not disagree. 64 FR 55008 (Oct. 8, 1999). The Department recognized that the rule will have an economic impact on the coal mining industry, and in particular on underground bituminous coal mine operators that employ less than 20 people. It is for this reason that in its second notice of proposed rulemaking, the Department prepared an initial regulatory flexibility analysis in lieu of its prior certification that the proposed rule would not have a significant economic impact on a substantial number of small entities. 64 FR 55006 (Oct. 8, 1999). The existence of an economic impact, however, does not mean that the Department is foreclosed from promulgating its rule. In *Associated Fisheries,* the First Circuit quoted with approval from the Commerce Department's explanation of its responsibilities under the Regulatory Flexibility Act:

> The intent of the RFA is not to limit regulations having adverse economic impacts on small entities, rather the intent is to have the agency focus special attention on the impacts its proposed actions would have on small entities, to disclose to the public which alternatives it considered to lessen adverse impacts, to require the agency to consider public comments on impacts and

alternatives, and to require the agency to state its reasons for not adopting an alternative having less of an adverse impact on small entities.

127 F.3d at 115–116. The Regulatory Flexibility Act thus vests the Department with the responsibility for determining, in light of the recognized costs, whether the rule should nevertheless be promulgated.

The economic analysis performed in connection with the Department's initial regulatory flexibility analysis described the costs that the rule would impose on the coal mining industry. That analysis was based on a number of conservative assumptions that were designed to establish a cost ceiling, *i.e.,* the maximum additional costs that industry would face as a result of these rules. For example, the analysis assumed that all coal mine operators purchase commercial insurance. The Department did not attempt, however, to estimate precisely the number of mines which would close as a result of these increased costs. Instead, the Department concluded that there was only a significant potential for closures in the very smallest size class of underground bituminous coal mine, those with under 20 employees. Rulemaking Record, Exhibit 80, Exhibits O and Q. These mines will feel the greatest effect of the Department's rule largely because of their operating characteristics. As a group, very small coal mines are far more labor intensive (*i.e.,* much less mechanized) than larger coal mines. Because the rule will raise costs in the form of higher insurance premiums, which in turn are based on each mine's payroll, increased premiums will represent a substantially higher cost increase per ton of coal mined for a very small mine than for a larger mine. Thus, based on its preliminary economic analysis (Rulemaking Record, Exhibit 80, pp. 46–51), the Department found that larger mines—including many mines that meet the definition of a ''small'' business under the definition used by the Small Business Administration—would not face significant impacts from the rule in terms of closures.

In addition to being more labor intensive, very small underground mines also incur the higher insurance premiums associated with underground coal mining. Data contained in comments received by the Department indicate that surface bituminous coal mine insurance rates average $1.57, only 59 percent of the average underground mine insurance rate of $2.64. Similarly, surface mine rates average only 53 percent of underground rates for eastern bituminous mines; and 37 percent of underground rates for a four-state average of Pennsylvania, Kentucky, Virginia, and West Virginia. For anthracite coal, surface mine insurance rates are only 44 percent of underground mine insurance rates. Rulemaking Record, Exhibit 89–37, Appendix A, Table 4. Any increase in insurance rates, then, assuming that all other things are equal, will affect the price per ton of underground coal twice as much as it will the price of coal extracted from surface mines. This distinction renders very small underground coal mines potentially vulnerable to closures in a way that very small surface coal mines are not. Because the insurance rates for surface anthracite mines are also high, very small anthracite strip mines may also be potentially vulnerable to closure.

Additional data provided by commenters, as well as data that has become available from the Department of Energy since publication of the Department's initial regulatory flexibility analysis, allow the Department to forecast the number of potential mine closures in somewhat greater detail. This analysis confirms the Department's preliminary conclusion that, although the regulations will have a significant impact on some mines, the impact on the mining industry as a whole will not be substantial. The Department's additional analysis therefore provides no basis to reconsider the decision to promulgate final regulations.

Mine Safety and Health Administration data are useful in establishing the number of mines that are potentially at risk of closure. The Department emphasizes, however, that this data addresses only the mines that are potentially at risk of closure because of the Department's rulemaking. The actual effects of the rule can be determined only by establishing the ''base case'' of mines that could be expected to close even if the Department does not promulgate its final rule. In 1998, 1,609 mines produced bituminous coal. An additional 743 bituminous mines are listed in the MSHA data but produced no coal during 1998. Of the 1,609 producing mines, 791 were underground mines, and 263 of the underground mines had fewer than 20 employees. Of these 263 mines, 37 produced over 100,000 short tons of coal in 1998. Because mines with fewer than 20 employees that produced over 100,000 short tons have high labor productivity, the Department does not believe that they will be significantly impacted by a rule whose primary effects are felt through increased insurance premiums that are based on labor costs. Subtracting these 37 mines from the 263 very small underground mines leaves 226 mines. The mines are located in Kentucky (81 mines), West Virginia (71 mines), Virginia (52 mines), Pennsylvania (14 mines), Tennessee (5 mines), and Alabama (3 mines). These mines are extremely small, employing a total of only 2,586 people. Median 1998 employment per mine was 11; mean employment was 11.4. Median production was 25,957 short tons of coal; mean production was 34,273 short tons.

The Department's previous economic analysis demonstrated that very small underground mines with first quartile accounting profits (the one-quarter of these mines with lowest profits) might be forced to close as a result of the rule, but that mines with median accounting profits were not in such jeopardy. For purposes of estimating the potential number of mine closures, however, the Department will assume that as many as three-eighths of these mines (the half-way point between .25, representing the first quartile, and .5, representing the second) are at risk. Multiplying this figure (.375) by the total number of very small underground bituminous mines (226) yields a total of 85 mines. According to MSHA data, these 85 underground bituminous mines represent 5.3 percent of all producing bituminous coal mines, employed 1.3 percent of the miners engaged in bituminous coal mine employment, and accounted for 0.3 percent of bituminous coal production.

MSHA data indicate that 117 mines produced anthracite in 1998. An additional 87 anthracite mines are listed in the MSHA data but produced no coal during 1998. Of the 117 producing mines, 60 were strip mines, 39 were underground mines, and 18 were culm bank/refuse pile operations. Of the 117 mines, 12 (10 strip mines, 1 underground mine, and 1 culm bank operation) had 20 or more employees, and only 3 had more than 50 employees. An additional 6 mines (3 strip mines and 3 culm bank operations) produced over 100,000 short tons in 1998. Culm bank operations and mines with 20 or more employees or over 100,000 tons output do not appear to be at risk of closure. Culm banks are discussed in detail below in response to a comment regarding the Department's assumptions about price elasticity. Thus, the population of very small anthracite mines consists of 85 mines. This total includes 47 strip mines (60 total strip mines minus 10 strip mines with 20 or more employees minus 3 strip mines that produced more than 100,000 short tons of coal in 1998) and 38

underground mines (39 underground mines minus 1 mine with 20 or more employees). These mines are extremely small. They had a total of 411 employees (220 in strip mines and 191 in underground mines). Median 1998 employment was 3; mean employment was 4.8. Median production of these anthracite mines was 4,500 short tons (7,484 for strip mines and 2,598 for underground mines); mean production was 12,173 short tons (17,116 for strip mines and 6,060 for underground mines).

Profit data for anthracite mines are not available. It appears reasonable to assume, however, that very small anthracite strip mines will be potentially subject to closure because their insurance premiums are high, and that very small underground anthracite mines will be even more heavily impacted. The Department will therefore assume that three-eighths of very small anthracite strip mines (the same figure used for bituminous mines) and five-eighths of very small anthracite underground mines (a higher figure to take into account the possibility of a heavier impact on these mines) are potentially in jeopardy of closure because of costs of the rule. Thus, an estimated 42 very small anthracite mines (18 strip mines (.375 times 47 mines) and 24 underground mines (.625 times 38 mines)) are potentially in jeopardy of closing as a result of the rule.

The next step in forecasting the number of mines that may close as a result of the rule is establishing the ''base case,'' *i.e.,* the number of mines that would close regardless of whether the Department promulgated new regulations. This is particularly important for an industry such as coal mining, where the number of small mines has been declining for decades, and where a continued sharp decline is likely in the foreseeable future. Only after establishing the base case can the Department estimate the extent to which the rule may result in additional closures.

The current and predicted decline in the number of small coal mines is the result of a variety of market factors. They include electricity deregulation, reduction in coal reserves, the use of on-time delivery by coal company customers, equipment upgrades, increased use of low sulfate coals, and the reduction in the number of small mining firms due to industry consolidation over the last two decades. All of these factors put very small coal mines, particularly underground mines, in an increasingly disadvantageous competitive position. Because of their size, very small coal mines have difficulty increasing productivity. They lack the physical scale to take advantage of new, high-productivity equipment, most of which is very large, or to adopt more productive techniques, such as continuous miner operations or longwall mining. Restricted space, of course, is a greater constraint in underground coal mines than surface mines.

Many very small coal mines are also characterized by unfavorable geological conditions. These may include thin coal veins, splitting coal beds, fractures or offsets due to faulting, interruptions in coal deposits or coal quality due to sandstone-or clay-filled channels, and unstable roof rock. Such geologic conditions may well be the reason the mine is small to begin with. They also make it costly to extract coal and difficult to improve productivity. Mines with such geological problems are therefore especially vulnerable to price competition. The economic suitability of coal beds for mining is reflected in changes in committed active reserves as the price of coal changes. Culling reserves to eliminate hard-to-mine reserves, or ''high-grading'' of reserve blocks, is a logical adaptation to low coal prices. From 1991 to 1996, as coal prices fell, the reserves of small mines (annual production of 10,000 to 100,000 short tons) fell by 61.6 percent, compared with a 12.9 percent decline for the coal mining industry as a whole. U.S. Department of Energy, Energy Information Administration, ''The U.S. Coal Industry in the 1990's: Low Prices and Record Production,'' (October, 1999) p. 6 (hereafter, ''U.S. Coal Industry'').

In addition, the shift in demand to low-sulfur western coal, which has occurred in response to the Clean Air Act Amendments of 1990 and the resulting regulations of the Environmental Protection Agency, puts very small coal mines at a severe disadvantage. Very small coal mines are concentrated in areas where coal has a relatively high sulfur content. Low-sulfur coal is found predominantly in the west, particularly in the Powder River Basin. The large strip mines that produce low sulfur coal have easy geology (thin overburden and thick coal beds), and their large scale results in labor productivity approximately three times as high as that of eastern mines. This productivity differential continues to grow. Moreover, recent investments in track by western railroads are further lowering the power-plant price of Powder River Basin coal.

Finally, many very small coal mines have management that may not be well equipped with tools such as computers. Such mines are in a poor position to adapt to practices such as on-time delivery or to utilize other risk management techniques that utility deregulation is making increasingly important in coal mine operation. Independent very small coal mines are also, by virtue of their size, in a relatively poor position to participate in strategic inter-fuel alliances, an increasingly common result of utility deregulation.

Because of all of these market factors, the outlook for independent very small mines is extremely bleak. The Department's preliminary economic analysis, in fact, was based on the observation that the base case already includes extensive closures of very small mines. Over the last 15 or 20 years, the market forces discussed above have eliminated a large majority of very small mines. Data collected by the Energy Information Administration (EIA) indicate that in the 11 years between 1986 and 1997 the number of coal mines with annual production of less than 10,000 short tons decreased from 1,069 to 281 (a total of 74 percent), while production of mines of this size decreased from 4.4 million short tons to 1.2 million tons, or by 73 percent. In the same period, the number of coal mines with annual production of 10,000 to 100,000 short tons decreased from 1,956 to 638 (a 67 percent decrease), while production of mines of this size decreased from 82.8 million short tons to 27.8 million short tons, or by 66 percent. EIA, U.S. Coal Industry, p. 3, Table 1.

To estimate both baseline closures and closures that may be considered impacts of the rule, two regression models were created using EIA data for 1986 through 1998. Both used the log of the number of underground bituminous coal mines with production in the range of 10,000 to 99,999 short tons. Both models used the log of the national price of coal as an independent variable, and one also included time as an independent variable. Both models had high statistical significance by any measure. Using EIA projections of coal price changes (*see* Department of Energy, Energy Information Administration, ''Challenges of Electric Power Industry Restructuring for Fuel Suppliers'' (September 1998) (hereafter, ''Challenges,''), Table ES1, p. 13), the models were used to forecast the percentage decrease in the number of coal mines in the base case in the years 2005 and 2015, and the decreases that may result from the Department's rule during the same interval.

The log-log model with no time variable predicted a baseline decrease in underground bituminous mines of 32 percent from the year 1998 to the year 2005 and a baseline decrease in underground bituminous mines of 61 percent from 1998 to 2015. Of the 85 bituminous mines identified as in jeopardy of closure, therefore, this model forecast that 27 would close by 2005 and 52 would close by 2015, even without the costs of the rule. When costs of the rule for the very small class of mines was added, the predicted decreases in the number of mines were 39 percent (or 33 mines) between 1998 and 2005 and 66 percent (or 56 mines) between 1998 and 2015. Thus the model predicts that the costs of the rule would result in the additional closure of 6 mines (33 mines minus 27 mines) as of 2005 but only 4 more mine closures (56 mines minus 52 mines) than the baseline as of 2015.

The model with a time variable predicted much sharper baseline decreases in the number of mines (43 percent decrease by 2005 and 86 percent by 2015) and impacts of the rule of about 0.4 mine closures by both years. It should also be noted that, because complete data were not available, neither model included mines producing less than 10,000 short tons, which have been closing at a faster rate than the mines that were included in the model. Thus, use of results from the model without a time variable represents a conservatively low choice of estimate of baseline closures.

A similar procedure was used for anthracite mines, with some modifications. Separate models were estimated for underground mines and strip mines, but total mines were used for the dependent variable. The log-log form without a time variable is reported. For the 24 at-risk underground anthracite mines, the model forecasts a base-case decrease in the number of mines of 21 percent as of 2005 (5 mines) and 43 percent as of 2015 (10 mines). Considering the additional costs imposed by the rule, the forecasts were decreases of 29 percent as of 2005 (1.92 additional mines) and 48 percent as of 2015 (1.2 additional mines). For the 18 at-risk surface anthracite mines, the model forecasts a base-case decrease in the number of mines of 8 percent as of 2005 (1 mine) and 20 percent as of 2015 (4 mines). Considering the additional costs imposed by the rule, the forecasts were decreases of 10 percent as of 2005 (.36 additional mines) and 21 percent as of 2015 (.18 additional mines).

The Regulatory Flexibility Act does not require the Department to extrapolate its projection of the cost of its rulemaking activity in order to determine the rule's collateral effects, *i.e.,* the extent to which the mining industry will absorb the costs of compliance by reducing either employment or output. It is possible, however, to make a rough estimate of these effects. The number of incremental closures of bituminous mines due to the rule (rather than the base case), was projected to be 6 mines as of 2005 and 4 mines as of 2015. This conclusion is consistent with the Department's previous analysis, which observed that the largest impact of the rule would be to close some mines sooner than they would have closed in the base case. Estimated employment impacts related to closures would be 70 jobs as of 2005 and 45 jobs as of 2015. Estimated production impacts related to closures would be 208,880 short tons of bituminous coal annually as of 2005 and 133,736 short tons as of 2015. Since the mines which may close presumably have relatively low productivity, the overall effect would be to raise industry productivity. The estimated level of impacts—about one-eighth of the baseline closure rate as of 2005 and one tenth the baseline closure rate as of 2015—is much too small to have a meaningful impact on the competitive structure of the industry.

The Department projected the number of incremental closures of anthracite mines due to the rule (rather than the base case) to be 2.28 mines as of 2005 and 1.38 mines as of 2015. Under this projection, the estimated maximum employment loss related to closures would be 10 jobs as of 2005 and 7 jobs as of 2015. This projected job loss assumes that no additional jobs are created elsewhere in the anthracite industry. Estimated production loss related to closures would be 14,564 short tons of bituminous coal annually as of 2005 and 11,058 short tons as of 2015. Since the mines which may close presumably have relatively low productivity, the overall effect would be to raise industry productivity. Closure of 1 or 2 mines is not expected to have a meaningful impact on the competitive structure of the industry.

It is also possible to assess the impact of the rule on mining communities using the counties in which such operations are located. Very small underground bituminous coal mines are found in 46 counties. If closures are randomly distributed, 22 of these counties have less than a 5 percent chance of any mine closure, 13 more have less than a 20 percent chance, 5 more have less than a 30 percent chance, and 3 more have less than a 50 percent chance of any mine closing. Thus, each of the possibly affected counties can expect to lose no more than 6 jobs and have very little chance of losing more than a dozen. Nearly half (42 percent) of very small underground bituminous coal mines are located in three counties (in three separate states). Of these counties, one can be expected (as of 2005) to have one mine closure, and the other two less than one mine closure each. A majority (65 percent) of anthracite underground and strip mines are located in one Pennsylvania county. This county can expect one mine closure as a result of the rule, and the other six counties with anthracite mines can expect one closure of a very small mine among them. Closure of one very small anthracite mine would have an impact of approximately 5 jobs. Overall, then, only two counties are likely to experience community impacts as great as one very small mine closing in any given year, and in neither of those counties is the impact likely to be greater than two very small mines closing.

