The commenters opposed to the Department's proposal also objected to the Department's failure to consult the National Institute of Occupational Safety and Health (NIOSH). Although NIOSH had commented favorably on the Department's proposal, and specifically on the provision recognizing the progressive nature of pneumoconiosis, the Department decided, in light of the divergent comments it had received from medical professionals, to seek additional guidance from NIOSH. The Department transmitted a copy of all of the testimony and commentary it had received to Dr. Linda Rosenstock, the Director of NIOSH, and asked NIOSH to determine, in light of the then existing record, whether NIOSH continued to support the Department's proposal. NIOSH responded, in a December 7, 1998 letter from Dr. Paul Schulte, the Director of NIOSH's Education and Information Division, that ''[t]he unfavorable comments received by DOL do not alter our previous position: NIOSH scientific analysis supports the proposed definitional changes.'' Dr. Schulte provided additional medical references to support NIOSH's conclusion. The Department notified parties of this additional evidence in its second notice of proposed rulemaking. *See* 64 FR 54978–79 (Oct. 8, 1999).

One commenter accuses the Department of obtaining assistance from NIOSH's information officer rather than its scientific staff. The Department does not agree that the identity or title of the agency official through whom NIOSH chose to communicate its response to the Department's inquiry renders that response invalid. The Department's request was sent to the Director of NIOSH, and observed that the resolution of the issues related to the definition of the term ''pneumoconiosis'' required scientific and medical expertise. Dr. Schulte's letter, transmitted on behalf of NIOSH in response to the Department's request, specifically refers to ''NIOSH scientific analysis.'' Accordingly, the Department rejects the commenter's inferences that its consultation with NIOSH was less than complete, and that the Department sought to exclude the agency's scientific staff. To the extent that the statute imposes an obligation to consult with NIOSH on the definition of ''pneumoconiosis,'' the Department has fully complied with that obligation.

The commenters opposed to the Department's proposal also attack the scientific basis of the conclusion that the Department and NIOSH have drawn from the evidence of record. In the following discussion, where a scientific article or treatise is cited, the Department has also cited to a Rulemaking Record Exhibit or, when appropriate, the **Federal Register**, where that source appears. This second citation is not an exhaustive list; thus, each source may appear at additional points in the Rulemaking Record. In support of their attack, the commenters have submitted an analysis of the available medical literature from Dr. Gregory Fino, a Board-certified physician in Internal Medicine and Pulmonary Disease, and Dr. Barbara Bahl, who has a doctorate in nursing and biostatistics. Drs. Fino and Bahl analyze nine articles and textbooks dealing with latency, which they define parenthetically as ''0/0 or 0/1 to 1/0+.'' The analysis thus focuses on evidence that would show that a miner whose chest X-rays are classified by a radiologist as ''negative'' (0/0 or 0/1 under the ILO–UC classification scheme, *see* 20 CFR 718.102(b)), after he leaves the mine can develop a disease that will result in chest X-rays that are classified as ''positive.'' Under the ILO–UC scheme, an X-ray classified as category 1, 2, or 3, ranging from 1/0 to 3/3, is considered positive for simple pneumoconiosis. An X-ray classified as A, B, or C is considered positive for complicated pneumoconiosis, also known as progressive massive fibrosis or massive pulmonary fibrosis. 20 CFR 718.102(b), 718.304(a) (1999). They conclude that ''the medical literature provides no evidence that coal workers' pneumoconiosis or silicosis in coalminers is a latent disease. There is also no evidence to show that the development of pulmonary impairment is latent.'' Rulemaking Record, Exhibit, 89–37, Appendix C at 29.

Drs. Fino and Bahl also analyzed five articles dealing with progression, which they define parenthetically as ''1/0 to 1/0.+'' Their analysis of progression thus focuses on whether individuals whose chest X-rays are initially read as 1/0, the lowest positive classification in the ILO–UC scheme, may have later chest X-rays classified greater than 1/0. They observe that ''there are authors who have identified progression of pneumoconiosis in coal miners,'' but that other authors have reached the contrary conclusion. They conclude as follows:

> Why do some miners progress within the ILO scale of simple pneumoconiosis and others do not? The answer lies in the proper definition of pneumoconiosis. Careful attention must be made to differentiate simple coal workers' pneumoconiosis and silicosis. The miners who have been described to progress over time after exposure ceases are miners who have likely contracted silicosis, not simple coal workers' pneumoconiosis. * * *
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> Silicosis may be a progressive disease in a small percentage of miners after coal mine dust exposure ends. The literature does not support the statement that coal workers' pneumoconiosis is progressive absent further dust exposure. There are no studies that show progressive impairment in miners who have left the mines. The studies do not show any progression in industrial bronchitis after a miner leaves the mines. In fact, the studies do suggest that the minor reduction in the FEV1 [Forced Expiratory Volume in one second] as a result of industrial bronchitis occurs in the first few years of mining and then the effect over the remaining years in the mines is negligible and may even recover.

Rulemaking Record, Exhibit 89–37, Appendix C at 30–31. In evaluating the medical evidence contained in the rulemaking record, the Department is mindful that Congress provided an exceptionally broad definition of the term ''pneumoconiosis:'' ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' 30 U.S.C. 902(b). The regulatory definitions promulgated by the Department over the last 25 years have reflected the scope of this provision.

In 1978, the Department promulgated its interim criteria, 20 CFR Part 727. Those criteria included a definition of ''pneumoconiosis'' at 20 CFR 727.202. After repeating the statutory definition, the regulation further provided that ''[t]his definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis[,]anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis[,] silicosis, or silicotuberculosis arising out of coal mine employment.'' 43 FR 36825 (Aug. 18, 1978). The Department promulgated its permanent criteria, 20 CFR Part 718, in 1980. Section 718.201, entitled ''Definition of pneumoconiosis,'' contained a definition that was identical to that of § 727.202. 45 FR 13685 (Feb. 29, 1980). The federal courts of appeals have long recognized that the Act compensates not merely coal workers' pneumoconiosis, as that term is used by the medical community, but ''legal'' pneumoconiosis. *See, e.g., Peabody Coal Co.* v. *Lowis,* 708 F.2d 266, 268 n.4 (7th Cir. 1983) (''the 'legal' definition of pneumoconiosis contained in the above-quoted regulation [§ 727.202] includes not only 'true or clinical' pneumoconiosis but also other respiratory or pulmonary diseases arising from dust exposure in coal mine employment''); *Gulf & Western Industries* v. *Ling,* 176 F.3d 226, 231 (4th Cir. 1999) (''[the regulations detail the breadth of what is frequently called

'legal' pneumoconiosis * * *''); *see also* the Department's preamble to § 718.201.

The Department has reviewed all of the medical literature referenced in the record, and does not agree that it lacks support for the proposition that pneumoconiosis is a latent, progressive disease. Contrary to Dr. Fino's conclusions, a number of medical references document the latent, progressive nature of the disease. For example, Seaton, in ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42, contains the observation that ''PMF [Progressive massive fibrosis] may occur after dust exposure has ceased, even when the miner has left the industry with no apparent simple pneumoconiosis, although this will only occur if the worker has had substantial dust exposure''). Similarly, National Institute for Occupational Safety and Health, *Criteria for a Recommended Standard: Occupational Exposure to Respirable Coal Mine Dust,* § 4.2.1.3.1, Rulemaking Record, Exhibit 2–1 at 48, summarized an article (Maclaren WM, Soutar CA, ''Progressive massive fibrosis and simple pneumoconiosis in ex-miners,'' Br. J. Ind. Med. 42:734–740 (1985)) as follows: ''Among 1,902 ex-miners who had not developed PMF within 4 years of leaving mining, 172 (9%) developed PMF after leaving mining. Of those 172 miners with PMF, 32% had no evidence of simple CWP (category 0) when they left mining.'' In that article, in fact, Maclaren and Soutar reported both small opacities (evidence of simple pneumoconiosis) and large opacities (evidence of complicated pneumoconiosis) in ex-miners who did not show evidence of coal workers' pneumoconiosis after the miners left the industry.

Moreover, contrary to the conclusion of Dr. Fino and Dr. Bahl, the study conducted by Donnan *et al.* did find significant evidence of latency. Donnan PT, Miller BG, Scarisbrick DA, Seaton A, Wightman AJA, Soutar CA, ''Progression of simple pneumoconiosis in ex-coalminers after cessation of exposure to coalmine dust,'' IOM report TM/97/07 (Institute of Occupational Medicine, December 1997) 1–67, see also Rulemaking Record, Exhibit 89–37, Appendix C at 26, 29. Dr. Fino and Dr. Bahl write that ''only one out of 200 miners [in the study] was found to progress from a negative to a positive film.'' That conclusion, however, was not the conclusion of the study's authors. Their tables 3.4a (Median profusion score for 14 CWP progressors and 19 PMF progressors) and 3.4b (Median profusion score for 161 CWP non-progressors) compare X-rays taken within two years of the dates on which the 200 miners left the coal mining industry with X-rays taken 10 years later. They demonstrate that of 138 ex-miners whose early X-rays were read as 0/0 or 0/1, 11 had later X-rays read as positive for either simple or complicated pneumoconiosis. This proportion, 7.97%, has epidemiologic significance, and supports the authors' conclusion that ''[t]he results have demonstrated that progression does occur after cessation of exposure.'' Donnan *et al.* at 23.

In light of this evidence, the Department is not persuaded by the reliance Dr. Fino and Dr. Bahl place on the conclusion of Drs. Merchant, Taylor and Hodous in ''Occupational Respiratory Diseases'' (National Institute for Occupational Safety and Health, 1986), *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 26. Dr. Fino and Dr. Bahl quote the textbook's statement that ''the chance of radiological progression over ten years at a mean dust concentration of 2 milligrams per cubic meter is essentially zero for a miner with x-ray category 0/0.'' This textbook was published by the Division of Respiratory Disease Studies of the Appalachian Laboratory for Occupational Safety and Health, a component of the National Institute of Occupational Safety and Health, more than 10 years prior to the Donnan study. In light of NIOSH's conclusion that scientific analysis supports the Department's regulations, the Department does not agree that the statement by Merchant *et al.* requires the Department to revise its regulatory approach.

Similarly, the Department is not persuaded by Dr. Fino and Dr. Bahl's attempt to dismiss the effect of silica on coal miners, and therefore to discount the applicability of studies demonstrating the latency and progressivity of silicosis. It remains the Department's position that pneumoconiosis, as defined in the statute, 30 U.S.C. 902(b), is both latent and progressive. The statutory definition includes both simple coal workers' pneumoconiosis and silicosis. Although they acknowledge studies showing that silicosis is a latent, progressive disease, Dr. Fino and Dr. Bahl argue that coal workers' pneumoconiosis must be distinguished from silicosis. The Black Lung Benefits Act, however, does not permit such a distinction. As discussed above, the regulatory definition of the term ''pneumoconiosis,'' implementing the broad statutory definition, includes silicosis within the list of conditions that must be considered pneumoconiosis. In addition, inclusion of silicosis in the definition of pneumoconiosis is based on practical as well as legal considerations. It is difficult to separate the effects of coal and silica in the occupational setting. Coal contains a number of non-organic materials, including quartz, and the percentage of quartz is greater in high rank coals. Seaton, ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42. Seaton and colleagues reported a cohort of miners who had a rapid progression of radiologic findings resembling silicosis, despite a relatively low total coal dust exposure. Seaton A, Dick JA, Dodgson J, Jacobsen M., ''Quartz and pneumoconiosis in coal miners,'' Lancet 2:1272 (1981), *see also* Rulemaking Record, Exhibit 2–1 at 50. Analysis revealed that the percentage of quartz in the mixed coal mine dust was significantly higher in these affected miners than in matched controls. They concluded that quartz exposure was an important factor contributing to pneumoconiosis in some miners and that disease in such miners was more aggressive. Moreover, miners who drill into hard rock, such as those who bore shafts or work as roof bolters, are exposed to higher concentrations of quartz and are known to be at higher risk for developing silicosis. Seaton, ''Coal Workers' Pneumoconiosis,'' in Morgan, WKC and Seaton A, eds., *Occupational Lung Diseases* (WB Saunders Co., 3d ed. 1995) 389, *see also* Rulemaking Record, Exhibit 89–37, Appendix C at 34, 42. Based on these observations, it is reasonable to conclude that there is a clear risk of developing pneumoconiosis with characteristics of silicosis in coal miners exposed to dusts with high quartz content. Accordingly, the Department believes that it may properly rely on studies of silicosis in promulgating regulations governing the compensability of pneumoconiosis as that term has been defined by Congress. *See also* Beckett WS, ''Occupational Respiratory Diseases,'' The New England Journal of Medicine, 342:406–13 (Feb. 12, 2000) (citing a study of silicosis to support the conclusion that ''[w]ith many substances (including coal and silica dust), the disease may progress for decades after the exposure has ceased.''). (Dr. Beckett's review article did not appear until after the

rulemaking record had closed; it is cited only as additional evidence confirming the Department's previous use of studies involving silicosis).

Finally, there is also evidence that lung function can continue to deteriorate after a miner leaves the coal mining industry. The authors of Dimich-Ward H and Bates DV, ''Reanalysis of a longitudinal study of pulmonary function in coal miners in Lorraine, France,'' Am J Ind Med, 25:613–623 (1994), *see also* 62 FR 3344 (Jan. 22, 1997), demonstrated a decline of pulmonary function in both smoking and non-smoking coal miners that continues over time even after retirement from mining. Given this evidence of progression, it is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of ''pneumoconiosis'' includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is particularly significant.

The commenters also cite the 1985 report of the Surgeon General, U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Cancer and Chronic Lung Disease in the Workplace* (1985), *see also* Rulemaking Record, Exhibit 89–21, Appendix 11, in support of their argument. Of the seven items listed in the ''Summary and Conclusions'' section of Chapter Seven, ''Respiratory Disease in Coal Miners,'' none addresses the latency or progressivity of pneumoconiosis. In addition, the Surgeon General's report, which focused on the health consequences of smoking, did not review many of the articles on which the Department's conclusion is based. Because the overwhelming majority of the references cited by the Department in its first and second notices of proposed rulemaking, *see* 62 FR 3343–44 (Jan. 22, 1997); 64 FR 54978–79 (Oct. 8, 1999), as well as the references discussed above, were prepared after 1985, this is not surprising. Accordingly, the Department does not believe that anything in the Surgeon General's report requires the Department to ignore the conclusions that it has drawn from the studies and articles in the rulemaking record.

Contrary to the commenters' argument, then, the record does contain abundant evidence demonstrating that pneumoconiosis is a latent, progressive disease. That evidence is certainly sufficient to justify the Department's regulation governing subsequent claims. Moreover, neither the regulation permitting subsequent claims nor the Department's explicit recognition of the progressive nature of the disease represents a departure from the Department's prior positions. The Department's original promulgation of a regulation governing subsequent claims in 1978 was based on the progressive nature of the disease. 43 FR 36785 (Aug. 18, 1978). The federal courts of appeals have also recognized that pneumoconiosis is a progressive disease. *Plesh* v. *Director, OWCP,* 71 F.3d 103, 108 (3d Cir. 1995) (''pneumoconiosis is progressive and incurable''); *Labelle Processing Co.* v. *Swarrow,* 72 F.3d 308, 314–315 (3d Cir. 1995) (''Congress, in enacting the BLBA, recognized the perniciously progressive nature of the disease * * *. Moreover, courts have long acknowledged that pneumoconiosis is a progressive and irreversible disease.''); *Kowalchick* v. *Director, OWCP,* 893 F.2d 615, 621 (3d Cir. 1990) (''That the three earliest x-rays of record * * * were read negative is not inconsistent with the progressive nature of pneumoconiosis.''); *Shendock* v. *Director, OWCP,* 893 F.2d 1458, 1467 n.10 (3d Cir. 1990) (''it is well recognized that pneumoconiosis is a progressive disease whose symptoms increase in severity over time''); *Bethenergy Mines Inc.* v. *Director, OWCP,* 854 F.2d 632, 636 (3d Cir. 1988) (''Due to the progressive nature of pneumoconiosis, a coal mine operator is less likely to know the details underlying a particular claim than an employer is in the typical case arising under the LHWCA.''); *Zielinski* v. *Califano,* 580 F.2d 103, 107 (3d Cir. 1978) (''pneumoconiosis and related lung diseases progress slowly''); *Eastern Associated Coal Corp.* v. *Director, OWCP,* ____ F.3d ____, No. 99–1312, slip op. at pp. 11–12 (4th Cir. July 12, 2000) (observing ''the assumption of progressivity that underlies much of the statutory regime''); *Lane Hollow Coal Co.* v. *Lockhart,* 137 F.3d 799, 803 (4th Cir. 1998) (''pneumoconiosis is progressive and irreversible''); *Adkins* v. *Director, OWCP,* 958 F.2d 49, 51 (4th Cir. 1992) (''pneumoconiosis is a progressive disease''); *Greer* v. *Director, OWCP,* 940 F.2d 88, 90 (4th Cir. 1991) (pneumoconiosis is ''a slowly-progressing condition''); *Hamrick* v. *Schweiker,* 679 F.2d 1078, 1081 (4th Cir. 1982) (''pneumoconiosis is a progressive disease''); Prater v. Harris, 620 F.2d 1074, 1082 (4th Cir. 1980) (''pneumoconiosis is a progressive disease''); *Barnes* v. *Mathews,* 562 F.2d 278, 279 (4th Cir. 1977) (''pneumoconiosis is a slow, progressive disease often difficult to diagnose at early stages''); *Crace* v. *Kentland-Elkhorn Coal Corp.,* 109 F.3d 1163, 1167 (6th Cir. 1997) (''because of the progressive nature of pneumoconiosis, more recent evidence is often accorded more weight''); *Consolidation Coal Co.* v. *McMahon,* 77 F.3d 898, 906 (6th Cir. 1996) (recognizing ''the progressive nature of pneumoconiosis''); *Sharondale Corp.* v. *Ross,* 42 F.3d 993, 997 (6th Cir. 1994) (''the material change provision [provides] relief from the principles of finality for those miners whose conditions have deteriorated due to the progressive nature of black lung disease''); *Johnson* v. *Peabody Coal Co.,* 26 F.3d 618, 620 (6th Cir. 1994) (''Pneumoconiosis is a progressive debilitating disease.''); *Woodward* v. *Director, OWCP,* 991 F.2d 314, 320 (6th Cir. 1993) (''Pneumoconiosis is a progressive and degenerative disease.''); *Campbell* v. *Consolidation Coal Co.,* 811 F.2d 302, 303 (6th Cir. 1987) (recognizing ''the progressive nature of pneumoconiosis''); *Back* v. *Director, OWCP,* 796 F.2d 169, 172 (6th Cir. 1986) (''Because of the progressive nature of pneumoconiosis, earlier negative and later positive X-rays of the same individual are not necessarily in conflict.''); *Orange* v. *Island Creek Coal Co.,* 786 F.2d 724, 727 (6th Cir. 1986) (''pneumoconiosis * * * is a progressive disease''); *Director, OWCP* v. *Bivens,* 757 F.2d 781, 788 (6th Cir. 1985) (''the Black Lung Benefits Act provides compensation for disability based on an invisible and progressive disease''); *Collins* v. *Sec'y of HHS,* 734 F.2d 1177, 1180 (6th Cir. 1984) (''Medically we note that pneumoconiosis is a slow, progressive disease. Its characteristics and symptoms often do not manifest themselves in a way that promote [sic] immediate detection. In some cases the disease may take years before it is readily detectable.''); *Smith* v. *Califano,* 682 F.2d 583, 587 (6th Cir. 1982) (''coal workers'' pneumoconiosis * * * is a progressive disease''); *Hill* v. *Califano,* 592 F.2d 341, 345 (6th Cir. 1979) (''pneumoconiosis is a slowly progressive disease''); *Morris* v. *Mathews,* 557 F.2d 563, 568 (6th Cir. 1977) (recognizing Congressional finding that ''pneumoconiosis [is] a progressive chronic dust disease of the lung''); *Begley* v. *Mathews,* 544 F.2d 1345, 1354 (6th Cir. 1976) (describing pneumoconiosis as ''a disease known to be of a slowly progressive character''); *Amax Coal Co.* v. *Franklin,* 957 F.2d 355, 359 (7th Cir. 1992) (''Black lung

disease, at least when broadly defined, is a progressive disease * * *.''); *Dotson* v. *Peabody Coal Co.,* 846 F.2d 1134, 1139 (7th Cir. 1988) (''Pneumoconiosis is a progressive disease* * *''.); *Russell* v. *Director, OWCP,* 829 F.2d 615, 616 (7th Cir. 1987) (''Coal miners'' pneumoconiosis (black lung) is a progressive, debilitating disease.''); *Amax Coal Co.* v. *Director, OWCP,* 801 F.2d 958, 964 (7th Cir. 1986) (recognizing ''the difficulty of clinically diagnosing the progressive disease''); *Consolidation Coal Co.* v. *Chubb,* 741 F.2d 968, 973 (7th Cir. 1984) (''In light of the progressive nature of pneumoconiosis, [the ALJ's] according greater weight to the recent x-ray was not irrational.''); *Lovilia Coal Co.* v. *Harvey,* 109 F.3d 445, 450 (8th Cir. 1997) (recognizing progressive nature of pneumoconiosis); *Robinson* v. *Missouri Mining Co.,* 955 F.2d 1181, 1184 (8th Cir. 1992) (''pneumoconiosis is a progressive disease''); *Campbell* v. *Director, OWCP,* 846 F.2d 502, 509 (8th Cir. 1988) (''pneumoconiosis is a progressive disease''); *Newman* v. *Director, OWCP,* 745 F.2d 1162, 1165 (8th Cir. 1984) (''pneumoconiosis is a progressive disease''); *Padavich* v. *Mathews,* 561 F.2d 142, 146 (8th Cir. 1977) (''Pneumoconiosis is a progressive illness* * *.''); *Humphreville* v. *Mathews,* 560 F.2d 347, 349 (8th Cir. 1977) (''pneumoconiosis is a progressive disease''); *Wyoming Fuel Co.* v. *Director, OWCP,* 90 F.3d 1502, 1507 (10th Cir. 1996) (recognizing ''the nature of pneumoconiosis as a disease that develops progressively and is difficult to diagnose''); *Lukman* v. *Director, OWCP,* 896 F.2d 1248, 1253 (10th Cir. 1990) (recognizing real purpose of duplicate claims regulation is to provide ''miners with progressively worsening health full and equal access to black lung benefits.''); *Ohler* v. *Sec'y of HEW,* 583 F.2d 501, 506 (10th Cir. 1978) (''pneumoconiosis is a progressive disease, as is emphysema''); *Paluso* v. *Mathews,* 573 F.2d 4, 10 (10th Cir. 1978) (''It is well-established medically that pneumoconiosis is a progressive disease which frequently defies diagnosis.''); *Alabama Dry Dock and Shipbuilding Corp.* v. *Sowell,* 933 F.2d 1561, 1566 (11th Cir. 1991) (black lung ''can lie essentially dormant in the body for many years after an employee has left his employment before progressing to the point where [it] is disabling''); *Curse* v. *Director, OWCP,* 843 F.2d 456, 457 (11th Cir. 1988) (recognizing black lung disease develops slowly and progressively); *Doss* v. *Califano,* 598 F.2d 419, 421 (11th Cir. 1979) (''pneumoconiosis is a progressive disease''); *but see Zeigler Coal Co.* v. *Lemon,* 23 F.3d 1235, 1238 (7th Cir. 1994) (chastising an administrative law judge for assuming that pneumoconiosis is progressive without any evidence in the record to support the assumption).

Although one commenter asserts that the regulation creates an irrebuttable presumption that each miner's condition is progressive, it actually does no such thing. As revised, § 725.309 simply effectuates the current one-element test adopted by a substantial number of federal appellate courts and most recently the Benefits Review Board, *Allen* v. *Mead Corp.,* ____ Black Lung Rep. (MB) ____, BRB No. 99–0474 BLA (May 31, 2000). The one-element test allows a miner who demonstrates a material change in one of the conditions of entitlement previously decided against him to avoid an automatic bar on establishing his current entitlement to benefits. To the extent that the commenter would require each miner to submit scientific evidence establishing that the change in his specific condition represents latent, progressive pneumoconiosis, the Department disagrees and has therefore not imposed such an evidentiary burden on claimants. Rather, the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by two statutory presumptions, 30 U.S.C. 921(c)(1) and (c)(3). The revised regulation continues to afford coal mine operators an opportunity to introduce contrary evidence weighing against entitlement.

(c) One comment submitted in connection with the first notice of proposed rulemaking, and cited by another comment submitted in connection with the second notice of proposed rulemaking, suggests that the Department's proposed revision would compensate the 15 to 20 percent of cigarette smokers who develop chronic airway obstruction if they spent 10 years or more in the coal mining industry. The Department does not agree that the possibility that miners will suffer reduced pulmonary function as a result of cigarette smoking justifies the automatic denial of additional claims by miners under § 725.309. In addition, the previously cited study by Dimich-Ward and Bates documented the progressive decrement in lung function among both miners who smoked and those who did not. Dimich-Ward H, Bates DV, ''Reanalysis of a longitudinal study of pulmonary function in coal miners in Lorraine, France,'' Am J Ind Med, 25:613–623 (1994), see also 62 FR 3344 (Jan. 22, 1997). The Department accordingly believes that a miner who files his first claim before he is truly totally disabled, but later becomes totally disabled, must be afforded an opportunity to establish that his condition is related to his coal mine employment. Under § 718.204, the miner continues to bear the burden of proving this element of his entitlement. To the extent that a coal mine operator produces medical evidence demonstrating that the miner's total disability is due solely to cigarette smoking, that evidence would also be relevant to the inquiry under § 718.204.

(d) A number of comments argue that § 725.309 violates accepted principles of claim preclusion and issue preclusion, particularly with respect to the treatment of additional claims filed by miners' survivors. The Department disagrees. In its initial proposal, the Department explained that its additional filing rules gave full effect to the principles of claim preclusion but that the applicability of these principles was limited in two important respects: (1) The liberal reopening provision created by Congress under § 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a); and (2) the recognition that an individual's eligibility for workers' compensation benefits is not fixed at a single time, but, especially with respect to occupational diseases, may be subject to relitigation even if the worker's first claim is denied. 62 FR 3352 (Jan. 22, 1997). Under these principles, and subject to the limitation that the party must have a full and fair opportunity to litigate its position, *Kremer* v. *Chemical Constr. Corp.,* 456 U.S. 461, 481 n. 22 (1982), a final adjudication of the merits of a cause of action will preclude the parties from relitigating issues that were or could have been raised in the first proceeding. *Rivet* v. *Regions Bank of Louisiana,* 522 U.S. 470, 476 (1998), citing *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 398 (1981).

Section 725.309 applies these principles to the adjudication of black lung benefits claims. For example, if the sole basis for denying a miner's claim is a finding on an issue that is not subject to change, and that the miner had an opportunity to fully and fairly litigate, a subsequent claim by the miner must also be denied. Thus, where the first claim was denied solely on the grounds that the applicant did not work as a miner, and he does not allege that he engaged in any additional coal mine employment since he filed that application, his second claim must be denied as well. Where the issue is subject to change, however, neither claim preclusion principles nor

§ 725.309 bars the litigation of the miner's additional claim. For example, where the original denial was based on the miner's failure to establish that his respiratory impairment was totally disabling, and new evidence establishes that that condition has worsened, the miner should not be barred from prosecuting a second application for benefits.

The regulation gives similar treatment to cases involving miners' survivors. Where a previous survivor's claim was denied solely on the basis that the survivor did not prove that the miner died due to pneumoconiosis, an element not subject to change, the survivor may be barred from litigating another claim filed more than one year after the denial of the first one. The Department does not agree, however, with the commenters' suggestion that none of the elements of a survivor's claim is subject to change. In the case of a miner's survivor, for example, the Secretary's regulations recognize, consistent with Departmental practice, court of appeals precedent, and applicable Social Security law, that although a miner's survivor who remarries is not then eligible for benefits, she may become re-entitled to benefits if that marriage ends. *See* preamble to § 725.213. Section 725.309 recognizes this possibility by allowing a miner's survivor to litigate a second claim where one of the grounds on which the first claim was denied, *e.g.,* that the survivor was married, is subject to change.

Moreover, § 725.309 incorporates two other limitations which are accepted components of traditional claim preclusion. First, where none of the elements is subject to change, and denial by virtue of claim preclusion is appropriate under § 725.309, the regulation requires the party defending the claim to specifically plead that doctrine. The Supreme Court has observed that ''[c]laim preclusion (res judicata), as Rule 8(c) of the Federal Rules of Civil Procedure makes clear, is an affirmative defense.'' *Rivet,* 522 U.S. at 476. Section 725.309 similarly requires an operator seeking the denial of an additional survivor's claim by virtue of preclusion to raise that issue at the appropriate time. Like traditional claim preclusion, § 725.309 offers the party defending the cause of action an affirmative defense that is subject to waiver if not properly and timely raised. *See, e.g., Garry* v. *Geils,* 82 F.3d 1362, 1367 n. 8 (7th Cir.1996).

Second, claim preclusion is inappropriate even in traditional civil litigation where the party against whom the defense is invoked was not able to fully litigate those issues which the defendant now seeks to bar. *Kremer,* 456 U.S. at 481 n. 22. For example, this issue would arise if the administrative law judge adjudicating the survivor's first claim found that the survivor's remarriage barred her entitlement, and alternatively concluded that the miner did not die due to pneumoconiosis. In that case, the survivor could not have overturned the adverse finding on the cause of the miner's death because she would not have been able to avoid the prohibition on the eligibility of remarried widows. Accordingly, she could not be said to have had a full and fair opportunity to litigate the issue of the cause of the miner's death. In these circumstances, neither ordinary principles of claims preclusion nor § 725.309 would preclude her from litigating her entitlement to benefits in a subsequent claim.

Similarly, the Department's application of claim preclusion to additional claims contains an exception based on the absence of an opportunity to fully and fairly litigate the issues in a previous proceeding. As the Department explained in its second notice of proposed rulemaking, where one of the applicable conditions of entitlement has changed, *e.g.,* where the miner has become totally disabled or a survivor has ended her second marriage, neither the party defending against the claim—the coal mine operator or the Trust Fund—nor the claimant is entitled to rely on findings made in connection with the denial of an earlier claim for benefits. 64 FR 54985 (Oct. 8, 1999). One commenter's suggestion that an administrative law judge's determination in the original proceeding that an X-ray is not worthy of credit precludes any further litigation of that issue in a subsequent proceeding simply reflects a misunderstanding of the tenets of issue preclusion. Where that finding was not essential to the original denial of benefits, because the ALJ ultimately denied benefits on another basis, or used alternative bases, issue preclusion would not prevent a second factfinder from making a different finding, based on his independent weighing of the evidence, in connection with an additional claim.

(e) One comment opposes the revised version of § 725.309, suggesting it represents a revised application of the common law concept of claim preclusion to adjudications under the Act. In fact, however, with one exception in the case of survivors' entitlement, the revised version of section 725.309 functions no differently than the former regulation with respect to this common law doctrine. As the Department observed in its initial proposal, its ''one-element'' rule, allowing a miner to avoid claim preclusion by establishing one of the conditions of entitlement decided against him in the previous adjudication, derives from a series of appellate decisions adopting the Department's interpretation of the former regulation. *See* 62 FR 3351 (Jan. 22, 1997); *see also* 64 FR 54984 (Oct. 8, 1999). The provision requiring the denial of survivors' claims is also substantially the same as the former rule. Like the revised version, the former rule was subject to waiver just as any other affirmative defense would be under common law. *See Clark* v. *Director, OWCP,* 838 F.2d 197, 200 (6th Cir. 1988) (permitting the Director to waive reliance on section 725.309). The provision governing additional survivors' claims has been altered only in order to accommodate revisions to section 725.213, which will explicitly permit a remarried survivor to establish her entitlement to benefits upon ending her marriage. Accordingly, the Department does not agree that it has substantially revised the applicability of the common law doctrine of claim preclusion under the Black Lung Benefits Act.

(f) One comment argues that the one-element test codified by the revised regulation violates the principles of issue preclusion. The commenter suggests that an X-ray that is found not to be credible in an earlier adjudication may not be credited in a subsequent adjudication. Common law principles of issue preclusion, however, do not require such a result. Instead, once a claimant has submitted new evidence in order to establish one of the elements of entitlement previously resolved against him, an administrative law judge must conduct a *de novo* weighing of the evidence relevant to the remaining elements, regardless of whether any of that evidence is newly submitted. The Court of Appeals for the Seventh Circuit discussed this issue at length in *Peabody Coal Co.* v. *Spese,* 117 F.3d 1001 (7th Cir. 1997) (en banc). It held as follows:

> The law of preclusion also bars relitigation of issues between the same parties when those issues were actually litigated and necessary to the decision of the earlier tribunal. *See Astoria Fed. Sav. & Loan Ass'n* v. *Solimino,* 501 U.S. 104, 107, 111 S.Ct. 2166, 2169, 115 L.Ed.2d 96 (1991) (preclusion applies to administrative agency acting in judicial capacity to resolve fact issues properly before it); *United States* v. *Wyatt,* 102 F.3d 241, 245 n. 5 (7th Cir. 1996), cert. denied, __ U.S. __, 117 S.Ct. 1325, 137 L.Ed.2d 486 (1997); *Waid* v. *Merrill Area*

Public Schools, 91 F.3d 857, 866 (7th Cir. 1996) (state agency hearing). * * *

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[The Fourth Circuit, in *Lisa Lee Mines* v. *Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996) (en banc), *cert. denied,* 519 U.S. 1090 (1997)] pointed out, correctly, that a claimant who loses on three possible alternate grounds has no incentive to take an appeal to ''correct'' the agency on grounds 2 and 3, even if he thinks there was error, if ground 1 is unassailable. Assuming that the passage of time has led to a material change in ground 1 and he can demonstrate this to the Director, the question is whether he should be barred from proceeding on a new claim just because he has not also developed new evidence to negate grounds 2 and 3. Under the Director's ''one-element'' approach, as endorsed by the Fourth Circuit and others, * * * the answer is no. This answer is consistent with general principles of issue preclusion, under which holdings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect to either issue standing alone. *See Lisa Lee Mines,* 86 F.3d at 1363, citing Restatement (Second) of Judgments § 27, comment i (1982); *Comair Rotron, Inc.* v. *Nippon Densan Corp.,* 49 F.3d 1535, 1538 (Fed. Cir. 1995) (issue on which preclusion is sought must have clearly been necessary to judgment); *Baker Elec. Co-op., Inc.* v. *Chaske,* 28 F.3d 1466, 1475 (8th Cir. 1994); *Gelb* v. *Royal Globe Insur. Co.,* 798 F.2d 38, 45 n. 6 (2d Cir. 1986).