The nature of the rule also makes it quite unlikely that there will be significant impacts on coal mine employment or output beyond those instances where mines close. The regulation has no direct effect on mining operations. The principal effect of the rule will be a very small increase in the cost of labor. This increased cost provides an incentive to substitute capital for labor, and to increase labor productivity and production generally to provide a broader base over which to spread the costs. This substitution, like any other measure designed to increase labor productivity, will enhance rather than restrict improvements in productivity. The Department's analysis already demonstrates a strong trend of increasing productivity in the coal mining industry, and any impacts of the rule will simply reinforce this trend.

In addition, recent history and available forecasts indicate that the use of coal in generating electricity will continue to increase. Any price pass-through will be small because the costs of the rule are (for the industry as a whole) not significant. There is no other plausible mechanism (except for closure of mines) by which the rule could induce reductions in production. Enhancement of productivity, for which there are incentives, will tend to increase production. Thus, aside from mine closures, the rule will not have adverse impacts on coal production.

Finally, there is a slight possibility that the rule may result in a decreased workforce in mines that continue to operate. The principal mechanism for such an impact is the incentive to

substitute capital for labor. A number of factors, however, make any such impact minimal in its significance. Because the costs of the rule are generally not significant, the incentive itself will be quite small. Increases in production will tend to mitigate job loss. By itself, any impact of the rule on employment is almost certainly small enough to be handled by attrition in an industry with an annual labor turnover rate of approximately 7 percent. Because the base case trend toward labor saving innovation in the coal mining industry is so strong, any adverse effect on employment will be a temporary acceleration of job loss, rather than a net long-term impact. Moreover, in the current strong employment market, any unemployment effects will generally be transitory, so that their significance will be minimal. For these reasons, aside from mine closures, the rule will not have significant adverse impacts on employment.

The Department's initial regulatory flexibility analysis, as supplemented by the additional study undertaken in the final regulatory flexibility analysis, demonstrates that the Department's final rule is being promulgated following examination of the potential effects of the rule on small coal mine operators. The Regulatory Flexibility Act does not dictate substantive results, or prevent the Department from acting in such a case. *See A.M.L. International, Inc.* v. *Daley,* 107 F. Supp. 2d 90, 105 (D. Mass. 2000) (''The intent of the RFA is not to limit regulations having adverse economic impacts on small entities.''). Because the Department believes that a revision of the regulations implementing the Black Lung Benefits Act is long overdue, the Department has decided to proceed with this final rule.

The Department also received comments on its economic analysis. In its initial regulatory flexibility analysis, the Department specifically invited comment on the assumptions used in developing its economic analysis, including 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. 64 FR 55008 (Oct. 8, 1999). One of the comments received by the Department, whose conclusions were endorsed by a number of other commenters, contained an economic analysis by Milliman & Robertson, Inc. (M&R). Rulemaking Record, Exhibit 89–37, Appendix A.

As an initial matter, the M&R analysis criticizes the assumption in the Department's economic analysis that the approval rate for claims paid by responsible operators and their insurers under the revised regulations will not exceed the approval rate for claims paid by the Black Lung Disability Trust Fund under the former regulations. The Department's economic analysis had assumed that the overall approval rate for responsible operator claims (currently 7.33 percent) would not exceed 12.18 percent, the overall approval rate for Trust Fund claims. Rulemaking Record, Exhibit 80, p. 38. The M&R analysis states that ''DOL has offered no support for this assertion.'' M&R at p. 17, *see also* Rulemaking Record, Exhibit 89–37, pp. 31–32.

The Department's analysis explicitly stated, however, that ''[t]he proposed regulations represent the Department's past and current practice in Trust Fund cases,'' and that ''several factors make the Trust Fund approval rate substantially higher than the responsible operator approval rate.'' Exhibit 80 at p. 38. These factors include the age of applicants whose claims are payable by the Trust Fund and the fact that most of their exposure to coal mine dust predated the 1969 federal dust standards. Thus, the Department believes that the approval rate for Trust Fund cases will remain the same, and that the approval rate for responsible operator cases will rise, but not to the level of Trust Fund approvals. The Department's assumption is based on its more than 15 years' experience in adjudicating claims for black lung benefits under the prior regulations, and its detailed knowledge of the evidentiary showings required for those claims' approval.

The National Mining Association, whose comment incorporates the M&R analysis, suggests that the Department's revised definition of the term ''pneumoconiosis'' represents a considerable departure from past practice. Specifically, the commenter takes issue with the Department's preliminary economic analysis which refused to assign costs to the amended definition of pneumoconiosis because inclusion of chronic obstructive pulmonary disease arising from coal mine employment as pneumoconiosis simply clarified the regulation and made it consistent with past practice. Rulemaking Record, Exhibit 89–37 at 29; Rulemaking Record, Exhibit 80 at 29. In the preamble to § 718.201, the Department has cited 14 decisions from six federal appellate courts with jurisdiction over the vast majority of claims filed under the Act (the Third, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits). These courts recognize that pneumoconiosis, as it is defined in the Act and was defined in the prior regulations, includes obstructive lung disease arising from coal mine dust exposure. Similarly, in the preamble to § 725.309, the Department has cited 44 decisions from seven federal appellate courts (the six listed above plus the Tenth Circuit). These courts recognize the progressive, latent nature of pneumoconiosis. All of these decisions reflect longstanding positions of the Department. Because of these positions, the Department has not attempted to deny claims because the miner's disabling lung disease was obstructive in nature, provided that condition was shown to have arisen out of coal mine employment, or because the miner's condition was alleged to have progressed. The Department, therefore, does not expect that any additional Trust Fund claims will be approved as a result of the revised definition of pneumoconiosis. Similarly, there is simply no reason to believe that the revised definition of pneumoconiosis will result in a higher approval rate in responsible operator claims than in Trust Fund claims.

The same commenter states that the limitation on documentary medical evidence tilts the playing field toward claimants by allowing a claimant three examinations (his choice of an approved physician to conduct the complete pulmonary evaluation plus two more) as opposed to the operator's two examinations. The commenter argues that this evidentiary imbalance will increase the number of approved claims payable by responsible operators. Rulemaking Record, Exhibit 89–37, p. 29. Again, however, the Department's Trust Fund experience forms a reasonable upper bound of the approval rate expected under the revised regulations. That experience demonstrates that the Department seldom develops more than two medical reports in any individual claim for which the Trust Fund is liable. In addition, claimants under the former regulations had the ability to choose *any* physician to conduct their initial evaluation, 20 CFR 725.406(a) (1999), subject only to a district director's approval, which was seldom refused. Claimants generally submitted no more than one additional medical report in support of their applications. Thus, once again, the rate of Trust Fund awards forms a reasonable upper boundary of the approval rate expected in responsible operator cases under the revised regulations.

Finally, the commenter argues that the provision requiring that ''controlling weight'' be given to the opinion of a treating physician will result in ''numerous'' claims being approved that previously would have been denied. The Department does not accept this assessment. The revisions to § 718.104 require only that an adjudication officer evaluate certain criteria to determine whether a treating physician may have developed an in-depth knowledge of the miner's pulmonary condition. As the Department has repeatedly emphasized, the regulation does not require that the adjudication officer credit the opinion of the treating physician where there is contrary evidence in the record. To the contrary, the rule is designed to force a careful and thorough assessment of the treatment relationship. 64 FR 54976–77 (Oct. 8, 1999); *see also* preamble to § 718.104, paragraph (f). Accordingly, the Department does not agree that this revision will result in the approval of ''numerous'' additional claims. The Department stands by its assumption in the initial regulatory flexibility analysis that any increase in the approval rate of claims due to this regulation will be ''very small.'' Exhibit 80 at p. 34. The Department reiterates that ''[i]t is difficult to see how this provision would lead to an increase in approval of weak or non-meritorious claims.'' Exhibit 80 at p. 27. The commenter's assertions have thus failed to undermine the Department's assumption that the approval rate for Trust Fund claims represents an appropriate upper bound for estimating the approval rate applicable to operator claims under the revised regulations.

The M&R analysis also arrives at a higher overall approval rate for Trust Fund claims (20 percent rather than 12.18 percent) by analyzing Trust Fund claims involving only post-1981 coal mine employment and by eliminating claims filed by individuals with less than 10 years of coal mine employment. M&R at p. 17 n. 41. The Department does not agree that manipulating the data in this fashion produces a more accurate result. First, responsible operators are also liable for claims involving pre-1982 coal mine employment, so it is appropriate to include that group. Second, exclusion of all claims based on less than 10 years of coal mine employment clearly will not create a true picture of the overall claims experience. A number of miners who are employed in the mines for less than 10 years ultimately are determined to be eligible for benefits. Although the M&R analysis includes claims filed by such miners in determining the number of approved claims, Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations* (July 22, 1997), p. 106 (testimony of Robert Briscoe), it excludes denied claims filed by such miners from the total number of filed claims. In its prior analysis, M&R stated that this exclusion was justified because claims filed by miners with less than 10 years of coal mine employment will not be ''present in the population of coal miners recently leaving the coal workforce.'' Rulemaking Record, Exhibit 5–160, Appendix 5, p. 28. The Department's database of claim filing information, however, does not support the inference that this group should not be counted in determining the approval rate for claims that are being filed currently. Indeed, throughout the last decade, claims filed by miners with less than 10 years of coal mine employment have represented approximately one-quarter of the total number of responsible operator claims. Because these claims continue to represent a significant number of responsible operator claims, the Department believes that both approved and denied claims from this group should be counted. Accordingly, the Department does not agree that its approval rate must be ''corrected'' by excluding these claims.

The M&R analysis also exaggerates the effect of the Department's rule on insurance rates. M&R criticizes the Department because its analysis ''fails to test the current federal black lung insurance rates being charged to determine if they are a reasonable base from which to project future cost changes * * *.'' M&R at p. 2. M&R suggests, for example, that the rate in Kentucky is ''too low,'' M&R at p. 7, and concludes that the corrected rate for underground bituminous mines, when combined with the effects of the Department's regulatory revision, will increase premiums by at least 1,075 percent. M&R at p. 8, Table 6. The impact of the Department's regulatory revision, however, does not include the correction of inadequate rates; such correction must be factored in independently, not assigned as a cost of the regulations. Moreover, M&R states that the premiums in the three other large Eastern coal states (Pennsylvania, Virginia, and West Virginia) are ''redundant'' (and rates are ''generally redundant in the other 23 coal mining states), suggesting that insurance companies (or in West Virginia's case, its state-administered fund) are making excess profits from these markets. M&R at p. 7. In this case, correcting redundant rates should not be assigned as a benefit of the revisions. In addition, the insurance rates used by M&R, M&R at p. 6, Table 4, whose source is not identified, are generally lower than the rates used by the Department by about one percentage point (*i.e.,* by $1.00 per $100 of payroll). Because the Department's analysis of the rule's cost was based on a percentage increase of existing rates, use of the M&R figures would result in a substantially lower estimate of total dollar costs. The substantial difference between the Department's analysis of insurance rate increases and M&R's prediction derives primarily from different assumptions about the approval rate for claims filed after the regulations go into effect. Because the Department does not believe that the approval rate for responsible operator claims will exceed the approval rate for Trust Fund claims, the Department does not believe that M&R's predictions concerning insurance rates are accurate. In any event, insurance rate increases are subject to approval by state authorities.

The Department also requested comment on a possible increase in the number of claims filed as a result of this regulatory revision. The Department's economic analysis was based on the assumption that, although the revisions will not produce a significantly greater number of approved claims, expectations created by the mere issuance of regulatory revisions will cause a temporary increase in the number of claims filed, an additional 3,440 responsible operator claims over a two-year period. Rulemaking Record, Exhibit 80, pp. 39, 42. The M&R analysis did not specifically address this assumption. Instead, the M&R analysis is simply based on its own, wholly different assumption regarding the number of claims that are likely to be filed once the revised regulations take effect. M&R posits that ''the application of the reproposed regulations to the large number of denied claims from all past years will in effect rewrite the history of approvals.'' M&R, p. 21. M&R uses an actuarial model to estimate the ''number of ultimate claim filings that are likely to be received'' under the former regulations and under the newly revised regulations. M&R, p. 21. From the data provided in Table 12 of the M&R analysis, it appears that M&R estimates that 2,567 additional claims will be filed by miners whose last coal mine employment was during the years 1982 to 1999. However, the Department was unable to determine what assumptions M&R made to generate this estimate. In any case, M&R's estimate cannot be compared with the

Department's, because M&R excludes claimants with less than 10 years of coal mine employment. The Department believes that it is not necessary to change the methodology used in the initial regulatory flexibility analysis to estimate the likely increase in claims resulting from the revised regulations.

The Department also received comments disputing its assumption that coal mine operators could pass on to coal consumers by price increases the increased costs caused by the Department's rule. Rulemaking Record, Exhibit 80, p. 52. The Department agrees that it is difficult to determine with precision the ability of small coal mine operators to pass on costs to coal consumers. Indeed, the Department acknowledged in its initial economic analysis that some small coal mine operators would be unable to pass on these costs, and that this inability might represent the difference between being able to continue mining operations and suspending them. Interpreting current profit rates that are unsustainably low or negative, however, must be done carefully, because there are two distinct types of firms that may have such profit rates at any one point in time. Some firms may have such rates for a short time, because of industry cycles or the firm's unique circumstances. These firms will rebound and may or may not experience significant impacts from a regulation. Other firms will have negative profits because they are already in the process of failing.

These two cases have very different implications in the analysis of the economic impact of the Department's revisions. If a firm is in the process of failing in any event, the impact of the revised regulations will be small or non-existent. At most, the impact will hasten the firm's failure by a short period of time. Neither the failure itself, however, nor any loss of jobs, should be considered an impact of the regulations. If a firm is about to rebound, the situation is considerably more complicated. The issue is whether the firm will rebound to the level that it can absorb the economic impact. It is perfectly correct in such cases to say, as one commenter points out, that ''additional costs imposed by regulations are certainly relevant since the added cost of regulations will make it that much more difficult for the firm to achieve profitability.'' Rulemaking Record, Exhibit 89–37, p. 33. The problem is that it is extremely difficult to predict from a negative profit rate how far a firm may rebound. One reasonable assumption (given the very limited data) is that a rebounding firm will achieve median profits. If that is the case, then, as the Department's initial analysis indicated, the firm will not fail even given the economic impact of the regulations. See Rulemaking Record, Exhibit 80, Exhibit P.

The Department's analysis, moreover, is based on the assumption that coal mine operators (other than culm-bank operations, discussed below) will be unable to pass through any of the costs associated with the Department's rule. That assumption is based on a worst-case scenario for analytical purposes, and it does not necessarily reflect the current state of the energy industry. Although the recent deregulation of electric utilities has led to considerable reorganization, the use of coal is both extensive and increasing. In general, electric utilities currently are taking advantage of the opportunities presented by deregulation to deal with expanding demand by management, rather than by making major investments in new generating capacity. In this environment, natural gas and oil are attractive, in part, because they are used to meet on-peak demand for electricity. As a result, most generation capacity, now in use and currently planned, is gas-fired. The relatively low capital cost of gas- or oil-fired generation capacity (despite the relatively high fuel cost) makes these fuels cost-effective for the low capacity utilization associated with on-peak power production. Coal, however, is the mainstay of off-peak, baseline electricity generation. The different use pattern is reflected by different capacity utilization rates. In 1996, for example, capacity utilization was 63 percent for coal-fired power plants but only 20 percent for natural gas power plants and 11 percent for oil-fired plants. (EIA, ''Challenges,'' Chapter 1, p. I–4). In baseline power generation, coal faces less competitive pressure and more opportunities for investment in new capacity. Run-of-stream hydroelectric power is limited, as is the potential for its expansion. Nuclear generation capacity is declining because old plants are coming off line, and no new ones are being built. As a consequence, utilities are burning more coal—not less—and this trend is expected to continue.

It is certainly true that long-term high-price contracts for coal are giving way to shorter term contracts with more flexibility. Yet even here there are mitigating factors. Only about half of current contracts will expire by 2005. The impetus for the shift away from long-term contracts was stimulated by stabilization of other fuel prices at moderate levels, but quite recently oil prices have shot up again. The point is that the current market still offers considerable opportunities for passing costs to consumers.

Available information indicates that most of the downward pressure on coal prices is flowing from developments within the coal industry and intra-industry competition. Coal producers as a whole have increased their productivity and lowered their costs. Cost reduction has resulted from improved management of mining operations and delivery, introduction of new technology (*e.g.,* longwall mining), investment in more productive equipment, consolidation to achieve economies of scale, closure of high-cost mines, and takeover and restructuring of high cost mines to operate them more economically. The EIA has observed that ''the relationship between coal prices and productivity gains is circular: Productivity gains allow coal prices to be lowered and price declines induce actions by coal producers that raise productivity and cut costs' (EIA, ''Challenges,'' Chapter 1, p. I–12). The problem that small coal mines face is that they are less able than large mines to implement such productivity enhancing measures. As a result, small inefficient coal mine operators are being squeezed by larger more efficient mine operators.

Rapidly increasing productivity, however, does not preclude the coal industry as a whole from increasing its prices in the short run to recoup regulatory compliance costs. These costs are small. Based on West Virginia insurance rates, the increase in insurance rates would translate into a one-time increase in labor costs of 1.2 percent a year. By contrast, labor productivity (tons per miner hour) increased by an average of 6.9 percent each year from 1980 to 1996 (EIA, ''Challenges,'' Chapter 1, p. I–12). This annual productivity increase—five or six times as large as the estimated impact of the regulation—would allow the coal industry to pass through costs of the rule without raising prices at all. Only a small one-time diminution in the reduction of the price of coal would be needed.

It is true that small mines cannot increase prices beyond those of larger counterparts and stay competitive. The analysis of relative impacts indicates that very small, underground coal mines may be able to pass through one quarter to one half of their costs of the rule to consumers under the cover of larger mines passing all of their costs of the rule through to consumers. The Department's preliminary economic analysis treated pass-through of costs of the rule essentially as a factor that could mitigate to some extent—not prevent—

impacts on profits. *See* Rulemaking Record, Exhibit 80, pp. 52–56. For the reasons outlined above, the Department continues to believe that this is the case. Because of the difficulty of quantifying these effects, however, the quantitative analysis will continue to assume zero cost pass-through. The uncertainty as to the extent to which costs can be passed through does not mean that the Department is unable to estimate impacts, however. Rather, the assumptions that the analysis made to deal with the uncertainty result in estimates of impacts on profits and closures that are known to be biased upward—as is appropriate for a conservative analysis of impacts.

The market for anthracite coal is significantly more sheltered from price competition than the market for bituminous coal. Since 1996, a majority of anthracite production has been accounted for by culm bank operations. These operations salvage previously-mined anthracite from old mine tailings on the surface. The market for these operations (and potentially for other anthracite mines) is nearby power plants. Most of these plants are cogeneration plants, which produce heat or steam for industrial use as their principal output, and then generate electric power as a byproduct. Some, however, are small power plants built solely to use anthracite from culm banks. The Public Utility Regulatory Policies Act of 1978, Pub. L. 95–617, 92 Stat. 3117(1978), requires electric utilities to purchase electric energy from cogeneration facilities and other qualifying small power production facilities. The Act goes on to stipulate that the price at which utilities purchase electric energy may not exceed ''the incremental cost to the electric utility of alternative electric energy.'' 16 U.S.C. 824a–3(b). Since most of the electricity generated with the anthracite is a byproduct of steam and heat produced for other purposes and the capacity is already installed, the incremental cost of power to utilities is virtually certain to provide sufficient revenue to make these anthracite operations economically viable, despite the costs of the rule. If anything, anthracite from culm banks is likely to become more competitive as the prices of other fuels used to generate electricity rise. Indeed, anthracite culm banks are the only part of the coal mining industry in which both the number of very small operations and the number of employees have expanded substantially over the last 10 to 15 years.

The broader market for anthracite includes metallurgical uses and other specialty markets. This provides anthracite with a degree of product differentiation that bituminous coal does not have. The economic forces in the anthracite mining industry are significantly different from those in the bituminous coal mining industry. In anthracite, there are no large mines, no high-productivity mines, and generally not the geological conditions that are favorable to large-scale equipment or techniques that would allow increases in productivity. Instead of a steady increase in output, anthracite production (exclusive of culm banks) fell by 19 percent between 1986 and 1997. Together with the rise of anthracite salvage operations, this decline appears to reflect exhaustion of anthracite deposits that can be mined economically, rather than the sort of fierce competition characterized by highly elastic demand.

One comment argues that the Department's initial regulatory flexibility analysis did not properly analyze the effect of its rule on coal mine construction and transportation contractors, as well as on other small businesses performing services at mine sites. The Department acknowledged that its rule would have an effect on entities in the ''Coal Mining Services'' industry, and estimated that of 275 firms listed in data available from the Small Business Administration, no more than 209 were small businesses within the SBA's definition (less than $5 million in annual receipts). The Department recognized, however, that this number might understate the number of coal mine construction and coal transportation companies. 64 FR 55008 (Oct. 8, 1999).

The RFA does not require, however, that the Department determine precisely the economic effect on small businesses where it is not feasible to do so. Instead, it requires only that the initial regulatory flexibility analysis ''describe the impact of the rule on small entities.'' 5 U.S.C. 603(a). The Department's initial regulatory flexibility analysis described the impact of its proposed regulations based on an economic analysis. The economic analysis projected an increase in the approval rate of black lung claims payable by responsible operators and a temporary increase in the number of claims filed. To the extent that coal mine contractors obtain insurance to spread the risk of potential liability under the Act, the Department's initial regulatory flexibility analysis of the resulting increase in insurance premiums was also relevant to those entities. In the absence of a more precise estimate of the number of entities involved, however, and the manner in which those entities currently absorb the costs imposed by the Black Lung Benefits Act, the Department's initial regulatory flexibility analysis fulfilled the requirements of the RFA by identifying a potential impact on the coal mine contracting industry.

Thus, the Department does not believe the comments undermine the validity of its initial regulatory flexibility analysis, or of the economic analysis that the Department used in preparing it. Both analyses describe the impact that the revised regulations are likely to have on small coal mine operators, and both analyses acknowledge that this impact may be sufficient to make the mining of coal uneconomical for some. 64 FR 55008–09 (Oct. 8, 1999); Rulemaking Record, Exhibit 80, pp. 44–46, 52. The Department's proposal, and its discussion of possible alternatives intended to mitigate the impact of the proposal on small businesses, were made with full knowledge of the projected economic impact. Accordingly, although the Department has committed to the revision of the Part 722 regulations, *see* discussion of alternatives, below, and preamble to Part 722, the Department has not altered its proposal in response to any of the comments it received in response to the initial regulatory flexibility analysis.

Small Businesses to Which the Rule Will Apply

The revised regulations implementing the Black Lung Benefits Act will apply, like the Act itself, to coal mine operators. *See, e.g.,* 30 U.S.C. 932(b) (''each such operator shall be liable for and shall secure the payment of benefits * * * ''). The term ''operator'' includes not only traditional coal mining companies, but also employers who provide services to such companies, including coal mine construction and coal transportation companies. 30 U.S.C. 802(d). In the initial regulatory flexibility analysis published in its second notice of proposed rulemaking, the Department observed that the Regulatory Flexibility Act requires an administrative agency to use the definition of a ''small business'' promulgated by the Small Business Administration unless the agency, after consulting with the SBA's Office of Advocacy and providing an opportunity for public comment, establishes its own definition. 5 U.S.C. 601(3). (The Department's regulations do not apply to any small organizations or small governmental jurisdictions; accordingly, the Department's analysis is limited to small businesses.) The Department therefore announced its intention to use the SBA definition, which establishes

criteria for different industries, arranged by the Standard Industrial Codes (SICs) used by the Bureau of the Census. SBA's regulations define a small business in the coal mining industry (SIC Codes 1220, 1221, 1222, 1230, and 1231) as one with fewer than 500 employees. A small business in the coal mining services industry (SIC Codes 1240 and 1241) is one with less than $5 million in annual receipts. 64 FR 55007–08 (Oct. 8, 1999).

Based on 1995 data, the Department determined that of 2,822 establishments in the coal mining industry, 2,811 employed less than 500 people. Of those, 1,581 were surface bituminous mining companies, 1009 were underground bituminous mining companies, and 221 were anthracite mining companies. The Department estimated that no more than 209 of the 275 firms in the coal mining services industry would be considered small businesses. The Department observed, however, that its estimate did not necessarily include all coal mine construction and coal transportation companies, and that the precise number of such businesses could not be estimated with precision. 64 FR 55007–08 (Oct. 8, 1999).

More recent data available from the Mine Safety and Health Administration suggest that the composition of the coal industry has not changed significantly. In 1997, 2,568 of 2,578 establishments in the coal mining industry employed less than 500 people. Of these, 1,441 were surface bituminous mining companies, 913 were underground bituminous mining companies, and 214 were anthracite mining companies. Census figures available from the Small Business Administration do not allow the Department to calculate how many of the 317 firms in the coal mining services industry would be considered small businesses, because those figures do not contain sufficient information on the revenues of those firms.

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

In its initial regulatory flexibility analysis, the Department observed that its proposed revisions would not impose any additional reporting or recordkeeping requirements on small businesses. The Department stated that the compliance requirements of the rule were largely economic in impact. The Department projected its regulatory revisions would increase the cost of commercial insurance (through increased premiums) purchased by coal mine operators to secure their benefits liability under the Act. The Department also projected an increase in the potential exposure of operators who are authorized to self-insure their liability under the Act. A summary of these additional costs was published in the Department's initial regulatory flexibility analysis. 64 FR 55008–09 (Oct. 8, 1999). In addition, the Department observed that coal mine operators that did not purchase insurance, either because they were self-insured, or because they were not required to secure benefits, or because they had ignored the Act's security requirement, would face additional burdens. These burdens included responding more promptly to notice from the Department that a claim had been filed by one of their former employees, and posting security in the event that they were held liable for the payment of benefits on an individual claim. Operators that had been authorized to self-insure their liability under the Act would be required to maintain security for claims filed against them, even after they ceased mining coal. Finally, the Department observed that the regulatory revisions enhanced its ability to enforce civil money penalties against operators that failed to comply with the Act's security requirements. 64 FR 55008–09 (Oct. 8, 1999).

The regulatory revisions in the Department's final rule do not significantly change the costs identified by the Department's initial regulatory flexibility analysis. Specifically, only one of the changes that the Department has adopted in this final rule in response to public comments has cost implications. The Department has eliminated the notice of initial finding, a document that the Department currently uses to deny claims informally before the district director. Both the first and second notices of proposed rulemaking proposed the continued use of this document. Eliminating issuance of initial findings will decrease operator costs in all cases by reducing the numbers of responses that coal mine operators have to file with the Department. Eliminating this document, however, will also require that coal mine operators undertake the development of responsible operator evidence (evidence showing that another entity that employed the miner should be the responsible operator) in a number of additional cases. Under the Department's second notice of proposed rulemaking, coal mine operators would not have been required to develop responsible operator evidence in cases in which the claimant failed to respond to the Department's notice of initial finding denying their claims. Under the final rule, a coal mine operator may not know whether the claimant is interested in pursuing his claim (unless the claimant withdraws his application under § 725.306) until after that operator has developed its responsible operator evidence.

The Department believes that the costs resulting from this revision will have only a minor impact on its previous estimate of the costs of the rule. As an initial matter, the Department estimates that this revision will affect less than 10 percent of all responsible operator cases. In FY 1999, a total of 5,724 cases were filed. The Department estimates that just over 75 percent of these claims, or 4,293, were claims involving potential responsible operator liability. Ten percent of this number is 429. The Department's economic analysis assumed that an additional 1,720 operator cases will be filed each year for two years following issuance of the Department's final rules. Ten percent of this number is 172. In each of the next two years, then, the revision will cause the additional development of responsible operator evidence in only 601 claims. Under the proposed rule in the Department's second notice, however, operators would also have had to develop such evidence in the 30 percent of such cases that proceed beyond adjudication by the district director. Consequently, the Department's final rule will require additional evidentiary development in only the remaining 70 percent of cases, or 421 cases. The Department has no way of accurately estimating the costs of developing such evidence. However, a rough estimate can be made using information in M&R's first analysis. M&R estimated that the total cost to operators in defending claims that were resolved at the district director level was approximately $3,000. Rulemaking Record, Exhibit 5–160, Appendix 5, p. 24. This figure included not only the development of responsible operator evidence but, under the Department's first proposal (to which M&R was responding), of all medical evidence as well. Although the cost of developing medical evidence is typically much higher than the cost of operator evidence, because it involves payments to expert witnesses, the Department will assume that half of these defense costs represent the cost of developing responsible operator evidence. Accordingly, the total additional costs imposed by this revision are not likely to exceed $631,050 (70 percent of 601 claims times $1,500) in each of the first two years, and will drop to no more

than $450,450 (70 percent of 429 claims times $1,500) for each year thereafter. In light of the point estimate of $57.56 million in annual costs identified by the Department's economic analysis of the proposed rule, these additional costs are not significant. In any event, these additional costs will be at least partially offset by the savings realized in all cases from the reduced number of required operator responses. In addition, the Department's decision to permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator as a party to the claim will result in additional savings to coal mine operators in some cases.

Description of Steps the Agency has Taken to Minimize the Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes; Discussion of Alternatives

The primary objective of the Black Lung Benefits Act is set forth in § 901 of the Act:

> It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. 901. The statute also seeks to ensure, however, that liability for a miner's benefits is borne by the entity most responsible for the development of that miner's totally disabling pneumoconiosis. Prior to 1978, claims that were not paid by individual coal mine operators were paid by the federal government from general revenues. In 1978, Congress created the Black Lung Disability Trust Fund, financed by an excise tax on coal production, to assume the payment of benefits in cases for which no individual operator bore liability. Congress clearly indicated its preference that the Trust Fund should be considered a payment source of last resort. In discussing the successor operator provisions of the Black Lung Benefits Reform Act of 1977, enacted in 1978, the Senate Committee on Human Resources, whose bill contained the provisions ultimately included in the Act, stated: ''It is further the intention of this section, with respect to claims [in] which the miner worked on or after January 1, 1970, to ensure that individual coal mine operators rather than the trust fund bear the liability for claims arising out of such operator's mine, to the maximum extent feasible.'' S. Rep. 95–209, 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).

In its initial regulatory flexibility analysis, the Department observed that these two principles severely constrained its ability to select alternatives that the Department had identified as potentially providing relief for small coal mine operators. The Department discussed several alternatives, including adjusting a miner's entitlement criteria according to the size of the operator that would be considered the responsible operator under the Department's regulations. A second alternative would have limited the liability of certain employers. These employers might include those that met either the SBA definition of a small business (over 90 percent of the industry) or those employers with fewer than 20 employees, companies that the Department's economic analysis had identified as most vulnerable. In such cases, the Department considered imposing liability on larger operators or on the Black Lung Disability Trust Fund. The Department rejected both alternatives, however, as contrary to the intent of Congress as expressed in the Black Lung Benefits Act. 64 FR 55009 (Oct. 8, 1999). The Department did provide relief to small mining companies in its revised regulations governing the assessment of civil money penalties for an operator's failure to secure the payment of benefits, 20 CFR Part 726, Subpart D. These regulations specifically assess a smaller base penalty amount on a smaller employer, *i.e.,* one with few miner-employees. Finally, the Department invited comment from interested parties as to other alternatives that would reduce the financial impact of the rules on the small business community.

A number of comments suggest that by inviting comments as to other alternatives, the Department abdicated its responsibilities under the Regulatory Flexibility Act. The Department does not agree. Nothing in the RFA requires an agency to forego rulemaking because the regulated community is unhappy with the alternatives that the agency considered in its initial regulatory flexibility analysis, or because that community has proposed additional alternatives. On the contrary, the RFA encourages agencies to notify small businesses of proposed rulemaking activities precisely so that those small businesses may participate in the identification of additional alternatives that might reduce the impact of the rule. *See* 5 U.S.C. 609(a).

The National Mining Association (NMA), endorsed by a number of other commenters, has identified six alternatives that it believes the Department should have considered: (1) establish a fund to insure coal mine operators for federal black lung claims on a first dollar basis under the authority granted the Department by 30 U.S.C. 943; (2) establish a fund to reinsure coal mine operators for federal black lung claims on a specific or aggregate of loss basis, also under the authority granted the Department by 30 U.S.C. 943; (3) name only the most likely responsible operator; (4) establish criteria to determine when a state black lung program is sufficient to end the federal program in that state; (5) allow settlement of federal black lung claims; and (6) establish cost-containment mechanisms for health care providers. Rulemaking Record, Exhibit 89–37, p. 31. The M&R analysis similarly suggests the first four alternatives, although it would apply the third alternative (naming the most likely operator) only where that operator is a small coal mine operator. In addition, the M&R analysis suggests that the Department establish a formal, ongoing review of state workers' compensation programs to determine whether they are sufficient to permit the Secretary to declare the federal program inapplicable to miners in particular states. Rulemaking Record, Exhibit 89–37, Appendix A, M&R at pp. 17–18. The Department will consider these alternatives in order.

1. *Exercising the authority of 30 U.S.C. 943* (NMA alternatives 1 and 2, M&R alternatives 1 and 2). Section 933 of the Black Lung Benefits Act, 30 U.S.C. 943, authorizes the Secretary of Labor to establish a Black Lung Compensation Insurance Fund to allow coal mine operators to purchase insurance to secure their obligations under the Act. The Fund may be used to insure coal mine operators directly, 30 U.S.C. 943(c)(1), or to enter into reinsurance agreements with one or more insurers or pools of insurers, 30 U.S.C. 943(c)(2). The Act provides an important limitation on the Secretary's authority, however: ''The Secretary may exercise his or her authority under this section *only if, and to the extent that, insurance coverage is not otherwise available, at reasonable cost, to operators of coal mines.*'' 30 U.S.C. 943(b) (emphasis added). The record contains no evidence that would allow the Secretary to determine, under subsection (b), that insurance coverage is not currently available at reasonable cost to operators of coal mines.

Consequently, the statute does not permit the ''alternative'' suggested by the commenters. Projections provided by the mining and insurance industries, however, predict significantly higher percentage increases in the cost of commercial black lung insurance if these rules become final. The Department disagrees with these projections and has explained its reasoning above. The Department also recognizes its obligation, however, to closely monitor insurance rates, especially any increase in rates that may result from the final promulgation of the Department's regulations. To the extent that rates do increase, the Department will have to determine whether those increases have resulted in insurance becoming unavailable at a reasonable cost to coal mine operators, the statutory prerequisite for the Secretary's authority under 30 U.S.C. 943(b).