117 F.3d at 1008.

The commenter's example, an X-ray that is found not to be credible in the previous adjudication, illustrates the operation of the regulation. If the prior claim was denied solely on the basis that the miner failed to establish the existence of pneumoconiosis, the commenter's concern about a re-weighing of the X-ray evidence submitted in the prior adjudication is simply unfounded. Because this was the only issue resolved against the claimant, he must introduce new evidence that demonstrates the existence of the disease if he is to avoid an automatic denial of an additional claim. Consequently, the factfinder may not award benefits simply by redetermining the credibility of the earlier evidence. In most cases, however, the denial of the prior claim will rest on multiple findings. For example, an administrative law judge may conclude that the claimant has not established either that he suffers from pneumoconiosis or that he suffers from a totally disabling respiratory impairment. In such a case, the Department's regulation, consistent with the principles of issue preclusion set forth in *Spese,* requires that the claimant submit new evidence relevant only to one of the issues. If he submits new evidence that establishes his total disability, the factfinder must weigh the X-ray evidence *de novo.* Far from contravening accepted principles of issue preclusion, the Department's regulation gives those principles full force and effect. The commenter's suggestion, that a party must be bound by a credibility determination that it was unable to overturn on appeal, turns those principles on their head.

(g) One comment suggests that the Department would breach its fiduciary duty to the Black Lung Disability Trust Fund in any case in which it affirmatively waived its right to rely on the automatic denial of an additional survivor's claim. The Department's obligation to the Trust Fund is to ensure that the Fund not be required to pay non-meritorious claims, *i.e.,* that the Trust Fund does not pay benefits to individuals who do not meet the statutory eligibility criteria. Where appropriate, the Department will invoke the automatic denial provision in order to reduce the transaction costs that the Fund would incur in defending a non-meritorious survivor's claim. The Department does not believe, however, that it is obligated to invoke claim preclusion in order to bar a claim in which a surviving spouse meets all of the conditions of entitlement and simply erred in filing a first application while remarried.

(h) One comment suggests that the Department should penalize individuals who file an additional claim without a change in condition. The Department disagrees. In its second notice of proposed rulemaking, the Department announced its desire to reduce the costs associated with non-meritorious claims by providing applicants with a more realistic view of their possible entitlement based on better pulmonary evaluations and better reasoned explanations of the denials of their claims. 64 FR 54968, 54984 (Oct. 8, 1999). The Department also explained, however, that it did not believe that it was appropriate to penalize an applicant simply because he had filed a previous claim for benefits prematurely. *Id.* The complete pulmonary evaluation provided by the Department includes difficult tests, and the Department does not believe that a miner would deliberately subject himself to that testing if he did not truly believe that he met the Act's eligibility criteria. Moreover, preventing a miner from filing an additional claim merely on the grounds that a previous additional claim was denied may result in the denial of benefits to individuals who meet the Act's eligibility requirements. Even requiring miners to wait an additional period of time between additional claims would involve similar risks. The average applicant for benefits is over 60 years old, and any delay in the receipt of benefits may effectively deny them the right to receive benefits and appropriate medical treatment. Accordingly, the Department does not intend to ''penalize'' individuals who file unsuccessful subsequent claims.

(i) A number of comments object that the revisions encourage the repeated relitigation of cases without Congressional authority. The Department has previously explained that section 725.309 does not allow the relitigation of denied claims. 64 FR 54968, 54984–85 (Oct. 8, 1999). Once a claim has been denied, and the one-year time period for modification has passed, a claimant cannot thereafter seek to have that claim reopened. Even if he prevails on a subsequent claim, the miner will be unable to obtain benefits for any period prior to the date on which the earlier denial became final. Thus, rather than encouraging repeated relitigation, the Department is simply effectuating Congressional intent that miners who are totally disabled due to pneumoconiosis receive compensation for their injury. Additional or subsequent claims must be allowed in light of the latent, progressive nature of pneumoconiosis. Thus, the additional claim is a different case, with different facts (if the claimant is correct that his condition has progressed). There is no indication that Congress intended to deny a miner benefits, or otherwise penalize him, for erroneously filing an application before his disease had progressed to the point of total disability.

Moreover, as the Department explained in its second notice of proposed rulemaking, the revised version of § 725.309 does not have a reopening effect equivalent to that of H.R. 2108. 64 FR 54972 (Oct. 8, 1999). The House of Representatives passed H.R. 2108 in 1994, but the Senate adjourned without taking action on the legislation. If enacted, the bill would have required the *de novo* consideration of any claim filed on or after January 1, 1982, without regard to any earlier denials. The Department's regulation does not have that effect. It simply codifies the Department's former rule, as interpreted by the appellate courts, and provides procedures to be followed upon the filing of an additional claim covering later periods of alleged benefit entitlement. Accordingly, the Department is not authorizing the reopening or relitigation of claims in excess of Congressional authority. In addition, as the Department has previously explained, Congress' failure to enact legislation governing additional claims does not prevent the Department

from promulgating regulations on that subject as long as the regulations are issued pursuant to an appropriate grant of statutory authority. *Ibid.*

(j) One comment suggests that the Black Lung Disability Trust Fund should be liable for the payment of any subsequent claims that are approved. The commenter states that imposing the liability for these claims on the insurance industry is fundamentally unfair. The Department disagrees. As revised, section 725.309 does not alter the adjudication of additional claims in any substantive manner. Since 1978, section 725.309 has recognized the need for allowing additional claims and provided the conditions under which such claims could be approved. As the Department has repeatedly emphasized, the revised regulation simply effectuates the gloss given this regulation by the federal courts of appeals. The Department recognizes that additional claims filed after the effective date of these regulatory revisions will be adjudicated under new procedural rules, and under regulations that clarify the entitlement criteria in Part 718 in a manner consistent with appellate interpretations of the existing criteria. The insurance policies purchased by coal mine operators to secure their liability under the Black Lung Benefits Act require the insurer to assume the risk of adverse appellate court interpretations of the statute and regulations as well as the possibility of revision of the statutory criteria. *See* 20 CFR 726.203(b) (1999) (insurance endorsement). Accordingly, the Department does not agree that the insurance industry is entitled to relief from the effect of revising § 725.309.

(k) A number of comments voice their approval of the changes in the Department's second notice of proposed rulemaking. No other comments have been received concerning this section and no other changes have been made to it.

20 CFR 725.310

(a) In its first notice of proposed rulemaking, the Department proposed amending subsection (b) to limit the documentary medical evidence that parties are entitled to submit in connection with a request for modification. 62 FR 3353 (Jan. 22, 1997). The Department amended subsection (c) to reconcile a number of appellate decisions concerning the district director's ability to conduct modification proceedings under the Black Lung Benefits Act and to ensure that any party requesting modification receives a *de novo* adjudication of the existing evidence of record. The Department also revised subsection (d) with the stated purpose of prohibiting the recovery, by either the Trust Fund or a responsible operator, of benefits paid pursuant to a final award of benefits that is later modified. In its second notice of proposed rulemaking, the Department added two provisions to subsection (d). The first would allow the recovery of any benefits that were paid when the claimant was at fault in creating the overpayment. The second provision implemented the Department's intention to bar recovery of overpayments arising from modification of awards where the award was final before initiation of the modification proceedings. 64 FR 54985–86 (Oct. 8, 1999). In addition, the Department proposed revising the evidentiary limitation in subsection (b) to correspond to similar changes in § 725.414. Finally, the Department responded to comments addressing the responsibility of factfinders to reweigh the evidence of record on modification, and the district director's authority to initiate modification in responsible operator cases.

(b) One comment argues that the Department's proposed regulation destroys the effect of claim preclusion and issue preclusion, while another comment suggests that the revised regulation would allow an adjudicator simply to reweigh the evidence of record and reach a conclusion different from the one reached before. Both observations are correct, and both outcomes are mandated by the statutory language that the regulation implements, 33 U.S.C. 922, incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a). In *Banks* v. *Chicago Grain Trimmers Association*, 390 U.S. 459 (1968), the Supreme Court reversed an appellate court's holding that a claimant's modification request was barred by *res judicata*, or claim preclusion. Instead, the Court held that the statute clearly authorized reopening compensation awards in order to correct factual errors. In *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255 (1972), the Court held that a factfinder was authorized to grant modification under section 22 ''merely on further reflection on the evidence initially submitted.'' *See also Betty B Coal Co.* v. *Director, OWCP (Stanley)*, 194 F.3d 491, 497 (4th Cir. 1999) (modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings); *The Youghiogheny & Ohio Coal Co.* v. *Milliken*, 200 F.3d 942, 954 (6th Cir. 1999) (ALJ has the authority on modification simply to rethink his conclusions). One commenter also objects that the regulation would prohibit an administrative law judge from simply denying a modification request based on the claimant's failure to present additional evidence. In its second notice of proposed rulemaking, the Department observed that the Supreme Court's *O'Keeffe* decision requires this result. 64 FR 54986 (Oct. 8, 1999). Accordingly, the commenters' observations do not provide a basis for altering the Department's proposal.

(c) Two comments renew the argument that the Department should not be able to initiate modification in responsible operator cases. The Department responded to a similar comment in its second notice of proposed rulemaking by citing the clear statutory language providing the district director with the independent authority to initiate modification. (''Upon his own initiative, * * *, on the ground of a change in conditions or because of a mistake in a determination of fact * * * the deputy commissioner may * * * issue a new compensation order. * * * 33 U.S.C. 922(a), as incorporated by 30 U.S.C. 932(a)). The Department also observed that there were awarded cases in which a coal mine operator is nominally liable for the payment of benefits but, because of bankruptcy, dissolution, or other events, can no longer pay. In such cases, the Department noted the district director's need to exercise his modification authority. 64 FR 54986 (Oct. 8, 1999). In response, one commenter requests that the Department limit its authority to initiate modification to those specific cases involving operator bankruptcy. The Department declines to do so. The district director's initiation of modification in any case, whether the defendant is a responsible operator or the Trust Fund, is consistent with Congress's intent. Congress has included in the Black Lung Benefits Act section 22 of the Longshore and Harbor Workers' Compensation Act, a workers' compensation program in which the overwhelming majority of cases represent disputes between an employee and his private employer. Thus, Congress clearly contemplated that the district director would exercise his modification authority in cases involving private employers. The examples provided by the Department in its second notice of proposed rulemaking were not intended to be an exclusive listing of the circumstances in which a district director would be justified in initiating modification in a responsible operator case. Because the

Department does not believe it can readily identify all of the circumstances in which district director-initiated modification would be appropriate, it does not intend to limit the district director's discretion in the initiation of modification proceedings.

(d) One comment argues that an operator seeking to modify a benefits award should not be able to obtain new pulmonary testing, but should instead be limited to the report of one consultant. The commenter also argues, however, that miners should be able to submit the results of additional testing in support of a modification petition seeking to change a denial of benefits to an award. The Department does not agree that opposing parties should be governed by different evidentiary rules. One of the Department's goals in proposing a limitation on the submission of documentary medical evidence, as reflected in § 725.414 and § 725.310, is to ensure that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder. That goal would not be served by creating an evidentiary advantage for a claimant who requests modification of a denial of benefits. In such cases, both the claimant and the responsible operator, or Trust Fund in appropriate cases, will be entitled to submit one medical report, and associated testing, as well as appropriate rebuttal evidence, as outlined in the Department's second notice of proposed rulemaking.

(e) One comment argues that in light of the evidentiary limitations imposed by section 725.310 and 725.408, an operator will be deprived of its ability to seek modification of an erroneous responsible operator determination that is discovered after the hearing. The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.

The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) Documentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by § 725.414 and 725.456(b)(1). Under section 725.408, a coal mine operator that has been identified as a potentially liable operator by the district director with respect to a particular claim for benefits must contest that identification within 30 days of the date on which it receives that notification, and must submit certain evidence within 90 days of receipt of notification. § 725.408(a), (b). The specific issues on which the operator must submit all of its documentary evidence within this 90-day period include whether the operator was an operator after June 30, 1973; whether it employed the miner for a cumulative period of not less than one year; whether the miner was exposed to coal mine dust while working for the operator; whether the operator employed the miner for at least one day after December 31, 1969; and whether the operator is financially capable of assuming liability for the payment of benefits. The time period for submitting this evidence may be extended for good cause, § 725.423, but the operator may not thereafter submit any further documentary evidence on these issues. § 725.408(b)(2).

Sections 725.414 and 725.456(b)(1) govern the remaining documentary evidence relevant to the liability issue, *i.e.,* evidence relevant to which of the miner's former employers is the responsible operator according to the criteria set forth in § 725.495. Under § 725.414, an operator may submit documentary evidence to prove that a company that more recently employed the miner should be the responsible operator. This evidence must be submitted to the district director in accordance with a schedule to be established by the district director. § 725.410. Additional documentary evidence may be submitted only upon a showing of extraordinary circumstances. § 725.456(b)(1).

The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.

That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the district director. The comment appears to suggest that there will be cases in which an operator discovers evidence bearing on its own employment of the miner after the period for submitting evidence has closed. The Department does not believe that there are extraordinary circumstances sufficient to justify the admission of this evidence in any further proceedings. The evidence in question is within the control of the operator notified by the district director or, where an insurance company is the real party-in-interest, in the control of a party with whom that insurer has contracted to provide necessary coverage. The time period set forth in section 725.408 is adequate to permit a full investigation and development of this evidence. If the operator or insurer is unable to locate the evidence within that period, it should seek an extension of time from the district director.

A party's ability to seek reconsideration under § 22 of the Longshore and Harbor Workers' Compensation Act is subject to the limitation that reconsideration must " 'render justice under the Act.' " *McCord* v. *Cephas,* 532 F.2d 1377, 1380–81 (D.C. Cir. 1976). In *McCord,* an employer declined to supply evidence and participate in the initial adjudication of the claimant's application for benefits under the Longshore and Harbor Workers' Compensation Act. After the award became final, the employer sought reconsideration. The D.C. Circuit held that although the adjudication officer had jurisdiction to consider the employer's request, his consideration should take the interests of justice into account. *See also General Dynamics Corp.* v. *Director, OWCP,* 673 F.2d 23, 25 (1st Cir. 1982). In order to properly administer the Black Lung Benefits Act in accordance with this expression of Congressional intent, S.Rep. No. 588, 73d Cong., 2d Sess., 3–4 (1934); H.R.Rep. No. 1244, 73d Cong., 2d Sess.,

4 (1934), the Department has balanced the desire of operators to request modification against the Department's interest in ensuring that potentially liable operators submit all of the evidence relevant to their employment of the miner while the claim is first pending before the district director. The Department believes that it is appropriate to prohibit an operator's ability to introduce, in a modification proceeding, ''new'' evidence relevant to the operator's employment of the miner or the operator's status as a financially capable operator.

(f) One comment argues that the Department has not taken sufficient steps to prevent the misuse of modification by claimants who file repeated modification petitions. The commenter has supplied no information that suggests there is a widespread problem involving the filing of non-meritorious modification petitions by claimants. Like operators, claimants may only obtain such reconsideration as will render justice under the Act, and operators remain free to assert, on a case-by-case basis, that the application of this standard requires a denial of a claimant's request for modification. The Department does not believe, however, that it should establish numerical or temporal limitations (*e.g.,* limiting claimants to a maximum number of modification requests, or no more than a certain number in a given time period) on a claimant's right to seek modification. Congress's overriding concern in enacting the Black Lung Benefits Act was to ensure that miners who are totally disabled due to pneumoconiosis arising out of coal mine employment, and the survivors of miners who die due to pneumoconiosis, receive compensation. Because any limitation on the right to file modification petitions could deny, or delay, the payment of compensation to eligible claimants, the Department does not believe that such limitations are appropriate.

(g) One comment suggests that the proposal authorizes claimants to petition for modification in order to avoid the repayment of an overpayment. The Department does not believe that the regulation addresses this situation. The Department's current practice, in cases in which payments from the Black Lung Disability Trust Fund have been made based on the district director's initial determination, and benefits have subsequently been denied by a higher tribunal, has been to suspend the collection of any potential overpayment if that denial has been appealed further. The Department currently permits its district directors to exercise discretion as to whether to suspend collection where the original denial has become final and the claimant has filed a request for modification. For example, in cases where the request is based solely on a change in the miner's condition, a district director could reasonably conclude that the overpayment of benefits for a period prior to that change should not be suspended. In both former § 725.547(c) and new § 725.549(a), district directors are permitted to ''issue appropriate orders to protect the rights of the parties.'' The Department anticipates that any disputes over the collection of overpayments will be resolved under that provision. Accordingly, there is no need to address the collection of overpayments in the regulation governing modification.

(h) No other comments have been received concerning this section, and no other changes have been made to it.

20 CFR 725.311

(a) The Department proposed revising § 725.311 in its first notice of proposed rulemaking in order to remove the rule allowing parties an additional 7 days within which to respond to a document that is sent by mail, and to add the birthday of Martin Luther King, Jr., to the list of legal holidays contained in the regulation. 62 FR 3354 (Jan. 22, 1997). The Department also sought to resolve a split between the Courts of Appeals for the Fourth and Tenth Circuits governing the time period for responding to a document which was supposed to be served by certified mail but was not. *Compare Dominion Coal Corp.* v. *Honaker*, 33 F.3d 401, 404 (4th Cir. 1994) with *Big Horn Coal Co.* v. *Director, OWCP*, 55 F.3d 545, 550 (10th Cir. 1995). In a case in which the party actually received the document, notwithstanding improper service, the rule would commence the time period for response upon a party's actual receipt of the document. The Department did not address 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) One comment objects to deletion of the seven-day grace period, formerly applicable to all documents sent by mail, arguing that the Department has no good reason to eliminate it. The commenter also suggests that, if the grace period is not replaced with something else, the regulation will cause unnecessary litigation over deadlines and the unnecessary deprivation of the parties' rights.

When the Department first proposed section 725.311, *see* 43 FR 17743–44 (April 25, 1978), the regulation contained a three-day mailing rule which paralleled the rule in the Federal Rules of Civil Procedure. *Compare* Fed. R. Civ. P. 6(e). In the final rule, the Department changed the time period to seven days ''[i]n view of the difficulties encountered in mail deliveries in many rural coal mining areas.'' 43 FR 36786 (Aug. 18, 1978). The Department's experience in administering the black lung benefits program, however, has suggested that the grace period contained in the former regulation was a source of confusion for the parties as well as for the district directors. For example, it could be argued that the former regulation added an additional seven days to the one-year time limit for filing a modification petition, or the 30-day time limit for filing a response to a proposed decision and order. The federal rule has engendered similar litigation. *See, e.g., FHC Equities* v. *MBL Life Assurance Corp.*, 188 F.3d 678, 681–82 (6th Cir. 1997) (rule does not apply to time periods that begin with entry of an order or judgment).

Accordingly, the Department has eliminated the seven-day grace period insofar as it formerly applied to all documents served by mail. The Department believes that, rather than increasing litigation, the revised regulation will provide the parties with more exact notice of when pleadings are due, and thus will reduce litigation over issues raised by the seven-day grace period. As a general rule, the analogy between the Department's black lung regulations and the federal rules is inexact. The federal rules govern the filing of a variety of pleadings, including responses to complex motions. Rule 6(e) attempts to ensure that a party receives the full amount of time—usually thirty days—allotted by the drafters of the rules for preparing a response. In contrast, the documents whose filing is governed by Part 725 are relatively straightforward and simple. They include responses to a schedule for the submission of evidence issued under § 725.410, which will contain the district director's designation of the responsible operator, and a proposed decision and order issued under § 725.418. The regulations require that a party do no more within the initial 30-day period following the issuance of these documents than indicate its agreement or disagreement with the assertions or findings contained in the document. The Department believes that this 30-day time period, commencing with the date the document is sent, provides ample time for the parties' responses. Deleting the grace period

ensures that all parties to a claim, including claimants who are not represented by an attorney, are able to ascertain their response time from the date of a document.

The Department recognizes that one of the filings governed by Part 725 is more complex. Section 725.408 requires that an operator that has been identified by the district director of its status as a potentially liable operator must accept or contest that identification within 30 days of the date on which it receives notification from the district director. That response requires the operator to address five specific assertions: that the operator was an operator after June 30, 1973; that the operator employed the miner for a cumulative period of not less than one year; that the miner was exposed to coal mine dust while working for the operator; that the miner's employment with the operator included at least one working day after December 31, 1969; and that the operator is capable of assuming liability for the payment of benefits. That response requires more investigation than the others in Part 725. In addition, unlike the other response times governed by Part 725, the operator's response does not begin to run on the date that the notification is mailed, but on the date that it is received. In order to ensure that operators have the full 30 days in which to file their responses, and to allow the Department to assess the timeliness of that response, the Department has added a sentence to subsection (d). This provision will allow the district director to presume, in the absence of evidence to the contrary, that the notice was received seven days after it was mailed.

(c) One comment urges enlarging the number of communications which must be sent by certified mail to include several types of decisional documents issued by the district director. Specifically, the commenter suggests use of certified mail to serve the following documents: initial determination; proposed decision and order; decision on modification; denial by reason of abandonment; notice of conference; and memorandum of conference. The Department's revised regulations ensure that all important documents are served by certified mail. See proposed § 725.407(b) notification of potentially liable operator, § 725.409(b) (denial by reason of abandonment); § 725.410(c) (evidentiary submission schedule); § 725.418(b) (proposed decision and order). The revised regulations eliminate the district director's initial finding and memorandum of conference. The ''initial determination'' is a document, served on all the parties after the issuance of a proposed decision and order, requesting that the designated responsible operator commence the payment of benefits. It does not require a written response. 20 CFR 725.420 (1999). With respect to a case in which a petition for modification is being adjudicated, the district director may issue either a proposed decision and order or a denial by reason of abandonment at the conclusion of the proceedings; both of these documents must be served by certified mail. The Department believes the current requirements provide adequate protection for the parties, and therefore declines to add the notice of conference to the list of documents which must be served by certified mail. Section 724.416, governing the conduct of informal conferences, permits the imposition of sanctions only for a party's unexcused failure to attend. In the case of a claimant, the district director must offer the claimant an opportunity to explain why he did not appear at the conference. *See* § 725.409(b). The Department believes that failure to receive the notice of conference would constitute an adequate explanation for a claimant's failure to appear. Similarly, any employer against whom the district director has imposed sanctions for an unexcused failure to appear at an informal conference may request reconsideration based on its failure to receive the required notice. Obviously, district directors may obviate the need for disputes over whether a party received the notice by sending it via certified mail.

(d) Two comments urge the Department to afford a party either a rebuttable presumption or a conclusive finding of non-receipt of a document if it must be sent by certified mail, the party alleges a failure to receive it, and the Department cannot produce a signed return receipt. The recommended presumption is not necessary. In the foregoing circumstances, an allegation of non-receipt and absence of the signed return receipt is sufficient to impose on the Department the burden to prove by some other evidence that the individual received the document. The lack of the signed receipt itself, however, should not be conclusive if other circumstances demonstrate the individual actually received the document. The Department therefore declines to amend the proposal.

(e) One comment argues that subsection (d) is inconsistent with existing law. The commenter believes subsection (d) requires the response time to commence upon *service* of the document rather than the *date of actual receipt* when a document is served in violation of the certified mail requirement. Subsection (d), however, states that the response time ''shall commence on the date the document was received.'' The provision is therefore clear that only actual receipt of a document served in violation of a certified mail requirement commences the recipient's time for response.

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

Subpart D

20 CFR 725.351

The Department made only technical changes to section 725.351 in its initial notice of proposed rulemaking, and the rule was not open for comment. *See* 62 FR 3340–41 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed deleting the requirement in subsection (a)(3) that a district director must seek the approval of the Director, OWCP, before issuing a subpoena to compel the production of documents. 64 FR 54986–87 (Oct. 8, 1999). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.362

In its initial notice of proposed rulemaking, the Department proposed revising section 725.362 in order to conform the regulation to the requirements of 5 U.S.C. 500(b), which allows an attorney to enter an appearance without submitting an authorization signed by the party he represents. The Department also proposed adding a requirement that a notice of appearance, whether by an attorney or by a lay representative, include the OWCP number of the claim. 62 FR 3354 (Jan. 22, 1997). The Department did not discuss the rule in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.365

The Department received one comment relevant to § 725.365. This section was not open for comment; it was repromulgated without alteration for the convenience of the reader. *See* 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.366

The Department has received one comment relevant to § 725.366. This

section had only technical revisions made to it and was not open for comment, *see* 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.367

(a) In its initial notice of proposed rulemaking, the Department proposed a number of revisions to clarify the application of section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 928, as incorporated by 30 U.S.C. 932(a), and made relevant to adjudications under the Black Lung Benefits Act. 62 FR 3354 (Jan. 22, 1997). The regulation provided a non-exclusive list of instances in which an operator could be held liable for the payment of a claimant's attorney's fee, and recognized the Trust Fund's liability for fees by making it coextensive with that of a responsible operator. The Department proposed a substantial revision of this regulation in its second notice of proposed rulemaking. 64 FR 54987–88 (Oct. 8, 1999). Because the evidentiary limitations proposed by the Department make legal representation for claimants advisable at the earliest possible stage of claims adjudication, the Department revised the regulation to require operators or the Trust Fund to pay a reasonable fee for any necessary work done even if the work was performed prior to the date on which the operator controverted the claimant's entitlement to benefits. Thus, although the creation of an adversarial relationship and the ultimately successful prosecution of a claim were still necessary to trigger employer or fund liability for attorneys' fees, the date on which the adversarial relationship commenced no longer served as the starting point for such liability. The Department rejected comments suggesting that lay representatives should be entitled to collect fees from responsible coal mine operators or the fund. The Department also discussed the several appellate court decisions and their impact on responsible operator and fund liability for attorneys' fees.

(b) The Department has revised the first sentence of subsection (a)(1) and the first sentence of subsection (a)(2) in order to reflect changes to §§ 725.410 and 725.412. In place of the former initial finding, the district director will issue a schedule for the submission of additional evidence under § 725.410. This schedule will include the district director's preliminary analysis of the medical evidence of record, and his designation of the responsible operator liable for the payment of benefits. Section 725.412 provides that, following receipt of the schedule, the designated responsible operator may file a statement accepting the claimant's entitlement to benefits. The operator may avoid any liability for attorneys' fees by filing this statement within 30 days of the issuance of the schedule. If it fails to do so, the responsible operator will be considered to have created an adversarial relationship between the operator and the claimant. If the district director exercises his authority under § 725.415 or § 725.417 to issue another schedule for the submission of additional evidence in order to designate a different operator as the responsible operator, and that operator is ultimately determined to be liable for the payment of benefits, that operator will be liable for the payment of attorneys' fees only if it fails to accept the claimant's entitlement within 30 days of the date upon which it is notified of its designation. In cases where there is no operator liable for the payment of benefits, the district director's issuance of a schedule for the submission of additional evidence will create the adversarial relationship between the Black Lung Disability Trust Fund and the claimant, such that the Trust Fund will be liable for attorneys' fees if the claim is successfully prosecuted. Similarly, in subsection (a)(4) the Department has deleted the reference to an operator's ''notice of controversion'' contesting a claimant's request for an increase in the amount of benefits payable. As revised, the regulations do not require a specific notice of controversion to create the adversarial relationship between a claimant and an employer.

The Department has also substituted the phrase ''reasonable fees for necessary services'' for the phrase ''fees for reasonable and necessary services'' in subsection (a), and has substituted the phrase word ''necessary'' for the word ''reasonable'' in subsections (a)(1)–(5). The changes make the regulation consistent with § 725.366(a). The previous wording was not intended to create a different test for gauging the need for an attorney's services, and the revision will eliminate any potential confusion.

(c) Two comments argue that the Department's proposal violates the plain language of the incorporated provision of the Longshore and Harbor Workers' Compensation Act governing the payment of attorneys' fees. Specifically, they argue that section 28 permits employer liability for a claimant's attorney's fees only for services rendered after the employer controverts the applicant's eligibility for benefits. One of the commenters also cites the expectation, created by the statute, that a claimant is responsible for a portion of the fees owed to his attorney and specifically the fee for any service provided before the employer controverts the applicant's entitlement. The commenter suggests that, by removing that responsibility from the claimant, the Department has not properly implemented the statute.

The Department does not agree that the revised regulation violates the plain language of the statute. The only court to have considered this issue is the Court of Appeals for the Fourth Circuit. In *Kemp* v. *Newport News Shipbuilding and Dry Dock Co.,* 805 F.2d 1152 (4th Cir. 1986), the court held that the LHWCA is ambiguous on the issue of whether an employer may be liable for attorneys' fees incurred by a claimant before the employer has controverted the claimant's entitlement. 805 F.2d at 1153. Instead, the statute provides only that an employer will be liable for attorneys' fees after it contests the applicant's entitlement, leaving unresolved the starting point of such liability. The court recently reiterated its interpretation of LHWCA § 28 in *Clinchfield Coal Co.* v. *Harris,* 149 F.3d 307, 310–11 (4th Cir. 1998). In resolving statutory ambiguity through the regulatory process, the Department is entitled to select any reasonable interpretation that is consistent with Congressional intent. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 842–3 (1984).

The Department is fundamentally altering the obligations of the parties at the district director level in a manner that will encourage claimants to consult with attorneys much earlier in the process. Among other things, the Department is limiting the quantity of medical evidence that all parties are entitled to submit. In addition, at the claimant's request, the Department will provide his treating physician with the test results obtained during the complete pulmonary evaluation authorized by section 413(b) of the Act, 30 U.S.C. 923(b). Because these revisions will require claimants to make critical decisions at the earliest stage of adjudication, the regulations must also encourage attorneys to represent claimants as early as possible. The Department hopes that claimants will receive advice when that advice is most helpful. Insurance carriers, who are primarily liable in cases in which they provide insurance to the responsible operator, as well as self-insured operators, most commonly have the assistance of experienced attorneys and claims processing agents in the early

stages of claim development, and the Department believes that claimants should have comparable aid. Accordingly, the Department believes that it is justified in adopting a new interpretation as to the starting point of the employer's or the fund's liability for attorneys' fees.

In addition, contrary to the suggestion of the commenter, the Department's proposal does not eliminate all instances in which a claimant may be responsible for his attorney's fees. Section 28(c), 33 U.S.C. 928(c), states that ''[a]n approved attorney's fee, in cases in which the obligation to pay the fee is upon the claimant, may be made a lien upon the compensation due under an award.'' The commenter argues that a claimant will never be liable for attorneys' fees under the Department's proposal, and that the proposal thus contravenes the statutory language. The Department does have the authority to vary incorporated provisions of the Longshore Act for purposes of administering the Black Lung Benefits Act, *see* 30 U.S.C. 932(a). It has not done so in this case, however. Instead, the Department's regulation does contemplate that a claimant may be liable for an attorney's fee. 20 CFR 725.365. For example, in any case in which the liable party, either the Trust Fund or the operator, accepts the claimant's entitlement prior to the expiration of the 30-day period in § 725.412(b) but the claimant has nevertheless retained counsel who has performed services in connection with the claim, the prerequisite for shifting fee liability—the controversion of entitlement—has not been met. A similar case may arise where the operator initially designated the responsible operator by the district director fails to accept the claimant's eligibility, but the finally designated responsible operator does accept the claimant's eligibility. In such a case, the responsible operator would not be liable for the payment of the claimant's attorney's fee. Because the overwhelming majority of coal mine operators contest claimant eligibility at this stage, the Department does not expect this kind of case to arise often. In either case, however, the claimant remains responsible for any reasonable fees approved by the district director for necessary work performed in obtaining the award. Accordingly, the Department's revised attorney fee regulation does not violate any statutory command.

(c) One comment observes that the Department's revisions would expand the availability and award of attorneys' fees, while another argues that the Department's provision may not be applied retroactively. It has consistently been the Department's position that before liability for a claimant's attorney's fee may shift to a responsible operator or the fund, there must be a controversion of entitlement sufficient to create an adversarial relationship followed by the successful prosecution of a claim. Nothing in this regulation alters that requirement. The Department does agree, however, that once these prerequisites are met, the revised regulation could result in the award of higher attorneys' fees. The Department believes that an increase in attorneys' fees is necessary in order to encourage earlier attorney involvement in the adjudicatory process, and that such involvement will be helpful to claimants in light of the evidentiary restrictions imposed by these regulations. The Department also hopes to encourage a larger number of attorneys to represent claimants by allowing the award of higher fees. During the rulemaking hearings, witnesses repeatedly brought to the Department's attention that few attorneys are willing to represent claimants, in part because of the many restrictions on the award of attorneys' fees. Transcript, *Hearing on Proposed Changes to the Black Lung Program Regulations,* (June 19, 1997), p. 22 (testimony of Cecil Roberts); p. 168 (testimony of John Cline); pp. 238–239, 246 (testimony of Grant Crandall). The Department also agrees that the rule should not be applied retroactively, and has changed § 725.2 accordingly.

(d) Several comments agree with the Department's revisions, but two urge the Department to take further steps to increase the participation of attorneys in black lung benefits adjudications by providing additional attorney funding from the Black Lung Disability Trust Fund. Specifically, the commenters urge the Department to make funds available to pay black lung associations and other non-profit groups assisting claimants or to advance fees awarded to claimant attorneys litigating against responsible operators before the award of benefits becomes final. The commenters also urge the Department to repeal the prohibition on receiving fees for time spent preparing a fee petition, and to clarify the right of attorneys to obtain fees for time spent litigating their right to fees.

The Department cannot agree that amounts from the Trust Fund should be made available to pay additional attorneys' fees. In its initial proposal, the Department observed that one of its goals in revising the regulation of attorneys' fees was to ensure that the liability of the Trust Fund for such fees was coextensive with that of a liable coal mine operator. 62 FR 3354 (Jan. 22, 1997). This liability derives from a series of appellate court opinions holding that the Trust Fund must stand in the shoes of a coal mine operator in any case in which no operator may be held liable for the payment of benefits. 62 FR 3354 (Jan. 22, 1997). Those opinions rejected the Department's argument that the Trust Fund could not be held liable for any attorneys' fees. Although the Department's regulations have been revised to acknowledge the Trust Fund's liability under these circumstances, the Department does not believe that the statute can be read in the manner suggested by these commenters to authorize the expenditure of additional amounts of Trust Fund moneys to increase counsel availability for black lung claimants.

With respect to time spent preparing a fee petition and litigating the issue of attorneys' fees, two comments seek the revision of material in § 725.366. Because § 725.366 was not listed among the regulations open for comment, no changes are being made in it. 62 FR 3341 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Moreover, the regulation's current language does not prohibit an attorney from receiving a fee for time spent litigating the amount of his attorney's fees, and the Department does not believe that more explicit language is necessary. The Benefits Review Board has held that time spent by an attorney defending a fee represents ''necessary work done,'' so as to entitle the attorney to an additional fee under 20 CFR 802.203(c) (1999), *see Workman* v. *Director, OWCP,* 6 Black Lung Rep. (MB) 1–1281, 1–1283 (Ben Rev. Bd. 1984), and the Department believes that §§ 725.366 and 725.367 require the same result. The prohibition in § 725.366 on fees for time spent filling out a fee application presents an entirely different question from whether it is reasonable to require an employer who unsuccessfully challenges that application to pay a fee for the necessary additional time that the attorney was required to spend defending his fee request. Because the Department believes that the current regulations permit an award of attorneys' fees in the latter case, it is not necessary to change the regulation.

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

Subpart E

20 CFR 725.403

The Department made only technical revisions to § 725.403 in its first notice of proposed rulemaking, and the regulation was not open for comment. 62 FR 3341 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed deleting § 725.403. 64 FR 54988 (Oct. 8, 1999). Section 725.403 implemented the requirement in 30 U.S.C. 923(c) that claimants who filed applications under the Black Lung Benefits Act between July 1 and December 31, 1973, 30 U.S.C. 925, must file a claim under the workers' compensation law of their state unless such filing would be futile. Because the time period for filing such claims expired over 25 years ago, the Department proposed removing § 725.403, and specifically invited comment on its removal. The Department did not receive any comments on the proposed removal of § 725.403 and therefore has removed it from further publications of the Code of Federal Regulations. The Department has not altered the rules applicable to any claim filed between July 1 and December 31, 1973, however. Parties interested in reviewing § 725.403 may consult 20 CFR 725.403 (1999).

20 CFR 725.404

The Department received one comment relevant to § 725.404. The Department made only technical revisions to this section, and the regulation was not open for comment; *see* 62 FR 3340–41 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.405

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (b) to recognize its practice of refusing to provide a complete pulmonary evaluation to claimants who never worked as a miner. 62 FR 3354 (Jan. 22, 1997). The Department did not discuss § 725.405 in its second notice of proposed rulemaking. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) Two comments argue the regulation is too limited because it does not address the district director's obligation to develop evidence other than medical evidence. The Department disagrees. The specific purpose of this regulation is stated in its title: ''Development of medical evidence; scheduling of medical examinations and tests.'' The development of evidence in general is addressed at § 725.404. In any event, subsection (d) of § 725.405 authorizes the district director to collect ''other evidence'' concerning the miner's employment and ''[a]ll other matters relevant to the determination of the claim.'' This language is sufficiently broad to acknowledge the district director's obligations concerning evidentiary development of a claim as well as the authority to discharge those obligations. No useful purpose would be served by a more specific enumeration of particular areas of inquiry in this provision.

The type of inquiry urged by these commenters is covered in more detail elsewhere in the Secretary's regulations. Section 725.495(b) imposes on the Director, OWCP, the burden of proving that the responsible operator designated liable for the payment of benefits is a potentially liable operator. In addition, § 725.495(d) requires that if the responsible operator designated for the payment of benefits is not the operator that most recently employed the miner, the district director must explain the reasons for his designation. These provisions make necessary the district director's gathering of a miner's employment history, including, in most instances, his Social Security earnings record. Indeed, § 725.404(a) requires each claimant to furnish the district director with a complete and detailed history of coal mine employment and, upon request, supporting documentation. The district director must send to each operator notified of its potential liability for a claim copies of the claimant's application and all evidence obtained by the district director relevant to the miner's employment. § 725.407(b), (c). If the district director concludes that the miner's most recent employer cannot be designated the responsible operator because it is not financially capable of assuming liability for the payment of benefits, the district director must explain his conclusion based on a search of the records maintained by the OWCP. § 725.495(d). Only if the OWCP has no record of insurance or authorization to self-insure for that last employer, and the record so states, may OWCP name an employer other than the miner's most recent as the responsible operator for the claim. Thus, the district director's obligation to develop the evidence of record, other than medical, is set forth elsewhere in the regulations where relevant.

(c) One comment recommends changing the regulatory reference to ''miner'' in paragraph (a) from § 725.202 to § 725.101(a)(19). This recommendation is rejected. While both sections define ''miner,'' § 725.202 provides the more detailed definition as well as the criteria and presumptions which apply to determining whether a particular individual satisfies the definition.

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

20 CFR 725.406

(a) In its first notice of proposed rulemaking, the Department proposed revising § 725.406 to address the relationship between the evidentiary limitations contained in § 725.414 and the complete pulmonary evaluation provided by the Department under 30 U.S.C. 923(b). 62 FR 3354–55 (Jan. 22, 1997). As initially proposed, § 725.406 retained the Department's practice of allowing a claimant to select the physician to perform the complete pulmonary evaluation at the Department's expense. In those cases, however, the report generated by the evaluation would have counted as one of the two reports that the claimant was entitled to submit into evidence. If, on the other hand, the claimant went to a physician selected by the Department, the evaluation would not count against the limitations imposed on the claimant. Instead, in cases in which the Black Lung Disability Trust Fund would bear liability for benefits, such a report would count as one of the two reports that could be offered by the Director. In cases in which a responsible operator was potentially liable for benefits, the complete pulmonary evaluation provided by a doctor of the Department's choosing would not have counted against the evidentiary limit imposed on either the responsible operator or the claimant. The Department also discussed its responsibilities for ensuring that the report, and each component of the evaluation, substantially complied with the Department's quality standards. Finally, the Department clarified the mechanism by which it might seek reimbursement of the cost of the evaluation from an operator that had been finally determined to be liable for the payment of claimant's benefits.

The Department proposed major revisions to § 725.406 in its second notice of proposed rulemaking. 64 FR 54988–990 (Oct. 8, 1999). The Department agreed with commenters who suggested that it placed an unnecessary burden on a claimant to choose whether or not to select a physician to perform his complete pulmonary evaluation. In most cases, such a choice would be made before a claimant obtained representation, and could result in a claimant being limited

thereafter to the submission of only one additional medical report. Accordingly, the Department proposed the creation of a list of physicians, authorized by the Department to perform complete pulmonary evaluations. Miners who applied for benefits would be required to select a physician from that list, but could choose any listed doctor either in their state of residence or from a contiguous state. The resulting evaluation would not be considered one of the two medical reports that a claimant was entitled to submit in support of his claim for benefits.

The Department further stated its intent to develop more rigorous standards for selecting physicians authorized to perform a complete pulmonary evaluation. The Department's suggested standards included: (1) Qualification in internal or pulmonary medicine; (2) ability to perform each of the necessary tests; (3) ability to schedule the claimant for an evaluation promptly; (4) ability to produce a timely, comprehensive report; and (5) willingness to answer follow-up questions and defend his conclusions under cross-examination. The Department specifically sought comment on these and other standards for selecting physicians to be included on its list, 64 FR 54989 (Oct. 8, 1999). In addition, the Department stated its intention to survey clinics and physicians on the fees they charged for these services, with the goal of attracting highly qualified doctors to perform the testing and evaluation required by the Department for the complete pulmonary evaluation. The Department also added subsection (d) to the proposed regulation in order to allow a claimant to have the Department send the objective test results obtained in connection with the complete pulmonary evaluation to his treating physician. The Department noted its intent to make available to each claimant at least one set of legally sufficient objective test results so that no claimant would be hindered by a lack of financial resources in pursuing his application for benefits. 64 FR 54989 (Oct. 8, 1999).

The Department rejected comments suggesting the deletion of subsection (e), permitting the district director to clarify ''unresolved medical issues.'' The Department also discussed comments concerning the district director's ability to determine whether all parts of the complete pulmonary evaluation were in substantial compliance with the Department's quality standards. The Department revised subsection (c) to provide a claimant whose initial tests do not comply with the quality standards due to a lack of effort with one additional opportunity to take those tests. Finally, the Department discussed its treatment of subsequent claims, in which the Department provides a new complete pulmonary evaluation, and modification requests, in which it does not. 64 FR 54989–90 (Oct. 8, 1999).

(b) Several comments continue to oppose subsection (e), observing that if the Department develops a list of highly qualified physicians to perform the complete pulmonary evaluation, it should have no need to seek the opinion of yet another physician at this stage of the adjudication. Another comment objects to the proposed substitution of evidence under subsection (e), calling it the destruction of relevant evidence. In response to the initial proposal, the same commenter objected to subsection (e) because the district director's authority to have the miner retested and reexamined invited piecemeal and protracted evidentiary development. The Department has reconsidered the authority granted by subsection (e), and agrees that the provision should be deleted. The Department has relabeled subsection (f) as subsection (e) to accommodate this revision. The deletion of subsection (e) does not affect the district director's authority under subsection (c) to determine whether the individual components of the complete pulmonary evaluation have been administered and reported in compliance with the Department's quality standards. The Department agrees, however, that the district director should have no need to send the claimant for additional examination and testing after completion of a complete pulmonary evaluation, the components of which are in substantial compliance with the applicable quality standards, § 725.406(a)–(c). Under revised § 725.406, the initial evaluation will be performed by a highly qualified physician who may be asked to clarify and/or supplement an initial report if unresolved medical issues remain.

(c) Two comments state that a miner should be entitled to choose an authorized physician anywhere in the country to perform his complete pulmonary evaluation rather than being limited to one from his state of residence or a contiguous state. The commenters state that claimants would be willing to pay the additional costs incurred as a result of such travel. Although the commenters suggest that there will not be a sufficient supply of physicians in some areas, such as Wyoming and Alabama, the Department has no evidence that would support that contention. Moreover, even if the Department is unable to obtain a sufficient pool of physicians in certain states (a pool that includes physicians in all contiguous states), the Department will simply adjust the procedural rules applicable to claimants who reside in those states. The absence of a sufficient pool of physicians in some limited number of states would not justify a national exception to the policy of requiring claimants to submit to a complete pulmonary evaluation in their own region. In addition, claimants remain free to go to any physician of their choosing for the development of evidence in support of their claims.

(d) One comment argues that claimants should be randomly assigned to physicians on the Department's list rather than allowing claimants their own choice. The Department disagrees. The list that the Department ultimately compiles will contain physicians who are well-qualified to perform complete pulmonary evaluations, and whose opinions the Department is willing to accept in the initial stages of adjudication of the claimant's eligibility. Claimants may already be acquainted with one or more physicians on the list, and requiring that claimant submit to an examination by a different physician, perhaps in a neighboring state, would be inefficient. Accordingly, the Department has not changed the regulation.

The commenter also argues that the mere fact that a physician is included on the Department's approved list by meeting the Department's standards does not guarantee that the physician will provide an impartial opinion, particularly when a claimant has a role in selecting the physician who will perform the complete pulmonary evaluation. The Department does not believe that it is required to provide an absolute guarantee of the impartiality of physicians selected for inclusion on the list. By establishing high standards for the performance of these evaluations, and by ensuring that only highly qualified physicians are included on the approved list, the Department will be taking appropriate steps to ensure impartial opinions. In addition, the Department has revised subsection (c) to limit a miner's choice of the examining physician in two respects. First, the miner may not select a close relative of himself or his spouse. The regulation uses the term ''fourth degree of consanguinity'' to exclude, among others, parents, children, grandchildren, brothers, sisters, nephews, nieces, aunts, uncles, and first cousins from those individuals otherwise qualified to perform a complete pulmonary evaluation. Second, the miner may not select any physician who has examined him or treated him in the year preceding

his application for benefits. The Department believes that it would be inappropriate to allow a miner to select a physician with whom he has an ongoing treatment relationship to perform the complete pulmonary evaluation paid for by the Department. Although the Department does not mean to suggest that a physician would be unable to provide an impartial assessment of the miner's respiratory condition in such a case, his opinion could present at least the appearance of a conflict of interest. In order to ensure the credibility of the Department's pulmonary evaluation, the Department has adopted a bright-line test, in the form of a one-year cutoff, that will be easily understood by miners and their physicians. The Department believes that a physician's examination or treatment of the miner prior to the one-year period preceding the miner's application should not disqualify that physician from performing the complete pulmonary evaluation. The Department reserves the right to delete a physician from the list if he is unable to provide an impartial opinion.

(e) Several comments argue that the Department needs to make public the criteria it will use to select physicians for inclusion on the list. In its second notice of proposed rulemaking, the Department notified interested parties that these criteria will be published in the Department's Black Lung Program Manual which will be available to the public. 64 FR 54989 (Oct. 8, 1999). Interested parties will thus be able to monitor the Department's standards and use of these standards in selecting physicians for inclusion on the list.

In addition, a number of commenters responded to the Department's request for comments on the standards that the Department proposed to use to select physicians. Two commenters emphasized the importance of requiring that the evaluations be performed by a physician board-certified in internal medicine or a physician board-eligible in pulmonary medicine or one with extensive knowledge of pulmonary disease. The Department will make every effort to ensure that its list includes highly qualified physicians. Optimally, the Department will be able to enlist the services of Board-certified internists who have a subspecialty in pulmonary medicine, who are Board-eligible in pulmonary medicine, or who can demonstrate extensive experience in the diagnosis and treatment of pneumoconiosis to perform complete pulmonary evaluations. There may be circumstances, however, in which there will not be a sufficient supply of such highly qualified physicians willing to perform the evaluation. In such areas, the criteria will need to afford the Department enough flexibility to ensure an adequate supply of physicians who meet certain minimum qualifications, such as affiliation with a black lung clinic funded in part by the Department of Health and Human Services.

Two comments urge the Department to rule out physicians who have demonstrated that they do not accept one or more of the basic premises of the Black Lung Benefits Act. These commenters urge the Department to review the opinions and depositions of each physician who seeks to be included on the list, eliminating those with opinions which make it impossible to provide a sound evidentiary basis for the district director's initial decision. Another comment urges the Department to accept any physician who applies for inclusion on the list provided that the physician possesses the necessary professional qualifications. As an initial matter, the Department does not intend to screen physicians who apply for inclusion on the list beyond satisfying itself that the basic requirements for inclusion are met. The Department simply does not have the resources to conduct an intensive review of the medical reports and/or deposition testimony submitted by each physician in previous black lung cases. The Department reserves the right, however, to exclude from its list of approved physicians those who prove unable to provide opinions that are consistent with the premises underlying the statute and the Secretary's regulations. The federal courts of appeals have held that a denial of benefits may not be based on a medical opinion that is fundamentally at odds with the premises of the Black Lung Benefits Act. *See, e.g., Lane Hollow Coal Co.* v. *Director, OWCP,* 137 F.3d 799, 804–5 (4th Cir. 1998); *Penn Allegheny Coal Co.* v. *Mercatell,* 878 F.2d 106, 109–110 (3rd Cir. 1989); *Robbins* v. *Jim Walter Resources, Inc.,* 898 F.2d 1478, 1482 (11th Cir. 1990); *Wetherill* v. *Director, OWCP,* 812 F.2d 376, 382 (7th Cir. 1987); *Kaiser Steel Corp.* v. *Director, OWCP,* 757 F.2d 1078, 1083 (10th Cir. 1985). The Department reserves the right to determine appropriate exclusions from the list on a case-by-case basis.

(f) One comment states that the regulation should require the district director to explain to a claimant the possible consequences of having his test results provided to his treating physician. The Department intends to provide such information to claimants, *see also* 64 FR 54989 (Oct. 8, 1999), but does not believe that the regulation must reflect this intention. The regulation itself does state that a report from the claimant's treating physician, based on the Department's clinical testing, will count as one of the two reports the claimant is entitled to submit into evidence under § 725.414, § 725.406(d).

(g) One comment states that the Department's requirements prevent physicians from exercising their professional judgment by dictating the tests that they are required to perform and by emphasizing promptness and timeliness over completeness and thoroughness. The Department disagrees. The Act authorizes the Department to set minimal quality standards for medical evidence. Reports of physical examination must substantially comply with the applicable quality standards, § 718.104. That regulation requires that a report of physical examination be based on, among other things, a chest X-ray, a pulmonary function test, and a blood gas study, unless medically contraindicated. Because these tests are necessary for a complete pulmonary evaluation, the Department has authorized their performance under § 413(b) of the Act, 30 U.S.C. 923(b), for the last two decades. The Department expects that each physician included on the list will not only be able to administer these tests, but will commit to doing so in substantial compliance with the Department's quality standards, §§ 718.102–.106. The Department does not believe that its requirements prevent a physician from preparing a thorough and complete medical report. In order to process claims expeditiously, however, the Department must also ensure that the examination is scheduled promptly, and the resulting report is prepared in a timely manner. The Department recognizes that, in some cases, the claimant's choice of a physician may result in a slight delay if the physician he has selected is busy. The delay in such a case, however, is solely within the control of the claimant. If he is willing to accept the delay, he may wait for that physician. If not, he may choose another from the Department's approved list.

(h) Several comments approved of the revisions affording the claimant the right to select a doctor to perform the complete pulmonary evaluation from an approved list.

(i) No other comments were received concerning this regulation.

20 CFR 725.407

(a) In its first notice of proposed rulemaking, the Department proposed moving subsections (a) and (c) of 20

CFR 725.407 (1999) to § 725.406 and eliminating subsection (b). *See* preamble to §§ 725.407 and 725.408, 62 FR 3355 (Jan. 22, 1997). In their place, the Department proposed a new regulation governing the identification and notification of ''potentially liable operators,'' a subset of the miner's former employers that might be liable for a given claim. Depending on the complexity of the miner's employment history, section 725.407 would permit the district director initially to notify one or more potentially liable operators, and their insurers, of the existence of a claim and would also allow the notification of additional potentially liable operators at any time prior to referral of the case to the Office of Administrative Law Judges. The proposal placed no time limit on the notification of an operator if that operator fraudulently concealed its identity as an employer of the miner.

In its second notice of proposed rulemaking, the Department proposed revising subsection (d) to permit the district director to notify additional potentially liable operators after an administrative law judge reversed a district director's denial by reason of abandonment pursuant to § 725.409 and remanded the case for further proceedings. 64 FR 54990 (Oct. 8, 1999). The Department observed that without this provision, subsection (d) could have been read to prohibit the notification of additional operators, notwithstanding the fact that the district director had not been able to complete his administrative processing of the claim before its referral to the Office of Administrative Law Judges. In addition, the Department rejected a suggestion that it provide guidelines for district directors to use in determining the cases in which it would be appropriate to name more than one potentially liable operator.

(b) The Department has made two changes to § 725.407 to conform to changes to other regulations in this subpart. The Department has deleted the reference to a district director's initial finding in subsection (a) because the district director will no longer issue initial findings. The Department has replaced the reference to § 725.413 in the first sentence of subsection (d) with a reference to § 725.410(a)(3). This change reflects a move to § 725.410 of the district director's authority to dismiss potentially liable operators that the district director has previously notified.

(c) One comment objects that the Secretary's regulations preclude the dismissal of potentially liable operators who can prove that they were not properly named. This comment is more appropriately addressed under § 725.465, the regulation governing the dismissal of claims and parties.

(d) One comment argues that the revised regulation will raise the litigation costs of responsible operators. The commenter observes that the Department does not dispute the allegation, made in response to the Department's first notice of proposed rulemaking, that the Department's changes will generally increase litigation costs by $6,000 per claim. The commenter states that the revisions in the Department's second notice of proposed rulemaking will result in an additional $6,000 in costs per claim. With regard to the first figure, the commenter appears to have mischaracterized its prior comment. An economic analysis conducted by Milliman & Robertson, Inc., and submitted to the Department in response to the first notice, was based in part on an assumption that ''the average defense costs of $6,000 per claim currently expended by the responsible operators/insurers primarily on claims that are initially awarded or denied and appealed by the claimant (presently, approximately 30% of all claims filed), will be expended on all claims at the earliest stage of adjudication.'' Rulemaking Record, Exhibit 5–174, Appendix 5 at 4. This economic analysis did not assert that costs would rise in all cases, but that operators and insurers would be required to incur the cost of fully developing evidence in cases (70 percent of the claims filed) in which they formerly did not have to do so. The analysis did not assert that the Department's proposal would raise litigation costs in the remaining 30 percent of cases. The Department has no basis on which to dispute the industry's statement that its average defense costs, in cases that proceed beyond an initial denial of benefits by the district director, are $6,000. In fact, the economic analysis prepared for the Department in connection with the Regulatory Flexibility Act adopted the figures provided by the Milliman & Robertson economic analysis with respect to the costs of litigating claims at various levels of adjudication. Rulemaking Record, Exhibit 80 at 42.

The Department's second notice of proposed rulemaking, however, undermined the assumption that all of an employer's defense costs would be expended at the earliest stage of adjudication. Under the Department's first proposal, an employer would have been required to develop all of its evidence regarding both its liability as an operator and the claimant's eligibility while the case was pending before the district director. The Department's second notice of proposed rulemaking, however, proposed a substantial alteration in procedure that would permit parties to maintain their current practice of deferring the development of medical evidence until after a case has been referred to the Office of Administrative Law Judges. 64 FR 54993 (Oct. 8, 1999). The Department has adopted this second proposal in these final regulations. Consequently, while potentially liable operators will be required to develop evidence relevant to their liability while claims are pending before the district directors, they will no longer need to expend money on the development of medical evidence in those cases (70% of cases, according to industry estimates) that do not proceed beyond the district director level. In addition, the Department has further revised its regulations to require that all but one potentially liable operator, the one finally designated as responsible operator, be dismissed as parties to the case upon issuance of the district director's proposed decision and order. *See* § 725.418(d) and explanation accompanying § 725.414. Thus, only one potentially liable operator will incur costs in the adjudication of each claim for benefits beyond the district director level.

Under the revised regulations, potentially liable operators will be required to submit evidence to the district director in each case regarding their employment of the miner. *See* § 725.408. In addition, in the small number of cases in which the Department does not name the miner's most recent employer as the responsible operator, the earlier employer that has been designated the responsible operator may incur additional costs in attempting to establish that a more recent employer should be held liable for the payment of benefits. In comparison to the costs of developing medical evidence, however, the Department believes that the additional costs imposed by the regulations will not be significant.

The industry submitted an additional analysis by Milliman and Robertson to the Department in response to the second notice of proposed rulemaking. Rulemaking Record, Exhibit 89–37, Appendix A. That analysis abandons the assumption that the Department's regulations will cause the expenditure of $6,000 in defense costs in every case, rather than only those that proceed beyond the district director level, and replaces it with an assumption that claims defense costs will rise from their

current level of $6,314 to $12,000 under the new regulations. Rulemaking Record, Exhibit 89–37, Appendix A at 16. It is this analysis, apparently, that gives rise to the statement that the second notice of proposed rulemaking will result in an additional $6,000 in costs per claim. The economic analysis contains no explanation for its assumption that defense costs will double under the new regulations. Because the Department's regulations will actually reduce the quantity of medical evidence a party may submit from former levels, eliminate the need to expend money on developing medical evidence in the majority of cases, and eliminate potentially liable operators other than the designated responsible operator as parties to each case beyond the district director level, the Department believes that the assumption is incorrect.

(e) No other comments have been received concerning this regulation.

20 CFR 725.408

(a) The Department proposed eliminating 20 CFR § 725.408 (1999) in its first notice of proposed rulemaking, and replacing it with a regulation designed to elicit necessary information from a miner's former employers. 62 FR 3355–56 (Jan. 22, 1997). As proposed, § 725.408 required any operator notified of its liability under § 725.407 to file a response within 30 days of its receipt of that notification, indicating its intent to accept or contest its identification as a potentially liable operator. Specifically, an operator that contests its liability was required to admit or deny five assertions relevant to that liability: (1) That it operated a coal mine after June 30, 1973; (2) that it employed the miner for a cumulative period of not less than one year; (3) that the miner was exposed to coal mine dust while employed by the operator; (4) that the miner's employment with the operator included at least one working day after December 31, 1969; and (5) that the operator is financially capable of assuming its liability for the payment of benefits. The regulation required the operator to submit all documentary evidence relevant to these issues while the case was pending before the district director, within 60 days from the date on which the operator received notification.

In its second notice of proposed rulemaking, the Department responded to comments that the 60-day time period was too short by enlarging it to 90 days. 64 FR 54990–91 (Oct. 8, 1999). In addition, the Department observed, the period could be extended by the district director for good cause shown pursuant to § 725.423. The Department also acknowledged that, as proposed, the regulation required potentially liable operators to develop and submit evidence in cases that ultimately did not proceed beyond the earliest stage of adjudication. The Department stated that the district director's receipt of this information was necessary, however, in order to ensure that the correct parties were named in those cases that did proceed to the Office of Administrative Law Judges. The Department stated that it did not believe that the cost of developing this evidence would be significant. Finally, the Department rejected the suggestion that it bifurcate the administrative law judge's resolution of entitlement and liability issues.

(b) The Department has modified subsection (a)(1), and has added the phrase ''any of'' to subsection (a)(3), to clarify the meanings of those sentences.

(c) One comment argues that the Department's revision of this regulation injects additional complexity, adds unnecessary burdens and expense in cases involving multiple operators, and sets traps for unwary litigants. The commenter also argues that the Department's revision is based on the erroneous premise that operators are always better informed as to their employment of the miner. The Department agrees that the revised regulations place additional burdens on coal mine operators who have, in the past, routinely filed form controversions of their liability for benefits and waited until the case was referred to the Office of Administrative Law Judges to develop their defenses. In its first notice of proposed rulemaking, the Department explained its intention to change this practice in order to provide the district director with sufficient information to allow him to identify the proper responsible operator. Requiring the submission to the district director of all evidence relevant to the liability issue has become even more important in the final revision of the Department's rules. As revised, the regulations will 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, the responsible operator as finally designated by the district director. See § 725.418(d) and explanation accompanying § 725.414. The regulations prohibit the remand of cases for the identification of additional potentially liable operators, or to allow the district director to designate a new responsible operator, thereby reducing delay in the adjudication of the merits of a claimant's entitlement. This change also places the risk that the district director has not named the proper operator on the Black Lung Disability Trust Fund, however. 62 FR 3355–56 (Jan. 22, 1997). The Department believes that the additional demands placed upon potentially liable operators are not unreasonable. In addition, the Department does not accept the criticism that the regulation sets traps for unwary litigants. The nature of the evidence required by the Department, and the time limits for submitting that evidence, are clearly set forth in the regulations, and will be communicated to potentially liable operators who are notified of a claim by the district director.

The commenter also argues that the Department's revision is based on the erroneous premise that operators are better able to obtain information about their employment of the miner than is the government. The commenter states that the situation is made more difficult where the employment relationship was remote in time or if the miner worked for many different companies. The Department agrees that, in some cases, it may be more difficult for employers, and particularly for insurers, to readily ascertain the facts of the miner's employment. Clearly, however, operators and insurers are in a better position to ascertain these facts than is the Department of Labor. To the extent that an employer or insurer has difficulty in obtaining evidence in a specific case, it may ask that the time period for developing this evidence be extended. The Department will provide the operators notified of a claim the information that it has, including a copy of the miner's application and all evidence relating to his coal mine employment, § 725.407(c).

(d) One comment argues that the 90-day time limitation for an operator to submit documentary evidence in support of its position as to liability remains inadequate, and that, in any event, it should not commence until the operator receives the claimant's employment history, the Itemized Statement of Earnings obtained from the Social Security Administration, and, where applicable, the policy number of the insurance policy that the Department believes provides appropriate coverage. The Department intends to make every effort to supply a potentially liable operator notified of a claim with all of the information pertinent to that notification. As noted above, this information will include a copy of the employment history provided by the claimant. The Department will also provide the applicable insurance policy number if it has it. Similarly, if the Department has received the Itemized Statement of

Earnings, it will provide a copy to the potentially liable operator. The Department's receipt of that record, however, depends on the speed with which the Department's request is processed by the Social Security Administration. It will not be possible in all cases to supply that record to potentially liable operators at the time they receive notification. The initial information supplied to the operator should nevertheless be sufficient to allow it to accept or reject its notification as a potentially liable operator. If the operator needs additional time to respond to that initial notification, it may request an extension of time for good cause shown pursuant to § 725.423. Operators are not limited to a single extension of time in which to obtain this evidence, although a district director may reasonably expect the operator to demonstrate its diligence prior to requesting an additional extension.

(e) Several comments have misconstrued the requirements of § 725.408. Two comments argue that the proposal would shift the burden to the named responsible operator to investigate the proper responsible operator within 90 days and that the 90-day time period is unrealistic for that purpose. One comment argues that the revised regulations are objectionable because they make a responsible operator responsible not only for its own defense but also for the defense of other potentially liable operators. This statement has never been true with respect to liability determinations, and, under the Department's final regulations, is no longer true of entitlement determinations. Another comment argues that DOL's rationale for imposing this time limit on operators—*i.e.,* that operators have better access to the claimant's entire work record—is flawed. Section 725.408, however, does not govern the introduction of evidence relevant to the liability of other operators that employed the miner. Instead, the evidence required by § 725.408 is limited to evidence relevant to the notified operator's own employment of the miner and that operator's financial status. Documentary evidence relevant to another operator's liability is required later pursuant to the schedule established pursuant to § 725.410(b), and in accordance with the limitations set forth in § 725.414(b). Accordingly, the Department will discuss these comments under §§ 725.410 and 725.414.

(f) One comment argues that by creating adversity among the miner's former employers, the Department's revised regulations will create ethical problems for the limited pool of attorneys who currently represent employers in black lung benefits cases, and will therefore deprive employers of their right to the counsel of their choice. The Department acknowledges that the revised regulations increase the adversity among a miner's former employers in any case in which the district director has designated as the responsible operator an operator other than the operator that most recently employed the miner. In such a case, where the designated responsible operator may seek to develop evidence to show that a more recent employer should be designated the responsible operator, an attorney clearly could not represent both employers. Moreover, to the extent that the attorney has previously represented one of the operators, the applicable ethical rules of the attorney's state bar may prevent the attorney from accepting representation of the other operator. In most cases, however, this problem will be more illusory than real. Most of the cases in which the Department will name more than one potentially liable operator will be cases in which the miner's most recent employer is out of business, and had no insurance, or cannot be located. As a general rule, these employers typically have not participated in the adjudication of earlier black lung benefits claims. Accordingly, there will be few, if any, attorneys who will be unable to represent the designated responsible operator. Moreover, in cases in which the interests of potentially liable operators are not directly adverse, state rules typically permit an attorney to represent a client, even if the attorney has represented another party to the case previously, if the attorney obtains the consent of the previous client.

The Department recognizes that there may be a small minority of cases in which a true conflict is unavoidable. For example, if the miner's most recent employer, ABC Coal Co., denies that it employed the claimant as a miner, the Department may also name the miner's next most recent employer, XYZ Coal Co., as a potentially liable operator. An attorney who represented ABC in previous litigation could not now represent XYZ, whose interests are directly adverse. The possibility of such a conflict, however, is not a limitation on the Department's efforts to revise the regulations implementing the Black Lung Benefits Act. The Administrative Procedure Act does guarantee a party the right to be represented by counsel during an administrative adjudication. 5 U.S.C. 555(b). Contrary to the commenter's suggestion, however, nothing in that Act requires an administrative agency to structure its rules in order to preserve the ability of a limited number of attorneys to represent coal mine operators. Where the state ethics rules require an attorney to decline representation of a client, that client is entitled to seek other counsel. The Department does not believe that coal mine operators will be unable to find competent counsel to represent their interests. In fact, the Department has included two or more coal companies as parties in cases under the former regulations, *see, e.g., Martinez* v. *Clayton Coal Co. et al.,* 10 Black Lung Rep. (MB) 1–24 (Ben. Rev. Bd. 1987) (involving three coal mine operators), and did not receive any reports that the operators encountered problems in obtaining representation.

(g) One comment states that the regulation denies mine operators a reasonable opportunity to develop a record. In its second notice of proposed rulemaking, the Department explained its belief that the 90-day time period, which may be extended for good cause, affords sufficient time for operators to submit evidence relevant to their employment of the miner. 64 FR 54990 (Oct. 8, 1999). It cannot be emphasized too often that the period provided by § 725.408 does not require the development of evidence relevant to the designation of other potentially liable operators as the responsible operator. That evidence will be submitted later, in accordance with the schedule established by the district director pursuant to § 725.410.

(h) One comment argues that the regulation creates an impermissible presumption and thus violates the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). Section 725.408 does not create any presumptions. To the extent that the commenter objects to any other presumption used to establish the identity of the responsible operator liable for the payment of benefits, the Department discussed similar objections in its second notice of proposed rulemaking, *see* 64 FR 54972–74 (Oct. 8, 1999), and its response to comments under § 725.495 of Subpart G of this part.