2. *Naming only the most likely responsible operator* (NMA Alternative 3, M&R alternative 3). The NMA suggests that the Department name only the most likely responsible operator, which the NMA asserts was the Department's practice under its former regulations. The M&R analysis states that the Department could form an insurance fund to reimburse the Black Lung Disability Trust Fund for claims in which the most likely responsible operator is ultimately determined not to be liable for the payment of benefits, thereby imposing an unwarranted liability on the Fund. The Department does not agree that it formerly named only the most likely responsible operator. In its discussion of § 725.408, the Department observed that, where necessary, it made more than one operator a party to a claim under the prior regulations. *See* preamble to § 725.408, paragraph (f). In addition, M&R's solution to the problem of imposing additional risk on the Trust Fund—that the Department use an ''insurance fund'' to reimburse the Trust Fund for such claims—is flawed on two counts: 1) for the reasons described above, the Department cannot establish an insurance fund absent a finding that insurance is not available at reasonable cost; and 2) reimbursement of the Trust Fund for such claims is not among the statutorily-prescribed uses for monies in an insurance fund, *see* 30 U.S.C. 943(g)(1)(A)–(C).

The Department notes, however, the continued objection of a number of commenters to the Department's proposal that operators be forced to participate in a joint defense of the claimant's eligibility, *see* preamble to § 725.414. The Department has therefore reconsidered its administrative processing of cases in which the identity of the responsible operator is in doubt. As revised, the regulations permit the district director to refer a case to the Office of Administrative Law Judges with no more than one operator included as a party to the claim. *See* preamble to § 725.418. The Department recognizes that this approach imposes additional risk on the Black Lung Disability Trust Fund. *See* preamble to § 725.414. The Department has concluded that this risk is acceptable, however, because all the potentially liable operators will be required to submit evidence relevant to the issue of operator liability while the case is pending before the district director. The district director will thus have available all of the relevant evidence when he finally designates the operator responsible for payment of a claim. That one operator will remain a party in further proceedings.

The Department does not believe that this alternative is a truly significant one—*i.e.,* one which will provide the affected small business community with significant relief from the costs of the Department's regulatory revisions. First, it will apply in only a small percentage of cases. The Department estimates that less than 10 percent of responsible operator cases involve substantial questions as to the identity of the operator that should be liable for the payment of benefits. In addition, only 33 percent of all cases filed are referred to the Office of Administrative Law Judges. Accordingly, the Department's revision will likely affect only 3 percent of responsible operator cases. Second, the additional cost that would have been required by continued operator participation is relatively small. It is true that operators will no longer have to defend against an effort by the designated responsible operator to shift liability to them beyond the district director level. Instead, once a case is referred to the Office of Administrative Law Judges, if the designated responsible operator shows that it does not meet the criteria for a responsible operator, § 725.495, liability will shift to the Trust Fund. The costs associated with an operator's continued participation in a claim before the Office of Administrative Law Judges would have been small, however, because the operator would already have had to develop and submit all evidence relevant to the liability issue while the case was pending before the district director. The final regulations do not alter that requirement. A second set of costs eliminated by the Department's revision are those associated with monitoring the designated responsible operator's litigation of the claimant's eligibility while the case is pending before the Office of Administrative Law Judges. The Department's proposal would have permitted a potentially liable operator to submit its own documentary medical evidence upon establishing that the designated responsible operator had not undertaken a full development of the evidence. The Department does not believe that this situation would have arisen often, and thus believes that the overall costs associated with exercising this right were not significant. The costs relevant to both of these issues were thus largely the costs associated with hiring an attorney to monitor the litigation and, as appropriate, attend the hearing or file a brief to argue on the operator's behalf. In preparing its economic analysis, the Department used the industry's estimate of $6,000 as the current average cost for defending a claim that proceeds beyond the district director level. See preamble to § 725.407. This cost includes not only attorneys' fees, but also the development of evidence relevant to operator liability and claimant eligibility. The Department does not believe that the fees charged by an attorney to monitor the litigation and present argument represent a large component of the estimated costs. Accordingly, in light of both the small number of affected cases and the minimal expenses involved, the Department does not consider that its adoption of this alternative will result in significant savings to small coal mine operators.

3. *Establish criteria to determine when a state's workers' compensation program provides ''adequate coverage'' for totally disabling pneumoconiosis* (NMA alternative 4, M&R alternative 4). Section 421 of the Black Lung Benefits Act, 30 U.S.C. 931, requires the Secretary to publish in the **Federal Register** a list of all states whose workers' compensation laws provide ''adequate coverage'' for occupational pneumoconiosis. The Secretary's certification that a state provides adequate coverage prevents any claim for benefits arising in that state from being adjudicated under the Black Lung Benefits Act.

The Act provides certain criteria states must meet in order to gain Secretarial certification, 30 U.S.C. 921(b)(2)(A)—(E). It also provides that the Secretary may, by regulation, establish additional criteria. 30 U.S.C. 921(b)(2)(F). In its first notice of proposed rulemaking, the Department observed that the applicable regulations, 20 CFR Part 722 (1999), had not been

amended since 1973, and that, in light of statutory amendments in 1978 and 1981, those regulations were obsolete. 62 FR 3347 (Jan. 22, 1997). Accordingly, the Department proposed to delete the specific criteria contained in Part 722. The Department proposed replacing them with a general statement that it would review any state's application for certification in light of the provisions of the then-current Act, and the principle that the state law would be certified only if it guaranteed at least the same compensation, to the same individuals, as was provided by the Act.

The NMA and M&R urge the Department to develop specific criteria that would allow a state to determine what steps it needs to take to allow the Secretary to certify its law as providing adequate coverage for occupational pneumoconiosis. M&R states that ''[n]o single alternative would be more helpful to small coal operations than to be required to provide compensation under only one mechanism.'' M&R at p. 18. This suggestion would require the Department to update the criteria previously set forth in Part 722. Although no state has sought the Secretary's certification since 1973, the Department accepts the commenters' suggestion that a revision of the Part 722 criteria will encourage states to seek the certification permitted by the Act. Publication of a current set of criteria, however, will require considerable study and additional drafting, and would needlessly delay final promulgation of the remaining regulations in the Department's proposal. Following completion of that work, the Department will issue a new notice of proposed rulemaking in order to ensure that interested parties have an opportunity to comment upon possible Secretarial certification criteria. The Department believes that, in the interim, the revised Part 722 will accommodate any state seeking certification.

M&R also suggests that the Department establish a formal and ongoing Departmental review of state laws to determine whether they provide adequate coverage. The Department does not believe that it would be productive to engage in such a review. States that revise their workers' compensation laws to meet the Department's criteria will do so in order to preempt the application of the Black Lung Benefits Act. Those states will have a clear incentive to submit an application to the Department for the appropriate certification. Relying on states to initiate the certification process thus makes the most efficient use of government resources at both the state and federal levels.

4. *Permit the settlement of black lung claims* (NMA Alternative 5). The NMA suggests, without further explanation, that permitting the settlement of black lung claims will reduce the impact of the Department's regulatory revisions on small coal mine operators. The Department believes that the Black Lung Benefits Act does not allow the settlement of claims, and that permitting the settlement of claims would be contrary to the objectives of the Act in any event.

The Black Lung Benefits Act incorporates two provisions of the Longshore and Harbor Workers' Compensation Act relevant to settlements, and specifically excludes a third provision. Section 15(b) of the LHWCA, 33 U.S.C. 915(b), renders invalid any ''agreement by an employee to waive his right to compensation under this chapter.'' Section 16, 33 U.S.C. 916, invalidates any ''release * * * of compensation or benefits due or payable under this chapter, except as provided in this chapter.'' Together, these provisions, which have been part of the LHWCA since its 1927 enactment, have been interpreted to ''prevent[] any private settlement of a claim between the employer and the employee.'' *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 85 F.2d 625, 628 (3d Cir. 1936); *see also Lumber Mutual Casualty Ins. Co. of New York* v. *Locke,* 60 F.2d 35, 37 (2d Cir. 1932).

In 1938, Congress amended section 8 of the Longshore Act to specifically provide a settlement procedure in cases in which the injured employee sought compensation for permanent or temporary partial disability. *See* Act of June 25, 1938, c. 685, § 5, 52 Stat. 1166. The federal courts have long interpreted the section 8 procedure as the only means by which an injured employee could validly settle a claim for compensation. *See, e.g., Norfolk Shipbuilding & Drydock Corp.* v. *Nance,* 858 F.2d 182, 185–6 (4th Cir. 1988), *cert. denied,* 492 U.S. 911 (1989); *Oceanic Butler* v. *Nordahl,* 842 F.2d 773, 776 n. 3 (5th Cir. 1988). In incorporating certain procedures of the LHWCA into the Black Lung Benefits Act, however, Congress specifically excluded LHWCA § 8. *See* list of excluded provisions in 30 U.S.C. 932(a). Moreover, although Congress authorized the Secretary to vary the terms of incorporated LHWCA provisions in order to administer the Black Lung Benefits Act, it forbade the Department from promulgating provisions that were ''inconsistent with those specifically excluded * * *.'' By this language, Congress expressed its intention that the Secretary not use the broad powers granted her by the Black Lung Benefits Act to provide by regulation the substance of provisions that Congress had explicitly declined to incorporate. *See* Senate Conference Committee Report, reprinted in Committee Print, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969 at 1624 (''The Secretary of Labor is also authorized to publish additional provisions by regulation, together with all or part of the applicable provisions of said Act other than those specifically excluded * * *.''), quoted in *Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1274 n. 31 (4th Cir. 1977).

Congress's decision to exclude the settlement provisions of LHWCA section 8 when it incorporated other LHWCA provisions makes sense. When Congress enacted the Black Lung Benefits Act in 1969, and when it amended the list of excluded sections in 1972, section 8 permitted only the settlement of claims for partial disability. Because benefits under the Black Lung Benefits Act are available only to miners who are totally disabled due to pneumoconiosis, and to the survivors of miners who die from that disease, there was no reason to incorporate section 8. Congress amended section 8 in 1972 to allow settlement of claims for total disability, and again in 1984 to permit the settlement of survivors' claims. Pub. L. 92–576, § 20, 86 Stat. 1264 (1972); Pub. L. 98–426, § 8(f), 98 Stat. 1646 (1984). Congress did not revisit its exclusion of Longshore Act provisions from the Black Lung Benefits Act on either occasion, even though Congress specifically amended the relevant statutory section in the Black Lung Benefits Act, 30 U.S.C. 932(a), in the course of amending the LHWCA in 1984. *See* Pub. L. 98–426, § 28(h)(i), 98 Stat. 1655 (1984).

The Department thus believes that Congress has expressed its intent not to permit the settlement of claims for black lung benefits. Moreover, the Department believes that this decision is supported by sound policy considerations. The Black Lung Benefits Act is intended to provide benefits (37 and 1/2 percent of the monthly pay for a federal employee in grade GS–2, step 1, augmented for additional dependents) to miners who are totally disabled due to pneumoconiosis and to the survivors of miners who die due to the disease. 30 U.S.C. 922(a). ''Providing a minimum level of income for eligible miners disabled by black lung is at the heart of the statute.'' *Harman Mining Co.* v. *Stewart,* 826 F.2d 1388, 1390 (4th Cir. 1987). Interpreting the Act so as to

permit a totally disabled miner to accept a settlement that reduces that minimum level of benefits would thus contravene one of the basic objectives of the Act. Former coal miners tend to apply for black lung benefits shortly after they leave employment in the coal industry or when they retire, usually at the same time they file an application for Social Security benefits, rather than in response to a specific diagnosis or injury. The population of claimants thus tends to be significantly different than is the case with the population of claims under other workers' compensation programs, including the LHWCA. Because of the latent, progressive nature of pneumoconiosis, *see* preamble to § 725.309, a substantial number of applicants whose initial claims are denied are ultimately determined to be eligible for black lung benefits. In its second notice of proposed rulemaking, the Department observed that the approval rate for subsequent claims filed by miners whose initial claims were denied (10.56 percent) is higher than the approval rate for first-time applicants (7.47 percent). 64 FR 54984 (Oct. 8, 1999). These statistics demonstrate that first-time applicants may not fully appreciate the extent to which they may be affected by pneumoconiosis later in life. As a result, the Department believes that it would be inappropriate to encourage or permit such applicants to bargain away the minimum level of benefits guaranteed them by Congress. Accordingly, the Department does not accept the suggestion that permitting settlement, even if it were not forbidden by the Act, represents an alternative to the Department's rule that is consistent with the objectives of the Black Lung Benefits Act.

5. *Establish cost-containment mechanisms for health care providers* (NMA alternative 6).

Through the incorporation of LHWCA § 7, the Black Lung Benefits Act requires responsible coal mine operators and the Black Lung Disability Trust Fund to provide medical benefits to miners who meet the Act's eligibility criteria. 33 U.S.C. 907, as incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). The Department's regulations require that a miner be provided ''such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis * * * and disability require.'' 20 CFR 725.701(b) (1999). In Fiscal Year 1998, the Trust Fund paid approximately $82.1 million for the medical treatment of eligible miners, processing approximately 620,000 bills. OWCP Annual Report to Congress, FY 1998, p. 18.

The Department has already adopted a variety of cost-containment measures to reduce medical treatment costs paid by the Trust Fund. The Department's guidelines for the payment of medication expenses were derived from the system used by the United Mine Workers of America Health and Retirement Funds in light of the similar populations served by the UMWA Funds and the Trust Fund. The Department updates its list of allowable charges for various drugs on a monthly basis and for treatment procedures on a periodic basis to ensure that it does not reimburse miners and their medical providers an amount above what is usual and customary for the beneficiary population. The Medical Director of the Department's Office of Workers' Compensation Programs reviews medications that have not previously been approved for inclusion on the Department's list.

The Department also carefully screens inpatient service bills for both an acceptable diagnosis and an ''appropriate'' treatment based upon the diagnosis and procedure codes present on the Universal Billing Form. These diagnoses and treatments are compared to a set of algorithms that take into account whether the diagnoses are related to pneumoconiosis, the severity of covered and non-covered conditions, and the character of the procedures. The program then makes a determination as to whether a bill should be paid in full, paid in part, denied in full, or made subject to review by the Department's staff. Bills that are considered payable are subject to a series of edits to determine if specific types of services should be paid, denied, or reviewed before reimbursement. For example, the Department will deny a bill for a private room during a hospitalization in the absence of adequate justification and pay only the cost of a non-private room.

The cost-containment measures adopted by the Department have reduced the Trust Fund's expenditures for medical treatment. Operators and their insurers, organizations with considerable experience in cost-containment, are similarly free to adopt measures that ensure that they pay no more than the usual and customary amounts for necessary services. Under the Secretary's regulations, eligible miners present bills for medical services directly to the responsible operator liable for the payment of their benefits, its insurer, or its claims servicing agent. 20 CFR 725.704(a)(2) (1999). Any dispute between the miner and the operator over payment of the bill is subject to informal resolution by the district director. If that resolution is unsuccessful, either the miner or the operator may obtain an expedited hearing before the Office of Administrative Law Judges. 20 CFR 725.707 (a), (b) (1999). Similarly, an operator may request a hearing with respect to any bill which was paid from the Black Lung Disability Trust Fund while the operator was contesting the miner's eligibility for benefits. ''Though framed as contests between the particular Operator and the Fund over reimbursement, these determinations provide the means by which an Operator may challenge the validity of all or part of the miner's initial claim, including each medical expense, even though it has already been paid by the Fund.'' *BethEnergy Mines, Inc.* v. *Director, OWCP,* 32 F.3d 843, 847 (3d Cir. 1994). Thus, the statute and its implementing regulations afford an operator ample opportunity to challenge the reasonableness of any amount that a claimant seeks as payment for medical services. Although the Department will continue to refine its cost-containment procedures, it does not believe that these procedures represent an ''alternative'' to its rulemaking activities. Rather, cost-containment must take place simultaneously with any revision of the Department's regulations to ensure that the revisions do not produce any unreasonable changes in health care expenditures.

In summary, the Department does not believe that any of the alternatives suggested by the NMA and M&R offer relief to small business that is consistent with the stated objectives of the Black Lung Benefits Act. Although the Department does intend to revise the Part 722 criteria in light of the commenters' suggestion, the failure of any state to seek certification of its laws over the last quarter century indicates that this effort will not result in any quick relief to the small business community from the economic impact of the Department's regulations. With the exception of graduated civil money penalties, the requirements of the Black Lung Benefits Act simply do not permit the Department to adjudicate the issues of claimant eligibility and operator liability differently depending on the size of the coal mine operator that may be liable for the payment of those benefits. Because the Department believes that the ''no action'' alternative, discussed in detail above, would also be inappropriate, the Department has published a final rule implementing its proposed revisions.

Conclusion

The Department's final rule revising the regulations implementing the Black Lung Benefits Act will result in the increase of premiums paid by the coal mining industry to insure their obligations under the Act. The economic analysis prepared in connection with the Department's initial regulatory flexibility analysis demonstrated that this premium increase would result in additional annual costs to the industry with a point estimate of $57.56 million. The Department's revised rule will not result in any significantly higher costs. In light of the need for the revised regulations identified above, the Department believes that it is appropriate to finalize the rule.

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 first day of December, 2000.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

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), 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.

§§ 718.401–718.404 [Removed]

2. Part 718 is amended by removing subpart E (§§ 718.401–718.404), 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.