(i) One comment states the response time given potentially liable operators under § 725.408 should mirror the time period given claimants to submit information in § 725.404. The Department disagrees. Section 725.404 provides that claimants must provide the district director with a complete and detailed employment history as well as proof of age, marriage, death, family relationship, dependency, or other

matters of public record. If the information submitted by the claimant is insufficient, the district director must give the claimant a specified reasonable period of time within which to provide the information. Claimants applying for benefits have a positive incentive to supply this information; without it, the district director is unable to complete processing of the case, and any award of benefits will necessarily be delayed. In contrast, § 725.408 seeks information from the claimant's former employers, who have no similar incentive to provide information to the Department. The regulation thus establishes a presumptively reasonable period of time within which an employer must provide that information, and allows the employer to seek an extension of that period for good cause. Because §§ 725.404 and 725.408 affect different parties with different incentives, and serve different purposes, the Department does not believe that the time periods need be made identical.

(j) One comment urges that operators be given the 60 days originally proposed by the Department to respond to notification of potential liability rather than 90. The Department has retained the 90-day time period, which may be extended for good cause, to accommodate the operator community's general objection to the 60-day period and to provide additional time, as a matter of right, in that small percentage of cases in which the miner's employment history is complex or in the distant past.

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

20 CFR 725.409

(a) The Department proposed revising § 725.409 in its first notice of proposed rulemaking to make explicit one basis for denying a claim by reason of abandonment. The Department observed that the Court of Appeals for the Fourth Circuit had confirmed the Department's use of the authority in subsection (a)(3) to dismiss a claim by reason of abandonment based on a claimant's failure to appear at an informal conference. *Wellmore Coal Co.* v. *Stiltner,* 81 F.3d 490, 497 (4th Cir. 1996). The Department proposed to add subsection (a)(4) to the regulation to clarify that authority. In addition, the Department proposed to clarify the procedures for denying claims by reason of abandonment. 62 FR 3356 (Jan. 22, 1997). In the second notice of proposed rulemaking, the Department explained that, because of the severe effect of a dismissal, it had proposed revising § 725.416, the regulation governing informal conferences, to ensure that the parties to a claim are provided with the district director's reasons for holding an informal conference. Thus, under revised § 725.416, the district director is required to explain why he believes an informal conference will assist in the voluntary resolution of the issues in the case. The Department also rejected a suggestion that an administrative law judge should be permitted to hear the merits of claimant's entitlement in a case in which the claimant has requested a hearing as to the district director's dismissal of the claim, and the ALJ finds error in the district director's denial of the claim by reason of abandonment. In response to this comment, the Department added a sentence to subsection (c) of the regulation, to clarify its intent that an administrative law judge must remand a case for further administrative processing if he finds the district director erred in denying the claim. Finally, the Department rejected a comment that the proposal would increase the number of additional claims filed.

(b) Two comments continue to object to the Department's unwillingness to allow an administrative law judge to consider the merits of a claimant's entitlement to benefits if he finds that the district director improperly denied the claim by reason of abandonment. In its second notice of proposed rulemaking, the Department explained that a denial by reason of abandonment may take place before the administrative processing of the claim has been completed, such as when a claimant unjustifiably refuses to attend a required medical examination. § 725.409(a)(1); 64 FR 54991 (Oct. 8, 1999). The Department has reconsidered its complete prohibition on allowing an administrative law judge to resolve the merits of a claim, however. Where the parties have completed their submission of evidence to the district director, and the district director has completed his analysis of the evidence relevant to the liability of all potentially liable operators, and has made a final designation of the responsible operator liable for the payment of benefits, the Department agrees that it would make no sense to require remand to the district director in the event the administrative law judge overturns his denial by reason of abandonment. Accordingly, the Department has revised subsection (c) to permit the Director, through the Office of the Solicitor, to make a case-by-base determination as to whether remand for further administrative processing is necessary. If further remand would be pointless, the Director's consent, which must be made in writing, would allow the case to proceed on the merits of the claimant's entitlement to benefits. The Department has also added a new sentence to subsection (c) to clarify the effect of a denial of a claim by reason of abandonment on a subsequent claim filed by the same individual.

(c) Several comments state that the Department should refer a claim for a hearing on the merits even if the claim has been denied by reason of abandonment. The Department disagrees. A claimant whose claim has been denied by reason of abandonment has suggested, by his actions, that he no longer wishes to pursue his claim for benefits. Referring all of these cases to an administrative law judge for hearing would be pointless and inefficient. It is true that in some cases, the claimant may have decided that he still desires benefits, but believes that the action required of him by the district director is unreasonable. Requiring these claimants to request an administrative law judge to resolve their dispute does not impose an unreasonable burden. Accordingly, the Department has not altered this requirement in the regulation.

(d) Several comments request that the Department reconsider denying a claim by reason of abandonment as an appropriate sanction. Another comment supports the denial. The Department explained its reason for using a denial by reason of abandonment where a claimant fails to attend an informal conference in its second notice of proposed rulemaking. 64 FR 54991–92 (Oct. 8, 1999). The Department continues to believe that, although a denial is a harsh sanction, it is the only valid sanction that may be imposed for a claimant's failure to participate in the adjudication process. A claimant whose failure to participate is the result of simple negligence may avoid that sanction by indicating his willingness to comply with the district director's initial instructions.

(e) Several comments request that the Department reconsider its use of informal conferences. These comments are more appropriately addressed under § 725.416.

(f) No other comments were received concerning this section.

20 CFR 725.410–725.413

(a) In its first notice of proposed rulemaking, the Department proposed new §§ 725.410–725.413 in order to streamline the investigation and initial adjudication of claims for black lung benefits. 62 FR 3356 (Jan. 22, 1997). The

proposed regulations provided for concurrent investigations into the medical issues surrounding the claimant's eligibility and the identity of the operator liable for the payment of any benefits. Under the proposed regulations, those investigations would have culminated in an initial finding containing the district director's preliminary resolution of both issues. If any party indicated dissatisfaction with the initial finding, the district director would have proceeded to an initial adjudication of the claim and would have established a schedule for the submission of evidence. The proposed regulations included a number of significant changes. For example, the Department stated that it would not honor hearing requests made before the conclusion of administrative proceedings. In addition, the Department provided claimants with up to one year to respond to an initial finding.

In its second notice of proposed rulemaking, the Department did not discuss §§ 725.410, 725.412, or 725.413. *See* list of Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999). The Department did discuss § 725.411, although it did not propose any additional changes to that regulation. Instead, the Department advised all interested parties that it intended to substantially revise the documents used in connection with the issuance of an initial finding under § 725.411. The Department noted its commitment to improve the quality of the information provided to parties to the adjudication of black lung claims. The Department hoped that improved communication would make district office claims processing easier to understand and would also give claimants a clearer picture of the medical evidence developed in connection with their claims. It was hoped that with better information, claimants would be able to make more informed decisions as to how to proceed. In response to a number of comments, the Department stated that a hearing request filed within one year of the initial finding would constitute a request for further adjudication of the claim. The Department also discussed its decision not to honor premature hearing requests, *i.e.*, requests for hearing made before the district director issued a proposed decision and order. Additionally, the Department rejected the suggestion that the one-year response time to an initial finding impermissibly extended a claimant's modification rights. Finally, the Department explained its decision not to permit an extension under § 725.423 of the one-year time period.

(b) A number of comments continue to object to the Department's proposal with respect to the initial adjudication of claimant eligibility and operator liability. Among other things, these commenters criticize the increased formality and complexity of the proposed procedure; the burdensome requirement that operators must respond to initial findings in all cases; and the Department's failure to honor premature hearing requests. In response to these comments, the Department has reconsidered the procedural rules governing district director claims processing, and has altered the proposal in a number of significant respects.

(i) The Department will no longer issue an initial finding of claimant eligibility and operator liability. Instead, following the development of certain medical evidence under § 725.405, including the complete pulmonary evaluation authorized by § 725.406, and the submission of evidence relevant to the employment of the miner by potentially liable operators notified pursuant to § 725.407, the district director will issue a schedule for the submission of additional evidence. § 725.410. This schedule will notify the parties of the district director's preliminary evaluation of the evidence regarding the miner's eligibility, but will not require a formal response as to eligibility from any party. In the event that the district director concludes that the evidence supports an award of benefits, and there is no operator that may be held liable for the payment of benefits, § 725.411 requires the district director to issue immediately a proposed decision and order awarding benefits payable by the Black Lung Disability Trust Fund. In such a case, the district director will not issue a schedule for the submission of additional evidence because no further evidentiary development is needed. In the event the district director's preliminary evaluation of the medical evidence in a Trust Fund case weighs against a benefits award, the district director will issue a schedule allowing the submission of additional medical evidence, but the claimant need not respond. Instead, the claimant may wait until the issuance of the proposed decision and order, which will provide him 30 days within which to request a hearing. Similarly, an operator need not respond to a district director's schedule for the submission of evidence. Silence on an operator's part as to the claimant's entitlement to benefits after issuance of the district director's schedule will be deemed a contest of that entitlement. The revised regulations thus eliminate certain responses that previously would have been required following issuance of the proposed initial findings. In addition, they eliminate the one-year period of time that the proposal would have provided a claimant to respond to the initial finding. Two commenters continued to object to that time period. Instead, all parties will have the statutory period, one year, to file a request for modification after the district director's proposed decision and order becomes effective. The proposed decision and order becomes effective 30 days after issuance, *see* § 725.419.

By replacing the notice of initial finding with a less formal schedule for the submission of additional evidence, the Department hopes to further its goal of providing more easily understood documents. The schedule will summarize the medical evidence developed by the Department, and provide a clear explanation of why that evidence may fail to establish a claimant's entitlement to benefits. In addition, the schedule will provide a clear explanation of the steps remaining in the district director's claim processing. A number of commenters had objected to the complexity of the Department's proposed procedures, and the Department believes that this simplified, revised process will eliminate confusion.

(ii) The schedule will also contain the Department's preliminary designation of the responsible operator liable for the payment of claimant's benefits. Along with the schedule, the district director will supply all potentially liable operators with a copy of the evidence needed to meet the Director's initial burden of proof under § 725.495, if such a showing is necessary. Within 30 days of the date on which the schedule is issued, the designated responsible operator must either agree or disagree with the district director's designation. If it disagrees, it must submit any evidence regarding the liability of other operators in accordance with the district director's schedule. The schedule must provide a minimum of 60 days to submit evidence pertaining to both responsible operator liability and the claimant's entitlement, and an additional 30 days to respond to other parties' evidence. These periods may be extended pursuant to § 725.423 for good cause shown. In addition, the designated responsible operator may, but does not have to, agree that the claimant is entitled to benefits. Silence on this issue for 30 days after the district director issues a schedule will be deemed a decision to contest the claimant's benefit entitlement sufficient

to make the responsible operator liable for a reasonable attorney's fee if the claimant successfully prosecutes his claim.

(iii) The Department has also deleted the language in proposed § 725.411 which would have rendered invalid premature hearing requests. Accordingly, the Department will continue its current practice of following the decision in *Plesh* v. *Director, OWCP*, 71 F.3d 103, 111 (3d Cir. 1995). Under that decision, the Department may complete its administrative processing of the claim, but must forward a claim for a hearing at the conclusion of that processing if the claimant has previously filed a request for a hearing and that request has not been withdrawn. The Department has revised § 725.418 to accomplish this result and to extend similar treatment to operators. *See* response to comments under § 725.418.

(c) Two comments submitted in connection with the Department's first notice of proposed rulemaking, and renewed in connection with the Department's second notice of proposed rulemaking, argue that the Department's proposed § 725.413 improperly transfers adjudication powers from the administrative law judge to the district director in violation of the Administrative Procedure Act. The Department disagrees. The regulations currently permit the district director to issue a proposed decision and order. Any party aggrieved by the proposed decision and order may request a formal hearing before the Office of Administrative Law Judges, making the district director's factual findings irrelevant. If no party objects to the proposed decision and order, however, it becomes final. 20 CFR 725.419 (1999). The revised regulations continue that procedure. They do not deny any party the right to an adjudication of contested issues by an administrative law judge, as provided by both the Administrative Procedure Act, 5 U.S.C. 556, and section 19 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919, as incorporated by 30 U.S.C. 932(a).

(d) Several comments submitted in connection with the Department's first notice of proposed rulemaking state that the time frames for developing and submitting evidence to the district director are too short. These time frames, which have been moved from proposed § 725.413(c)(2) to § 725.410(b), set only the minimum periods for evidentiary submissions. Section 725.423 allows any party to request additional time within which to take a required action if good cause is shown. In addition, the Department has relaxed the requirements for the development of documentary medical evidence in §§ 725.414 and 725.456, and has increased the opportunities for submitting such evidence outside the periods established by § 725.410. The Department has not modified, however, the requirement contained in the original proposal, that all documentary evidence pertaining to operator liability must be submitted to the district director in the absence of extraordinary circumstances. In a small number of claims, the responsible operator designated by the district director may wish to submit documentary evidence to meet its burden of establishing that another employer of the miner should be the responsible operator. The Department estimates that these cases will represent less than 10 percent of all responsible operator claims. The Department recognizes that, in some of these cases, the initial 60-day period may be insufficient to allow the designated responsible operator to complete its development of the necessary evidence. In such a case, however, the operator may request that the district director grant it additional time. In addition, if the district director finds the evidence submitted by the designated responsible operator persuasive, he may designate a different operator as the responsible operator only after he provides that operator, pursuant to § 725.410, with at least 60 additional days to develop its own evidence relevant to both the liability and eligibility issues. Finally, in a case in which the operator encounters particular difficulty in obtaining the necessary evidence, it may be able to establish the existence of "extraordinary circumstances" permitting the introduction of such evidence after the case is referred to the Office of Administrative Law Judges. No changes are necessary in response to these comments.

(e) One comment submitted in connection with the Department's first notice of proposed rulemaking objects to the district director's authority to reinstate an operator which has been dismissed. This authority is necessary to correct erroneous dismissals, especially since an operator can not be named a party to a claim once a case is referred to the Office of Administrative Law Judges for a hearing on the merits, § 725.407(d). The remainder of the commenter's objections pertain more properly to § 725.414, and are addressed under that regulation.

(f) In light of the extensive changes to §§ 725.410–.413, none of the other comments received concerning the proposed revisions to these regulations remain relevant.

20 CFR 725.414

(a) In its first notice of proposed rulemaking, the Department proposed to limit the quantity of documentary medical evidence that parties to a claim would be able to submit. Specifically, the Department's initial proposal would have permitted the claimant and the party opposing the claimant's entitlement each to submit the results of no more than two complete pulmonary examinations or consultative reports, and one review of each of its opponent's diagnostic studies and examinations. Parties could submit additional documentary medical evidence only by demonstrating extraordinary circumstances. In proposing this limitation, the Department acknowledged the concerns of the Court of Appeals for the Sixth Circuit in *Woodward* v. *Director, OWCP,* 991 F.2d 314, 321 (6th Cir. 1993). In that decision, the court noted the superior financial resources of some parties allowed the development of a greater quantity of evidence with the result that the "truth-seeking function of the administrative process is skewed and directly undermined." 991 F.2d at 321. 62 FR 3356–61 (Jan. 22, 1997). In cases in which the Department named more than one potentially liable operator as a party to the claim, the proposal delegated responsibility for the development of documentary medical evidence to the responsible operator designated by the district director. Other operators would be permitted to submit documentary medical evidence, up to the limit of two medical evaluations per side, only by showing that the designated responsible operator had not undertaken a full development of the evidence and that, without it, the potentially liable operator was unable to secure a full and fair litigation of the claimant's eligibility.

The Department also proposed to require that all documentary evidence—evidence relevant to operator liability as well as medical evidence relevant to a claimant's eligibility—be submitted while the case was pending before the district director. Like the limitation on the quantity of medical evidence, the required submission of evidence to the district director was made subject to an extraordinary circumstances exception. The Department observed that this proposal would end parties' current practice of delaying the development of evidence on both issues until a claim was referred to the Office of Administrative Law Judges. It would also provide district directors with a

better evidentiary record on which to adjudicate a claim. The proposal would have required parties to identify all of their witnesses while a case was pending before the district director. Finally, the Department explained that both proposed revisions were permissible exercises of the broad regulatory authority granted the Department under the Black Lung Benefits Act.

The Department proposed several significant revisions in its second notice of proposed rulemaking. 64 FR 54992–96 (Oct. 8, 1999). Responding to numerous comments, the Department withdrew its proposed requirement that all documentary medical evidence be submitted to the district director. Instead, the Department proposed to retain the current procedures, allowing parties to submit documentary medical evidence to the Office of Administrative Law Judges up to 20 days prior to the formal hearing. *See* preamble to § 725.456. The Department did not revise its proposal with respect to documentary evidence relevant to the issue of operator liability, however. Any such evidence that was not submitted to the district director could be submitted to the administrative law judge only upon a showing of extraordinary circumstances. The Department observed that this proposal represented a weighing of the claimant's interest in the prompt adjudication of his entitlement against the interest of the Department in protecting the Black Lung Disability Trust Fund from unwarranted liability. Under the Department's proposal, the Director, OWCP, would be unable to have a case remanded to the district director for the development of additional evidence as to operator liability once a case was referred to the Office of Administrative Law Judges for an adjudication of the merits. This provision helped to ensure the prompt adjudication of the claimant's entitlement. The procedure also subjected the Trust Fund to the risk, however, that a district director would not name the correct operator as a party to the claim before the case was referred to OALJ. Such a risk could be justified only if the district director was able to examine all of the documentary evidence relevant to the issue of operator liability.

Although numerous comments had objected to the Department's limitation on the quantity of medical evidence, the Department did not propose to alter that limitation. In order to accommodate the differing circumstances of individual cases, however, and to ensure that all parties were given due process, the Department proposed revising the standard that would allow a party to exceed that limitation. Accordingly, the Department replaced the ''extraordinary circumstances'' exception with a ''good cause'' standard that would be easier to meet in appropriate cases. The Department also clarified the types of documentary medical evidence that parties would be entitled to submit, in order to resolve some of the ambiguities presented by its original proposal. Specifically, the Department proposed that a party's affirmative case be limited to two chest X-ray interpretations, the results of two pulmonary function studies, two arterial blood gas studies, and two medical reports. In rebuttal, each party would be able to submit one piece of evidence analyzing each piece of evidence submitted by the opposing side. For example, an operator could have each of the claimant's chest X-rays reread once, and could submit one report challenging the validity of each pulmonary function test submitted by the claimant. The Department also provided the parties with an opportunity to rehabilitate the evidence they had submitted in connection with their affirmative case that had been the subject of rebuttal. The second proposal justified the medical evidentiary limitations as applied to multiple potentially liable operators named as parties to the same claim. Finally, the Department clarified the provision in subsection (a)(4) as allowing the submission of hospital records and any other treatment records relating to the mine's respiratory or pulmonary condition without regard to the evidentiary limitations elsewhere in the regulation.

(b) A number of comments continue to object to the proposed requirement that more than one potentially liable operator might be retained as a party to a claim and might have to participate in a joint defense of the claimant's eligibility for benefits subject to the same medical evidentiary limitations as would be present in a case involving only one operator. The Department proposed this requirement in order to ensure that a claimant in a multiple operator case—a case in which the identity of the responsible operator was in doubt—would not have to face more documentary medical evidence than a claimant whose eligibility was opposed by only one potentially liable operator. On further reflection, however, the Department has decided not to retain more than one potentially liable operator as a party to each case after the case is referred to the Office of Administrative Law Judges. The final revisions to the regulations attempt to simplify and streamline the processing of claims at the district director level. For example, the final rules eliminate certain party responses formerly required to be filed with the district director, and thus reduce the parties' transaction costs. Similarly, in these final rules, the Department has simplified the adjudication of claims beyond the district director level by permitting the district director to refer a case to the Office of Administrative Law Judges with only one designated responsible operator as a party to the claim. *See* explanation accompanying §§ 725.415, 725.416, 725.417, 725.418, and 725.421.

The Department recognizes that this solution may slightly increase the Black Lung Disability Trust Fund's liability. In the event the responsible operator designated by the district director is adjudicated not liable for a claim, the Black Lung Disability Trust Fund will pay any benefit award. The Department's proposals, on the other hand, would have subjected the Trust Fund to liability only where the miner was not employed by any operator that met the criteria for a potentially liable operator, or where the district director had not named as a party to the claim the operator ultimately held to be the responsible operator. The Department's final regulations create Trust Fund liability in different circumstances: where the district director's designation of the responsible operator proves to be incorrect. For example, if the miner's most recent employer, ABC Trucking Co., argues that it did not employ the claimant as a miner, the proposal would have permitted the district director to retain, as parties to the claim, the miner's prior employers as fallback potentially liable operators. Under the final regulation, however, if the district director designates ABC as the responsible operator, and the ALJ awards benefits but finds that the miner's next most recent employer, XYZ Coal Co., should have been the responsible operator, benefits will be payable by the Trust Fund. The Department intends that, once a claim is referred to the Office of Administrative Law Judges, the Department shall not be able to impose liability for that claim on any operator other than the one finally designated as responsible operator by the district director, whether through remand by the administrative law judge or through modification of a finally awarded claim. This limitation will eliminate a major source of delays in the adjudication of claims, and prevent a claimant from having to relitigate his entitlement to benefits. To the extent

that a denied claimant files a subsequent claim pursuant to § 725.309, of course, the Department's ability to identify another operator would be limited only by the principles of issue preclusion. For example, where the operator designated as the responsible operator by the district director in a prior claim is no longer financially capable of paying benefits, the district director may designate a different responsible operator. In such a case, where the claimant will have to relitigate his entitlement anyway, the district director should be permitted to reconsider his designation of the responsible operator liable for the payment of the claimant's benefits.

The Department does not believe that the risk of increased Trust Fund liability is significant. Serious disputes about the identity of the responsible operator arise in less than 10 percent of claims. In addition, the regulations still require that all of the documentary evidence relevant to the issue of operator liability be submitted to the district director, and that all of the potential witnesses as to this issue be identified. In fact, the Department's willingness to accept the risk that the district director's designation will be incorrect reinforces the need for both of those requirements. Thus, the district director will be able to make a determination as to the identity of the responsible operator based on the same information that will be available to the administrative law judge. In such circumstances, the Department believes that any additional risk of liability imposed on the Trust Fund is acceptable.

The Department has made extensive revisions to § 725.414 to implement this change. Subsection (a)(3)(iv) and the introductory paragraph of subsection (a)(3) have been deleted, and references to potentially liable operators other than the designated responsible operator have been removed from subsections (a)(2)(ii), (a)(3)(i), (a)(3)(ii), and (c). The Department has revised subsection (a)(3)(iii) to reflect the Trust Fund's right to develop evidence in a case in which the district director has notified one or more potentially liable operators of their liability pursuant to § 725.407, but has subsequently dismissed all of the operators. The revised regulation also recognizes the Trust Fund's right to develop and submit evidence relevant to the compensability of a claimant's medical benefits. The Department has also revised subsections (b)(1) and (b)(2) to clarify the meaning of the regulation.

In addition, the Department has deleted subsection (a)(6). As proposed, subsection (a)(6) would have required the district director to admit into the record all of the evidence submitted while the case was pending before him. As revised, however, the regulation may require the exclusion of some evidence submitted to the district director. In the more than 90 percent of operator cases in which there is no substantial dispute over the identity of the responsible operator, most of the evidence available to the district director will be the medical and liability evidence submitted pursuant to the schedule for the submission of additional evidence, § 725.410. In the remaining cases, however, the district director may alter his designation of the responsible operator after reviewing the liability evidence submitted by the previously designated responsible operator. For example, he may decide that the evidence submitted by ABC Trucking Co. establishes that the claimant did not work as a miner for that company, and may designate the claimant's next most recent employer, XYZ Coal Co., as the responsible operator. In such a case, the regulations require that the district director issue another schedule for the submission of additional evidence in order to give XYZ Coal the opportunity to submit additional evidence bearing on its liability for benefits. If the district director ultimately concludes that XYZ should be designated the responsible operator, the regulation requires him to exclude the medical evidence previously developed by ABC, unless XYZ adopts that evidence as its own, § 725.415(b). The Department has revised § 725.415(b) to defer the development of any additional medical evidence in such a case until after the district director has completed his analysis of all evidence pertaining to operator liability and has made a final responsible operator determination. At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the district director will not be able to determine which medical evidence belongs in the record until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(b)(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations. Accordingly, the Department has deleted the requirement in § 725.414(a)(6) that the district director admit into the record all of the medical evidence that the parties submit.

The Department does not expect the deletion to have a significant practical effect. Because the Department withdrew its first proposal requiring that all medical evidence be submitted to the district director, *see* paragraph (a), above, the Department expects that parties generally will not undertake the development of medical evidence until the case is pending before the administrative law judge. Certainly, if the designated responsible operator believes itself not to be liable for a given claim, it might defer the development of medical evidence while developing evidence relevant to liability. Accordingly, in the overwhelming majority of cases, there will be no evidence that the district director will be required to exclude from the record. The Department recognizes, however, the theoretical possibility that a claimant may have to undergo additional physical examination and testing. In the example discussed above, if ABC Trucking had submitted the result of its examination and pulmonary testing, XYZ could, if it chose not to use ABC's evidence, require the claimant to submit to an additional examination. The Department does not believe that this is a likely scenario, however, even in cases in which the district director changes his designation of the responsible operator.

(c) Two comments dispute the Department's observation, in its second notice of proposed rulemaking, 64 FR 54996 (Oct. 8, 1999), that autopsy and biopsy reports are generally not developed in connection with a claim, and that those reports need not be addressed in the Department's evidentiary limitations. The Department has reconsidered its earlier proposal allowing the admission of these reports without regard to number, and agrees that the evidentiary limitations of § 725.414 should be revised. Accordingly, the regulation now permits each side to submit, as part of its affirmative case, one report of an autopsy and one report of each biopsy. Subsections (a)(2)(i) and (a)(3)(i) have been revised accordingly. In addition, the Department has revised subsections (a)(2)(ii) and (a)(3)(ii) to allow each side to submit one report in rebuttal of an autopsy report and one report in rebuttal of each biopsy report offered by the opposing side. The Department has also deleted the reference to autopsy and biopsy reports in subsection (a)(4), the catch-all provision permitting the introduction of evidence that is not addressed elsewhere in § 725.414.

(d) Several comments object to the Department's proposed addition of subsection (e). This provision, which tracks the current regulation at 20 CFR 725.414(e)(1) (1999), would have

prohibited the introduction of evidence before an administrative law judge which was obtained by a party while the claim was pending before a district director but which was withheld from the district director or any other party. Another comment states that the subsection is meaningless since it suggests that withheld evidence must be admitted upon the request of a party, even absent a showing of extraordinary circumstances. The Department agrees that this provision should be deleted. *See* preamble to § 725.456, paragraph (b). Accordingly, subsection (e) has been deleted. A corresponding change has been made to § 725.456.

(e) A number of comments argue that the Department should limit the claimant and the party opposing entitlement to one examination and one set of pulmonary testing. Thus, instead of being able to submit the results two pulmonary function studies and two arterial blood gas studies, each party would be entitled to submit only one set of test results. One commenter states that this revision would simply maintain the status quo with respect to testing. The Department disagrees. The former regulations do not limit the number of test results a party may submit, and evidentiary records often contain a substantial number of such tests. The Department recognizes that the testing may be difficult for some claimants. In the absence of good cause, the Department's regulations limit the maximum total number of tests to five in the vast majority of cases involving a designated responsible operator (four in a case in which the Black Lung Disability Trust Fund will be liable for the payment of any benefits), and spread these tests out over time. The first such test will be performed in connection with the complete pulmonary evaluation shortly after the claimant files his application, § 725.406. The last test will most likely be performed shortly before the formal hearing, as parties seek to complete the development of their evidence before the twentieth day prior to the hearing, as required by § 725.456(b)(2). It would not be appropriate to further limit the testing that a claimant must undergo. An operator who wishes to submit the results of two physical examinations performed in accordance with § 718.104 is entitled to have the physicians who perform those examinations administer appropriate testing, *see* § 718.104(a)(6). Accordingly, the Department has not changed the regulation in this respect.

(f) A number of comments continue to object generally to the Department's proposed limitations on the quantity of medical evidence that parties may submit in the adjudication of a black lung claim. Among other things, they argue that the proposed limitations violate § 413(b) of the Black Lung Benefits Act, 30 U.S.C. 923(b), which requires the consideration of "all relevant evidence," and infringe on the rights of coal mine operators under the due process clause of the Constitution. The Department has previously addressed both arguments. In its first notice of proposed rulemaking, the Department explained that § 413(b), which is contained in Part B of the Black Lung Benefits Act, was incorporated into Part C, governing adjudications by the Department of Labor, "to the extent appropriate." 30 U.S.C. 940. The proposed evidentiary limitations thus represent the extent to which the Department believes that medical evidence should be submitted for consideration by the factfinder. In addition, the Department has noted that § 413(b) does not require the admission of all evidence simply because that evidence could be described as relevant, and that the Department was free to prescribe conditions under which evidence would be admissible in black lung adjudications. 62 FR 3358–59 (Jan. 22, 1997). The Department discussed the requirements of the due process clause in its second notice of proposed rulemaking. The Department observed that a due process analysis involves weighing the potentially disparate interests of a number of parties. 64 FR 54994–95 (Oct. 8, 1999). In the Department's view, the regulation achieves the correct balance, particularly in light of the Department's decision to permit parties to exceed the numerical limitations on documentary medical evidence upon a showing of good cause. To the extent that these commenters objected, on due process grounds, to the requirement that potentially liable operators other than the responsible operator defer to the responsible operator's development of medical evidence, those objections have been rendered moot by the Department's revisions permitting only one designated responsible operator to be included as a party to a case before the Office of Administrative Law Judges.

The Department also cannot accept the assertion, made by several commenters, that the numerical limits are fundamentally unfair, and that they will result in inaccurate and incomplete evaluations of the claimant's pulmonary condition. In cases involving a coal mine operator, the record may contain up to five medical reports—two submitted by the claimant, two by the operator, and the results of the complete pulmonary evaluation. Each of these reports may be based on independent medical testing. Accordingly, the Department does not agree that the evaluation of the claimant's medical status will be less than complete and thorough. Moreover, the Department does not agree that requiring the parties to develop medical evidence meeting certain quality standards, §§ 718.102—718.107, will result in an unfair adjudication of the claimant's entitlement to benefits.

(g) One comment suggests that the Department's rationale for its proposed change is insufficient, and that anecdotal evidence of a few cases in which coal mine operators submitted a large volume of evidence does not demonstrate that the current procedure is unfair. The commenter further argues that the former system, developed under the Administrative Procedure Act, is a fair system. The Department agrees that the APA generally provides a fair basis for the adjudication of parties' interests in the administrative context. In its first notice of proposed rulemaking, however, the Department demonstrated that Congress did not explicitly impose the requirements of the APA on adjudications under the Federal Mine Safety and Health Act. *See* 62 FR 3359 (Jan. 22, 1997). In addition, the Department expressed its preference for a bright-line test that allows adjudication officers to resolve issues of eligibility based on the quality of the medical evidence developed by the parties rather than merely the quantity of evidence that parties with superior financial resources may be able to submit. The Department continues to believe that the adjudications that will take place under these revised regulations will result in fairer, more credible evaluations of black lung claims than the former system permitted.

(h) One comment argues that the "minimum" number of examinations that may be submitted by the parties is not equal. The commenter also objects that the claimant is entitled to travel a longer distance to obtain his medical evidence than the employer is authorized to send him to obtain its medical evidence. Specifically, the commenter states that a claimant could travel less than one hundred miles away for the complete pulmonary evaluation provided by the Department under § 725.406, but then travel a longer distance to obtain a subsequent examination at his own expense. Because the limitation on the travel an operator can require is tied to the distance traveled for the § 725.406 evaluation, the commenter argues that

the claimant could in fact travel much farther than the operator is permitted to send him in obtaining its evidence. The commenter's emphasis on a ''minimum'' number of medical reports is puzzling; since parties on both sides remain free not to submit any medical evidence, the Department believes that the commenter refers to the maximum permissible number of reports and tests. That limitation is equally balanced. Unless the administrative law judge finds that good cause justifies the admission of additional evidence, each side may submit up to two medical reports, two chest X-ray interpretations, the results of two pulmonary function studies and arterial blood gas studies, one report of each biopsy, and one autopsy report. The Department believes that the limitation applicable to each type of evidence per side represents an inherently fair way of ensuring that the adjudication officer's focus is on the quality of the evidence submitted rather than on its quantity. To the extent that the comment refers to the claimant's ability to select the physician to perform the complete pulmonary evaluation from among those on the Department's list, the Department has responded to that comment under § 725.406. *See* preamble to § 725.406, paragraph (b).

With respect to the travel requirements, the Department believes that a coal mine operator should not be entitled to wait to develop its medical evidence until after the claimant has finished his evidentiary development in order to learn how far it may ask the claimant to travel. The complete pulmonary evaluation offers the claimant the opportunity to travel anywhere in his state or any contiguous state at Departmental expense. The Department does not believe that a claimant will deliberately select a closer physician for this examination and then pay for his own travel to a more distant location for either of the two medical reports that he is entitled to submit. Accordingly, the Department believes that the distance a claimant travels for the complete pulmonary evaluation, or 100 miles, whichever is greater, represents a proper limitation on a coal mine operator's ability to compel the claimant to travel. Moreover, the regulation's proscription on additional travel is not absolute. Like the former regulation, 20 CFR 725.414(a)(1999), which subsection (a)(3)(i) mirrors, subsection 725.414(a)(3)(i) permits an operator to request the district director to authorize a trip of greater distance. Operators who are unable to find a qualified physician within the 100-mile radius thus may seek permission to send the claimant further.