Subpart B—Criteria for the Development of Medical Evidence

Subpart C—Determining Entitlement to Benefits

Subpart D—Presumptions Applicable to Eligibility Determinations

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 January 19, 2001 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 January 19, 2001. 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.

(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. This document is available from the Division of Coal Mine Workers' Compensation in the U.S. Department of Labor, Washington, D.C., telephone (202) 693–0046, and from the National Institute for Occupational Safety and Health (NIOSH), located in Cincinnati, Ohio, telephone (513) 841–4428) and Morgantown, West Virginia, telephone (304) 285–5749. A chest X-ray classified as Category Z under the ILO Classification (1958) or Short Form (1968) shall be reclassified as Category 0 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 0, 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) Except as provided in this paragraph, 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 paragraphs (a) through (d), such X-ray may form the basis for a finding of the presence or absence of pneumoconiosis 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 developed 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) Except as provided in this paragraph, 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, where no pulmonary function tests are in substantial compliance with paragraphs (a) and (b) and Appendix B, noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the 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), 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, where no report is in substantial compliance with paragraphs (a) and (b), a report prepared by a physician who is unavailable may nevertheless form the basis for a finding if, in the opinion of the adjudication officer, it is accompanied by sufficient indicia of reliability in light of all relevant evidence.

(d) *Treating physician.* 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 must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. Specifically, the adjudication officer shall take into consideration the following factors in weighing the opinion of the miner's 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. In appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight, provided that the weight 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 PC02, P02, 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. (e) In the case of a deceased miner, where no blood gas tests are in substantial compliance with

paragraphs (a), (b), and (c), noncomplying tests may form the basis for a finding if, in the opinion of the adjudication officer, the only available tests demonstrate technically valid results. This provision shall not excuse compliance with the requirements in paragraph (d) for any blood gas study administered during a hospitalization which ends in the miner's 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 a material adverse effect on the miner's respiratory or pulmonary condition; or

(ii) Materially 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

(2) Where 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 cause of death, or

(3) Where the presumption set forth at § 718.304 is applicable, or

(4) Where either of the presumptions set forth at § 718.303 or § 718.305 is applicable and has not been rebutted.

(5) Where the cause of death is significantly related to or aggravated by pneumoconiosis.

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

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a ''substantially contributing cause'' of a miner's death if it hastens the miner's death.

(d) To minimize the hardships to potentially entitled survivors due to the disruption of benefits upon the miner's death, survivors' claims filed on or after January 1, 1982, shall be adjudicated on an expedited basis in accordance with the following procedures. The initial burden is upon the claimant, with the assistance of the district director, to develop evidence which meets the requirements of paragraph (c) of this section. Where the initial medical evidence appears to establish that death was due to pneumoconiosis, the survivor will receive benefits unless the weight of the evidence as subsequently developed by the Department or the responsible operator establishes that the miner's death was not due to pneumoconiosis as defined in paragraph (c). However, no such benefits shall be found payable before the party responsible for the payment of such benefits shall have had a reasonable opportunity for the development of rebuttal evidence. *See* § 725.414 concerning the operator's opportunity to develop evidence prior to an initial determination.

§ 718.206 Effect of findings by persons or agencies.

Decisions, statements, reports, opinions, or the like, of agencies, organizations, physicians or other individuals, about the existence, cause, and extent of a miner's disability, or the cause of a miner's death, are admissible. If properly submitted, such evidence shall be considered and given the weight to which it is entitled as evidence under all the facts before the adjudication officer in the claim.

Subpart D—Presumptions Applicable to Eligibility Determinations

§ 718.301 Establishing length of employment as a miner.

The presumptions set forth in §§ 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of the miner's coal mine work history must be

computed as provided by 20 CFR 725.101(a)(32).

§ 718.302 Relationship of pneumoconiosis to coal mine employment.

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. (See § 718.203.)

§ 718.303 Death from a respirable disease.

(a)(1) If a deceased miner was employed for ten or more years in one or more coal mines and died from a respirable disease, there shall be a rebuttable presumption that his or her death was due to pneumoconiosis.

(2) Under this presumption, death shall be found due to a respirable disease in any case in which the evidence establishes that death was due to multiple causes, including a respirable disease, and it is not medically feasible to distinguish which disease caused death or the extent to which the respirable disease contributed to the cause of death.

(b) The presumption of paragraph (a) of this section may be rebutted by a showing that the deceased miner did not have pneumoconiosis, that his or her death was not due to pneumoconiosis or that pneumoconiosis did not contribute to his or her death.

(c) This section is not applicable to any claim filed on or after January 1, 1982.

§ 718.304 Irrebuttable presumption of total disability or death due to pneumoconiosis.

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, that a miner's death was due to pneumoconiosis or that a miner was totally disabled due to pneumoconiosis at the time of death, if such miner is suffering or suffered from a chronic dust disease of the lung which:

(a) When diagnosed by chest X-ray (see § 718.202 concerning the standards for X-rays and the effect of interpretations of X-rays by physicians) yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in:

(1) The ILO–U/C International Classification of Radiographs of the Pneumoconioses, 1971, or subsequent revisions thereto; or

(2) The International Classification of the Radiographs of the Pneumoconioses of the International Labour Office, Extended Classification (1968) (which may be referred to as the ''ILO Classification (1968)''); or

(3) The Classification of the Pneumoconioses of the Union Internationale Contra Cancer/Cincinnati (1968) (which may be referred to as the ''UICC/Cincinnati (1968) Classification''); or

(b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

(c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided*, *however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

§ 718.305 Presumption of pneumoconiosis.

(a) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest X-ray submitted in connection with such miner's or his or her survivor's claim and it is interpreted as negative with respect to the requirements of § 718.304, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that such miner's death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis. In the case of a living miner's claim, a spouse's affidavit or testimony may not be used by itself to establish the applicability of the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where it is determined that conditions of the miner's employment in a coal mine were substantially similar to conditions in an underground mine. The presumption may be rebutted only by establishing that the miner does not, or did not have pneumoconiosis, or that his or her respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

(b) In the case of a deceased miner, where there is no medical or other relevant evidence, affidavits of persons having knowledge of the miner's condition shall be considered to be sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment for purposes of this section.

(c) The determination of the existence of a totally disabling respiratory or pulmonary impairment, for purposes of applying the presumption described in this section, shall be made in accordance with § 718.204.

(d) Where the cause of death or total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment or the evidence establishes that the miner does not or did not have pneumoconiosis, the presumption will be considered rebutted. However, in no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

(e) This section is not applicable to any claim filed on or after January 1, 1982.

§ 718.306 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner whose claims have been filed prior to June 30, 1982, shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request, furnish such evidence as is available with respect to the health of the miner at the time of death, and the nature and duration of the miner's coal mine employment.

(b) For the purpose of this section, a miner will be considered to have been ''partially disabled'' if he or she had reduced ability to engage in work as defined in § 718.204(b).

(c) In order to rebut this presumption the evidence must demonstrate that the miner's ability to perform work as defined in § 718.204(b) was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) None of the following items, by itself, shall be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

Appendix A To Part 718—Standards for Administration and Interpretation of Chest Roentgenograms (X-Rays)

The following standards are established in accordance with sections 402(f)(1)(D) and

413(b) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health. These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting X-rays and that the best available medical evidence will be submitted in connection with a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be assigned to the physician's report of an X-ray.

(1) Every chest roentgenogram shall be a single postero-anterior projection at full inspiration on a 14 by 17 inch film. Additional chest films or views shall be obtained if they are necessary for clarification and classification. The film and cassette shall be capable of being positioned both vertically and horizontally so that the chest roentgenogram will include both apices and costophrenic angles. If a miner is too large to permit the above requirements, then a projection with minimum loss of costophrenic angle shall be made.

(2) Miners shall be disrobed from the waist up at the time the roentgenogram is given. The facility shall provide a dressing area and, for those miners who wish to use one, the facility shall provide a clean gown. Facilities shall be heated to a comfortable temperature.

(3) Roentgenograms shall be made only with a diagnostic X-ray machine having a rotating anode tube with a maximum of a 2 mm source (focal spot).

(4) Except as provided in paragraph (5), roentgenograms shall be made with units having generators which comply with the following: (a) the generators of existing roentgenographic units acquired by the examining facility prior to July 27, 1973, shall have a minimum rating of 200 mA at 100 kVp; (b) generators of units acquired subsequent to that date shall have a minimum rating of 300 mA at 125 kVp.

Note: A generator with a rating of 150 kVp is recommended.

(5) Roentgenograms made with battery-powered mobile or portable equipment shall be made with units having a minimum rating of 100 mA at 110 kVp at 500 Hz, or 200 mA at 110 kVp at 60 Hz.

(6) Capacitor discharge, and field emission units may be used.

(7) Roentgenograms shall be given only with equipment having a beam-limiting device which does not cause large unexposed boundaries. The use of such a device shall be discernible from an examination of the roentgenogram.

(8) To insure high quality chest roentgenograms:

(i) The maximum exposure time shall not exceed 1/20 of a second except that with single phase units with a rating less than 300 mA at 125 kVp and subjects with chest over 28 cm postero-anterior, the exposure may be increased to not more than 1/10 of a second;

(ii) The source or focal spot to film distance shall be at least 6 feet;

(iii) Only medium-speed film and medium-speed intensifying screens shall be used;

(iv) Film-screen contact shall be maintained and verified at 6-month or shorter intervals;

(v) Intensifying screens shall be inspected at least once a month and cleaned when necessary by the method recommended by the manufacturer;

(vi) All intensifying screens in a cassette shall be of the same type and made by the same manufacturer;

(vii) When using over 90 kV, a suitable grid or other means of reducing scattered radiation shall be used;

(viii) The geometry of the radiographic system shall insure that the central axis (ray) of the primary beam is perpendicular to the plane of the film surface and impinges on the center of the film.

(9) Radiographic processing:

(i) Either automatic or manual film processing is acceptable. A constant time-temperature technique shall be meticulously employed for manual processing.

(ii) If mineral or other impurities in the processing water introduce difficulty in obtaining a high-quality roentgenogram, a suitable filter or purification system shall be used.

(10) Before the miner is advised that the examination is concluded, the roentgenogram shall be processed and inspected and accepted for quality by the physician, or if the physician is not available, acceptance may be made by the radiologic technologist. In a case of a substandard roentgenogram, another shall be made immediately.

(11) An electric power supply shall be used which complies with the voltage, current, and regulation specified by the manufacturer of the machine.

(12) A densitometric test object may be required on each roentgenogram for an objective evaluation of film quality at the discretion of the Department of Labor.

(13) Each roentgenogram made under this Appendix shall be permanently and legibly marked with the name and address of the facility at which it is made, the miner's DOL claim number, the date of the roentgenogram, and left and right side of film. No other identifying markings shall be recorded on the roentgenogram.

Appendix B to Part 718–Standards for Administration and Interpretation of Pulmonary Function Tests. Tables B1, B2, B3, B4, B5, B6.

The following standards are established in accordance with section 402(f)(1)(D) of the Act. They were developed in consultation with the National Institute for Occupational Safety and Health (NIOSH). These standards are promulgated for the guidance of physicians and medical technicians to insure that uniform procedures are used in administering and interpreting ventilatory function tests and that the best available medical evidence will be submitted in support of a claim for black lung benefits. If it is established that one or more standards have not been met, the claims adjudicator may consider such fact in determining the evidentiary weight to be given to the results of the ventilatory function tests.

(1) Instruments to be used for the administration of pulmonary function tests shall be approved by NIOSH and shall conform to the following criteria:

(i) The instrument shall be accurate within +/−50 ml or within +/−3 percent of reading, whichever is greater.

(ii) The instrument shall be capable of measuring vital capacity from 0 to 7 liters BTPS.

(iii) The instrument shall have a low inertia and offer low resistance to airflow such that the resistance to airflow at 12 liters per second must be less than 1.5 cm H20/liter/sec.

(iv) The instrument or user of the instrument must have a means of correcting volumes to body temperature saturated with water vapor (BTPS) under conditions of varying ambient spirometer temperatures and barometric pressures.

(v) The instrument used shall provide a tracing of flow versus volume (flow-volume loop) which displays the entire maximum inspiration and the entire maximum forced expiration. The instrument shall, in addition, provide tracings of the volume versus time tracing (spirogram) derived electronically from the flow-volume loop. Tracings are necessary to determine whether maximum inspiratory and expiratory efforts have been obtained during the FVC maneuver. If maximum voluntary ventilation is measured, the tracing shall record the individual breaths volumes versus time.

(vi) The instrument shall be capable of accumulating volume for a minimum of 10 seconds after the onset of exhalation.

(vii) The instrument must be capable of being calibrated in the field with respect to the FEV1. The volume calibration shall be accomplished with a 3 L calibrating syringe and should agree to within 1 percent of a 3 L calibrating volume. The linearity of the instrument must be documented by a record of volume calibrations at three different flow rates of approximately 3 L/6 sec, 3 L/3 sec, and 3 L/sec.

(viii) For measuring maximum voluntary ventilation (MVV) the instrument shall have a response which is flat within +/−10 percent up to 4 Hz at flow rates up to 12 liters per second over the volume range.

(ix) The spirogram shall be recorded at a speed of at least 20 mm/sec and a volume excursion of at least 10mm/L. Calculation of the FEVl from the flow-volume loop is not acceptable. Original tracings shall be submitted.

(2) The administration of pulmonary function tests shall conform to the following criteria:

(i) Tests shall not be performed during or soon after an acute respiratory illness.

(ii) For the FEV1 and FVC, use of a nose clip is required. The procedures shall be explained in simple terms to the patient who shall be instructed to loosen any tight clothing and stand in front of the apparatus. The subject may sit, or stand, but care should be taken on repeat testing that the same position be used. Particular attention shall be given to insure that the chin is slightly elevated with the neck slightly extended. The subject shall be instructed to expire completely, momentarily hold his breath, place the mouthpiece in his mouth and close the mouth firmly about the mouthpiece to ensure no air leak. The subject will than make a maximum inspiration from the

instrument and when maximum inspiration has been attained, without interruption, blow as hard, fast and completely as possible for at least 7 seconds or until a plateau has been attained in the volume-time curve with no detectable change in the expired volume during the last 2 seconds of maximal expiratory effort. A minimum of three flow-volume loops and derived spirometric tracings shall be carried out. The patient shall be observed throughout the study for compliance with instructions. Inspiration and expiration shall be checked visually for reproducibility. The effort shall be judged unacceptable when the patient:

(A) Has not reached full inspiration preceding the forced expiration; or

(B) Has not used maximal effort during the entire forced expiration; or

(C) Has not continued the expiration for least 7 sec. or until an obvious plateau for at least 2 sec. in the volume-time curve has occurred; or

(D) Has coughed or closed his glottis; or

(E) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(F) Has an unsatisfactory start of expiration, one characterized by excessive hesitation (or false starts). Peak flow should be attained at the start of expiration and the volume-time tracing (spirogram) should have a smooth contour revealing gradually decreasing flow throughout expiration; or

(G) Has an excessive variability between the three acceptable curves. The variation between the two largest FEV1's of the three acceptable tracings should not exceed 5 percent of the largest FEV1 or 100 ml, whichever is greater. As individuals with obstructive disease or rapid decline in lung function will be less likely to achieve this degree of reproducibility, tests not meeting this criterion may still be submitted for consideration in support of a claim for black lung benefits. Failure to meet this standard should be clearly noted in the test report by the physician conducting or reviewing the test.

(iii) For the MVV, the subject shall be instructed before beginning the test that he or she will be asked to breathe as deeply and as rapidly as possible for approximately 15 seconds. The test shall be performed with the subject in the standing position, if possible. Care shall be taken on repeat testing that the same position be used. The subject shall breathe normally into the mouthpiece of the apparatus for 10 to 15 seconds to become accustomed to the system. The subject shall then be instructed to breathe as deeply and as rapidly as possible, and shall be continually encouraged during the remainder of the maneuver. Subject shall continue the maneuver for 15 seconds. At least 5 minutes of rest shall be allowed between maneuvers. At least three MVV's shall be carried out. (*But see* § 718.103(b).) During the maneuvers the patient shall be observed for compliance with instructions. The effort shall be judged unacceptable when the patient:

(A) Has not maintained consistent effort for at least 12 to 15 seconds; or

(B) Has coughed or closed his glottis; or

(C) Has an obstructed mouthpiece or a leak around the mouthpiece (obstruction due to tongue being placed in front of mouthpiece, false teeth falling in front of mouthpiece, etc.); or

(D) Has an excessive variability between the three acceptable curves. The variation between the two largest MVVs of the three satisfactory tracings shall not exceed 10 percent.

(iv) A calibration check shall be performed on the instrument each day before use, using a volume source of at least three liters, accurate to within +/−1 percent of full scale. The volume calibration shall be performed in accordance with the method described in paragraph (1)(vii) of this Appendix. Accuracy of the time measurement used in determining the FEV1 shall be checked using the manufacturer's stated procedure and shall be within +/−3 percent of actual. The procedure described in the Appendix shall be performed as well as any other procedures suggested by the manufacturer of the spirometer being used.

(v)(A) The first step in evaluating a spirogram for the FVC and FEV1 shall be to determine whether or not the patient has performed the test properly or as described in (2)(ii) of this Appendix. The largest recorded FVC and FEV1, corrected to BTPS, shall be used in the analysis.

(B) Only MVV maneuvers which demonstrate consistent effort for at least 12 seconds shall be considered acceptable. The largest accumulated volume for a 12 second period corrected to BTPS and multiplied by five or the largest accumulated volume for a 15 second period corrected to BTPS and multiplied by four is to be reported as the MVV.

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Appendix C to Part 718—Blood-Gas Tables

The following tables set forth the values to be applied in determining whether total disability may be established in accordance with §§ 718.204(b)(2)(ii) and 718.305(a), (c). The values contained in the tables are indicative of impairment only. They do not establish a degree of disability except as provided in §§ 718.204(b)(2)(ii) and 718.305(a), (c) of this subchapter, nor do they establish standards for determining normal alveolar gas exchange values for any particular individual. Tests shall not be performed during or soon after an acute respiratory or cardiac illness. A miner who meets the following medical specifications shall be found to be totally disabled, in the absence of rebutting evidence, if the values specified in one of the following tables are met:

(1) For arterial blood-gas studies performed at test sites up to 2,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	75
26	74
27	73
28	72
29	71
30	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40–49	60
Above 50	(1)

[1] Any value.

(2) For arterial blood-gas studies performed at test sites 3,000 to 5,999 feet above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	70
26	69
27	68
28	67
29	66
30	65
31	64
32	63
33	62
34	61
35	60
36	59
37	58
38	57
39	56
40–49	55
Above 50	(2)

[2] Any value.

(3) For arterial blood-gas studies performed at test sites 6,000 feet or more above sea level:

Arterial PCO2 (mm Hg)	Arterial PO2 equal to or less than (mm Hg)
25 or below	65
26	64
27	63
28	62
29	61
30	60
31	59
32	58
33	57
34	56
35	55
36	54
37	53
38	52
39	51
40–49	50
Above 50	(3)

[3] Any value.

3. Part 722 is revised as follows:

PART 722—CRITERIA FOR DETERMINING WHETHER STATE WORKERS' COMPENSATION LAWS PROVIDE ADEQUATE COVERAGE FOR PNEUMOCONIOSIS AND LISTING OF APPROVED STATE LAWS

Sec.
722.1 Purpose.
722.2 Definitions.
722.3 General criteria; inclusion in and removal from the Secretary's list.
722.4 The Secretary's list.

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 *et seq.*, 921, 932, 936; 33 U.S.C. 901 *et seq.*, Secretary's Order 7–87, 52 FR 48466, Employment Standards Order No. 90–02.

§ 722.1 Purpose.

Section 421 of the Black Lung Benefits Act provides that a claim for benefits based on the total disability or death of a coal miner due to pneumoconiosis must be filed under a State workers' compensation law where such law provides adequate coverage for pneumoconiosis. A State workers' compensation law may be deemed to provide adequate coverage only when it is included on a list of such laws maintained by the Secretary. The purpose of this part is to set forth the procedures and criteria for inclusion on that list, and to provide that list.

§ 722.2 Definitions.

(a) The definitions and use of terms contained in subpart A of part 725 of this title shall be applicable to this part.

(b) For purposes of this part, the following definitions apply:

(1) *State agency* means, with respect to any State, the agency, department or officer designated by the workers' compensation law of the State to administer such law. In any case in which more than one agency participates in the administration of a State workers' compensation law, the Governor of the State may designate which of the agencies shall be the State agency for purposes of this part.

(2) *The Secretary's list* means the list published by the Secretary of Labor in the **Federal Register** (see § 722.4) containing the names of those States which have in effect a workers' compensation law which provides adequate coverage for death or total disability due to pneumoconiosis.

§ 722.3 General criteria; inclusion in and removal from the Secretary's list.

(a) The Governor of any State or any duly authorized State agency may, at any time, request that the Secretary include such State's workers' compensation law on his list of those State workers' compensation laws providing adequate coverage for total disability or death due to pneumoconiosis. Each such request shall include a copy of the State workers' compensation law and any other pertinent State laws; a copy of any regulations, either proposed or promulgated, implementing such laws; and a copy of any relevant administrative or court decision interpreting such laws or regulations, or, if such decisions are published in a readily available report, a citation to such decision.

(b) Upon receipt of a request that a State be included on the Secretary's list, the Secretary shall include the State on the list if he finds that the State's workers' compensation law guarantees the payment of monthly and medical benefits to all persons who would be entitled to such benefits under the Black Lung Benefits Act at the time of the request, at a rate no less than that provided by the Black Lung Benefits Act. The criteria used by the Secretary in making such determination shall include, but shall not be limited to, the criteria set forth in section 421(b)(2) of the Act.

(c) The Secretary may require each State included on the list to submit reports detailing the extent to which the State's workers' compensation laws, as reflected by statute, regulation, or administrative or court decision, continues to meet the requirements of paragraph (b) of this section. If the Secretary concludes that the State's workers' compensation law does not provide adequate coverage at any time, either because of changes to the State workers' compensation law or the Black Lung Benefits Act, he shall remove the State from the Secretary's list after providing the State with notice of such removal and an opportunity to be heard.

§ 722.4 The Secretary's list.

(a) The Secretary has determined that publication of the Secretary's list in the Code of Federal Regulations is appropriate. Accordingly, in addition to its publication in the **Federal Register** as required by section 421 of the Black Lung Benefits Act, the list shall also appear in paragraph (b) of this section.

(b) Upon review of all requests filed with the Secretary under section 421 of the Black Lung Benefits Act and this part, and examination of the workers' compensation laws of the States making such requests, the Secretary has determined that the workers' compensation law of each of the following listed States, for the period from the date shown in the list until such date as the Secretary may make a contrary determination, provides adequate coverage for pneumoconiosis.

State	Period commencing
None	

4. Part 725 is revised as follows:

PART 725—CLAIMS FOR BENEFITS UNDER PART C OF TITLE IV OF THE FEDERAL MINE SAFETY AND HEALTH ACT, AS AMENDED

Subpart A—General

Sec.
725.1 Statutory provisions.
725.2 Purpose and applicability of this part.
725.3 Contents of this part.
725.4 Applicability of other parts in this title.
725.101 Definitions and use of terms.
725.102 Disclosure of program information.
725.103 Burden of proof.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

725.201 Who is entitled to benefits; contents of this subpart.

Conditions and Duration of Entitlement: Miner

725.202 Miner defined; conditions of entitlement, miner.
725.203 Duration and cessation of entitlement, miner.

Conditions and Duration of Entitlement: Miner's Dependents (Augmented Benefits)

725.204 Determination of relationship; spouse.
725.205 Determination of dependency; spouse.
725.206 Determination of relationship; divorced spouse.
725.207 Determination of dependency; divorced spouse.
725.208 Determination of relationship; child.
725.209 Determination of dependency; child.
725.210 Duration of augmented benefits.
725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

Conditions and Duration of Entitlement: Miner's Survivors

725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.
725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.
725.214 Determination of relationship; surviving spouse.
725.215 Determination of dependency; surviving spouse.
725.216 Determination of relationship; surviving divorced spouse.
725.217 Determination of dependency; surviving divorced spouse.
725.218 Conditions of entitlement; child.
725.219 Duration of entitlement; child.

Authority: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 921, 932, 936; 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.

Subpart A—General

§ 725.1 Statutory provisions.

(a) *General.* Title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, provides for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis (black lung disease) and to certain survivors of a miner who dies due to pneumoconiosis. For claims filed prior to January 1, 1982, certain survivors could receive benefits if the miner was totally (or for claims filed prior to June 30, 1982, in accordance with section 411(c)(5) of the Act, partially) disabled due to pneumoconiosis, or if the miner died due to pneumoconiosis.

(b) *Part B.* Part B of title IV of the Act provided that all claims filed between December 30, 1969, and June 30, 1973, are to be filed with, processed, and paid by the Secretary of Health, Education, and Welfare through the Social Security Administration; claims filed by the survivor of a miner before January 1, 1974, or within 6 months of the miner's death if death occurred before January 1, 1974, and claims filed by the survivor of a miner who was receiving benefits under part B of title IV of the Act at the time of death, if filed within 6 months of the miner's death, are also adjudicated and paid by the Social Security Administration.

(c) *Section 415.* Claims filed by a miner between July 1 and December 31, 1973, are adjudicated and paid under section 415. Section 415 provides that a claim filed between the appropriate dates shall be filed with and adjudicated by the Secretary of Labor under certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.). A claim approved under section 415 is paid under part B of title IV of the Act for periods of eligibility occurring between July 1 and December 31, 1973, by the Secretary of Labor and for periods of eligibility thereafter, is paid by a coal mine operator which is determined liable for the claim or the Black Lung Disability Trust Fund if no operator is identified or if the miner's last coal mine employment terminated prior to January 1, 1970. An operator which may be found liable for a section 415 claim is notified of the claim and allowed to participate fully in the adjudication of such claim. A claim filed under section 415 is for all purposes considered as if it were a part C claim (see paragraph (d) of this section) and the provisions of part C of title IV of the Act are fully applicable to a section 415 claim except as is otherwise provided in section 415.

(d) *Part C.* Claims filed by a miner or survivor on or after January 1, 1974, are filed, adjudicated, and paid under the provisions of part C of title IV of the Act. Part C requires that a claim filed on or after January 1, 1974, shall be filed under an applicable approved State workers' compensation law, or if no such law has been approved by the Secretary of Labor, the claim may be filed with the Secretary of Labor under section 422 of the Act. Claims filed with the Secretary of Labor under part C are processed and adjudicated by the Secretary and paid by a coal mine operator. If the miner's last coal mine employment terminated before January 1, 1970, or if no responsible operator can be identified, benefits are paid by the Black Lung Disability Trust Fund. Claims adjudicated under part C are subject to certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(e) *Section 435.* Section 435 of the Act affords each person who filed a claim for benefits under part B, section 415, or part C, and whose claim had been denied or was still pending as of March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, the right to have his or her claim reviewed on the basis of the 1977 amendments to the Act, and under certain circumstances to submit new evidence in support of the claim.

(f) *Changes made by the Black Lung Benefits Reform Act of 1977.* In addition to those changes which are reflected in paragraphs (a) through (e) of this section, the Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for determining eligibility for benefits. Among these are:

(1) A provision which clarifies the definition of ''pneumoconiosis'' to include any ''chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment'';

(2) A provision which defines ''miner'' to include any person who works or has worked in or around a coal mine or coal preparation facility, and in coal mine construction or coal transportation under certain circumstances;

(3) A provision which limits the denial of a claim solely on the basis of employment in a coal mine;

(4) A provision which authorizes the Secretary of Labor to establish standards and develop criteria for determining total disability or death due to pneumoconiosis with respect to a part C claim;

(5) A new presumption which requires the payment of benefits to the survivors of a miner who was employed for 25 or more years in the mines under certain conditions;

(6) Provisions relating to the treatment to be accorded a survivor's affidavit, certain X-ray interpretations, and certain autopsy reports in the development of a claim; and

(7) Other clarifying, procedural, and technical amendments.

(g) *Changes made by the Black Lung Benefits Revenue Act of 1977.* The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) produced and sold or used in the United States after March 31, 1978. The Secretary of the Treasury is the managing trustee of the fund and benefits are paid from the fund upon the direction of the Secretary of Labor. The fund was made liable for the payment of all claims approved under section 415, part C and section 435 of the Act for all periods of eligibility occurring on or after January 1, 1974, with respect to claims where the miner's last coal mine employment terminated before January

1, 1970, or where individual liability can not be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund was also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and to seek reimbursement from such operator. The purpose of the fund and the Black Lung Benefits Revenue Act of 1977 was to insure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contained other provisions relating to the fund and authorized a coal mine operator to establish its own trust fund for the payment of certain claims.

(h) *Changes made by the Black Lung Benefits Amendments of 1981.* In addition to the change reflected in paragraph (a) of this section, the Black Lung Benefits Amendments of 1981 made a number of significant changes in the Act's standards for determining eligibility for benefits and concerning the payment of such benefits. The following changes are all applicable to claims filed on or after January 1, 1982:

(1) The Secretary of Labor may re-read any X-ray submitted in support of a claim and may rely upon a second opinion concerning such an X-ray as a means of auditing the validity of the claim;

(2) The rebuttable presumption that the death of a miner with ten or more years employment in the coal mines, who died of a respirable disease, was due to pneumoconiosis is no longer applicable;

(3) The rebuttable presumption that the total disability of a miner with fifteen or more years employment in the coal mines, who has demonstrated a totally disabling respiratory or pulmonary impairment, is due to pneumoconiosis is no longer applicable;

(4) In the case of deceased miners, where no medical or other relevant evidence is available, only affidavits from persons not eligible to receive benefits as a result of the adjudication of the claim will be considered sufficient to establish entitlement to benefits;

(5) 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 and after January 1, 1982, only when the miner's death was due to pneumoconiosis;

(6) Benefits payable under this part are subject to an offset on account of excess earnings by the miner; and

(7) Other technical amendments.

(i) *Changes made by the Black Lung Benefits Revenue Act of 1981.* The Black Lung Benefits Revenue Act of 1981 temporarily doubles the amount of the tax upon coal until the fund shall have repaid all advances received from the United States Treasury and the interest on all such advances. The fund is also made liable for the payment of certain claims previously denied under the 1972 version of the Act and subsequently approved under section 435 and for the reimbursement of operators and insurers for benefits previously paid by them on such claims. With respect to claims filed on or after January 1, 1982, the fund's authorization for the payment of interim benefits is limited to the payment of prospective benefits only. These changes also define the rates of interest to be paid to and by the fund.

(j) *Longshoremen's Act provisions.* The adjudication of claims filed under sections 415, 422 and 435 of the Act is governed by various procedural and other provisions contained in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by sections 415 and 422. The incorporated LHWCA provisions are applicable under the Act except as is otherwise provided by the Act or as provided by regulations of the Secretary. Although occupational disease benefits are also payable under the LHWCA, the primary focus of the procedures set forth in that Act is upon a time definite of traumatic injury or death. Because of this and other significant differences between a black lung and longshore claim, it is determined, in accordance with the authority set forth in section 422 of the Act, that certain of the incorporated procedures prescribed by the LHWCA must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim. The changes made are based upon the Department's experience in processing black lung claims since July 1, 1973, and all such changes are specified in this part or part 727 of this subchapter (see § 725.4(d)). No other departure from the incorporated provisions of the LHWCA is intended.

(k) *Social Security Act provisions.* Section 402 of Part A of the Act incorporates certain definitional provisions from the Social Security Act, 42 U.S.C. 301 *et seq.* Section 430 provides that the 1972, 1977 and 1981 amendments to part B of the Act shall also apply to part C ''to the extent appropriate.'' Sections 412 and 413 incorporate various provisions of the Social Security Act into part B of the Act. To the extent appropriate, therefore, these provisions also apply to part C. In certain cases, the Department has varied the terms of the Social Security Act provisions to accommodate the unique needs of the black lung benefits program. Parts of the Longshore and Harbor Workers' Compensation Act are also incorporated into part C. Where the incorporated provisions of the two acts are inconsistent, the Department has exercised its broad regulatory powers to choose the extent to which each incorporation is appropriate. Finally, Section 422(g), contained in part C of the Act, incorporates 42 U.S.C. 403(b)–(l).

§ 725.2 Purpose and applicability of this part.

(a) This part sets forth the procedures to be followed and standards to be applied in filing, processing, adjudicating, and paying claims filed under part C of title IV of the Act.

(b) This part applies to all claims filed under part C of title IV of the Act on or after August 18, 1978 and shall also apply to claims that were pending on August 18, 1978.

(c) The provisions of this part reflect revisions that became effective on Janaury 19, 2001. This part applies to all claims filed, and all benefits payments made, after January 19, 2001. With the exception of the following sections, this part shall also apply to the adjudication of claims that were pending on January 19, 2001: §§ 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.495, 725.547. The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim shall be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

§ 725.3 Contents of this part.

(a) This subpart describes the statutory provisions which relate to claims considered under this part, the purpose and scope of this part, definitions and usages of terms applicable to this part, and matters relating to the availability of information collected by the Department of Labor in connection with the processing of claims.

(b) Subpart B contains criteria for determining who may be found entitled to benefits under this part and other provisions relating to the conditions and duration of eligibility of a particular individual.

(c) Subpart C describes the procedures to be followed and action to be taken in connection with the filing of a claim under this part.

(d) Subpart D sets forth the duties and powers of the persons designated by the Secretary of Labor to adjudicate claims and provisions relating to the rights of parties and representatives of parties.

(e) Subpart E contains the procedures for developing evidence and adjudicating entitlement and liability issues by the district director.

(f) Subpart F describes the procedures to be followed if a hearing before the Office of Administrative Law Judges is required.

(g) Subpart G contains provisions governing the identification of a coal mine operator which may be liable for the payment of a claim.

(h) Subpart H contains provisions governing the payment of benefits with respect to an approved claim.

(i) Subpart I describes the statutory mechanisms provided for the enforcement of a coal mine operator's liability, sets forth the penalties which may be applied in the case of a defaulting coal mine operator, and describes the obligation of coal operators and their insurance carriers to file certain reports.

(j) Subpart J describes the right of certain beneficiaries to receive medical treatment benefits and vocational rehabilitation under the Act.

§ 725.4 Applicability of other parts in this title.