(i) Three comments suggest that the determination as to whether additional evidence would provide only marginal utility should not be made by regulation of the Department of Labor but by administrative law judges on a case-by-case basis. These commenters contend it is up to administrative law judges to determine when evidence is cumulative and that the Department should not micromanage the adjudicatory process. The Department has previously expressed its preference for a ''bright-line'' limitation over the *ad hoc* determinations of individual adjudication officers. 62 FR 3357 (Jan. 22, 1997). Where the circumstances compel a determination of whether additional medical evidence should be allowed, *i.e.,* upon an allegation of good cause for submitting medical evidence in excess of the evidentiary limitation, that determination will be made by administrative law judges. The need for such a determination in some cases, however, does not obviate the more compelling need for a general rule limiting the amount of medical evidence that parties may submit in black lung benefits claims. The Department believes that it should be incumbent on the party seeking to exceed that limit to demonstrate good cause for submitting additional evidence.

(j) One comment argues that the Department should include the ''good cause'' exception in § 725.414 as well as in § 725.456, and that its failure to do so represents a trap for the unwary. The Department does not agree that the ''good cause'' exception needs to be repeated in § 725.414. As a practical matter, the Department's removal of the requirement that parties submit all of their documentary medical evidence before the district director will generally cause parties to delay the development of their evidence until a case reaches the administrative law judge. Thus, the Department does not anticipate that there will be many occasions on which a party would ask the district director, rather than the administrative law judge, to find ''good cause'' to exceed the numerical limitations of § 725.414. In any event, because any finding on this issue by the district director would be subject to *de novo* review by an administrative law judge, the Department does not believe that the absence of an explicitly stated ''good cause'' exception while a case is pending before the district director will impair the parties' development of evidence.

(k) One comment argues that, contrary to the opinion expressed in the Department's second notice of proposed rulemaking, the progressive nature of pneumoconiosis should not constitute ''good cause'' for the submission of additional evidence because it is scientifically unsupported. In its second notice of proposed rulemaking, the Department had suggested that the progressive nature of the disease might justify an administrative law judge's finding of good cause to admit documentary medical evidence in excess of the § 725.414 limitations when both parties had fully developed their evidence prior to the hearing but the hearing had to be rescheduled due to weather conditions. 64 FR 54994–95 (Oct. 8, 1999). The commenter suggests that a claim of regression should be automatic good cause. The Department has discussed the evidence demonstrating the progressive nature of pneumoconiosis in its response to comments under § 725.309. The Department does not agree that a bare claim of ''regression'' should entitle a coal mine operator to exceed the § 725.414 evidentiary limitations. The example provided by the Department was intended to illustrate one of the circumstances in which the ''good cause'' exception might apply; it was not intended to provide an automatic right to submit documentary medical evidence in excess of the limitations in any particular case.

(l) One comment states that the ''good cause'' exception is unnecessarily complex and leaves many unanswered questions. The commenter poses a hypothetical situation involving a claimant's submission of an additional report of examination, and asks what additional evidence the opposing party may submit in response or in rebuttal. The Department does not believe that the regulation or this preamble can explicitly anticipate every conceivable situation that may arise in the adjudication of claims. Instead, the Department fully expects that administrative law judges will be able to fashion a remedy in all cases that both permits the party opposing entitlement to develop such rebuttal evidence as is necessary to ensure a full and fair adjudication of the claim, and retains the principle inherent in these regulations that the fairest adjudication of a claimant's entitlement will occur when the factfinder's attention is focused on the quality of the medical evidence submitted by the parties rather than on its quantity.

(m) One comment argues that the Department's regulations improperly deny a dismissed operator the right to defend itself, in violation of the Black Lung Benefits Act, the Longshore and

Harbor Workers' Compensation Act, and the Administrative Procedure Act. Under the regulations, if an operator is dismissed by the district director, and is not reinstated before a case is referred to the Office of Administrative Law Judges, it may not be held liable for benefits. Such an operator will therefore not need to defend itself. If the district director dismisses an operator and later realizes that he did so incorrectly, he may reinstate that operator but must provide it with an opportunity, under § 725.410, to develop additional evidence. Consequently, the Department does not agree that the regulations limit the rights of dismissed operators.

(n) One comment states that the requirement that a party identify a testifying witness while a claim is pending before the district director is unreasonable and onerous, and that it diminishes the authority of administrative law judges. This comment is more appropriately addressed under § 725.457, governing the use of witnesses before an administrative law judge. *See* preamble to § 725.457, paragraph (b).

(o) A number of comments generally favor the Department's medical evidentiary limitations.

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

20 CFR 725.415

(a) In its first notice of proposed rulemaking, the Department revised § 725.415 to require the district director to issue a proposed decision and order in each case. Citing the need to strengthen the integrity of the district director's adjudication, the Department proposed removing the district director's authority to refer a claim to the Office of Administrative Law Judges without first issuing a proposed decision and order. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.415 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 revised subsection (b) in light of its decision not to allow more than one operator to remain a party to a black lung claim after the conclusion of district director processing. As revised, the regulation recognizes the district director's authority to reconsider his initial designation of a responsible operator following the submission of liability evidence by that initially designated operator. Where the district director believes that that evidence establishes that the first operator is not the proper responsible operator, he may issue another schedule for the submission of additional evidence under § 725.410, designating a new responsible operator and providing that operator with time within which to submit its own evidence relevant to the liability issue. If, after reviewing that operator's evidence, the district director decides that his first designation was correct, he may not allow the second designated responsible operator to develop any additional medical evidence. If, however, he decides that his second designation was correct (or proceeds to a third or fourth designation), he must provide the operator that he finally determines to be the responsible operator with the opportunity to submit medical evidence. That operator may develop its own evidence, or may adopt any evidence previously submitted by an operator. In either case, the finally designated responsible operator is subject to the evidentiary limitations set forth in § 725.414.

(c) The Department has replaced the reference to § 725.413(c)(2) with a reference to § 725.410(b) in order to reflect the new provision governing the time period for submitting documentary evidence to the district director. The Department has also deleted the word "operator's" from the title of the regulation. As revised, the Department's regulations do not provide a separate period for the development of an operator's evidence.

(d) One comment submitted in connection with the first notice of proposed rulemaking states that this section affords the district director too much authority, but does not identify which specific powers are objectionable. Without more detail, the Department cannot respond meaningfully to the commenter's concerns. Subsection (b) does enumerate the possible actions a district director may take after reviewing all of the evidence developed in conjunction with the claim. The district director may notify additional potentially liable operators, issue another schedule for the submission of additional evidence, schedule a conference, issue a decision, or take any other action appropriate to the circumstances of the claim. The district director must enjoy some degree of flexibility in determining how to proceed once evidentiary development has concluded. For example, the district director may determine, in light of evidence submitted by the designated responsible operator, that one or more additional potentially liable operators must be notified of the claim, or that a previously notified potentially liable operator should be designated the responsible operator. In such cases, the district director must have sufficient authority to permit the parties to submit additional evidence on the liability issue. Accordingly, the Department does not view the authority provided the district director as excessive.

(e) One comment states that eliminating the requirement in § 725.414, as initially proposed, that all documentary medical evidence be submitted to the district director has also eliminated the need to strengthen the integrity of the district director's adjudication. The Department disagrees. In light of the Department's final revisions, the proposed decision and order will be the only decisional document that the district director issues addressing the claimant's eligibility for benefits and the liability of a responsible operator for the payment of those benefits. A substantial number of claimants currently accept the district director's conclusions regarding their eligibility, and do not seek further review of their claims for benefits. The alternative to issuing proposed decisions and orders—referring all cases to the Office of Administrative Law Judges (OALJs) for a formal hearing on the merits—would represent a considerable and unnecessary expenditure of the resources of the OALJs, the Office of Workers' Compensation Programs, and the coal mine operators who must litigate such cases. Accordingly, the Department does not agree that § 725.415 should be revised to retain the current rule under which district directors may simply forward cases to the OALJs. Also, issuance of some document is necessary to establish the date from which the parties' modification rights begin to run. The Department believes that it will be easier for all parties if there is only one such document in each case.

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

20 CFR 725.416

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (c) to provide for the imposition of sanctions on any party that failed to appear at a scheduled informal conference and whose absence was not excused. The Department also proposed revising subsection (d) to put parties on notice that those attending the conference would be deemed to have the authority to stipulate to facts or issues or resolve the claim. 62 FR 3361 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department responded to a number of comments from a variety of sources urging the elimination of informal conferences.

Although the Department declined to eliminate conferences, it proposed revising subsection (b) to require the district director to articulate specific reasons for holding one. In the absence of such a statement, the district director would be prohibited from imposing sanctions for a party's failure to appear. In addition, in order to reduce parties' costs, the Department proposed to recognize the current practice of allowing parties to participate in informal conferences by telephone. 64 FR 54996 (Oct. 8, 1999).

(b) A number of comments generally oppose the use of informal conferences, contending they create additional delay and complexity in district director claims processing. As explained in both its first and second notices of proposed rulemaking, the Department believes that informal conferences may serve useful purposes, including, in appropriate cases, narrowing issues, achieving stipulations, and crystallizing positions. 62 FR 3361 (Jan. 22, 1997); 64 FR 54996 (Oct. 8, 1999). The Department agrees, however, that conferences should not unduly delay the further adjudication of a claim. In addition, they should be held only in appropriate circumstances. Accordingly, the Department has made two major changes to § 725.416. In subsection (a), the Department has added the requirement that a district director conduct any conference within 90 days of the date on which the period for submitting evidence under § 725.410(b) closes, unless one of the parties requests a postponement for good cause. The Department has also deleted the reference in subsection (b) to the district director's discretion to reschedule conferences. Subsection (a) permits the district director to reschedule conferences, but only upon the motion of a party. The Department has also replaced the reference to § 725.413(c)(2) in subsection (a) with a reference to § 725.410(b) in order to reflect a change in those regulations. In addition, in order to further limit the delay caused by informal conferences, the Department will continue to require that the district director issue a decision within 20 days of the close of all conference proceedings, including the time permitted for the submission of any additional evidence. *See* § 725.417.

The Department has made a second major change to § 725.416 to remove any appearance of impropriety in the informal conference process. The district director is a subordinate of the Director, Office of Workers' Compensation Programs, a party in each claim for black lung benefits. The district director is also responsible for the development of evidence on behalf of the Black Lung Disability Trust Fund. These dual roles may affect the degree to which the district director is viewed as a neutral arbiter of the issues before him. An appearance of a conflict of interest is particularly troubling in a case in which there is no operator liable for the payment of benefits, and the claimant lacks representation. In order to minimize any appearance of unfairness, the Department believes that conferences should be held only when all parties are capable of making informed judgments to protect their own interests. Accordingly, in addition to explaining why holding a conference in a particular claim would be beneficial, the Department will inform the parties that no conference will be held if all parties do not have representation. In the event that a claimant is not represented, the district director will not hold a conference. An appointed lay representative is sufficient, however, to allow an informal conference to go forward, 20 CFR 725.362, 725.363 (1999). The regulation extends the same protection to operators that are neither insured nor self-insured. Many self-insured coal mine operators and insurers do not obtain formal representation at this stage of adjudication, but have claims processing personnel, either in their offices or in the claims servicing organizations that they use, who are knowledgeable concerning the entitlement and liability criteria of the Black Lung Benefits Act and its implementing regulations. The Department believes that such personnel should be able to enter into binding stipulations on behalf of the self-insured or insured coal mine operator. The Department has replaced the reference to § 725.362 in subsection (d) with a reference to subsection (b) to accomplish this result. Accordingly, the regulation deems that such operators are represented for purposes of scheduling an informal conference. By contrast, the Department intends that operators that are neither insured nor self-insured—operators that are not often called upon to participate in the adjudication of black lung benefits claims—should not be asked to enter into stipulations without the benefit of a formal representative's advice. Because there will no longer be any conferences involving unrepresented claimants, the Department has deleted the last two sentences of subsection (e). The district director may continue to exercise his discretion, however, to determine whether parties understand any stipulations which they are asked to enter. Exercise of this discretion is particularly important where a claimant is represented by a lay representative.

(c) One comment submitted in connection with the first notice of proposed rulemaking and renewed in connection with the second notice of proposed rulemaking objects to the regulation contending it improperly provides for an adjudication of the claim before the district director that is neither on the record nor under oath. The commenter also objects generally to the discretion given the district director to determine the procedures to be used at the conference. The Department recognizes that the informal conference will not be conducted under oath and on the record, but believes that the changes it has made to the informal conference procedures obviate this objection. As revised, an informal conference will only be held if all parties to a claim are represented or are deemed to be represented. This revision removes the danger that the district director will be able to obtain a stipulation from an unsophisticated party. Moreover, following the termination of the informal conference proceedings, the district director will issue a proposed decision and order. The district director's "adjudication" of the claim is thus subject to the consent of the parties. A request for a hearing will require the district director to forward the claim to the Office of Administrative Law Judges for *de novo* adjudication. Consequently, the district director's inability to conduct the informal conference under oath, and to have the conference transcribed, will not affect the substantive rights of any party.

(d) No other comments have been received concerning this section.

20 CFR 725.417

(a) In its first notice of proposed rulemaking, the Department proposed revising subsection (b) to incorporate the limitations on documentary evidence contained in § 725.414. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.417 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 revised subsection (b) to clarify the district director's authority to seek additional information on the issue of responsible operator liability even after he has held a conference. The conference may provide the district director with additional information regarding the claimant's employment history. Accordingly, subsection (b) authorizes the district director to issue another

notification of potential operator liability under § 725.407 and/or another schedule for the submission of additional evidence under § 725.410.

(c) One comment objected to the requirement in proposed subsection (d) that parties respond in writing to the district director's memorandum of conference. The Department agrees that this response is unnecessary, and has further streamlined its informal adjudication of claims by eliminating in its entirety the memorandum of conference and the required response that would have followed. Instead, at the conclusion of informal conference proceedings, including the submission of any additional evidence, the district director will issue a proposed decision and order under § 725.418. The Department has also revised subsection (b) in order to clarify the meaning of the sentence.

(d) One comment urges the Department to create a time limit within which the district director must issue a decision after holding a conference. Subsection (c), 20 CFR 725.417(c) (1999), requires the district director to issue a decision within 20 days of the conclusion of the informal conference proceedings. Consequently, no change in the regulation is required.

(e) One comment submitted in connection with the first notice of proposed rulemaking recommended amending subsection (b) to allow submission of post-conference supplementary reports from any physician who has already prepared a report if clarification of the physician's report is needed. No change in the proposed regulation is necessary. A party may request the opportunity to submit additional evidence post-conference which may further support its position or a physician's views. The only restriction imposed by subsection (b) is that such additional evidentiary development cannot circumvent the numerical limitations in § 725.414. To the extent that the comment implies a ''clarifying'' report should be considered an extension of the initial report, the Department disagrees. Excluding supplementary reports from the § 725.414 limitations would create an exception which eviscerates the limitation. A party could invite comment from the physician on almost any aspect of the medical evidence in the record under the guise of ''clarifying'' the physician's views in light of that evidence. In effect, the supplementary report would constitute another medical report. Moreover, any internal ambiguity or omission in the physician's opinion should be apparent upon receipt and review of the report, and can therefore be corrected before submitting the report into the record. If, however, some aspect of a physician's report has been the subject of rebuttal evidence by an opposing party, § 725.414 does allow the rehabilitation of the original report by the submission of a clarifying report from the original doctor. Such rehabilitative evidence is allowed by the evidentiary limitations in § 725.414.

(f) One comment argues that the regulation is questionable in light of the changes made to § 725.414. In the absence of any further explanation by the commenter, the Department is unable to respond.

(g) The Department received no other comments concerning this section.

20 CFR 725.418

(a) The Department proposed revising subsection (a) in its first notice of proposed rulemaking to identify the proposed decision and order as the step which follows a district director's memorandum of conference or, if no conference was held, the period established by the district director for the submission of evidence. The revision was intended to require the issuance of a proposed decision and order in each case, and to eliminate the district director's option of referring the case for a hearing without issuing a proposed decision and order. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.418 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 added subsection (d) to provide explicitly that, to the extent he has not done so before, the district director must dismiss, as parties to the claim, all potentially liable operators except one. Moreover, the regulation guarantees that no operator may be the finally designated responsible operator unless it: (1) Was notified of its potential liability pursuant to § 725.407, and thus given the opportunity to submit evidence under § 725.408; and (2) given the opportunity to submit additional evidence relevant to the liability of other potentially liable operators and the claimant's eligibility pursuant to § 725.410.

(c) The Department has deleted the reference in the first sentence of subsection (a) to the parties' responses to the district director's recommendations because a district director will no longer issue a memorandum of conference following the termination of conference proceedings. *See* preamble to § 725.416. In its place, the Department has added a reference to the 20-day time period provided by § 725.417(c) within which the district director must issue a proposed decision and order. In addition, the Department has replaced the reference to § 725.413(c)(2) with a reference to 725.410(b) in order to reflect changes to those regulations. The Department has deleted the words ''to be'' in the first sentence of subsection (a) as unnecessary, and has revised the last sentence of subsection (a) to clarify the meaning of the regulation. The Department has also revised subsection (b) to clarify that the proposed decision and order is the document that must be served on the parties by certified mail.

(d) A number of comments objected to the Department's proposed revision of § 725.411, which would have treated a hearing request filed before the conclusion of district director processing as a request for the further adjudication of the claim. *See* 62 FR 3356 (Jan. 22, 1997). The Department believes that its amended procedures in §§ 725.410 through 725.412, 725.416—725.417, will eliminate much of the confusion that has led parties to file hearing requests before the conclusion of administrative processing. Whereas the Department's original proposal authorized the district director to issue an initial finding, a memorandum of conference, and a proposed decision and order, the revised regulations provide for the issuance of only one decisional document in most cases: A proposed decision and order. The Department does agree, however, that it should honor any hearing request that is filed by a party even if it is filed before the conclusion of a district director's processing. Accordingly, the Department has added subsection (c) to require that the proposed decision and order apprise parties of their right to a hearing. Where a party has previously filed a hearing request, and can reasonably be said to be aggrieved by the proposed decision and order, the district director will inform the party that the case will be referred to the Office of Administrative Law Judges unless the party revokes its previous request. In the case of a claimant who has previously requested a hearing, the district director will forward the case if he has denied benefits. In the case of an operator who has previously requested a hearing on either the claimant's eligibility or its liability for benefits, the district director will forward the case if he has awarded benefits.

(e) One comment submitted in connection with the first notice of proposed rulemaking and renewed in response to the second notice of proposed rulemaking expresses general

dissatisfaction with the issuance of a proposed decision and order calling it an unnecessary procedural step. The issuance of this document, however, is the logical culmination of the claims adjudication process at the district director level. Under the revised procedures adopted by the Department, it will serve as the district director's only attempted resolution of the issues of claimant eligibility and operator liability. The proposed decision and order thus serves either as a final disposition of the claim if the parties accept the decision, or as the conclusion of the initial stage of adjudication if a party aggrieved by the result intends to pursue the case to the hearing stage. The Department therefore rejects the suggestion that a proposed decision and order is unnecessary.

(f) No other comments were received concerning this section.

20 CFR 725.419

The Department received two comments relevant to § 725.419. This section was not open for comment; only technical changes were made to it. *See* 62 FR 3340–41 (Jan. 22, 1997); 64 FR 54970 (Oct. 8, 1999). Therefore no changes are being made in it.

20 CFR 725.421

(a) In its first notice of proposed rulemaking, the Department proposed deleting language in subsection (a) to allow district directors to maintain the files of cases which have been referred to the Office of Administrative Law Judges. Formerly, those files had been sent to the national office of OWCP's Division of Coal Mine Workers' Compensation. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.421 in its second notice of proposed rulemaking. *See* list of Proposed Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has revised subsection (b)(3) to ensure that the record is sufficient to establish that the district director provided the finally designated responsible operator with notification of its status as a potentially liable operator under § 725.407 as well as its designation as the responsible operator pursuant to § 725.410. In addition, the Department has revised subsection (b)(4) to ensure that the record forwarded to the Office of Administrative Law Judges contains only medical evidence submitted by the claimant and the finally designated responsible operator or fund, as appropriate. *See* explanation accompanying §§ 725.414, 725.415. All evidence relevant to the issue of operator liability shall be made a part of the record.

(c) In subsection (a), the Department has added the word ''evidentiary'' and deleted the phrase ''in the claim'' to clarify the meaning of the sentence.

(d) One comment submitted in connection with the Department's first notice of proposed rulemaking objects to subsection (c) because it requires a party to pay for copies of documents which have previously been provided. The commenter argues that claimants in particular are unaware of the importance of keeping all documents associated with their claims. No change is made in response to this comment. Subsection (c) is a rule of general applicability, and affects responsible operators and insurance carriers as well as claimants. The provision states that the district director shall determine the amount of the copying fee. It therefore allows the district director to consider mitigating factors (the individual's financial condition, the cost of the documents being replaced, etc.) as grounds for reducing or waiving the copying fee. No other comments concerning this section were received, and no changes have been made in it.

20 CFR 725.422

The Department received several comments relevant to § 725.422. This section was not open for comment; it was repromulgated without alteration for the convenience of the reader; *see* 62 FR 3341 (Jan. 22, 1997); 64 FR 54971 (Oct. 8, 1999). Therefore, no changes are being made in it.

20 CFR 725.423

(a) In its first notice of proposed rulemaking, the Department proposed the addition of § 725.423 to consolidate all of the provisions governing extensions of time in subpart E of part 725. With the exception of two time periods, one in § 725.411(a)(1)(i) governing a claimant's response to an unfavorable initial finding and the other in § 725.419 governing responses to a district director's proposed decision and order, the proposed regulation would have allowed any time period to be extended for good cause shown provided a request for an extension was filed before the time period expired. 62 FR 3361 (Jan. 22, 1997). The Department did not discuss § 725.423 in its second notice of proposed rulemaking. *See* list of Proposed Changes in the Department's Second Proposal, 64 FR 54971 (Oct. 8, 1999).

(b) The Department has eliminated the reference in § 725.423 to the time period set forth in § 725.411(a)(1) because that time period has been eliminated from the regulations. *See* preamble to §§ 725.410–.413.

(c) One comment submitted in connection with the first notice of proposed rulemaking objects to a single regulation governing extensions of time. The commenter would prefer individual provisions in each affected regulation to add clarity to the proceedings. The Department disagrees. In terms of an efficient structure for the program regulations, a single provision with application to the entire Subpart E is more logical than a series of repetitive provisions added to each regulation containing a time frame for action.

(d) One comment submitted in connection with the first notice of proposed rulemaking urges explicit recognition that a request for an extension of time may be honored even if submitted after the time period for taking action has expired. This suggestion cannot be adopted. A ''well-settled'' principle of the black lung program requires the parties to ''strictly adhere to the substantive and procedural requirements of the Black Lung Benefits Act and its implementing regulations.'' *Jordan* v. *Director, OWCP,* 892 F.2d 482, 486 (6th Cir. 1989). Strict adherence to clearly delineated time frames for taking action promotes ''a just, efficient and final resolution'' of claims. 892 F.2d at 487. Any party, however, may ask for additional time to act. The Department believes a requirement that the extension be sought before the time for acting elapses is reasonable. *See generally Fetter* v. *Peabody Coal Co.,* 6 Black Lung Rep. 1–1173, 1–1175 (1984). Each party has notice of when some action must be taken during the adjudication process. Even if the party cannot complete the action itself, it may at least complete the request for additional time. Submitting a timely request for an extension is not an onerous burden.

(e) One comment recommends including proposed § 725.411(a)(1)(i) among the time periods which can be extended. As originally proposed, section 725.411(a)(1)(i) would have afforded a claimant who has been denied benefits one year from the district director's initial finding within which to request further adjudication. The revisions made by the Department to §§ 725.410–.413 have eliminated the time period in § 725.411(a)(1)(i). Accordingly, the comment is no longer relevant.

(f) One comment urges the Department to specify that a party cannot seek an extension of its right to file a request for modification under § 725.310 if that request is not filed before the expiration of the one-year

time period. By its terms, section 725.423 governs the extension of time periods in subpart E of part 725. It thus does not govern section 725.310, which is located in subpart C. The Department does not believe that a catchall provision for the entire part 725 is appropriate, and, in the absence of such a provision, believes that § 725.423 should not include a reference to any regulations outside of subpart E.

(g) One comment argues that the Department should not create a non-statutory jurisdictional bar by refusing to permit an extension of time in the case of a proposed decision and order. The commenter argues that the Department's regulation violates the rights of parties under the Administrative Procedure Act and the Black Lung Benefits Act to obtain a hearing. The Department disagrees. The time limit established by § 715.419 for responding to a proposed decision and order is necessary to create finality in those cases where no party contests the district director's initial adjudication of a claim. In the event that the Department issues a proposed decision and order awarding benefits and the designated responsible operator fails to respond in a timely manner, the Department must be able to enforce the award against the operator. Enforcement of an award under § 21(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(d), as incorporated by 30 U.S.C. 932(a), and the collection of benefits owed the Black Lung Disability Trust Fund under 30 U.S.C. 934, however, require that the decision and order awarding benefits be final. The time limit in the current version of § 725.419, 20 CFR 725.419 (1999), has been interpreted to be jurisdictional, *Freeman United Coal Mining Co* v. *Benefits Review Board*, 942 F.2d 415, 422 (7th Cir. 1991), and § 725.423 simply recognizes that interpretation. Contrary to the commenter's suggestion, assigning finality to a district director's proposed decision and order awarding benefits in the absence of a timely objection by the designated responsible operator violates no provision in the Administrative Procedure Act or the Black Lung Benefits Act. Nothing in either statute requires the Department to give effect to a party's late request for a hearing following the conclusion of the district director's administrative proceedings.

(h) No other comments were received concerning this section.

Subpart F

20 CFR 725.452

(a) The Department proposed adding subsection (d) in its first notice of proposed rulemaking to prohibit the deciding of a case without holding a hearing unless the administrative law judge believes an oral hearing is not necessary, notifies the parties that he intends to decide the case on the record, and the parties do not object. 62 FR 3361 (Jan. 22, 1997). 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) One comment objects to the Department's insistence on an in-person hearing. The commenter states that an administrative law judge should be entitled to decide whether a hearing is necessary in the event that the parties disagree. The regulation reflects the Department's consistent position that any party is entitled to a hearing before an administrative law judge in a case that is not appropriate for summary judgment. Section 19(c) of the Longshore and Harbor Workers' Compensation Act requires a hearing "upon application of any interested party." 33 U.S.C. 919(c), as incorporated by 30 U.S.C. 932(a). In its recent decision in *Robbins* v. *Cyprus Cumberland Coal Co.,* 146 F.3d 425, 430 (6th Cir. 1998), the Sixth Circuit recognized the existence of such a right in a modification proceeding. *See also Cunningham* v. *Island Creek Coal Co.,* 144 F.3d 388, 389–90 (6th Cir. 1998); *Pyro Mining Co.* v. *Slaton,* 879 F.2d 187, 190 (6th Cir. 1989). The *Robbins* court explained several reasons for requiring an in-person hearing:

> The mere fact that parties rarely bring a live expert is immaterial. [The claimant] should have had the opportunity to bring a live expert. Additionally, although the ALJ required any documentary evidence to be introduced in advance, the Director correctly points out that [the claimant] could request and receive permission at a hearing to introduce additional documentary evidence.

146 F.3d at 429. The in-person hearing also allows the parties to offer lay testimony on such issues as the miner's employment and medical history. Finally, the Department believes that guaranteeing the ability of all parties to appear before a highly qualified administrative law judge increases the parties' confidence in the fairness and impartiality of the adjudication process. Contrary to the commenter's suggestion, the Department does not insist that an in-person hearing must be held in every case. The parties remain free to move for summary judgment under subsection (c) in those rare cases where there is no genuine dispute as to a material issue of fact. In all other cases, however, the Department's revised regulation gives each party to a claim the right to insist on an in-person hearing. Permitting the cancellation of a hearing over the objection of even one of the parties, in a case involving disputed facts, would contravene the explicit command of 33 U.S.C. 919, as incorporated by 30 U.S.C. 932(a). No other comments were received concerning this section, and no changes have been made in it.

20 CFR 725.453

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. 54970–71 (Oct. 8, 1999). The regulation was repromulgated only for the convenience of readers. Accordingly, no changes are being made in this section.

20 CFR 725.454

(a) In its first notice of proposed rulemaking, the Department proposed eliminating the provision allowing administrative law judges to reopen the record for the receipt of additional evidence for "good cause." 62 FR 3361 (Jan. 22, 1997). The Department's proposal reflected the evidentiary limitations then imposed by § 725.414. 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) Several comments submitted in response to both the Department's 1997 proposal and its 1999 reproposal oppose removal from the current regulation of the administrative law judge's authority to reopen the record to receive additional evidence for good cause shown. The Department responded to those objections when it reproposed § 725.414(c), (d) and § 724.456(b) for additional comment. 64 FR 54994–95 (Oct. 8, 1999). At that time, the Department changed the proposed standard for the admission of documentary medical evidence in excess of the regulations' numerical limitations from one of "extraordinary circumstances" to "good cause," while leaving the standard for admission of additional evidence relating to operator liability—evidence that was not submitted to the district director—one of extraordinary circumstances. In any event, the standard to be used to govern the introduction of documentary evidence while a case is pending before the Office of Administrative Law Judges

more properly belongs in § 725.456, and it remains there. In that regulation, medical evidence in excess of the limitations contained in § 725.414 may be admitted into the record upon a showing of good cause. No change has been made in § 725.454 in response to these comments.

(c) One comment recommends clarifying subsection (a) to underscore the claimant's right to request a hearing site somewhere outside the 75-mile radius around his residence for the convenience of his representative. No change is made in response to this comment. Subsection (a) specifically provides that a claimant may request an alternate location, and does not limit the site to a specific area or distance from the claimant's residence. A claimant may therefore request the administrative law judge to move the hearing site beyond the 75-mile boundary. Claimants, however, cannot be accorded an unqualified right to determine where hearings should be convened. All matters relating to the conduct of the hearing are ultimately the responsibility of the administrative law judge. He or she must balance the interests and rights of all the parties against the convenience of a particular site for the claimant. Consideration must also be given to administrative convenience and the efficient allocation of human and financial resources in general. An administrative law judge generally schedules several claims for adjudication in one location.

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

20 CFR 725.456

(a) The Department proposed revising section 725.456 in its first notice of proposed rulemaking in order to reflect its original proposal in § 725.414 requiring parties to submit all of their documentary evidence to the district director. As originally proposed, section 725.456 would have prohibited the introduction of any additional evidence before the administrative law judge in the absence of extraordinary circumstances. 62 FR 3361–62 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department eliminated the requirement in § 725.414 that parties submit all of their documentary medical evidence to the district director in the absence of extraordinary circumstances, although it retained that requirement with respect to documentary evidence relevant to the issue of operator liability. Instead, the Department proposed allowing admission of documentary medical evidence in excess of the § 725.414 numerical limitations upon a showing of good cause. Accordingly, in its second proposal, the Department revised section 725.456, adding subsections from 20 CFR 725.456 (1999) to govern the submission of documentary medical evidence to the administrative law judge. 20 CFR 725.456(b)(1)–(3), (c), (d) (1999). The Department also revised subsection (f), now subsection (e), to reflect changes to § 725.406. 64 FR 54996 (Oct. 8, 1999).

(b) A number of comments object to the Department's addition of proposed subsection (c) to § 725.456, which prohibits parties from introducing documentary evidence at the formal hearing that was in their possession while the case was pending before the district director and was withheld from the district director or any other party. Several of the comments argue under a parallel provision, proposed § 725.414(e), that the provision will most severely affect claimants who are not represented by counsel while the case is pending before the district director, and who may unwittingly fail to provide the district director with evidence that they have developed. Another comment urges the Department to harmonize subsection (c) with section 725.414(e).

Subsection (c) was originally promulgated by the Department in 1978, and was designed to ensure that the district director's initial determination of the claimant's eligibility was based on all of the available evidence regarding the miner's medical condition. The subsection was also designed to ensure that the parties had adequate time to respond to an opponent's evidence. *See* 43 FR 36794, 36798 (Aug. 18, 1978). The revised regulations, however, will significantly alter the adjudication of black lung benefits cases. In particular, the district director will make his initial determination in reliance on a complete pulmonary evaluation performed by a highly qualified physician, and will already have all of the evidence relevant to the identification of the responsible coal mine operator. Moreover, as the commenters point out, an unrepresented claimant who obtains an opinion from his treating physician may inadvertently fail to submit it to the district director, and, under proposed subsection (c), would be prevented from submitting it thereafter to the administrative law judge. In addition, the 20-day requirement in subsection (b)(2) will ensure that parties have an adequate period in which to respond to the opposing party's evidence. Thus, the Department does not believe that subsection (c) remains necessary. Neither of the stated bases for the original adoption of the rule remain. Accordingly, proposed subsection (c) is deleted, and proposed subsections (d), (e), and (f) are redesignated as subsections (c), (d), and (e), respectively. The Department has made a corresponding deletion of proposed section 725.414(e). Since both subsections are now deleted, there is no need to harmonize them.

(c) One comment argues that the Department's revision imposes increased costs on coal mine operators by ''front-loading'' the evidentiary development process in claims where such development is unnecessary or could be delayed. This comment appears to be based on the mistaken belief that the Department's regulations continue to require the parties to submit all of their documentary medical evidence to the district director. The Department revised its proposal in 1999, and § 725.456, as reproposed, will allow both the claimant and the designated responsible operator in a claim to delay their development of documentary medical evidence until shortly before the formal hearing. In the event that a claim does not proceed beyond the district director level, the operator will not have to develop any medical evidence. This is the operators' current practice in many claims.

The Department acknowledges, however, that operators will still be required to submit evidence regarding their potential liability for the claim to the district director while the claim is being adjudicated at this earliest stage. Under the former regulations, an operator did not have to submit any evidence to support its denial of liability until the case was referred to the Office of Administrative Law Judges for a formal hearing. In a number of cases, where no party requested a hearing, the operator did not need to develop or submit this evidence at all. Thus, the commenter's observation that the revised regulations will require the ''up-front'' development of evidence is well-taken with respect to operator liability evidence. In both its initial notice of proposed rulemaking and its second notice of proposed rulemaking, however, the Department explained its intention to require potentially liable operators to submit evidence relevant to their employment of the miner and their financial capability to pay benefits at the earliest possible stage. 62 FR 3355–56 (Jan. 22, 1997); 64 FR 54990–91 (Oct. 8, 1999). In these final regulations, the Department has also required operator development and submission of any evidence relevant to the liability of another party during the district director's claims processing. Evidentiary

development as to other parties will be necessary, however, only in that small percentage of claims in which the identity of the responsible operator is in serious question. *See* § 725.414(b). The Department continues to believe that these requirements are justified by the Department's need to ascertain the positions of potentially liable operators on these issues while the case is pending before the district director, especially given the fact that potentially liable operators other than the designated responsible operator will no longer be parties once a case has been referred to the Office of Administrative Law Judges. In addition, the Department continues to believe that the increased costs that operators will have to bear as a result of this ''front-loading'' will not be significant.

(d) One comment submitted in response to the 1997 proposal and the 1999 reproposal states that the Department's revision eliminates the authority of administrative law judges to perform certain functions. Another comment argues that the revision marginalizes administrative law judges and demeans their powers and duties. Although neither comment offers specific examples of functions, powers, and duties that the Department has eliminated by revising section 725.456, the Department has independently reviewed the provision and does not believe that it eliminates any function currently performed by the administrative law judge, nor any power or duty that administrative law judges currently possess. Under the revised regulations, administrative law judges will retain full authority to decide any issue in respect of a claim, as required by section 19(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 919(a), as incorporated by 30 U.S.C. 932(a). Neither the Longshore Act nor the Administrative Procedure Act gives administrative law judges the right to demand that more evidence be made available for their decision-making. To the extent that they are unpersuaded by the evidence of record, the administrative law judge must decide that issue against the party that bears the burden of producing the evidence on that issue.

(e) One comment argues that the revised regulation denies the rights of all parties to fully cross-examine adverse evidence and witnesses. The Department does not agree that section 725.456 affects the rights of any party to cross-examine adverse evidence. In *Richardson* v. *Perales,* 402 U.S. 388, 409 (1971), the Supreme Court emphasized the importance of preserving the parties' ability to cross-examine the authors of written medical reports, the evidentiary basis of Social Security's disability determinations. Similarly, the Department's regulations provide all parties with a full and fair opportunity to conduct cross-examination. If the author of a report testifies at the hearing, the opposing party may clearly avail itself of the opportunity to conduct live cross-examination. In cases where the documentary medical evidence stands on its own, the opposing party may question the author of the report under conditions determined by the administrative law judge. *See* § 725.459. Finally, the administrative law judge has the authority, in appropriate cases, to issue a subpoena to compel the attendance of a witness at the hearing. In addition, in any case involving documentary medical evidence, the opposing party has the right, under section 725.414, to submit documentary rebuttal evidence of its own. Accordingly, the Department does not agree that its revisions to 725.456 in any way limit the right of parties to conduct an effective cross-examination.

(f) One comment argues that a party should not be required to make an independent showing of ''good cause'' in order to put on its case. The Department does not agree that § 725.456 prohibits a party from putting on its affirmative case. In combination with § 725.414, this provision places reasonable limitations on the number of medical reports and tests that a party may submit into evidence. A showing of ''good cause'' is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. The Department believes that in the majority of cases, the quantity of medical evidence permitted by the regulations, even in the absence of a good cause showing, will provide a more than adequate evidentiary basis for an administrative law judge to determine the claimant's eligibility for benefits.

(g) Three comments approve of the Department's reinstatement of the 20-day rule governing the introduction of documentary evidence before the administrative law judge.

(h) One comment argues that § 725.457(d) is invalid in that it prohibits a physician from testifying as to medical evidence relevant to the miner's condition that is not contained in the record. This comment is more appropriately addressed under section 725.457.

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

20 CFR 725.457

(a) In its initial notice of proposed rulemaking, the Department proposed revising subsection (c) to conform the regulation to the requirement then in § 725.414 that a party identify all of its potential witnesses while the claim was pending before the district director. The Department also proposed adding a subsection (d) to address the permissible scope of a medical witness's testimony. 62 FR 3362 (Jan. 22, 1997). In light of changes to § 725.414 in the second notice of proposed rulemaking, the Department proposed altering the witness identification requirement so that it applied only to witnesses who were testifying to the liability of a potentially liable operator or the designation of the responsible operator. Thus, under the reproposal, the testimony of witnesses relevant to the liability of a potentially liable operator and/or the identification of the responsible operator was permissible only if the identity of that witness was disclosed to the district director.

In the second proposal, the Department eliminated the requirement that parties identify their medical witnesses while the case was pending before the district director because, as revised, the regulations allowed parties to forego development of medical evidence until a case was referred to the Office of Administrative Law Judges. In the reproposal, the testimony of medical witnesses was limited by only two considerations. First, the total number of medical reports and medical witnesses offered by a party could not exceed the limitations set forth in § 725.414 except upon a showing of good cause. Second, a party had to provide the other parties to a claim with appropriate notice of a witness' testimony: 10 days notice of any expert witness who would testify at the hearing, or 30 days notice of a deposition. The Department also revised subsection (d) to permit physicians to testify with respect to any medical evidence relevant to the miner's physical condition that was admitted into evidence. 64 FR 54996 (Oct. 8, 1999). The Department has added a clause to subsection (a) to clarify its intent that parties provide 10 days notice of any medical witness that they intend to present at the hearing, including witnesses who have prepared a medical report that has already been submitted into evidence.

(b) One comment argues that it is unreasonable to require a party to

identify a testifying witness while the claim is pending before the district director and that the requirement illegally diminishes the authority of the administrative law judge who conducts the hearing. The Department disagrees. This limitation is a reasonable extension of the requirement, set forth in Subpart E, that parties develop all of the evidence relevant to the liability of potentially liable operators while the case is pending before the district director. In both notices of proposed rulemaking, the Department explained that requiring the submission of evidence relevant to liability was intended to offset the risk that the Black Lung Disability Trust Fund would be required to assume liability in the event that none of the potentially liable operators named by the district director was ultimately determined to be the responsible operator. *See* 62 Fed. Reg. 3355–56 (Jan. 22, 1997); 64 Fed. Reg. 54993 (Oct. 8, 1999). A party should not be able to avoid the required evidentiary development before the district director by submitting its evidence to the administrative law judge in the form of witness testimony. Accordingly, the regulations require that parties identify all such witnesses while the case is pending before the district director. The regulations also recognize, however, that a party may submit additional documentary evidence on the liability issue at the hearing upon a showing of extraordinary circumstances, § 725.456(b)(1), and the regulations should provide the same standard for allowing witnesses' testimony. For example, the Department intends that a party will have shown extraordinary circumstances to present the testimony of a previously unidentified witness whose testimony is relevant to the issue of operator liability when the witness originally identified by the party is no longer available to testify. Accordingly, the Department has revised subsection (c)(1) to reflect this exception. The Department has also revised subsection (c)(1) to reflect its decision to permit the district director to refer the case to the Office of Administrative Law Judges with only one potentially liable operator, the designated responsible operator, as a party to the claim. The Department has also added a clause to subsection (c)(2) to clarify its intent that the combination of physician testimony and documentary medical reports may exceed the numerical limitations of § 725.414 only upon a showing of good cause. The Department has also deleted the last clause of this subsection; the introductory sentence of subsection (c) is sufficient to make clear the Department's intent that the limitations in the subsection are intended to govern testimony at a hearing as well as by deposition or interrogatories.

The Department does not agree, however, that revised § 725.457 diminishes the authority of administrative law judges. Under the procedures incorporated into the Black Lung Benefits Act from the Longshore and Harbor Workers' Compensation Act and the Administrative Procedure Act, administrative law judges are neutral arbiters of the issues presented to them for resolution. Based on the evidence submitted by the parties within the confines of the regulations promulgated by the Secretary, ALJs have ''full power and authority to hear and determine all questions in respect of such claim.'' 33 U.S.C. 919(a), as incorporated by 30 U.S.C. 932(a). The requirement that parties identify witnesses relevant to the issues of operator liability while a case is pending before the district director, and the limitation on expert testimony, are legitimate agency procedural rules designed to ensure the timely presentation of the evidence needed to adjudicate black lung benefits claims.

(c) Two comments state that the notice provision in subsection (a) should be harmonized with section 725.414(c). The Department does not believe that these provisions are in conflict. Subsection 725.414(c) requires the designated responsible operator to identify witnesses whose testimony may be introduced, either at the hearing or by deposition, on the issues relevant to operator liability while the claim is pending before the district director in the absence of extraordinary circumstances. The Department anticipates that the vast majority of these witnesses will be ''fact witnesses,'' *i.e.,* witnesses whose testimony will establish certain facts pertaining to the miner's employment. For example, an operator may present testimony to establish that the claimant did not work as a miner while working for the operator, or that the claimant was not exposed to coal mine dust. Because these witnesses are not ''expert witnesses,'' the 10-day notice requirement of section 725.457(a) is inapplicable. In cases where the witness who will appear at the hearing is an expert witness, such as a witness who will testify to the coal industry's use of certain terms in a coal mine lease, the party offering that witness's testimony must also provide 10 days notice to all other parties to the claim. That time allows the other parties sufficient time to prepare to cross-examine the expert witness at the hearing. If the witness testifies by deposition, the 30-day notice required by § 725.458 provides sufficient time for preparation.

(d) One comment argues that the Department's limitation on the testimony of physicians found in § 725.457(d) is more restrictive than that in the Federal Rules of Evidence and inconsistent with section 23 of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 923, as incorporated by 30 U.S.C. 932(a). The Department's regulation prohibits a physician who offers testimony from relying on materials relevant to the miner's medical condition that are not part of the record. The commenter contrasts the regulation with the Seventh Circuit's recent decision in *Peabody Coal Co.* v. *Director, OWCP,* 165 F.3d 1126 (7th Cir. 1999). In *Peabody Coal,* the Seventh Circuit reversed an award of benefits because the administrative law judge had discredited a medical opinion that was based on an autopsy review not admitted into the record. The court held that under Rule 703 of the Federal Rules of Evidence, an expert witness may base his opinion on materials that ''need not be admissible, let alone admitted, in evidence, provided that they are the sort of thing on which a responsible expert draws in formulating a professional opinion.'' 165 F.3d at 1128. The court further noted that it could not think of any reason why black lung adjudications should be subject to tighter restrictions on expert testimony, and added that ''[n]either Congress nor the Department of Labor thinks so. Nothing in the statute or regulations applicable to such cases supports the decision of the administrative law judge to impose tighter limits on expert witnesses in black lung cases than the Federal Rules of Evidence impose in ordinary civil and criminal trials.'' 165 F.3d at 1129.

The regulations under which *Peabody Coal* was adjudicated, however, did not contain any limitations on the quantity of medical evidence that a party was entitled to submit to the administrative law judge. Because the Department has now limited the amount of documentary medical evidence in the record, it cannot allow parties to avoid that limitation by presenting an expert witness who will be free to examine additional material that may not be admitted into the record. For example, if the party has already submitted a medical report prepared by one physician, and a consultative report prepared by a second physician, it is not entitled to submit the consultative report of a third physician in the absence of good cause. The regulation ensures that the party is not allowed to

avoid that limitation simply by having the second physician testify, not only about his own conclusions, but also about the conclusions reached by a third doctor. The Department believes that the limitation contained in subsection (d) is an appropriate means of ensuring the parties' adherence to the evidentiary limitations imposed by section 725.414. Like section 725.414, the revised version of section 725.457 will apply only to claims filed after the effective date of these regulations.

Contrary to the commenter's objection, then, the Department's revision does not ''violate'' the Seventh Circuit's decision in *Peabody Coal.* The court did not base its decision on an interpretation of unambiguous statutory language, but by using the Federal Rules of Evidence in a case in which the statute and regulations were silent. 165 F.3d at 1129. By promulgating a regulation that will produce a result contrary to the court's decision in the same circumstances, the Department has simply exercised its authority to fill in a gap identified by the court. ''The power of an administrative agency to administer a congressionally created * * * program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'' *Morton* v. *Ruiz,* 415 U.S. 199, 231 (1974).

Nor does section 725.457 violate section 23 of the Longshore Act. Section 23(a) provides that an administrative law judge ''shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter.'' 33 U.S.C. 923(a), as incorporated by 30 U.S.C. 932(a). Even if this provision could be read as prohibiting the Department from promulgating any regulations under the Longshore Act that govern hearing procedures and the submission of evidence, the Black Lung Benefits Act explicitly authorizes the Secretary of Labor to promulgate regulations that vary incorporated Longshore Act provisions in order to properly administer the black lung benefits program. 30 U.S.C. 932(a); *Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1274 (4th Cir. 1977). As discussed above, the limitation on the scope of testimony by physicians set forth in § 725.457 is necessary in order to ensure that parties adhere to the limitations on the quantity of medical evidence permitted each side in the adjudication of a claim for black lung benefits. Accordingly, the Department does not agree that the limitation violates section 23 of the Longshore Act.

(e) One comment approves of the Department's revision of the regulation with respect to the testimony of medical witnesses.

(f) No other comments were received concerning this section.

20 CFR 725.458

(a) In its first notice of proposed rulemaking, the Department proposed revising this regulation to ensure that the limitation on the scope of a physician's testimony set forth in § 725.457 was also applicable to testimony offered by deposition and to responses to interrogatories. 62 FR 3362 (Jan. 22, 1997). 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). The Department did revise § 725.457(d), however, in order to allow a physician who testifies at a hearing to address all of the medical evidence of record. By incorporating § 725.457(d), § 725.458 also incorporated this expansion of the permissible scope of a physician's testimony.

(b) The Department received several comments concerning the cross-reference to § 725.457(d). The reference to § 725.457(d) incorporates into the rule governing depositions and interrogatories the limitations on the scope of physician-witnesses' testimony at hearing. For the reasons expressed in connection with the reproposal of § 725.457, the scope of allowable physician testimony has been broadened to allow a physician to address all of the other medical evidence of record. 64 FR 54996 (Oct. 8, 1999). No response is therefore necessary to comments addressing the operation of § 725.458, with one exception. One commenter suggests that § 725.458 will permit a party to introduce the deposition testimony of physicians who have not previously submitted medical reports, thereby circumventing the evidentiary limitations imposed by § 725.414. In the second notice of proposed rulemaking, the regulation governing witness' testimony generally, § 725.457, was amended to make the Department's intent clear. 64 FR 55044 (Oct. 8, 1999). Subsection (c) specifically prohibits a witness' testimony, even if taken by deposition or interrogatory, unless the witness meets the requirements of § 725.414. Thus, in the absence of a finding of good cause pursuant to § 725.456(b)(1), if a party has submitted the maximum number of documentary medical reports permitted under § 725.414, it may not submit the testimony of a physician-witness at a hearing or by deposition or interrogatory who has not submitted a written medical report. A physician who has not submitted a written report may testify only if the party has not yet reached the maximum number of documentary medical reports allowed. In such a case, the physician's testimony would not exceed the § 725.414 limitations.

(c) One comment urged the Department to replace the 30-day notice requirement in the regulation with a requirement that the parties need only give ''reasonable notice'' of the date, time and place of the deposition, and the name and address of each person to be examined, the current requirement under Fed. R. Civ. P. 30(b)(1). The Department has no reason to believe that the 30-day notice requirement has proved to be unworkable or even has resulted in major inconvenience to the parties in black lung benefits adjudications. Parties remain free under the regulation to agree to less than 30 days' notice when they believe it is reasonable to do so. Many parties to black lung claims do not secure representation until shortly before the hearing, however, and the Department believes that the 30-day notice of deposition, if sent to an unrepresented party, provides an appropriate period of time not only to obtain the necessary representation but also to arrange for participation in a deposition.

(d) One comment submitted in connection with the Department's first notice of proposed rulemaking urges the Department to require parties to identify, while the case is pending before the district director, all physicians that will be deposed. The commenter argues that this requirement would expedite the claims process, eliminate surprise, and require the timely development of positions. In its second notice of proposed rulemaking, the Department eliminated the proposal, contained in the first notice of proposed rulemaking, that parties submit all of their documentary medical evidence while a case is pending before the district director. The Department explained that the revision reflected the wishes of numerous commenters, and was particularly necessary in the case of claimants who might be unable to obtain representation until shortly before the hearing. 64 FR 54992–93 (Oct. 8, 1999). In light of this revision, the Department does not believe that it would be appropriate to require parties to identify all medical witnesses while a case is pending before the district director. This requirement would effectively reinstate the original proposal by requiring parties to

undertake the development of their case as to medical eligibility at the earliest stage of adjudication. The Department believes that this suggestion would adversely affect unrepresented claimants. Section 725.458 provides that all parties must give 30 days notice of any deposition, and section 725.457(a) provides that parties must give 10 days notice of expert witnesses who will testify at the hearing. The commenter has not suggested that these time periods, which were contained in the program's former regulations, have proved to be insufficient.

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

20 CFR 725.459

(a) The Department proposed revising section 725.459 in its first notice of proposed rulemaking in order to require any party who compels a witness to appear at a deposition or hearing or respond to interrogatories for the purpose of cross-examination to pay that witness's costs. The Department also restructured and consolidated the remainder of the regulation. 62 FR 3362 (Jan. 22, 1997). The Department reconsidered how such costs should be assigned in its second notice of proposed rulemaking, and proposed that the party offering the witness's affirmative testimony should also pay any costs associated with his subsequent cross-examination. The sole exception to this rule pertained to indigent claimants and required administrative law judges to apportion the costs of cross-examining a witness offered by such a claimant between the claimant and the party or parties defending the claim. 64 FR 54997 (Oct. 8, 1999). The second proposal also required an administrative law judge to determine the least intrusive and expensive means of cross-examination as appropriate and necessary for a full and true disclosure of the facts. 64 FR 55044 (Oct. 8, 1999).

(b) The Department has substituted the term ''shall'' for the term ''may'' in the fourth and fifth sentences of subsection (b) in order to clarify its intention that the administrative law judge is required, rather than merely permitted, to consider the apportionment of the costs of cross-examination in each case involving a witness offered by an indigent claimant.

(c) Two comments approve of the Department's revision of section 725.459 to impose the costs of producing a witness for cross-examination upon the party relying on the witness's opinion, as well as the provision allowing administrative law judges to apportion costs in cases involving indigent claimants.

(d) One comment argues that the Department's proposal violates section 28 of the Longshore and Harbor Workers' Compensation Act by attempting to shift costs to employers in cases other than those authorized by statute. Section 28(d), 33 U.S.C. 928(d), incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a), requires an employer to pay the costs, fees, and mileage for necessary witnesses attending the hearing at the request of a claimant in any case in which an attorney's fee is awarded against the employer. Section 28(d) also requires that the necessity for the witness and the reasonableness of an expert witness fee be approved by an administrative law judge, Benefits Review Board, or court. Section 28(a) limits an employer's liability for attorneys' fees to cases in which the claimant successfully prosecutes his claim for benefits after the employer or carrier contests the claimant's entitlement. Accordingly, the commenter argues, the Department cannot shift the cost of cross-examination to employers in cases where the claimant is unsuccessful.

The Department does not agree. The Black Lung Benefits Act incorporates a variety of Longshore Act provisions governing the payment of costs and fees to witnesses. As with all such provisions, the Act explicitly authorizes the Department to vary the terms of those incorporated provisions in order to properly administer the black lung benefits program and effectuate Congress's intent in providing black lung benefits. *See* 30 U.S.C. 932(a) (permitting the Secretary to ''otherwise provide[] * * * by regulations * * *''); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977). In addition to section 28 of the Longshore Act, incorporated section 7 of the Longshore Act also governs the payment of costs by an operator. Section 7(e) provides the Secretary with the power to order an examination of an employee ''[i]n the event that medical questions are raised in any case,'' and to authorize an additional review or reexamination upon the request of any party. 33 U.S.C. 907(e), as incorporated by 30 U.S.C. 932(a). This statutory section further provides that the Secretary may ''charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases * * *.'' Thus, by its explicit terms, the cost-shifting mechanism of section 7(e) is not dependent on the miner's successful prosecution of his claim. Rather, Congress, in incorporating section 7(e) into the Black Lung Benefits Act, demonstrated its concern that miners not have to bear all the costs incurred in determining their entitlement to benefits, even in the event that they are ultimately unsuccessful.

In drafting a regulation governing the payment of witnesses' fees and costs, the Department was cognizant of its obligation to provide all parties with the right to conduct appropriate cross-examination of the witnesses offered by opposing parties. In *Richardson* v. *Perales*, 402 U.S. 388, 409 (1971), the Supreme Court recognized that the ability to cross-examine the preparer of an *ex parte* medical report served as an important guarantee of the reliability of such a report. Because the overwhelming majority of medical issues in the adjudication of a black lung benefits claim are decided on the basis of *ex parte* medical reports, rather than on testimony offered at the hearing, the Department must ensure that parties are permitted access to their opposing party's witnesses for the purpose of cross-examination.

At the same time, however, the Department must ensure that parties are not able to prevent an opposing party from offering a particular witness' opinion simply by scheduling a deposition of that witness. This is a particular problem where the claimant is indigent. Such a claimant must initially pay a physician to provide him with a medical opinion. If the operator exercises its right to cross-examine that physician, the claimant may not be able to afford the additional fees and costs necessary to pay the physician for the time he spends answering interrogatories or attending a deposition. Absent a mechanism permitting the apportionment of such costs, the claimant may be faced with the administrative law judge's refusal to consider his doctor's opinion because the doctor was not made available for cross-examination. The Department does not believe that Congress intended this result, and does not believe that a party's right to cross-examination should be used to exclude evidence offered by an opposing party that cannot afford the costs of expert testimony.

In those few cases in which there might be tension, section 725.459 strikes an appropriate balance between the twin goals of guaranteeing the right of cross-examination and ensuring a full and fair adjudication of an indigent claimant's eligibility for benefits. Consistent with incorporated Longshore Act provisions, as varied in order to

accommodate the needs of the black lung benefits program, and based on the Department's inherent to authority fill the statutory gaps left by Congress in the Black Lung Benefits Act, the revised regulation governing witness' fees represents a sensible cost-spreading measure in those relatively few cases in which a claimant is indigent.

(e) One comment suggests that the Department's witness fee regulation violates Supreme Court precedent. Although the commenter does not cite any specific decision, the Court's seminal decisions on cost-shifting, *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), and *West Virginia University Hospitals* v. *Casey*, 499 U.S. 83 (1991), do not prevent the Department from shifting the costs of cross-examination to employers in special circumstances. In *Crawford Fitting*, the Court discussed sections 1920 and 1821 of Title 28 of the United States Code, which authorize shifting witness fees of up to $40 per day. The Court ''held that these provisions define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further.'' *Casey*, 499 U.S. at 86, explaining the decision in *Crawford Fitting*. As discussed above, the Department believes that the Black Lung Benefits Act, by incorporating various provisions of the Longshore Act and authorizing the Secretary to vary those provisions in order to administer the black lung program, provides ample statutory authority for the Department's cost-shifting regulation. The existence of that authority compels the conclusion that the revised regulation does not violate the Court's decisions in *Crawford Fitting* and *Casey*.

(f) One comment argues that the Administrative Procedure Act does not provide the Department with the authority to limit a party's right to cross-examine an adverse witness. The Department discussed the extent to which the Black Lung Benefits Act incorporates the Administrative Procedure Act and the extent to which the Department may vary that incorporation by regulation in its second notice of proposed rulemaking. 64 FR 54972 (Oct. 8, 1999). In addition, the Administrative Procedure Act requires only that parties be allowed to ''conduct such cross-examination as may be required for a full and true disclosure of the facts.'' 5 U.S.C. 556(d). The Seventh Circuit has recently observed that, under the standard used by the Social Security Administration, a standard identical to the one in the Administrative Procedure Act, '' '[c]ross-examination is * * * not an absolute right in administrative cases.' '' *Butera* v. *Apfel*, 173 F.3d 1049, 1057 (7th Cir. 1999), quoting *Central Freight Lines, Inc.* v. *United States*, 669 F.2d 1063, 1068 (5th Cir. 1982). The Court thus upheld a decision by SSA not to grant a claimant's subpoena to compel the attendance at the hearing by two physicians who had examined the claimant. *See also Copeland* v. *Bowen*, 861 F.2d 536, 539 (9th Cir. 1988) (holding that a disability claimant is ''not entitled to unlimited cross-examination, but is entitled to such cross-examination as may be required for a full and true disclosure of the facts.''); *Yancey* v. *Apfel*, 145 F.3d 106, 113 (6th Cir. 1998) (no absolute right to subpoena reporting physician); *Flatford* v. *Chater*, 93 F.3d 1296, 1305 (6th Cir. 1996) (same). Subsection (b) of the revised regulation meets the APA standard by permitting the ALJ to determine the level of cross-examination that is required for a full and true disclosure of the facts.

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

20 CFR 725.465

(a) The Department made a technical change to section 725.465 in its first notice of proposed rulemaking, but did not open the rule for comment. 62 FR 3341 (Jan. 22, 1997). In its second notice of proposed rulemaking, the Department proposed revising subsection (b) to prohibit administrative law judges from dismissing potentially liable operators previously identified by the district director as parties to the case, except upon the motion or the written agreement of the Director. 64 FR 54997 (Oct. 8, 1999).

(b) One comment argues that the Department's proposed limitation on the ability of administrative law judges to dismiss potentially liable operators as parties to a case impermissibly usurps the authority of administrative law judges and violates the Administrative Procedure Act. The commenter states that the proposal violates the fundamental rights of coal mine operators and forces them to remain in a proceeding after they have been adjudicated not to be a proper party. Finally, the commenter states that the proposal violates section 424(a) of the Act, 30 U.S.C. § 934(a).

The Department does not agree that any party has a fundamental right to be dismissed from a black lung benefits adjudication prior to the final resolution of the issue of operator liability. The Department's final regulations, however, governing the treatment of claims in which more than one company has been named as a potentially liable operator have rendered these objections moot except in one instance. As finally revised, section 725.418 requires the district director to dismiss all but one operator as a party before referring the case to the Office of Administrative Law Judges. The Department has revised § 725.465 accordingly. If the district director erroneously fails to dismiss all operators except the one finally designated responsible pursuant to section 725.418(d), the ALJ may do so at any time. Subsection (b), however, continues to prohibit the ALJ from dismissing the responsible operator designated by the district director except upon the consent of the Director. The Department believes that this regulation remains necessary to prevent the premature dismissal of the designated operator by an administrative law judge. Currently, some administrative law judges resolve the responsible operator issue in a preliminary decision, and may dismiss the responsible operator(s) identified by the district director. In such cases, the Director, as the representative of the Black Lung Disability Trust Fund, must either file an interlocutory appeal with the Benefits Review Board, *cf. Collins* v. *J & L Steel,* 21 Black Lung Rep. (MB) 1–183, 1–1–186 (Ben. Rev. Bd. 1999), and ask that the adjudication of claimant's entitlement be held in abeyance pending the outcome of the appeal, or await the ALJ's resolution of the claimant's entitlement and then file an appeal. Both options are problematic. If the Director files an interlocutory appeal and the Board rejects the Director's arguments and affirms the dismissal, the Director may be unable to seek further review under the stricter standards that the federal appellate courts apply to interlocutory orders. *See, e.g., Redden* v. *Director, OWCP,* 825 F.2d 337, 338 (11th Cir. 1987), citing *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978). If the Director waits until after the claimant's eligibility is resolved to appeal the responsible operator issue to the Board, the Board may affirm the dismissal solely because the operator did not have an opportunity to participate in the adjudication of the merits of the claim. *Crabtree* v. *Bethlehem Steel Corp.,* 7 Black Lung Rep. (MB) 1–354 (Ben. Rev. Bd. 1984). Neither of these options represents an efficient means of resolving the issue of operator liability in the context of adjudicating a miner's eligibility for benefits.

The revised regulation is intended to eliminate these problems, and ensure that the designated responsible operator and the Director have the opportunity to fully litigate the liability issue at all

levels. Moreover, the regulation does not create any undue hardships. If, after considering all of the evidence relevant to the responsible operator issue, the ALJ finds that the designated responsible operator is not liable for the payment of benefits, but concludes that the claimant is entitled to benefits, the operator merely has to wait until the Director, on behalf of the Trust Fund, files an appeal with the BRB. The operator may then participate in that appeal in defense of the ALJ's liability determination if it wishes. If the Director does not petition for review of the ALJ's liability decision, the operator need not participate in any further adjudication of the case, regardless of whether it is formally included as a party.

Moreover, the revised regulation violates neither section 424 of the Black Lung Benefits Act, 30 U.S.C. 934, nor the Administrative Procedure Act. Section 424 requires coal mine operators who have been determined to be liable for the payment of benefits to a claimant to reimburse the Black Lung Disability Trust Fund for amounts the Trust Fund paid to that claimant on an interim basis. The statute requires, however, that the operator's liability have been ''finally determined'' before the reimbursement obligation may be enforced. 30 U.S.C. 934(b)(4)(B). Under the incorporated provisions of the Longshore and Harbor Workers' Compensation Act, that final determination includes not only an administrative law judge's decision, but also decisions by the Benefits Review Board and the court of appeals. Obviously, an appeal by an aggrieved party, including the Director, OWCP, on an operator liability issue cannot proceed in the absence of all the necessary parties. Thus, it is necessary that the designated responsible operator remain a party to a claim even while it is on appeal. Similarly, nothing in the Administrative Procedure Act gives administrative law judges the authority to issue final decisions on issues. Accordingly, the revised regulation does not violate any statutory provision. As revised, § 725.465 simply ensures that no responsible operator designated by the district director will be dismissed prior to a final determination of claimant eligibility and operator liability except with the approval of the Director.

Finally, the regulation does not preclude the designated responsible operator, in a case in which the district director committed an obvious error, from seeking the written agreement of the Director that it be dismissed as a party. The regulation, rather than giving the Director's representative veto power over an ALJ's decision, as the commenter asserts, simply protects the interests of the Trust Fund, and ensures that the Director, as a party to the litigation, receives a complete adjudication of his interests. The Board has upheld the similar requirement in subsection (d), which prohibits the dismissal of a claim in which the claimant has been paid interim benefits from the Trust Fund, absent the Director's consent. *Boggs* v. *Falcon Coal Co.,* 17 Black Lung Rep. (MB) 1–62, 1–66 (1992).

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

20 CFR 725.478

(a) The Department proposed revising this regulation in its initial notice of proposed rulemaking in order to recognize the opinions of three appellate courts and the Benefits Review Board that had rejected the Department's interpretation of the former regulation. The Department had argued that under the former regulation an administrative law judge's decision and order should be considered filed on the date that the ALJ mailed it to the parties. The proposal adopted the view that the date of actual receipt of an administrative law judge's decision and order by the Division of Coal Mine Workers' Compensation (DCMWC) constitutes its filing date and renders the decision effective. Thus, the date of DCMWC's receipt triggers the running of the 30-day period for challenging an administrative law judge's decision. The proposal conformed the regulation to existing caselaw. 62 FR 3362–63 (Jan. 22, 1997). The Department also proposed moving the last two sentences of the former regulation to a more appropriate location in § 725.502. 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) One comment stated that the revised regulation would extend the appeal time by several days, presumably because of the time used to send the file from the Office of Administrative Law Judges to DCMWC. The courts, however, rejected the Director's interpretation of the former regulation because it impermissibly shortened the 30-day statutory appeal time. *Trent Coal Co.* v. *Day,* 739 F.2d 116, 118 (1984); *Daugherty* v. *Director, OWCP,* 897 F.2d 740, 742 (1990). Following the reasoning of these decisions, the revision does not lengthen the appeal time, but simply recognizes the appeal time guaranteed by the statute.

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

20 CFR 725.479

(a) In its first notice of proposed rulemaking, the Department proposed adding subsection (d) to provide that the 30-day period to appeal an administrative law judge's decision and order will commence upon a party's receipt of that document even though it was not served by certified mail or there was some other defect in service. 62 FR 3363 (Jan. 22, 1997). 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) Several comments suggest that subsection (d) is unnecessary because strict adherence to the requirement in § 725.478 for service of an administrative law judge's decision by certified mail would eliminate any question as to the date of receipt of that decision. Subsection (d) does not supplant the requirement for serving decisions by certified mail. It simply establishes that actual receipt of a decision overcomes any technical defect in service for purposes of triggering appeal and reconsideration rights. These defects are not limited to cases where service is not made by certified mail. For example, a decision may be mailed to the wrong address but the party to whom it should have been sent later learns of the decision and obtains a copy. The revised regulation would begin the 30-day appeal period upon that party's receipt. The provision thus provides an element of finality to decisions while protecting the parties' rights to pursue litigation in a timely manner.

(c) One comment objects to subsection (d) as too technical and subject to violation by unwary litigants. The Department disagrees with this characterization. Subsection (d) eliminates any doubt that a party must exercise its options for challenging a decision in a timely manner once the party has received the decision and despite any defect in service. This provision therefore protects the litigants' rights and interests by dispelling any confusion as to the effectiveness of any decision which reaches the parties despite technical nonconformance with the service process.

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

Subpart G

20 CFR 725.490

In its first notice of proposed rulemaking, the Department proposed the reorganization and renaming of the rules governing the identification of responsible coal mine operators. Section 725.490 retained its title and much of its language. The Department proposed deleting the last clause of the last sentence of subsection (b), however, in order to reflect a move to part 726 of the regulations governing the obligations of coal mine operators to secure the payment of benefits. 62 FR 3363–65 (Jan. 22, 1997). No comments were received concerning this section, and no changes have been made in it.