(a) Part 718. Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled due to pneumoconiosis, or whether a miner died due to pneumoconiosis, shall be applicable to the determination of claims under this part. Claims filed after March 31, 1980, are subject to part 718 as promulgated by the Secretary in accordance with section 402(f)(1) of the Act on February 29, 1980 (see § 725.2(c)). The criteria contained in subpart C of part 727 of this subchapter are applicable in determining claims filed prior to April 1, 1980, under this part, and such criteria shall be applicable at all times with respect to claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(b) *Parts 715, 717, and 720.* Pertinent and significant provisions of Parts 715, 717, and 720 of this subchapter (formerly contained in 20 CFR, parts 500 to end, edition revised as of April 1, 1978), which established the procedures for the filing, processing, and payment of claims filed under section 415 of the Act, are included within this part as appropriate.

(c) *Part 726.* Part 726 of this subchapter, which sets forth the obligations imposed upon a coal operator to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part as appropriate.

(d) *Part 727.* Part 727 of this subchapter, which governs the review, adjudication and payment of pending and denied claims under section 435 of the Act, is applicable with respect to such claims. The criteria contained in subpart C of part 727 for determining a claimant's eligibility for benefits are applicable under this part with respect to all claims filed before April 1, 1980, and to all claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977. Because the part 727 regulations affect an increasingly smaller number of claims, however, the Department has discontinued publication of the criteria in the Code of Federal Regulations. The part 727 criteria may be found at 43 FR 36818, Aug. 18, 1978 or 20 CFR, parts 500 to end, edition revised as of April 1, 1999.

(e) *Part 410.* Part 410 of this title, which sets forth provisions relating to a claim for black lung benefits under part B of title IV of the Act, is inapplicable to this part except as is provided in this part, or in part 718 of this subchapter.

§ 725.101 Definition and use of terms.

(a) *Definitions.* For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) The *Act* means the Federal Coal Mine Health and Safety Act, Public Law 91–173, 83 Stat. 742, 30 U.S.C. 801–960, as amended by the Black Lung Benefits Act of 1972, the Mine Safety and Health Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Revenue Act of 1981, and the Black Lung Benefits Amendments of 1981.

(2) The *Longshoremen's Act* or LHWCA means the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. 901–950, as amended from time to time.

(3) The *Social Security Act* means the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. 301–431, as amended from time to time.

(4) *Administrative law judge* means a person qualified under 5 U.S.C. 3105 to conduct hearings and adjudicate claims for benefits filed pursuant to section 415 and part C of the Act. Until March 1, 1979, it shall also mean an individual appointed to conduct such hearings and adjudicate such claims under Public Law 94–504.

(5) *Beneficiary* means a miner or any surviving spouse, divorced spouse, child, parent, brother or sister, who is entitled to benefits under either section 415 or part C of title IV of the Act.

(6) *Benefits* means all money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis, including augmented benefits (see § 725.520(c)). The term also includes any expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406.

(7) *Benefits Review Board* or *Board* means the Benefits Review Board, U.S. Department of Labor, an appellate tribunal appointed by the Secretary of Labor pursuant to the provisions of section 21(b)(1) of the LHWCA. See parts 801 and 802 of this title.

(8) *Black Lung Disability Trust Fund* or the *fund* means the Black Lung Disability Trust Fund established by the Black Lung Benefits Revenue Act of 1977, as amended by the Black Lung Benefits Revenue Act of 1981, for the payment of certain claims adjudicated under this part (see subpart G of this part).

(9) *Chief Administrative Law Judge* means the Chief Administrative Law Judge of the Office of Administrative Law Judges, U.S. Department of Labor, 800 K Street, NW., suite 400, Washington, DC 20001–8002.

(10) *Claim* means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

(11) *Claimant* means an individual who files a claim for benefits under this part.

(12) *Coal mine* means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and

includes custom coal preparation facilities.

(13) *Coal preparation* means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

(14) *Department* means the United States Department of Labor.

(15) *Director* means the Director, OWCP, or his or her designee.

(16) *District Director* means a person appointed as provided in sections 39 and 40 of the LHWCA, or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter (see § 725.350). The term District Director is substituted for the term Deputy Commissioner wherever that term appears in the regulations. This substitution is for administrative purposes only and in no way affects the power or authority of the position as established in the statute. Any action taken by a person under the authority of a district director will be considered the action of a deputy commissioner.

(17) *Division* or *DCMWC* means the Division of Coal Mine Workers' Compensation in the OWCP, Employment Standards Administration, United States Department of Labor.

(18) *Insurer* or *carrier* means any private company, corporation, mutual association, reciprocal or interinsurance exchange, or any other person or fund, including any State fund, authorized under the laws of a State to insure employers' liability under workers' compensation laws. The term also includes the Secretary of Labor in the exercise of his or her authority under section 433 of the Act.

(19) *Miner* or *coal miner* means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

(20) *The Nation's coal mines* means all coal mines located in any State.

(21) *Office* or *OWCP* means the Office of Workers' Compensation Programs, United States Department of Labor.

(22) *Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

(23) *Operator* means any owner, lessee, or other person who operates, controls or supervises a coal mine, including a prior or successor operator as defined in section 422 of the Act and certain transportation and construction employers (see subpart G of this part).

(24) *Person* means an individual, partnership, association, corporation, firm, subsidiary or parent of a corporation, or other organization or business entity.

(25) *Pneumoconiosis* means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (see part 718 of this subchapter).

(26) *Responsible operator* means an operator which has been determined to be liable for the payment of benefits to a claimant for periods of eligibility after December 31, 1973, with respect to a claim filed under section 415 or part C of title IV of the Act or reviewed under section 435 of the Act.

(27) *Secretary* means the Secretary of Labor, United States Department of Labor, or a person, authorized by him or her to perform his or her functions under title IV of the Act.

(28) *State* includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and prior to January 3, 1959, and August 21, 1959, respectively, the territories of Alaska and Hawaii.

(29) *Total disability* and *partial disability*, for purposes of this part, have the meaning given them as provided in part 718 of this subchapter.

(30) *Underground coal mine* means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e., overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.

(31) A *workers' compensation law* means a law providing for payment of benefits to employees, and their dependents and survivors, for disability on account of injury, including occupational disease, or death, suffered in connection with their employment. A payment funded wholly out of general revenues shall not be considered a payment under a workers' compensation law.

(32) *Year* means a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 ''working days.'' A ''working day'' means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

(i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, shall not establish more than one year.

(ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.

(iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

(iv) No periods of coal mine employment occurring outside the United States shall be considered in computing the miner's work history.

(b) *Statutory terms.* The definitions contained in this section shall not be

construed in derogation of terms of the Act.

(c) *Dependents and survivors.* Dependents and survivors are those persons described in subpart B of this part.

§ 725.102 Disclosure of program information.

(a) All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director or his or her designee shall be the official custodian of those records maintained by the OWCP at its national office. The District Director shall be the official custodian of those records maintained at a district office.

(b) The official custodian of any record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR Part 70). The original record in any such case shall not be removed from the Office of the custodian for such inspection. The custodian may, in his or her discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his or her opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508 of this chapter.

(c) Any person may request copies of records he or she has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR Part 70).

(d) Any party to a claim (§ 725.360) or his or her duly authorized representative shall be permitted upon request to inspect the file which has been compiled in connection with such claim. Any party to a claim or representative of such party shall upon request be provided with a copy of any or all material contained in such claim file. A request for information by a party or representative made under this paragraph shall be answered within a reasonable time after receipt by the Office. Internal documents prepared by the district director which do not constitute evidence of a fact which must be established in connection with a claim shall not be routinely provided or presented for inspection in accordance with a request made under this paragraph.

§ 725.103 Burden of proof.

Except as otherwise provided in this part and part 718, the burden of proving a fact alleged in connection with any provision shall rest with the party making such allegation.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

§ 725.201 Who is entitled to benefits; contents of this subpart.

(a) Section 415 and part C of the Act provide for the payment of periodic benefits in accordance with this part to:

(1) A miner (see § 725.202) who is determined to be totally disabled due to pneumoconiosis; or

(2) The surviving spouse or surviving divorced spouse or, where neither exists, the child of a deceased miner, where the deceased miner:

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a survivor's claim filed prior to June 30, 1982, or;

(3) The child of a miner's surviving spouse who was receiving benefits under section 415 or part C of title IV of the Act at the time of such spouse's death; or

(4) The surviving dependent parents, where there is no surviving spouse or child, or the surviving dependent brothers or sisters, where there is no surviving spouse, child, or parent, of a miner, where the deceased miner;

(i) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. Survivors of miners whose claims are filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish their entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a survivor's claim filed prior to June 30, 1982.

(b) Section 411(c)(5) of the Act provides for the payment of benefits to the eligible survivors of a miner employed for 25 or more years in the mines prior to June 30, 1971, if the miner's death occurred on or before March 1, 1978, and if the claim was filed prior to June 30, 1982, unless it is established that at the time of death, the miner was not totally or partially disabled due to pneumoconiosis. For the purposes of this part the term ''total disability'' shall mean partial disability with respect to a claim for which eligibility is established under section 411(c)(5) of the Act. See § 718.306 of this subchapter which implements this provision of the Act.

(c) The provisions contained in this subpart describe the conditions of entitlement to benefits applicable to a miner, or a surviving spouse, child, parent, brother, or sister, and the events which establish or terminate entitlement to benefits.

(d) In order for an entitled miner or surviving spouse to qualify for augmented benefits because of one or more dependents, such dependents must meet relationship and dependency requirements with respect to such beneficiary prescribed by or pursuant to the Act. Such requirements are also set forth in this subpart.

Conditions and Duration of Entitlement: Miner

§ 725.202 Miner defined; condition of entitlement, miner.

(a) *Miner defined.* A ''miner'' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:

(1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or

(2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

(b) *Coal mine construction and transportation workers; special*

provisions. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. A transportation worker shall be considered a miner to the extent that his or her work is integral to the extraction or preparation of coal. A construction worker shall be considered a miner to the extent that his or her work is integral to the building of a coal or underground mine (see § 725.101(a)(12), (30)).

(1) There shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of:

(i) Determining whether such individual is or was a miner;

(ii) Establishing the applicability of any of the presumptions described in section 411(c) of the Act and part 718 of this subchapter; and

(iii) Determining the identity of a coal mine operator liable for the payment of benefits in accordance with § 725.495.

(2) The presumption may be rebutted by evidence which demonstrates that:

(i) The individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or

(ii) The individual did not work regularly in or around a coal mine or coal preparation facility.

(c) A person who is or was a self-employed miner or independent contractor, and who otherwise meets the requirements of this paragraph, shall be considered a miner for the purposes of this part.

(d) *Conditions of entitlement; miner.* An individual is eligible for benefits under this subchapter if the individual:

(1) Is a miner as defined in this section; and

(2) Has met the requirements for entitlement to benefits by establishing that he or she:

(i) Has pneumoconiosis (see § 718.202), and

(ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and

(iii) Is totally disabled (see § 718.204(c)), and

(iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

(3) Has filed a claim for benefits in accordance with the provisions of this part.

§ 725.203 Duration and cessation of entitlement; miner.

(a) An individual is entitled to benefits as a miner for each month beginning with the first month on or after January 1, 1974, in which the miner is totally disabled due to pneumoconiosis arising out of coal mine employment.

(b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events first occurs:

(1) The miner dies; or

(2) The miner's total disability ceases (see § 725.504).

(c) An individual who has been finally adjudged to be totally disabled due to pneumoconiosis and is receiving benefits under the Act shall promptly notify the Office and the responsible coal mine operator, if any, if he or she engages in his or her usual coal mine work or comparable and gainful work.

(d) Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, if an issue arises pertaining to the validity of the original award.

Conditions and Duration of Entitlement: Miner's Dependents (Augmented Benefits)

§ 725.204 Determination of relationship; spouse.

(a) For the purpose of augmenting benefits, an individual will be considered to be the spouse of a miner if:

(1) The courts of the State in which the miner is domiciled would find that such individual and the miner validly married; or

(2) The courts of the State in which the miner is domiciled would find, under the law they would apply in determining the devolution of the miner's intestate personal property, that the individual is the miner's spouse; or

(3) Under State law, such individual would have the right of a spouse to share in the miner's intestate personal property; or

(4) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which, but for a legal impediment, would have been a valid marriage, unless the individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household in the month in which a request is filed that the miner's benefits be augmented because such individual qualifies as the miner's spouse.

(b) The qualification of an individual for augmentation purposes under this section shall end with the month before the month in which:

(1) The individual dies, or

(2) The individual who previously qualified as a spouse for purposes of § 725.520(c), entered into a valid marriage without regard to this section, with a person other than the miner.

§ 725.205 Determination of dependency; spouse.

For the purposes of augmenting benefits, an individual who is the miner's spouse (see § 725.204) will be determined to be dependent upon the miner if:

(a) The individual is a member of the same household as the miner (see § 725.232); or

(b) The individual is receiving regular contributions from the miner for support (see § 725.233(c)); or

(c) The miner has been ordered by a court to contribute to such individual's support (see § 725.233(e)); or

(d) The individual is the natural parent of the son or daughter of the miner; or

(e) The individual was married to the miner (see § 725.204) for a period of not less than 1 year.

§ 725.206 Determination of relationship; divorced spouse.

For the purposes of augmenting benefits with respect to any claim considered or reviewed under this part or part 727 of this subchapter (see § 725.4(d)), an individual will be considered to be the divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to the miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final.

§ 725.207 Determination of dependency; divorced spouse.

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§ 725.206) will be determined to be dependent upon the miner if:

(a) The individual is receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order requires the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.208 Determination of relationship; child.

As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of death (see § 725.212), or a miner. An individual will be considered to be the child of a beneficiary if:

(a) The courts of the State in which the beneficiary is domiciled (see § 725.231) would find, under the law they would apply, that the individual is the beneficiary's child; or

(b) The individual is the legally adopted child of such beneficiary; or

(c) The individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent or adopting parent to such beneficiary; or

(d) The individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section if the beneficiary and the mother or the father, as the case may be, of the individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of the beneficiary if:

(1) The beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the parent of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(e)) because the individual is his or her son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time the beneficiary became entitled to benefits.

§ 725.209 Determination of dependency; child.

(a) For purposes of augmenting the benefits of a miner or surviving spouse, the term ''beneficiary'' as used in this section means only a miner or surviving spouse entitled to benefits (see § 725.202 and § 725.212). An individual who is the beneficiary's child (§ 725.208) will be determined to be, or to have been, dependent on the beneficiary, if the child:

(1) Is unmarried; and

(2)(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or

(iii) Is 18 years of age or older and is a student.

(b)(1) The term ''student'' means a ''full-time student'' as defined in section 202(d)(7) of the Social Security Act, 42 U.S.C. 402(d)(7) (see §§ 404.367—404.369 of this title), or an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(i) A school, college, or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof; or

(ii) A school, college, or university which has been accredited by a State or by a State-recognized or nationally-recognized accrediting agency or body; or

(iii) A school, college, or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited; or

(iv) A technical, trade, vocational, business, or professional school accredited or licensed by the Federal or a State government or any political subdivision thereof, providing courses of not less than 3 months' duration that prepare the student for a livelihood in a trade, industry, vocation, or profession.

(2) A student will be considered to be ''pursuing a full-time course of study or training at an institution'' if the student is enrolled in a noncorrespondence course of at least 13 weeks duration and is carrying a subject load which is considered full-time for day students under the institution's standards and practices. A student beginning or ending a full-time course of study or training in part of any month will be considered to be pursuing such course for the entire month.

(3) A child is considered not to have ceased to be a student:

(i) During any interim between school years, if the interim does not exceed 4 months and the child shows to the satisfaction of the Office that he or she has a bona fide intention of continuing to pursue a full-time course of study or training; or

(ii) During periods of reasonable duration in which, in the judgment of the Office, the child is prevented by factors beyond the child's control from pursuing his or her education.

(4) A student whose 23rd birthday occurs during a semester or the enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period, unless eligibility is otherwise terminated.

§ 725.210 Duration of augmented benefits.

Augmented benefits payable on behalf of a spouse or divorced spouse, or a child, shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. Augmentation of benefits on account of a dependent continues through the month before the month in which the dependent ceases to satisfy these conditions, except in the case of a child who qualifies as a dependent because such child is a student. In the latter case, benefits continue to be augmented through the month before the first month during no part of which such child qualifies as a student.

§ 725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

With respect to the spouse or child of a miner entitled to benefits, and with respect to the child of a surviving spouse entitled to benefits, the determination as to whether an individual purporting to be a spouse or child is related to or dependent upon such miner or surviving spouse shall be based on the facts and circumstances present in each case, at the appropriate time.

Conditions and Duration of Entitlement: Miner's Survivors

§ 725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b) If more than one spouse meets the conditions of entitlement prescribed in paragraph (a), then each spouse will be considered a beneficiary for purposes of section 412(a)(2) of the Act without regard to the existence of any other entitled spouse or spouses.

§ 725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual is entitled to benefits as a surviving spouse, or as a surviving divorced spouse, for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.212 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which either of the following events first occurs:

(1) The surviving spouse or surviving divorced spouse marries; or

(2) The surviving spouse or surviving divorced spouse dies.

(c) A surviving spouse or surviving divorced spouse whose entitlement to benefits has been terminated pursuant to § 725.213(b)(1) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.212. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.212(a)(3)(i)) or the miner's death due to pneumoconiosis (§ 725.212(a)(3)(ii)).