20 CFR 725.491

(a) The Department proposed revising section 725.491 in order to clarify the meaning of the statutory term ''operator.'' 62 FR 3363 (Jan. 22, 1997). Section 725.491 retains some material from the Secretary's current regulations, such as the rebuttable presumption of exposure to dust currently found in 20 CFR 725.492(c). Much of section 725.491's language is new, however. In particular, the Department sought to ensure that terms critical to the identification of a company potentially liable for the payment of benefits under the Black Lung Benefits Act, such as ''owner'' and ''independent contractor,'' were defined broadly in keeping with Congress' intent that the coal mining industry bear liability for individual claims to the maximum extent feasible. The Department's goal in proposing these revisions was to insure that any company, partnership, or individual that employed a ''miner'' could be held liable under the Act. The regulation also implements the Department's view that the officers of an uninsured corporate coal mine operator should not be considered coal mine operators in their own right. The Benefits Review Board has recently accepted that view with respect to the Department's current regulations. *Lester* v. *Mack Coal Co.,* 21 Black Lung Rep. (MB) 1–126, 1–130–131 (Ben. Rev. Bd. 1999).

In its second notice of proposed rulemaking, the Department revised subsection (a)(2)(i) in response to one comment to ensure the consistent use of the term ''coal mine dust'' rather than ''coal dust.'' 64 FR 54998 (Oct. 8, 1999). In addition, the Department responded to comments about its definition of independent contractors in subsection (c) and its exclusion of the federal government and state governments as operators in subsection (f). 64 FR 54997–98 (Oct. 8, 1999).

(b) One comment suggests that retroactive application of the Department's revised responsible operator regulations is impermissible. Although these new regulations will apply only to claims filed after the date on which the revisions become effective, *see* § 725.2, the commenter argues that the Department is expanding the scope of the term ''operator,'' and that with respect to refiled claims, the newly amended definition will be applied retroactively. In this regard, the commenter argues that the Department's reliance on the jurisdiction of the Mine Safety and Health Administration to regulate under the Black Lung Benefits Act is inappropriate. We understand the commenter's argument to be that the Department should not have relied on cases decided under the Federal Mine Safety and Health Act (FMSHA) in promulgating its definition of the term ''operator.'' The Department cited such cases in both notices of proposed rulemaking. 62 FR 3364 (Jan. 22, 1997); 64 FR 54997–98 (Oct. 8, 1999). The commenter suggests that the MSHA's jurisdiction is based on an agreement with the Occupational Safety and Health Administration (OSHA) to ensure that all American workplaces are subject to inspection by one of the two agencies, and that the Department's adoption of FMSHA criteria represents an expansion of coverage under the Black Lung Benefits Act.

The Department disagrees with the premise of the argument. The Black Lung Benefits Act, which is subchapter IV of the Federal Mine Safety and Health Act, has incorporated the definition of the term ''operator'' found in section 3(d) of the FMSHA, 30 U.S.C. 802(d), since its enactment in 1969. The Secretary's regulations do not attempt to expand that definition, either by imposing liability on companies that are not currently liable for benefits, or by increasing the number of employees for which a coal mine operator may be held liable. The Black Lung Benefits Act and the Secretary's implementing regulations have consistently contained expansive definitions of terms such as ''operator'' and ''independent contractor,'' *see, e.g.,* 20 CFR 725.491(b)(1)(company need not directly supervise work in order to be considered an operator). In addition, regardless of any agreement between MSHA and OSHA, the definitions set forth in the FMSHA create an outer limit for MSHA's jurisdiction; MSHA simply cannot exercise authority over employers and activities not covered by the FMSHA. These definitional provisions also govern the extent of coverage under the Black Lung Benefits Act. Accordingly, the regulations implementing the Black Lung Benefits Act must recognize and account for the extent of coverage provided by the FMSHA.

(c) One comment argues that even if certain individuals, such as food service workers, may be considered ''miners'' under the BLBA, the Department should not require the employers of such individuals to bear liability for the payment of any benefits to which they become entitled. The commenter suggests that the Department's regulation would require a number of companies with only a tenuous relationship to the mining of coal to purchase insurance in order to cover the risk that they will be liable for the payment of benefits. Adopting the commenter's suggestion that these companies should be exempt from liability, however, would require imposing potential liability for their employees' claims on the Black Lung Disability Trust Fund. In its initial proposal, the Department took note of Congress' intent that the coal mining industry, rather than the Black Lung Disability Trust Fund, bear liability for the payment of individual claims to the maximum extent feasible. *See* 62 FR 3363 (Jan. 22, 1997). Accordingly, if individuals whose work is integral to the extraction or preparation of coal but who may not be considered traditional coal miners are determined to be entitled to benefits under the Act as a result of occupational exposure to coal mine dust, their employers must bear responsibility for the payment of those benefits. For example, individuals who transport coal during the extraction or preparation process, *Norfolk & Western Railway Co.* v. *Roberson,* 918 F.2d 1144, 1149–50 (4th Cir. 1990), *cert. denied,* 500 U.S. 916, and who deliver supplies essential to the extraction or preparation of coal, *Pinkham* v. *Director, OWCP,* 7 Black Lung Rep. (MB) 1–55, 1–57 (Ben. Rev. Bd. 1984), have been determined to be ''miners'' under the Black Lung Benefits Act. The regulatory definition of the term ''operator'' must be broad enough to ensure that the employer of such an individual bears direct liability for any benefits to which the miner is entitled.

(d) One comment objects to the Department's exclusion in subsection (f) of state and federal governments from the term ''operator.'' With respect to state governments, the commenter argues that there is no indication that Congress intended to exempt the states from the Act's broad coverage of coal mine operators. As the Department has previously explained, however, the test

under relevant Supreme Court decisions is not whether Congress indicated its intention to exempt the states from coverage, but whether Congress indicated a clear intention to include the states. *See* 64 FR 54998 (Oct. 8, 1999), discussing *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991). The commenter does not allege that the BLBA meets this test with respect to state governments, noting only that the language of the Act could easily be construed to cover state employees. Although the commenter also objects to the exemption from liability under the Black Lung Benefits Act of the federal government, it argues that federal mine inspectors, the only federal employees who could be potentially covered by the BLBA, should not be considered ''miners.'' The Department agrees, and has taken the same position in litigation.

The commenter's true complaint appears to be that the liability for benefits payable to a claimant who was a miner before he became a coal mine inspector will fall on the operator that employed the claimant as a miner. The Fourth Circuit interpreted the Department's current regulations to require this result in *Eastern Associated Coal Corp.* v. *Director, OWCP,* 791 F.2d 1129, 1131–32 (4th Cir. 1986). Specifically, the court held that to the extent that an individual contracts pneumoconiosis as a result of work as a federal coal mine inspector, his exclusive remedy against the government lies under the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.* If such an individual is also able to obtain benefits under the Black Lung Benefits Act, based on other work as a miner, liability for those benefits rests with the coal mine operator that most recently employed the individual as a miner. *See also Consolidation Coal Co.* v. *Borda,* 171 F.3d 175, 179 (4th Cir. 1999). The commenter has offered no reason for the Department to revise its regulation to produce a different outcome.

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

20 CFR 725.492

(a) The Department proposed revising section 725.492 to specifically define the term ''successor operator'' and address the issues posed by this category of coal mine operator. 62 FR 3364 (Jan. 22, 1997). The revised regulation largely tracks the language of section 422(i) of the Act, 30 U.S.C. 932(i), and provisions contained in the current version of 20 CFR 725.493. In addition, the Department clarified the definition to give effect to Congress' demonstrated interest in ensuring that a wide variety of commercial transactions was sufficient to give rise to successor liability under the Black Lung Benefits Act. 30 U.S.C. 932(i)(3). The Department did not make any additional revisions to this regulation in its 1999 proposal, 64 FR 54998–99 (Oct. 8, 1999), but did respond to two comments relating to the purchase of coal assets in a corporate reorganization or liquidation and the primary liability of a prior operator's insurance company.

(b) One comment states that subsection (e) exceeds the scope of the Act by suggesting that a purchase of mineral rights alone may be sufficient to attach liability to the purchaser as a successor operator. The commenter argues that the BLBA imposes liability only on operators of coal mines. Subsection (e) defines ''acquisition'' of a coal mine to include any transaction that transfers the right to extract or prepare coal at a mine. This regulation is based on the statutory definition of an ''operator,'' which includes not only the operator of a mine but also the mine's owner. 30 U.S.C. 802(d). In addition, the Department's regulations have long recognized that the lessor of coal mining property may bear liability for the payment of benefits in certain cases. *See* 20 CFR 725.491(b)(2) (1999). The Department does agree, however, that, in order to become liable as a successor operator, the acquirer of mining property must continue to derive an economic benefit from the coal on the property. Thus, the mere acquisition of mineral rights alone, without the actual extraction, preparation, or transportation of coal, or coal mine construction, will not subject the acquirer to successor operator liability.

(c) No other comments have been received concerning this section. The Department has added a comma in subsection (c) and deleted a comma in subsection (d)(1) in order to clarify the punctuation of the regulation.

20 CFR 725.493

(a) In its first notice of proposed rulemaking, the Department proposed revising section 725.493 to define the required relationship between a coal mine operator and a coal miner, the statutory basis for an operator's liability for the miner's claim under the Black Lung Benefits Act. 30 U.S.C. 932(a). 62 FR 3364 (Jan. 22, 1997). The Department made a technical change in its second notice of proposed rulemaking. It also added more specific language to subsection (a)(1) to recognize as sufficient to establish the requisite employment relationship a variety of arrangements between a worker and the entity that supervises that work. 64 FR 54999 (Oct. 8, 1999).

(b) One comment states that the Department's regulation will eliminate the current operator practice of leasing employees. The Department's response to this comment is set forth under section 726.8. No other comments have been received concerning this section, and no changes have been made in it.

20 CFR 725.494

(a) Section 725.494 provides the criteria for the identification of one or more ''potentially liable operators'' with respect to a claim for benefits. 62 FR 3364 (Jan. 22, 1997). For each claim, the group potentially includes all of those operators who meet the criteria currently contained in 20 CFR 725.492 and 725.493 (*e.g.,* employment of the miner for a year, including at least one day after December 31, 1969). This revised regulation also explains the factors used to consider whether a company is financially capable of assuming liability for the payment of benefits. In the second notice of proposed rulemaking, the Department made several technical changes to the regulation to make it easier to read. 64 FR 54999 (Oct. 8, 1999). The Department responded to one comment contending that the presumption in subsection (a) was illegal by citing the broad statutory grant of authority given the Department to create regulatory presumptions and by noting that the presumption appears in the current regulations at 20 CFR 725.493(a)(6). The Department responded to a comment concerning subsection (e) by explaining that subsection (e) did not contain a presumption, but simply recited the evidence needed to support a finding that an operator is financially capable of assuming liability for the payment of benefits. The Department further explained that the criteria in section 725.494 have no effect on a miner's eligibility for benefits.

(b) One comment received in connection with the Department's consideration of alternatives under the Regulatory Flexibility Act urges the Department to identify only the coal mine operator that is most likely to be liable for the payment of benefits as the responsible operator. The commenter does not distinguish between processing the claim at the district director level and the formal adjudication of the claim beyond that level. The commenter's main concern, however, appears to be the transaction costs imposed by the proposed ''joint defense'' requirement. The Department has eliminated the requirement that operators participate in the joint defense of the claimant's

entitlement by prohibiting more than one operator from participating in a case beyond the district director level, and by requiring the district director to exclude from the record any documentary medical evidence submitted by an operator other than the finally designated responsible operator. *See* explanation accompanying §§ 725.414, 725.415, 725.421. This revision does not require any alteration in the text of § 725.494. To the extent that the commenter is objecting to the district director's notification of more than one operator as potentially liable operators, the Department's explanation of the need for this requirement is set forth in the preamble to § 725.407.

In addition, a number of courts have been critical of the length of time it takes to resolve individual black lung benefits claims, *see, e.g., C&K Coal Co.* v. *Taylor,* 165 F.3d 254, 258 (3d Cir. 1999), and have held that the delays may deprive operators of their due process rights. *Lane Hollow Coal Co.* v. *Director, OWCP,* 137 F.3d 799, 807 (4th Cir. 1998). Some of these delays have been caused by remands from the Office of Administrative Law Judges in order to require the identification of additional responsible operators and the development of more evidence on responsible operator issues. The Department's revised regulations governing the identification and adjudication of the liable coal mine operator are intended to prevent such delays from occurring in the future. In all claims filed after the effective date of these revisions, the Department will have only one opportunity, while the case is pending before the district director, to obtain evidence from the operators that employed the miner. To facilitate the district director's resolution of the responsible operator issue, the regulations require the submission of evidence relevant to the criteria in section 725.494 to the district director and enhance the district director's ability to use subpoenas to compel the production of additional documents. Once all of this evidence is forwarded to the Office of Administrative Law Judges for a formal hearing, the administrative law judge assigned to the case will determine, in light of the evidentiary burdens imposed by section 725.495, whether the district director designated the proper responsible operator. If the administrative law judge determines that the district director did not designate the proper responsible operator, liability will fall on the Trust Fund. No remand for further development of the responsible operator issue is permissible.

(c) No comments have been received specifically relating to this section, and no changes have been made in it.

20 CFR 725.495

(a) Section 725.495 contains the criteria for deciding which of the miner's former employers will be the responsible operator liable for the payment of benefits to the miner and/or his survivors. 62 FR 3364–65 (Jan. 22, 1997). From among the employers that meet the criteria in § 725.494 for a potentially liable operator, section 725.495 assigns liability to the company that most recently employed the miner. In addition, the regulation explicitly assigns burdens of proof in the adjudication of the responsible operator issue. The regulation thus fills the regulatory void noted by the Fourth Circuit in *Director, OWCP* v. *Trace Fork Coal Co.,* 67 F.3d 503, 507 (4th Cir. 1995). In its second notice of proposed rulemaking, the Department again addressed this issue, rejecting arguments that the Department's assignment of burdens of proof violated the Fourth Circuit's decision. 64 FR 54999 (Oct. 8, 1999).

(b) The Department has revised the language of the first sentence of subsection (d) to reflect changes in the manner in which the district director will process claims, set forth in §§ 725.410–725.413, as well as the change in § 725.418(d) which prohibits the district director from forwarding a case to the Office of Administrative Law Judges with more than one operator as a party. *See* explanation accompanying § 725.414. The district director will identify the designated responsible operator in a document titled a schedule for the submission of additional evidence rather than in an initial finding. *See* explanation accompanying §§ 725.410–725.413. Moreover, to help ensure that the district director properly identifies the responsible operator, sections 725.415 and 725.417 permit the district director to re-designate the responsible operator, by issuing another schedule for the submission of additional evidence, if he determines that his initial designation may have been erroneous. *See* explanation accompanying §§ 725.415 and 725.417. Accordingly, the Department has replaced the reference in subsection (d) to the operator ''initially found liable'' with a reference to the operator that is ''finally designated'' as the responsible operator.

(c) One comment suggests that a miner's prior employer should not have to bear liability for a claim when the financial inability to pay benefits of another coal mine operator who more recently employed the miner is the responsibility of the Department. For example, the commenter notes, the Department accepted as insurers a number of ''group self-insurance associations'' that are currently unable to make benefit payments because they did not adequately secure the payment of claims for which they were ultimately held liable. Under section 423(a)(2) of the Act, 30 U.S.C. 933(a)(2), however, the Department is obligated to accept insurance coverage from any company, association, person or fund that is authorized under the laws of any State to insure workmen's compensation. *Compare* 33 U.S.C. 932(a)(1)(B) (Longshore and Harbor Workers' Compensation Act provision giving the Department authority to approve insurers under that Act). Accordingly, the Department's ''decision'' to accept these state group associations as insurers was not based on an exercise of discretion but rather on the understanding that they were authorized under the laws of their states to insure workers' compensation. The Department thus did not voluntarily assume the risk that these associations would become insolvent.

By contrast, the Department does have the authority to accept or reject applications for self-insurance and to set the minimum standards applicable for qualifying as a self-insurer. 30 U.S.C. 933(a)(1). To the extent that the security deposited by a self-insured coal mine operator pursuant to § 726.104 proves insufficient to pay individual claims, the Department agrees that the liability for those claims should not be placed on operators that previously employed the miner. Rather, in establishing the amount of security required, the Department voluntarily accepts the risk that self-insured operators will not have deposited sufficient security to pay claims if they are liquidated or become bankrupt.

Accordingly, the Department has added paragraph (a)(4) to section 725.495. The regulation does not affect the liability of any operator that employed the miner after his employment with the self-insured operator ended, even if that latter employment only lasted one day, provided the miner's cumulative period with that employer totalled at least one year. In determining the length of this cumulative period, the factfinder should include any period for which the employer is considered a successor operator to the miner's actual employer, *see C&K Coal Co.* v. *Taylor,* 165 F.3d 254, 257 (3d Cir. 1999). Like the

remainder of section 725.495, this provision shall be applicable only to claims filed after the date upon which these revisions become effective. This provision does not affect the liability of any operator that employed the miner after he left employment with the self-insured operator.

(d) Several comments continue to object to the imposition of a burden of proof on the potentially liable operator that the Department designates as the responsible operator. The regulation imposes on the Department the initial burden of establishing that the designated operator is a potentially liable operator, assisted by a presumption in subsection (b) that the designated operator is financially capable of assuming liability for the payment of benefits. In addition, if the district director designates as the responsible operator any operator other than the miner's most recent employer, he must include in the record a statement explaining the reasons for his finding and, if appropriate, an explanation of the Department's search of its insurance files. The burden then shifts to the designated responsible operator to prove either that it is financially incapable of assuming liability for the payment of benefits or that another potentially liable operator (*i.e.,* an operator that meets the criteria in § 725.494) employed the miner more recently. The Department's rationale for this revision is fully set forth in its explanation of the original proposal. 62 FR 3363–65 (Jan. 22, 1997).

(e) One comment argues that the Department's imposition of the burden of proof on the designated responsible operator violates the Supreme Court's decisions in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994) and *Metropolitan Stevedore Co.* v. *Rambo,* 117 S. Ct. 1953 (1997), as well as the Administrative Procedure Act. The Department's response to this comment is fully set forth at 64 FR 54972–74 (Oct. 8, 1999). Congress gave the Department particularly broad authority to promulgate regulations governing the identification of the operator responsible for the payment of benefits, 30 U.S.C. 932(h), including the authority to create ''appropriate presumptions'' for determining whether pneumoconiosis arose out of a miner's employment with an individual coal company, and to establish ''standards for apportioning liability among more than one operator, where such apportionment is appropriate.'' This authority has been construed to permit the assignment of liability to a single operator. *See National Independent Coal Operators Association* v. *Brennan,* 372 F. Supp. 16, 24 (D.D.C.), *aff'd,* 419 U.S. 955 (1974). The burdens imposed by section 725.495 are thus fully consistent with the statutory authority granted the Department.

(f) Two comments argue that potentially liable operators should not be required to submit all of their evidence demonstrating the liability of other more recent of the miner's employers within the first 90 days after they receive notice of the claim. As the Department has discussed more fully in its response to comments concerning section 725.408, the 90-day time limit in that regulation is applicable only to the submission of evidence, generally within the control of an operator notified by the Department, which establishes that the operator is not a potentially liable operator in the claim. This includes evidence that the employer was not an operator for any period after June 30, 1973; that the operator did not employ the miner as a miner for a cumulative period of at least one year; that the miner was not exposed to coal mine dust while working for the employer; that the miner's employment did not include at least one working day after December 31, 1969; and that the employer is financially incapable of assuming liability for the payment of benefits. *See* §§ 725.408(a)(2)(i)–(v), 725.494(a)–(e). By contrast, documentary evidence submitted to demonstrate a more recent employer's potential liability is governed by section 725.414, which states that the evidence must be submitted pursuant to a schedule established by the district director after a party has indicated its dissatisfaction with the district director's initial findings of eligibility and liability. The submission of this evidence is therefore not subject to the 90-day time limit.

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

20 CFR 725.497

Although the Department received comments relevant to this section, the regulation was not open for comment, *see* 62 Fed. Reg. 3341 (Jan. 22, 1997); 64 Fed. Reg. 54971 (Oct. 8, 1999). It was inadvertently omitted from the list of technical revisions. Accordingly, no changes are being made in this section.

Subpart H

20 CFR 725.502

(a) The Department proposed significant changes to the current § 725.502 in its initial notice of proposed rulemaking. 62 FR 3412–13 (Jan. 22, 1997). The most important changes were designed to make clear to responsible operators their obligations under the terms of an effective award of benefits even though the claim might still be in litigation. By clarifying the obligations of a liable party pursuant to an effective award, the Department hoped to promote operator compliance. 62 FR 3366 (Jan. 22, 1997). The Department therefore proposed that a responsible operator pay all of the benefits due under the terms of an effective award, *i.e.,* both prospective monthly benefits and retroactive benefits. The proposed regulation also defined when benefits become due after the issuance of an ''effective'' decision awarding benefits. 62 FR 3412–13 (Jan. 22, 1997). Coupled with an assessment of an additional twenty-percent of any unpaid compensation (33 U.S.C. 914(f) as incorporated by 30 U.S.C. 932(b), proposed § 725.607), proposed § 725.502 substantially clarified the responsible operator's benefit payment obligations. In its second notice of proposed rulemaking, the Department responded to comments opposing the changes. Without disputing the statutory incorporation of § 14(f), the commenters contended that the addition of twenty-percent of unpaid compensation to late payments was punitive. They also opposed the obligation to pay retroactive benefits while an award was on appeal, arguing such a requirement violated Congressional intent and that recovery of those payments was unlikely in the event the award was overturned. 64 FR 54999–55000 (Oct. 8, 1999). Citing Congressional intent that the coal industry bear primary responsibility for benefits, the Department defended the assessment of an additional twenty-percent of unpaid compensation as a means to promote prompt compliance with effective awards. The Department noted its concern that operators rarely paid benefits while an award was on appeal, thereby shifting the financial burden and ultimate risk of loss to the Trust Fund. Moreover, the Department noted that requiring payment of retroactive benefits during active litigation was consistent with Congressional intent. The liable party is generally required to pay all benefits due the claimant under the terms of an effective award, and the ''benefits due'' include retroactive benefits. Congress enacted one exception: the Trust Fund is authorized to pay only future monthly benefits when it pays on behalf of an operator. 64 FR 55000 (Oct. 8, 1999). In response to another comment, the Department agreed that the law clearly requires the Trust Fund to pay interim benefits if an

operator obtains a stay of payments. The Department also concluded the proposed regulation required the operator to continue to pay benefits despite the pendency of a modification petition until a new effective order is issued pursuant to § 725.310. Finally, the Department reiterated its view that prospective monthly benefits are due and ''shall be paid'' when an administrative law judge's award becomes effective, *i.e.,* when the order is filed in the office of the district director. The Department did propose one change to § 725.502(b)(1) in its second notice. That change made monthly benefits due on the fifteenth day of the month following the month for which the benefits are paid, instead of the first business day of that month as originally proposed. 64 FR 55050 (Oct. 8, 1999). The Department has proposed one minor change in the final rule. Subsection (b)(2) requires the district director to compute the amount of retroactive benefits and interest a responsible operator owes the claimant, and to inform the parties. The Department has added language at the end of the last sentence of subsection (b)(2) to clarify that the district director must attach a current table of applicable interest rates to the computation.

(b) The Department has received one new comment in response to the second notice of proposed rulemaking. The commenter renews the objections stated in its response to the initial notice of proposed rulemaking, contending the Department did not respond adequately to its concerns in the 1999 preamble discussion. The comment cites several objections to requiring payment of retroactive benefits while an award is on appeal, and also objects to the assessment of the twenty-percent additional compensation for failure to pay such benefits. Specifically, the comment argues that use of the twenty-percent additional compensation is inconsistent with Congressional intent because the assessment was intended only to help claimants obtain prompt payment, and not reduce Trust Fund outlays. The comment also contends Congress intended the Fund to pay interim benefits during litigation on behalf of operators, and recoup those payments from operators only after the claimant ultimately prevails. In the commenter's view, Congress intended the Fund to share the risk of unsupportable awards with operators by assuming the operator's liability until litigation concluded and the validity of the award was established. The comment criticizes § 725.502(b)(2) because it will increase operator payments and lead to larger, and more numerous, overpayments. Finally, the comment objects to § 725.502(c), which requires the payment of one month of benefits if the miner-claimant dies in the month when eligibility commences. The comment states that the provision, in effect, allows duplicate benefits for that month in the event the survivor becomes entitled to benefits.

(c) The criticisms leveled at § 725.502(b)(2) rest on one basic premise: Since 1981, Congress has intended for the Trust Fund to pay prospective monthly benefits in all awarded claims remaining in litigation in which there is potential operator liability. Based on this premise, the commenter contends that an operator cannot be compelled by means of the § 14(f) ''penalty'' to pay any benefits—retroactive or prospective—until the award is final because no retroactive benefits are due and the Trust Fund is liable for the prospective benefits pending entry of a final award. The Department disagrees with the comment's premise and the conclusions derived from it.

As an initial matter, the comment does not cite any statutory section, legal authority, legislative history or other evidence for its position as to Congressional intent and the operation of the Trust Fund. It relies, instead, on an ''understanding'' or ''agreement'' between Congress and the members of the public affected by the 1981 amendments to the Black Lung Benefits Act (BLBA). None of the available material, however, supports the comment's views.

First, the expenditures which the Fund may undertake are a matter of statutory mandate. Under the Internal Revenue Code (in which the Trust Fund provisions appear), monies are available if ''the operator liable for the payment of such benefits * * * has not made a payment within 30 days after that payment is due[.]'' 26 U.S.C. 9501(d)(1)(A)(ii). The only limitation prohibits the payment of retroactive benefits by the Fund on behalf of operators in claims filed after the 1981 amendments. 26 U.S.C. 9501(d)(1)(A). The provision is clear: The operator is liable for any benefits which are due, and the Fund will pay only prospective benefits if the operator defaults. Section 9501(d)(1)(A)(ii) does not suggest Congress intended as a routine practice to relieve the operator of the obligation to pay benefits which are due while the claimant's entitlement remains in dispute.

Second, the legislative history of the creation and later-amended operation of the Black Lung Disability Trust Fund supports the Department's position. The historical antecedents are described in detail in *Old Ben Coal Co.* v. *Luker,* 826 F.2d 688, 693–94 (7th Cir. 1987). Briefly, Congress created the Fund in 1978 to relieve the federal government of its *de facto* primary financial responsibility for the Part C program. The Fund assumed responsibility for claims for which no operator was liable or in which the responsible operator defaulted on its payment obligations. Congress intended to ''ensure that individual coal operators rather than the trust fund bear the liability for claims arising out of such operator's mines *to the maximum extent feasible.*'' S. Rep. 95–209, 95th Cong., 1st Sess. 9 (1977), *reprinted in Committee on Education and Labor, House of Representatives, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 612 (Comm. Print) (1979) (emphasis supplied). By the conclusion of the 1981 fiscal year, however, the Fund had accumulated a deficit of approximately $1.5 billion. H.R. Rep. 97–406, 97th Cong., 1st Sess. 4 (1981), reprinted in U.S.C. C. & A.N. 2673. Individual responsible operators had also become burdened with unanticipated retroactive liabilities from denied claims which were reopened and approved under the 1978 legislation. Congressional concern over the Trust Fund's deficit prompted changes to the BLBA in 1981; the remedial actions included raising the excise tax on coal that provided revenue for the Fund, increasing the interest rate on operator liabilities to the Fund, and tightening eligibility criteria for claimants. Congress also relieved a limited group of operators from their retroactive liabilities based on the procedural histories of certain claims. These liabilities transferred to the Fund. Finally, Congress limited the Trust Fund to paying only prospective benefits if a responsible operator failed or refused to pay after entry of an initial determination of entitlement. The 1981 Amendments, however, did not disturb the operator's legal obligation to pay all benefits due under an effective award. 127 Cong. Rec. 29,932 (1981).

Against this background, the comment's position is untenable. In 1981, Congress amended the BLBA, in large part because the Fund was in economic crisis. The objective of the amendments was to eliminate the deficit by increasing revenues and revising eligibility criteria. A fiscally-concerned Congress would not then impose on the Fund the operators' collective liability for benefits pending conclusion of entitlement litigation in every claim.

The ability to recoup from the operator the amount paid by the Fund if the award survived litigation, plus interest, would restore only some of the revenues expended on interim benefits. Initial awards which were eventually overturned would become overpayments; recovering overpayments from a largely elderly and unemployed population was problematic at best. Given these circumstances, the Department rejects the argument that Congress intended the Fund to absorb all operators' liabilities as a matter of course until the conclusion of litigation in every approved claim.

The Department also rejects the comment's argument that vigorous use of the payment of additional compensation pursuant to section 14(f) is contrary to Congressional intent. The Department provided a detailed response to this argument in its second notice of proposed rulemaking. 64 FR 54999–55000 (Oct. 8, 1999). The response cited Congress' intention to impose liability on the operators to the maximum feasible extent, together with the provision's purpose to ensure the operator's prompt compliance with its benefit obligations. The only significant concern shown by Congress with respect to the use of section 14(f) was the caveat that the provision not apply until the operator ''has the right to contest the claim.'' 127 Cong. Rec. 19, 645 (1981). This concern is met by the requirement that § 14(f) does not apply until an effective award is in place, and an effective award arises only after the operator has had an opportunity for a hearing. The Department believes § 725.502(b) promotes Congress' overall objective to shift liability for the payment of benefits to those operators who owe the benefits. The significance of this objective has become more obvious since the 1981 amendments. The Fund's indebtedness to the U.S. Treasury at the conclusion of fiscal year 1997 was $ 5.487 billion. OWCP Annual Report to Congress for FY 1997 at 24.

(d) The comment challenges the allowance of one month of benefits if the miner dies in the first month during which all eligibility requirements are established. The comment contends that such a payment is not authorized by statute, and that a duplicate payment occurs if the miner-claimant dies and the survivor establishes entitlement independently because the miner's death was due to pneumoconiosis. The Department rejects this argument as a reason for eliminating the provision. As an initial matter, this provision was first promulgated as part of the original § 725.502. *See* 43 FR 36806 (Aug. 18, 1978). No comments were received then in response to the regulation, nor did the Department receive any comments in response to its initial notice of proposed rulemaking. *See also* 20 CFR 410.226(a). In any event, the payment of benefits twice for the same month of eligibility in these circumstances is proper. The program has always paid benefits for periods during which the miner established (s)he was totally disabled by pneumoconiosis arising out of coal mine employment. 33 U.S.C. 906(a), as incorporated by 30 U.S.C. 932(a), 922(a)(1). Although generally a miner's entitlement terminates in the month before the month of death (§ 725.203(b)(1)), § 725.502(c) creates an exception to that rule to recognize the successful prosecution of a claim, albeit only for one month of benefits. The program also pays survivor's benefits to eligible recipients if a miner dies due to pneumoconiosis, 30 U.S.C. 922(a)(2), and begins such benefit payments with the month of the miner's death, 20 CFR 725.212–725.213. The statute does not prohibit the payment of benefits twice in one month in the rare event a miner entitled to benefits for disability dies due to pneumoconiosis in the first month of his or her eligibility. No change in the regulation is necessary.

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

20 CFR 725.503

(a) In its initial notice of proposed rulemaking, the Department proposed adding § 725.503(d) to provide specific guidelines for determining the onset date for benefits awarded based on a modification petition. The proposed rule set forth the date from which benefits would be payable based either on a mistake in a determination of fact or on a change in the miner's condition. 62 FR 3366, 3412–13 (Jan. 22, 1997). In the case of a mistaken factual determination, the proposal employed the rules used in a miner's or a survivor's claim. If the award was based on a change in conditions and if the precise month in which the miner became disabled could not be ascertained, the proposed rule pegged the onset date to the earliest evidence supporting an element of entitlement not previously found in the claimant's favor, provided the evidence was developed after the most recent factfinder's denial of benefits. The proposed regulation drew criticism both for setting the onset date too late and for setting it too early, thereby allegedly violating a statutory requirement prohibiting the payment of benefits before the onset of the miner's entitlement. In the second notice of proposed rulemaking, the Department altered § 725.502(d)(2), noting a concern that the regulation as originally proposed would generate too much litigation. 64 FR 55001, 55050 (Oct. 8, 1999). The reproposed version required the actual onset date of entitlement to be determined if possible. If that date could not be ascertained, however, § 725.503(d)(2) set a default onset date using the date the miner filed the modification petition. The Department adopted this approach because the filing date of the application for benefits is the default onset date for approved miners' claims (20 CFR 725.503(b)), and that method had worked well in the adjudication of black lung claims in general. The Department therefore proposed using a similar method in change in conditions cases. 64 FR 55001 (Oct. 8, 1999). Use of a filing date reflects ''the logical premise'' that the miner would file a claim or a modification petition when (s)he believed (s)he is entitled to benefits. In the final rule, the Department has made two minor changes to § 725.503(b) and (c). Each subsection begins with similar language referring to the entitled individual to whom benefits are payable, *i.e.,* the miner entitled to benefits (subsection (b)), and the survivor entitled to benefits (subsection (c)). The purpose of this change is simply to use parallel language in each subsection to identify the individual receiving benefits.