§ 725.214 Determination of relationship; surviving spouse.

An individual shall be considered to be the surviving spouse of a miner if:

(a) The courts of the State in which the miner was domiciled (see § 725.231) at the time of his or her death would find that the individual and the miner were validly married; or

(b) The courts of the State in which the miner was domiciled (see § 725.231) at the time of the miner's death would find that the individual was the miner's surviving spouse; or

(c) Under State law, such individual would have the right of the spouse to share in the miner's intestate personal property; or

(d) Such individual went through a marriage ceremony with the miner, resulting in a purported marriage between them which, but for a legal impediment (see § 725.230), would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner's death.

§ 725.215 Determination of dependency; surviving spouse.

An individual who is the miner's surviving spouse (see § 725.214) shall be determined to have been dependent on the miner if, at the time of the miner's death:

(a) The individual was living with the miner (see § 725.232); or

(b) The individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (see § 725.233); or

(c) The individual was living apart from the miner because of the miner's desertion or other reasonable cause; or

(d) The individual is the natural parent of the miner's son or daughter; or

(e) The individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or

(f) The individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g)(1) The individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (g)(2) of this section), or

(ii) Occurs in line of duty while the miner is a member of a uniformed service serving on active duty (as defined in § 404.1019 of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which such miner died.

(2) For purposes of paragraph (g)(1)(i) of this section, the death of a miner is accidental if such individual received bodily injuries solely through violent, external, and accidental means, and as a direct result of the bodily injuries and independently of all other causes, dies not later than 3 months after the day on which such miner receives such bodily injuries. The term ''accident'' means an event that was unpremeditated and unforeseen from the standpoint of the deceased individual. To determine whether the death of an individual did, in fact, result from an accident the adjudication officer will consider all the circumstances surrounding the casualty. An intentional and voluntary suicide will not be considered to be death by accident; however, suicide by an individual who is so incompetent as to be incapable of acting intentionally and voluntarily will be considered to be a death by accident. In no event will the death of an individual resulting from violent and external causes be considered a suicide unless there is direct proof that the fatal injury was self-inflicted.

(3) The provisions of paragraph (g) shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

§ 725.216 Determination of relationship; surviving divorced spouse.

An individual will be considered to be the surviving divorced spouse of a deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter (see § 725.4(d)), if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

§ 725.217 Determination of dependency; surviving divorced spouse.

An individual who is the miner's surviving divorced spouse (see § 725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(a) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order required the miner to furnish substantial contributions to the individual's support (see § 725.233(c) and (e)).

§ 725.218 Conditions of entitlement; child.

(a) An individual is entitled to benefits where he or she meets the required standards of relationship and dependency under this subpart (see § 725.220 and § 725.221) and is the child of a deceased miner who:

(1) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982, or

(2) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. A surviving dependent child of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of this subchapter on a claim filed prior to June 30, 1982.

(b) A child is not entitled to benefits for any month for which a miner, or the surviving spouse or surviving divorced spouse of a miner, establishes entitlement to benefits.

§ 725.219 Duration of entitlement; child.

(a) An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.218 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the child attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the child's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the child is a student; or

(ii) The month in which the child attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the child's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

(d) A child whose entitlement to benefits has been terminated pursuant to § 725.219(b)(2) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.218. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.218(a)(1)) or the miner's death due to pneumoconiosis (§ 725.212(a)(2)).

§ 725.220 Determination of relationship; child.

For purposes of determining whether an individual may qualify for benefits as the child of a deceased miner, the provisions of § 725.208 shall be applicable. As used in this section, the term ''beneficiary'' means only a surviving spouse entitled to benefits at the time of such surviving spouse's death (see § 725.212), or a miner. For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

§ 725.221 Determination of dependency; child.

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained age 22, or in the case of a student, before the child ceased to be a student.

§ 725.222 Conditions of entitlement; parent, brother, or sister.

(a) An individual is eligible for benefits as a surviving parent, brother or sister if all of the following requirements are met:

(1) The individual is the parent, brother, or sister of a deceased miner;

(2) The individual was dependent on the miner at the pertinent time;

(3) Proof of support is filed within 2 years after the miner's death, unless the time is extended for good cause (§ 725.226);

(4) In the case of a brother or sister, such individual also:

(i) Is under 18 years of age; or

(ii) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), which began

before such individual attained age 22, or in the case of a student, before the student ceased to be a student; or

(iii) Is a student (see § 725.209(b)); or

(iv) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), at the time of the miner's death;

(5) The deceased miner:

(i) Was entitled to benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving dependent parent, brother or sister of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 of part 718 on a claim filed prior to June 30, 1982.

(b)(1) A parent is not entitled to benefits if the deceased miner was survived by a spouse or child at the time of such miner's death.

(2) A brother or sister is not entitled to benefits if the deceased miner was survived by a spouse, child, or parent at the time of such miner's death.

§ 725.223 Duration of entitlement; parent, brother, or sister.

(a) A parent, sister, or brother is entitled to benefits beginning with the month all the conditions of entitlement described in § 725.222 are met.

(b) The last month for which such parent is entitled to benefits is the month in which the parent dies.

(c) The last month for which such brother or sister is entitled to benefits is the month before the month in which any of the following events first occurs:

(1) The individual dies;

(2)(i) The individual marries or remarries; or

(ii) If already married, the individual received support in any amount from his or her spouse;

(3) The individual attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the individual attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the individual's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the individual is a student; or

(ii) The month in which the individual attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the individual's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

§ 725.224 Determination of relationship; parent, brother, or sister.

(a) An individual will be considered to be the parent, brother, or sister of a miner if the courts of the State in which the miner was domiciled (see § 225.231) at the time of death would find, under the law they would apply, that the individual is the miner's parent, brother, or sister.

(b) Where, under State law, the individual is not the miner's parent, brother, or sister, but would, under State law, have the same status (*i.e.,* right to share in the miner's intestate personal property) as a parent, brother, or sister, the individual will be considered to be the parent, brother, or sister as appropriate.

§ 725.225 Determination of dependency; parent, brother, or sister.

An individual who is the miner's parent, brother, or sister will be determined to have been dependent on the miner if, during the 1–year period immediately prior to the miner's death:

(a) The individual and the miner were living in the same household (see § 725.232); and

(b) The individual was totally dependent on the miner for support (see § 725.233(h)).

§ 725.226 ''Good cause'' for delayed filing of proof of support.

(a) *What constitutes ''good cause.''* ''Good cause'' may be found for failure to file timely proof of support where the parent, brother, or sister establishes to the satisfaction of the Office that such failure to file was due to:

(1) Circumstances beyond the individual's control, such as extended illness, mental, or physical incapacity, or communication difficulties; or

(2) Incorrect or incomplete information furnished the individual by the Office; or

(3) Efforts by the individual to secure supporting evidence without a realization that such evidence could be submitted after filing proof of support.

(b) *What does not constitute ''good cause.''* ''Good cause'' for failure to file timely proof of support (see § 725.222(a)(3)) does not exist when there is evidence of record in the Office that the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence.

§ 725.227 Time of determination of relationship and dependency of survivors.

The determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

§ 725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

An individual who has been convicted of the felonious and intentional homicide of a miner or other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary, and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

Terms Used in This Subpart

§ 725.229 Intestate personal property.

References in this subpart to the ''same right to share in the intestate personal property'' of a deceased miner (or surviving spouse) refer to the right of an individual to share in such distribution in the individual's own right and not the right of representation.

§ 725.230 Legal impediment.

For purposes of this subpart, ''legal impediment'' means an impediment resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution or resulting from a defect in the procedure followed in connection with the purported marriage ceremony—for example, the solemnization of a marriage only through a religious ceremony in a country which requires a civil ceremony for a valid marriage.

§ 725.231 Domicile.

(a) For purposes of this subpart, the term ''domicile'' means the place of an individual's true, fixed, and permanent home.

(b) The domicile of a deceased miner or surviving spouse is determined as of the time of death.

(c) If an individual was not domiciled in any State at the pertinent time, the

law of the District of Columbia is applied.

§ 725.232 Member of the same household—''living with,'' ''living in the same household,'' and ''living in the miner's household,'' defined.

(a) *Defined.* (1) The term ''member of the same household'' as used in section 402(a)(2) of the Act (with respect to a spouse); the term ''living with'' as used in section 402(e) of the Act (with respect to a surviving spouse); and the term ''living in the same household'' as used in this subpart, means that a husband and wife were customarily living together as husband and wife in the same place.

(2) The term ''living in the miner's household'' as used in section 412(a)(5) of the Act (with respect to a parent, brother, or sister) means that the miner and such parent, brother, or sister were sharing the same residence.

(b) *Temporary absence.* The temporary absence from the same residence of either the miner, or the miner's spouse, parent, brother, or sister (as the case may be), does not preclude a finding that one was ''living with'' the other, or that they were ''members of the same household.'' The absence of one such individual from the residence in which both had customarily lived shall, in the absence of evidence to the contrary, be considered temporary:

(1) If such absence was due to service in the Armed Forces of the United States; or

(2) If the period of absence from his or her residence did not exceed 6 months and the absence was due to business or employment reasons, or because of confinement in a penal institution or in a hospital, nursing home, or other curative institution; or

(3) In any other case, if the evidence establishes that despite such absence they nevertheless reasonably expected to resume physically living together.

(c) *Relevant period of time.* (1) The determination as to whether a surviving spouse had been ''living with'' the miner shall be based upon the facts and circumstances as of the time of the death of the miner.

(2) The determination as to whether a spouse is a ''member of the same household'' as the miner shall be based upon the facts and circumstances with respect to the period or periods of time as to which the issue of membership in the same household is material.

(3) The determination as to whether a parent, brother, or sister was ''living in the miner's household'' shall take account of the 1-year period immediately prior to the miner's death.

§ 725.233 Support and contributions.

(a) *Support* defined. The term ''support'' includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.

(b) *Contributions* defined. The term ''contributions'' refers to contributions actually provided by the contributor from such individual's property, or the use thereof, or by the use of such individual's own credit.

(c) *Regular contributions* and *substantial contributions* defined. The terms ''regular contributions'' and ''substantial contributions'' mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support.

(d) *Contributions and community property.* When a spouse receives and uses for his or her support income from services or property, and such income, under applicable State law, is the community property of the wife and her husband, no part of such income is a ''contribution'' by one spouse to the other's support regardless of the legal interest of the donor. However, when a spouse receives and uses for support, income from the services and the property of the other spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by the donor to the spouse's support.

(e) *Court order for support* defined. References to a support order in this subpart means any court order, judgment, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual's support and which is in effect at the applicable time. If such contributions are required by a court order, this condition is met whether or not the contributions were actually made.

(f) *Written agreement* defined. The term ''written agreement'' in the phrase ''substantial contributions pursuant to a written agreement'', as used in this subpart means an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable.

(g) *One-half support* defined. The term ''one-half support'' means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual's support at such time or during such period.

(h) *Totally dependent for support* defined. The term ''totally dependent for support'' as used in § 725.225(b) means that the miner made regular contributions to the support of the miner's parents, brother, or sister, as the case may be, and that the amount of such contributions at least equalled the total cost of such individual's support.

Subpart C—Filing of Claims

§ 725.301 Who may file a claim.

(a) Any person who believes he or she may be entitled to benefits under the Act may file a claim in accordance with this subpart.

(b) A claimant who has attained the age of 18, is mentally competent and physically able, may file a claim on his or her own behalf.

(c) If a claimant is unable to file a claim on his or her behalf because of a legal or physical impairment, the following rules shall apply:

(1) A claimant between the ages of 16 and 18 years who is mentally competent and not under the legal custody or care of another person, or a committee or institution, may upon filing a statement to the effect, file a claim on his or her own behalf. In any other case where the claimant is under 18 years of age, only a person, or the manager or principal officer of an institution having legal custody or care of the claimant may file a claim on his or her behalf.

(2) If a claimant over 18 years of age has a legally appointed guardian or committee, only the guardian or committee may file a claim on his or her behalf.

(3) If a claimant over 18 years of age is mentally incompetent or physically unable to file a claim and is under the care of another person, or an institution, only the person, or the manager or principal officer of the institution responsible for the care of the claimant, may file a claim on his or her behalf.

(4) For good cause shown, the Office may accept a claim executed by a person other than one described in paragraphs (c)(2) or (3) of this section.

(d) Except as provided in § 725.305, in order for a claim to be considered, the claimant must be alive at the time the claim is filed.

§ 725.302 Evidence of authority to file a claim on behalf of another.

A person filing a claim on behalf of a claimant shall submit evidence of his or her authority to so act at the time of filing or at a reasonable time thereafter in accordance with the following:

(a) A legally appointed guardian or committee shall provide the Office with certification of appointment by a proper official of the court.

(b) Any other person shall provide a statement describing his or her relationship to the claimant, the extent to which he or she has care of the claimant, or his or her position as an officer of the institution of which the claimant is an inmate. The Office may, at any time, require additional evidence to establish the authority of any such person.

§ 725.303 Date and place of filing of claims.

(a)(1) Claims for benefits shall be delivered, mailed to, or presented at, any of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims, or, in the case of a claim filed by or on behalf of a claimant residing outside the United States, mailed or presented to any office maintained by the Foreign Service of the United States. A claim shall be considered filed on the day it is received by the office in which it is first filed.

(2) A claim submitted to a Foreign Service Office or any other agency or subdivision of the U.S. Government shall be forwarded to the Office and considered filed as of the date it was received at the Foreign Service Office or other governmental agency or unit.

(b) A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark. In the absence of a legible postmark, other evidence may be used to establish the mailing date.

§ 725.304 Forms and initial processing.

(a) Claims shall be filed on forms prescribed and approved by the Office. The district office at which the claim is filed will assist claimants in completing their forms.

(b) If the place at which a claim is filed is an office of the Social Security Administration, such office shall forward the completed claim form to an office of the DCMWC, which is authorized to process the claim.

§ 725.305 When a written statement is considered a claim.

(a) The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part under the following circumstances:

(1) The claimant or a proper person on his or her behalf (see § 725.301) executes and files a prescribed claim form with the Office during the claimant's lifetime within the period specified in paragraph (b) of this section.

(2) Where the claimant dies within the period specified in paragraph (b) of this section without filing a prescribed claim form, and a person acting on behalf of the deceased claimant's estate executes and files a prescribed claim form within the period specified in paragraph (c) of this section.

(b) Upon receipt of a written statement indicating an intention to claim benefits, the Office shall notify the signer in writing that to be considered the claim must be executed by the claimant or a proper party on his or her behalf on the prescribed form and filed with the Office within six months from the date of mailing of the notice.

(c) If before the notice specified in paragraph (b) of this section is sent, or within six months after such notice is sent, the claimant dies without having executed and filed a prescribed form, or without having had one executed and filed in his or her behalf, the Office shall upon receipt of notice of the claimant's death advise his or her estate, or those living at his or her last known address, in writing that for the claim to be considered, a prescribed claim form must be executed and filed by a person authorized to do so on behalf of the claimant's estate within six months of the date of the later notice.

(d) Claims based upon written statements indicating an intention to claim benefits not perfected in accordance with this section shall not be processed.

§ 725.306 Withdrawal of a claim.

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's estate under § 725.305, may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

(3) Any payments made to the claimant in accordance with § 725.522 are reimbursed.

(b) When a claim has been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

§ 725.307 Cancellation of a request for withdrawal.

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

§ 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part on or before December 31, 1980. Any claim filed after that date shall be untimely unless the time for filing has been enlarged for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

§ 725.309 Additional claims; effect of a prior denial of benefits.

(a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in §§ 725.308(b) and 725.702.

(b) If a claimant files a claim under this part while another claim filed by the claimant under this part is still pending, the later claim shall be merged with the earlier claim for all purposes. For purposes of this section, a claim shall be considered pending if it has not yet been finally denied.

(c) If a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a request for modification of the prior denial and shall be processed and adjudicated under § 725.310.

(d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter (see § 725.4(d)), a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In any case involving more than one claim filed by the same claimant, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart H of this part.

§ 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional arterial blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings before the district director, the district director may issue a proposed decision and order (§ 725.418) or, if appropriate, deny the claim by reason of abandonment (§ 725.409). In any case in which the district director has initiated modification proceedings on his own initiative to alter the terms of an award or denial of benefits issued by an administrative law judge, the district director shall, at the conclusion of modification proceedings, forward the claim for a hearing (§ 725.421). In any case forwarded for a hearing, the administrative law judge assigned to hear such case shall consider whether any additional evidence submitted by the parties demonstrates a change in condition and, regardless of whether the parties have submitted new evidence, whether the evidence of record demonstrates a mistake in a determination of fact.

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing the amount of benefits payable based on a finding of a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, no payment made in excess of the decreased rate prior to the date upon which the party requested reconsideration under paragraph (a) of this section shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which is decreased following the initiation of modification by the district director, no payment made in excess of the decreased rate prior to the date upon which the district director initiated modification proceedings under paragraph (a) shall be subject to collection or offset under subpart H of this part, provided the claimant is without fault as defined by § 725.543. In the case of an award which has become final and is thereafter terminated, no payment made prior to the date upon which the party requested reconsideration under paragraph (a) shall be subject to collection or offset under subpart H of this part. In the case of an award which has become final and is thereafter terminated following the initiation of modification by the district director, no payment made prior to the date upon which the district director initiated modification proceedings