(b) One comment opposes the use of default onset dates for both claims and modification petitions. The comment contends the default date creates a presumption of entitlement to benefits as of the filing date when the claimant has not proven this fact. The commenter believes such a presumption violates the Administrative Procedure Act (APA), 5 U.S.C. 556(d), and the Supreme Court's decision in *Director, OWCP* v. *Greenwich Collieries,* 512 U.S. 267 (1994). The Department disagrees with the general proposition that a default onset date based on a presumption of entitlement as of a certain date violates the APA and *Greenwich Collieries.* The Department addressed this issue at length in its second notice of proposed rulemaking. 64 FR 54972–74 (Oct. 8, 1999). To summarize: the Federal Mine Safety and Health Act (FMSHA), of which the Black Lung Benefits Act (BLBA) is a part, generally is exempt from the provisions of the APA. 30 U.S.C. 956. The BLBA, however, incorporates section 19 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 919(d), thereby making the APA applicable to the

adjudication of claims. The incorporation of the APA (and 5 U.S.C. 556(d) in particular) is subject to one important constraint: Congress conferred on the Secretary the authority to vary the terms of the incorporated provisions by regulation. 30 U.S.C. 932(a) (provisions of LHWCA apply to BLBA ''except as otherwise provided * * * by regulations of the Secretary''). *See generally Director, OWCP* v. *National Mines Corp.,* 554 F.2d 1267, 1273–74 (4th Cir. 1977); *Patton* v. *Director, OWCP,* 763 F.2d 553, 559–60 (3d Cir. 1985). In *Greenwich Collieries,* the issue before the Court concerned the Department's authority to displace 5 U.S.C. 556(d) via a regulatory presumption (20 CFR 718.3) that required a finding for the claimant if the evidence for and against a particular finding was evenly balanced. The Court considered § 718.3(c) too ambiguous to vary the APA's burden of proof requirements as to the BLBA. It therefore held that the party who bears the burden of persuasion under the APA must prevail by a preponderance of the evidence. In so holding, the Court also acknowledged the Department's regulatory authority, consistent with the APA, to utilize presumptions which ease a party's burden of production. 512 U.S. at 280–81. The Court did not address the Department's argument that it has the authority to override 5 U.S.C. 556(d) by regulation and shift the burden of persuasion as well.

Since *Greenwich Collieries,* three courts have addressed the Department's authority to create presumptions which alter the parties' evidentiary burdens. Although no court has considered the Department's statutory authority to shift a burden of persuasion, all three courts have approved either directly or in dicta the Department's authority to create presumptions which shift the burden of production. In *Glen Coal Co.* v. *Seals*, 147 F.3d 502 (6th Cir. 1998), the Sixth Circuit considered whether a judicially-created presumption of medical benefits coverage for the treatment of pulmonary disorders was consistent with circuit caselaw. *See Doris Coal Co.* v. *Director, OWCP*, 938 F.2d 492 (4th Cir. 1991) (holding miner previously found totally disabled due to pneumoconiosis who receives treatment for pulmonary disorder is presumed to receive treatment for pneumoconiosis for purposes of medical benefits coverage). The majority held that the decisions below erroneously relied on the *Doris Coal* opinion when Sixth Circuit law applied and was inconsistent with Fourth Circuit precedent. 147 F.3d at 514 (Dowd, D.C.J.), 515 (Boggs, J.). 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. In *Gulf & Western Indus.* v. *Ling*, 176 F.3d 226 (4th Cir. 1999), the Fourth Circuit upheld the validity of the *Doris Coal* presumption under the APA as interpreted by *Greenwich Collieries*. The Court agreed with *Seals* that the presumption shifts the burden of production, not persuasion, and therefore was valid under the APA. 176 F.3d at 233–34. Most recently, the Eighth Circuit considered whether, for purposes of a subsequent claim, a ''material change'' in a miner's condition could be presumed if the miner established one element of entitlement not previously proven in connection with a prior denied claim. *Lovilia Coal Co.* v. *Harvey*, 109 F.3d 445 (8th Cir. 1997); *see* 20 CFR 725.309 (miner must show ''material change in condition'' between denial of one claim and filing of later claim). The Court rejected the operator's argument that the presumption of change violated 5 U.S.C. 556(d) and *Greenwich Collieries*. In so doing, the Court cited *Greenwich Collieries'* explicit approval of burden shifting presumptions which ease a party's obligation to produce evidence in support of its claim. 109 F.3d at 452–53.

Thus, the courts have upheld the Department's authority to shift the burden of production to the party opposing entitlement upon a showing of the predicate facts which support the presumption without violating the APA. Section 725.503 does create a presumption of entitlement to benefits as of the filing date of the claim absent contrary evidence. The presumption rests on a twofold basis: (i) The miner has established he is entitled to benefits; and (ii) the Department's belief that an individual will file a claim when he believes himself entitled to benefits. *See* 43 FR 36828–36829 (Aug. 18, 1978). The presumption, however, shifts only the burden of production to the party opposing benefits. That party may overcome the presumed entitlement date by introducing credible medical evidence that the miner was not disabled for some period of time after he filed his claim. *See Ling*, 176 F.3d at 233 (holding, in context of another black lung presumption which shifts burden of production, party must introduce ''credible'' evidence supporting its position). ''Credible'' evidence means medical opinions which are consistent with the adjudicator's findings in the underlying award of benefits. If the adjudicator has accepted evidence that the miner is totally disabled as of a certain date, then any later medical opinion contradicting this evidence is necessarily not credible. Medical opinions pre-dating the evidence of entitlement, however, may establish the miner was not disabled when he filed his application. *See Rochester & Pittsburgh Coal Co.* v. *Krecota*, 868 F.2d 600, 603 (3d Cir. 1989) (holding ALJ erroneously awarded benefits from filing date when evidence proved miner was not disabled at that time). The burden of *persuasion* remains with the claimant to provide medical evidence sufficient to overcome the opponent's. Similarly, a claimant may also prove he is entitled to benefits commencing before he filed his benefits application. In such a situation, the burden of persuasion remains, as always, with the claimant. The comment does not provide any other rationale for its position that default onset dates violate the APA. The Department therefore declines to abandon its use of such onset dates when the medical evidence fails to establish the date on which the miner became totally disabled due to pneumoconiosis.

(c) The same comment contends that using default dates based on filing dates violates section 6 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 906, as incorporated by the Black Lung Benefits Act (BLBA), 30 U.S.C. 932(a). The comment suggests using as an alternative default date the date of the earliest medical evidence the adjudicator accepts as sufficient to prove the miner is totally disabled by pneumoconiosis. The Department rejects this position. Section 6(a) of the LHWCA provides in relevant part that ''[n]o compensation shall be allowed for the first three days of the disability * * * Provided, however, That in case the injury results in disability of more than fourteen days, the compensation shall be allowed from the date of the disability.'' 33 U.S.C. 906(a). As discussed above, Congress expressly granted the Secretary the power to tailor incorporated Longshore Act provisions to fit the black lung program: the LHWCA sections apply to the BLBA ''except as otherwise provided * * * by regulations of the Secretary.'' 30 U.S.C. 932(a); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1273–1274 (4th Cir. 1977).

In 1978, the Secretary promulgated 20 CFR 725.503 to implement section 6(a). 43 FR 36806 (Aug. 18, 1978). Like the revised § 725.503, the 1978 regulation

prescribed two alternative means for determining the entitlement date. The adjudicator had to first consider whether the evidence established the month during which the miner became totally disabled due to pneumoconiosis. If the evidence was insufficient to identify the specific month, the adjudicator resorted to the default date: the month in which the miner filed his or her claim. Section 725.503(d)(2) adopts the same general approach for modification petitions, and substitutes the month the claimant filed the modification petition as the default date if the award is premised on a change in the miner's condition. 64 FR 55050 (Oct. 8, 1999). In the comments accompanying the promulgation of 20 CFR 727.302, the Secretary explained the reasoning behind the adoption of a default entitlement date:

> This approach was adopted in view of the great difficulty encountered in establishing a date certain on which pneumoconiosis, often a latent, progressive, and insidious disease, progressed to total disability. The filing date was thought to be fair since proof of onset, which was usually obtained after filing, would likely fix the date of total disability at the time at which the medical tests were administered. The filing date, on the other hand, was likely to be a more accurate measure of onset since it would be the date, or close to the date, on which the claimant felt the need to file for benefits, presumably because disability had become total.

43 FR 36828–36829 (August 18, 1978). The Secretary also emphasized that ''a reasonable effort will always be made to establish the month of onset.'' 43 FR 36806 (August 18, 1978).

Section 725.503 therefore deals with the difficulties inherent in identifying the particular month a miner's lung condition deteriorated to the point he became totally disabled due to pneumoconiosis. As noted above, the Department has long since concluded that pneumoconiosis is a latent and progressive disease which may manifest itself pathologically over a lengthy period of time. *See generally* § 718.201, responses to comments. As a result, detecting the precise month when the deterioration reached the level of compensable disability is problematic at best. In addition, clinical evidence of disability on a particular date does not mean the miner became disabled that day. The test may simply detect a condition which developed sometime earlier. *Green* v. *Director, OWCP*, 790 F.2d 1118, 1119 n.4 (4th Cir. 1986). Notwithstanding these difficulties, however, an award of benefits must set a date from which those benefits are payable. 20 CFR 725.503(f); 64 FR 55050 (Oct. 8, 1999). If the medical evidence in a particular case pinpoints the disability date, that date must be used. In many cases, the evidence is inconclusive or contradictory over time. Even if the earliest positive evidence establishes the miner's entitlement, that evidence only proves the miner was disabled on that date. Such evidence is entirely consistent with a compensable disability antedating the medical testing for some unknown period of time. *See Green,* 790 F.2d at 1119 n. 4. Consequently, the Department has consistently found a default entitlement date necessary, as a rule of administrative convenience, in order to implement the black lung program in an effective manner. *See generally* 30 U.S.C. 936(a) (authorizing Secretary to ''issue such regulations as [she] deems necessary to carry out the provisions of'' title IV). The choice of the filing date reflects the rational assumption that claimants, by and large, file claims or modification petitions when they believe themselves entitled to benefits (although compensable disability may in fact have occurred either prior to, or after, the application date). The Department recognizes claimants may file modification petitions for other reasons as well, *e.g.,* the claimant may secure the services of an attorney, obtain new medical evidence, or intend to prevent the underlying claim from becoming finally denied. These reasons do not detract from the underlying logic of the default onset date; rather, they simply explain why a claimant takes a particular action at a particular time. The natural impetus to pursue benefits at all is the individual's belief that (s)he is entitled to them. Like the default onset date for claims, the same explanation supports a similar approach for awards obtained on modification if the miner's condition has changed to the point of compensable disability and the actual onset date cannot be ascertained.

The Department believes the filing date strikes a reasonable balance between overcompensating and undercompensating the miner. Section 6(a) requires the liable party to pay benefits ''from the date of the disability.'' 33 U.S.C. 906(a), as incorporated. If the medical evidence does not identify that date, the miner might receive either more, or less, compensation than the amount to which (s)he is entitled by using the filing date. Obviously, if the medical evidence proves that the miner became disabled only after he filed, then the filing date is inapplicable; the adjudicator must select some later date to avoid compensating the miner for a period of time when (s)he was not eligible. *See Rochester & Pittsburgh Coal Co.* v. *Krecota*, 868 F.2d 600, 603 (3d Cir. 1989) (holding that ALJ erroneously relied on filing date when medical evidence clearly indicated miner was not disabled until several years later). Absent such evidence, however, the rationale underlying section 725.503 ensures the miner will receive the approximately correct amount of compensation. Accordingly, the Department rejects the comment's position that a default onset date based on a filing date—of either a claim or a modification petition—violates section 6(a).

The same comment also states that the use of default onset dates originated under part B of the BLBA and derives from the Social Security Act. The commenter contends that section 6(a) supersedes the Social Security Act rule for purposes of part C of the BLBA. As discussed above, default onset dates are entirely consistent with section 6(a). Furthermore, the comment does not explain why their origin has any legal relevance. The comment does not state a basis for eliminating default onset dates for part C claims.

(d) One comment opposes using the date the claimant petitioned for modification as the default onset date if benefits are awarded based on a change in the miner's condition. The commenter contends the proper default date should be immediately after the date of the adverse decision which was overturned on modification. For the reasons set out in comment (c), the Department rejects this suggestion. The filing date is the most rational point to begin benefits if the date on which the miner's pulmonary condition changed sufficiently to make him or her entitled to benefits is not established by the evidence of record. If, however, the record contains credible evidence of the miner's entitlement predating the modification petition, the onset date should be the date of that evidence provided no later credible evidence refuting entitlement exists, and the evidence was developed after the date on which the most recent denial by a district director or administrative law judge became effective.

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

20 CFR 725.515

(a) The Department did not open § 725.515 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department proposed amending § 725.515 in its second notice of

proposed rulemaking to conform it to changes in federal law which make black lung benefits payable by the Black Lung Disability Trust Fund subject to garnishment for child support and alimony. 64 FR 54971, 55001 (Oct. 8, 1999).

(b) Although one comment has suggested the Department allow claimants and responsible operators to negotiate settlements rather than fully litigate every claim, the Department opposes this suggestion. The Department's principal response to the issue of settlements appears in the Final Regulatory Flexibility Analysis, below. The Department takes the same position with respect to any assignment, release or commutation of benefits except to the extent authorized by the Black Lung Benefits Act (BLBA) or the Secretary's regulation. Such agreements are void. *Norfolk Shipbuilding & Drydock Corp.* v. *Nance,* 858 F.2d 182, 186 (4th Cir. 1988), *cert. den.* 492 U.S. 911 (1989). The BLBA prescribes precisely the amount of monthly benefits to which a claimant is entitled. 30 U.S.C. 922(a). This statutory compensation schedule represents Congress' judgment as to the reasonable level of monthly benefits a totally disabled miner or his or her survivor should receive. By incorporating section 16 regarding releases (and 15 regarding waiver, *see Brown* v. *Forest Oil Corp.,* 29 F.3d 966, 968 (5th Cir. 1994)) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 916, 915, into the BLBA, 30 U.S.C. 932(a), Congress demonstrated its intent to ensure that claimants receive the full amount of benefits to which they become entitled, thereby having less need to resort to other means of support, including public assistance. *See generally* 1 *Larson's Workers' Compensation Law* (MB) § 1.03[2] (1999). Moreover, making agreements to reduce, divert or bargain away benefits absolutely void also provides some level of protection to claimants' rights; no party who negotiates such an agreement can rely on its terms in the event the claimant elects to pursue his or her full rights under a claim. Such protections are especially appropriate given the claimant population most affected by the BLBA, *i.e.,* elderly, disabled and less educated retired workers and their survivors. Prohibiting settlements also recognizes the progressive nature of pneumoconiosis. Because this disease may evolve over a period of years, the availability of settlements may encourage a miner-claimant to forego a future claim for full benefits after the pneumoconiosis has progressed to the point of compensable disability in lieu of the present payment of a lesser amount. The Department therefore considers settlements ill-suited to the BLBA program. Finally, although it incorporated sections 16 and 15 of the LHWCA into the BLBA, Congress did not incorporate section 8 (allowing for district director approval of certain settlements under the LHWCA). The Department does not believe Congress meant to allow settlements to occur under the BLBA in the absence of an express and direct incorporation of such intent.

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

20 CFR 725.522

In its initial notice of proposed rulemaking, the Department proposed a shortened § 725.522, in which subsections (a) and (b) of 20 CFR 725.522 were combined in proposed § 725.522(a). Discussion of when benefit payments are due was moved to a newly expanded § 725.502. These proposed changes were part of a general rewriting of the regulations governing the payment of benefits, Part 725, Subpart H. 62 FR 3365–67 (Jan. 22, 1997). Although no comments were received concerning this section, the Department reiterates that the cost of a miner's complete pulmonary examination at Trust Fund expense—defined as a ''benefit'' under § 725.101(a)(6)—is not a payment included within ''overpayments'' for purposes of subsection (b). *See* 62 FR 3351 (Jan. 22, 1997); 64 FR 54982 (Oct. 8, 1999). No changes have been made in this section.

20 CFR 725.530

(a) In its initial notice of proposed rulemaking, the Department proposed a new § 725.530(a), setting out an operator's or carrier's obligation to pay benefits immediately when they become due pursuant to an effective order, and the consequences of an operator's failure to pay such benefits. 62 FR 3415–16 (Jan. 22, 1997). This proposed change was part of a general rewriting of the regulations governing the payment of benefits, Part 725, Subpart H. 62 FR 3365–67 (Jan. 22, 1997).

(b) Two comments object generally to the imposition of a ''penalty'' for an operator's failure to pay benefits when due, citing comments addressed to § 725.502. For the reasons expressed in the response to those comments, no changes are made to either regulation.

(c)(i) Several comments object to the imposition of a ''penalty'' for failure to pay a benefit within ten days after the payment is due, arguing that ten days is not enough time to calculate correct benefit amounts under the Black Lung Benefits Act (BLBA). The Department disagrees. This regulation does not change existing law in any material manner. The BLBA incorporates § 14 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 914, which governs the payment of compensation under that Act. 30 U.S.C. 932(a). Section 14(f) provides that additional compensation, in the amount of twenty percent of unpaid benefits, shall be paid if an employer fails to pay within ten days after the benefits become due. The twenty-percent additional compensation provision has been an incorporated provision of Part C since the inception of the statute. Consequently, § 725.530 merely restates existing law: failure to pay the full amount of benefits owed the claimant within ten days after the benefits are due shall result in the payment of an additional twenty percent of the unpaid benefits. *See also* § 725.607(a) (twenty-percent additional compensation assessed on unpaid benefits); *Sproull* v. *Director, OWCP,* 86 F.3d 895, 900–01 (9th Cir. 1996), *cert. den. sub nom. Stevedoring Services of America, Inc.* v. *Director, OWCP,* 117 S.Ct. 1333 (1997) (holding twenty percent additional compensation applies to late payment of interest notwithstanding employer timely paid underlying benefits) This assessment is self-executing, and attaches automatically upon the failure to make timely payment regardless of any equitable considerations explaining the untimeliness. *Severin* v. *Exxon Corp.,* 910 F.2d 286, 288 (5th Cir. 1990). The Department also notes that monthly benefit amounts are fixed by law and adjusted only once a year. Most black lung benefits are paid by insurance companies or self-insured coal companies who have ready access to current monthly benefits rates and the expertise to make any necessary computations. Finally, the Department notes that the actual amount of time available to the party liable for benefits to make a timely payment has been enlarged by virtue of changes made in § 725.502(b). That regulation requires the liable party to pay the benefits due, pursuant to an effective order, for any given month by the fifteenth day of the following month. 64 FR 55050 (Oct. 8, 1999). Liability for additional compensation in the amount of twenty-percent for defaulting on a payment cannot be invoked until an additional ten calendar days have passed after the monthly benefit becomes due. *See Pleasant-El* v. *Oil Recovery Co., Inc.,* 148 F.3d 1300, 1303 (11th Cir. 1998); *Burgo*

v. *General Dynamics Corp.,* 122 F.3d 140, 143 (2nd Cir. 1997) *cert. den.* 118 S.Ct. 1839 (1998); *Reid* v. *Universal Maritime Serv. Corp.,* 41 F.3d 200, 202 (4th Cir. 1994); *Irwin* v. *Navy Resale Exchange,* 29 Ben. Rev. Bd. Serv. 77 (1995); *contra Quave* v. *Progress Marine,* 912 F.2d 798, 800 (5th Cir. 1990) (holding ten days means ten business days). With respect to the initial payment after entry of an award, the responsible operator should always have at least 25 days (as shown by the following example) in which to make the computation and make the first payment of monthly benefits. If an award becomes effective on the last day of January, the operator has until February 15th in which to pay the benefits attributable to January; the operator also has an additional ten days to avoid liability for additional compensation. This amount of time should be sufficient to allow the calculation of the benefit amount due and pay the claimant, and therefore to comply fully with the regulatory deadlines. This minimum period of 25 days comes close to the 30 day-period suggested by one comment as ''more reasonable.'' In fact, in cases in which the order awarding benefits becomes effective at the beginning of the month, the operator will have far more than the suggested 30 days in which to issue the check. As for payments subsequent to the initial payment, the operator has ample time to calculate and issue the monthly benefits check before incurring the assessment of additional compensation for untimeliness. Continuing with the previous example: If the operator has made the initial payment on February 15th, the next installment is not due until March 15th; the operator then has an additional ten days until the § 14(f) assessment attaches in which to make the payment. (ii) The more complex computations involve retroactive benefits. Under § 725.502(b)(2), an operator need not pay retroactive benefits until the district director computes this amount, within 30 days after issuance of an effective award, and informs the responsible operator of it. Benefits and interest for periods prior to the effective date of the order are not due until the thirtieth day following issuance of the district director's computation. This time is sufficient to verify the district director's computation, and actually allows the employer considerably more time than the ten days provided by 20 CFR 725.607(a) in which to pay retroactive benefits before liability for twenty-percent additional compensation may be imposed.

(c) One comment contends the proposed changes depart from current departmental practice and penalize operators for appealing awards of benefits. The Department disagrees. Section 14(f), as noted above, is an incorporated statutory provision which has been a part of part C of the BLBA from the beginning. Its incorporation represents a policy determination by Congress to promote the prompt compliance of a responsible operator with the terms of an effective award. The proposed changes to the regulations do not vary the operation of section 14(f). Rather, they simply implement Congress' intent in placing section 14(f) into the BLBA. Whether current administrative practice does not apply section 14(f) to the maximum extent cannot change the plain meaning of the provision. Finally, imposition of additional compensation for failing to pay benefits in a timely manner is not a penalty for pursuing an appeal of an award. Section 14(f) is a tool for ensuring compliance with an operator's benefits obligations once an effective award is in place and regardless of what subsequent litigation strategy the operator chooses to pursue.

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

20 CFR 725.533

The Department did not open § 725.533 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). When the Department issued its second notice of proposed rulemaking, it proposed minor changes in the regulation and invited comments from the public. 64 FR 54971, 55001–02 (Oct. 8, 1999). Specifically, the Department proposed deleting provisions concerning section 415 ''transition'' claims, 30 U.S.C. 925, in both the current 20 CFR 725.403 and 725.533. Although the Department does not intend to alter the rules applicable to any section 415 claim that may remain in litigation, parties have adequate access to these rules in earlier editions of the Code of Federal Regulations. In the final rule, the Department has added a comma after the word ''circumstances'' in the first sentence of subsection (a) for grammatical purposes. No comments were received concerning this section, and no other changes have been made in it.

20 CFR 725.537

(a) The Department proposed changing § 725.537 in the initial notice of proposed rulemaking to harmonize the regulation with proposed § 725.212(b), which requires full benefits to be paid to each surviving spouse of a deceased miner if more than one eligible survivor exists. 62 FR 3366, 3417 (Jan. 22, 1997).

(b) Two comments state that the Department cannot retroactively apply the regulation permitting more than one surviving spouse of a deceased miner to receive monthly benefits as a beneficiary without regard to the existence of any other entitled spouse (*see* § 725.212(b)). The comments contain no citation to specific precedent and no further explanation. They do not afford the Department a sufficient basis for any change to the regulation. The Department has also addressed comments concerning the retroactive effect of the regulations in connection with § 725.2, and *see* 64 FR 54981–82 (Oct. 8, 1999).

(c) One comment contends the change permitting full benefits to multiple survivors is grounded on a false premise. The commenter states that the Social Security Administration (SSA) did not grant full benefits to multiple surviving spouses under part B of the Black Lung Benefits Act (BLBA), and ''required'' the Department to use the same rules. The comment does not provide any basis for either proposition. The Department rejects the comment for several reasons. First, the commenter cites no statutory authority, SSA regulation, or other evidence for its description of SSA practice, and thus no conclusions can be drawn about that agency's official practice concerning the issue. Second, SSA administered Part B of the BLBA, but the Department has had sole authority over Part C since January 1, 1974. Whatever SSA's internal views or practice, it cannot bind the Department if the Department concludes the statute requires a different result. Third, the Department believes the law compels what the revised regulation provides. In the initial notice of proposed rulemaking, the Department provided a detailed legal analysis of the pertinent statutory authorities and legislative history, all of which support awarding full monthly benefits to more than one surviving spouse. *See* 62 FR 3350–51 (Jan. 22, 1997). Congress amended the Social Security Act in 1965 to allow benefits to a divorced surviving spouse as a ''widow'' of the miner. Pub. L. No. 89–97, section 308(b)(1), 79 Stat. 286 (1965). The legislative history of the amendment clearly established Congress' intent that payment of benefits to two (or more) ''widows'' would not reduce the benefits paid to either. S. Rep. No. 404, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.

& A.N. 1943, 2047. In 1972, Congress amended the BLBA definition of ''widow'' to use the Social Security Act definition. 30 U.S.C. 902(e). The legislative history is equally clear that Congress intended to conform the BLBA definition to the Social Security Act definition. S. Rep. No. 743, 92nd Cong., 2d. Sess., *reprinted in* 1972 U.S.C.C. & A.N. 2305, 2332. The BLBA also reinforces this interpretation because it requires a ''widow'' to receive benefits at prescribed rates and makes no allowance for a reduction based on the existence of more than one widow. 30 U.S.C. 922(a)(2). To date, two courts of appeals and the Benefits Review Board have accepted the Department's position. *Peabody Coal Co.* v. *Director, OWCP [*Ricker*]*, 182 F.3d 637, 642 (8th Cir. 1999); *Mays et al.* v. *Piney Mountain Coal Co.,* 21 Black Lung Rep. 1–59, 1–65/1–66 (1997), *aff'd* 176 F.3d 753, 764–765 (4th Cir. 1999). No court has reached a contrary result, and no comment has addressed the substance of this analysis. Consequently, the Department has no basis for changing the regulation.

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

20 CFR 725.543

(a) The Department did not open § 725.543 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department received a number of comments, however, offering general criticisms of the overpayment waiver and adjustment criteria; the program had been using criteria developed by the Social Security Administration (SSA) for waiver of overpayments incurred under Part B of the Black Lung Benefits Act (BLBA). In response, the Department proposed revising § 725.543 to adopt the waiver standards in 20 CFR part 404, which are used by the SSA in administering title II of the Social Security Act. 64 FR 55055 (Oct. 8, 1999). The Department explained that the part 404 criteria better reflect the current law than the part 410 criteria because the part 410 have not been revised since 1972. 64 FR 55002 (Oct. 8, 1999).

(b) One comment generally opposes the extension of the overpayment waiver and recovery procedures to claims involving responsible operators, and incorporates by reference its response to § 725.547. The comment does not specifically address the substance of proposed § 725.543. The Department responds to comments concerning § 725.547 at that provision.

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

20 CFR 725.544

(a) The Department did not open § 725.544 for comment when it issued the initial notice of proposed rulemaking, 62 FR 3341 (Jan. 22, 1997). The Department did receive one comment which noted that the maximum amount subject to compromise had been raised to $100,000. 64 FR 55002 (Oct. 8, 1999). The Department proposed changing § 725.544 to reflect that fact, and to replace the reference to the Federal Claims Collection Act of 1966, now repealed, with a citation to 31 U.S.C. 3711. 64 FR 55055–56 (Oct. 8, 1999).

(b) One comment opposes in general terms the extension of the overpayment waiver and recovery procedures to claims involving responsible operators, and incorporates by reference its response to § 725.547. The comment does not specifically address the substance of proposed § 725.544. In any event, this provision only applies to the compromise of debts owed the United States government. *See* 31 U.S.C. 3711(a).

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

20 CFR 725.547

(a) In the initial notice of proposed rulemaking, the Department proposed amending § 724.547 to extend the waiver and adjustment provisions to overpayments owed by claimants to responsible operators. 62 FR 3366, 3419 (Jan. 22, 1997). Formerly, these protections had applied only to claimants who had been overpaid by the Trust Fund. 20 CFR § 725.547(a). The Department concluded that the opportunity to obtain a waiver or adjustment of the debt should be made available to all claimants regardless of their benefits' source. The Department received numerous comments opposing the proposed change for a variety of reasons. 64 FR 55002–03 (Oct. 8, 1999). Comments urging the Department to limit recoveries to the adjustment of future benefits, and objections based on increased difficulties for operators in recovering overpayments, were rejected based on the policy considerations set forth in the initial notice of proposed rulemaking. 62 FR 3366–67 (Jan. 22, 1997). The Department also rejected the position that waiver of an overpayment owed an operator amounted to the unconstitutional deprivation of property, citing caselaw upholding overpayment recoveries under the more restrictive Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 914(j), 922, as incorporated by 30 U.S.C. § 932(a). Finally, the Department addressed comments urging changes in the legal test for waiver by noting that the test is derived from an incorporated provision of the Social Security Act (SSA). The Department did, however, propose changes to § 725.543, adopting more current criteria for waiver. *See* 64 FR 55055 (Oct. 8, 1999).

(b) Two comments oppose the Department's use of the SSA waiver provisions rather than the LHWCA approach to the problem. The Black Lung Benefits Act (BLBA) incorporates the overpayment provisions of both statutes. 42 U.S.C. 404(b), as incorporated by 30 U.S.C. 923(b), 940 (SSA); 33 U.S.C. 914(j), 922, as incorporated by 30 U.S.C. 932(a) (LHWCA). The SSA requires the agency to obtain reimbursement of overpaid benefits unless the claimant can prove recovery would either deprive him of the financial resources to pay for necessary expenses, or violate equity and good conscience regardless of his financial condition. The LHWCA, however, limits recovery to the adjustment of future benefits; if no benefits will be paid, no overpayment can be recovered. In the initial notice of proposed rulemaking, the Department reviewed the reasons for using the SSA provisions: judicial precedent upholding the Department's authority to recover overpayments under the SSA scheme; adverse financial consequences for the Fund if the Department used the more restrictive Longshore provisions; and the protections afforded claimants by the waiver procedure, which limits recovery to those individuals who can afford to reimburse the overpaid benefits. 62 FR 3366–67 (Jan. 22, 1997). In the second notice of proposed rulemaking, the Department acknowledged the comments advocating use of the LHWCA model but relied on the policy considerations previously advanced. 64 FR 55002 (Oct. 8, 1999). The Department continues to believe that these considerations provide valid reasons for using the SSA provisions as the basis for the Department's overpayment recovery procedures. Moreover, adopting the more current overpayment criteria in 20 CFR part 404 will conform the Department's practice to changes in the law since 1972. *See* 64 FR 55055 (Oct. 8, 1999). The Department therefore disagrees with the commenters who urge that the SSA overpayment procedures be abandoned in favor of the LHWCA model.

(c) One comment states that the Department's response to comments in the second notice of proposed rulemaking, 64 FR 55002–03 (Oct. 8, 1999), failed to answer several concerns raised in the initial round of comments. Specifically, the original comment contended that: the LHWCA provisions supersede the SSA provisions with respect to part C claims, citing *Bracher* v. *Director, OWCP,* 14 F.3d 1157 (7th Cir. 1994); the Department must evaluate the cost of recovering overpayments against the amounts actually recovered; caselaw on waiver issues contradicts the Department's view that the standards will protect claimants from burdensome recoveries; and courts apply inconsistent interpretations of the waiver standards. None of the commenter's arguments warrant changing the basic overpayment recovery procedures. (i) The Seventh Circuit Court of Appeals' decision in *Bracher* does not support the commenter's position. The Court actually declined to address the relationship between the SSA and LHWCA overpayment provisions because the petitioner failed to make the argument in earlier proceedings. 14 F.3d at 1161. The Court also noted, in passing, that the Department has the explicit statutory authority in 30 U.S.C. 932(a) to modify incorporated LHWCA provisions by issuing regulations which vary the terms of those provisions. (ii) With respect to the costs involved in undertaking overpayment proceedings, this factor may be considered in determining whether to pursue individual cases. Cost alone is not a reason to ignore the duty to recover overpayments imposed by the BLBA. (iii) The Department disagrees that the cases cited by the commenter demonstrate that the waiver and recovery procedures provide inadequate protection of claimants' interests. The comment incorrectly states that the Seventh Circuit upheld a $47 difference between a claimant's monthly income and expenses as a sufficient cushion to allow repayment of an overpayment. *Benedict* v. *Director, OWCP,* 29 F.3d 1140 (7th Cir. 1994). The Court actually found that the claimant's monthly income exceeded his expenses by at least $110 (not including interest income), and that the available financial assets would enable the claimant to repay the overpayment without adverse effect on his living standard. The comment also cites *Bracher,* 14 F.3d 1157, as another example of the lack of protection afforded claimants by the waiver procedures. In that decision, the Seventh Circuit held an individual cannot claim reliance on ''erroneous information'' from the agency as a basis for waiver if the ''information'' is a district director's award which is later overturned. The Court correctly noted that characterizing such awards as erroneous agency information would result in waiver for virtually any overturned award, and render meaningless a regulatory provision which makes interim awards ''overpayments.'' 14 F.3d at 1162. *See also McConnell* v. *Director, OWCP,* 993 F.2d 1454, 1458 (10th Cir. 1993); *Weis* v. *Director, OWCP,* 16 Black Lung Rep. 1–56, 1–58 (1990). The comment does not explain in what manner *Bracher* proves the Department has exaggerated the extent to which the waiver and recovery regulations protect claimants' interests. (iv) Finally, the commenter contends that the circuits have reached inconsistent results in determining whether to waive recovery of overpayments, citing *Benedict,* 29 F.3d 1140, and *McConnell,* 993 F.2d 1454. Specifically, the comment expresses concern that one court granted a waiver for the claimant because he spent the benefits on a vacation while another court denied waiver to a claimant who saved the benefits. The results reached in these cases are not inconsistent. In *McConnell,* the Court granted the waiver because the miner relied on the receipt of the benefits to pay for the vacation; his detrimental reliance could be directly linked to the benefits because he would not have taken the vacation without the additional money. The Court concluded that permitting the Department to recoup the amount of benefits spent on the vacation would violate ''equity and conscience.'' 993 F.2d at 1461. With respect to the balance of the overpayment, the Court held that the miner had the financial capacity to repay the benefits because he had a $114 monthly cushion after comparing his income and expenses. 993 F.2d at 1160. Similarly, in *Benedict,* the Court considered a $110 monthly cushion sufficient. The Court rejected the argument that recovery would violate ''equity and good conscience'' because the miner did not relinquish any right or, unlike McConnell, undertake an expense because of the availability of the benefits. The Department therefore rejects the comment's interpretation of these decisions.

(d) One comment focuses on the differences between the LHWCA and BLBA programs as a basis for distinguishing caselaw under the LHWCA holding that limitations on overpayment recovery do not deprive employers of property rights. The comment stresses that LHWCA claimants generally suffer job-related traumatic injuries which are promptly known by the employer, and the claims litigation is resolved quickly. By contrast, the commenter notes that BLBA claimants generally file after retirement and the entitlement litigation is lengthy because the issues are contentious; the protracted litigation therefore causes delays and correspondingly larger overpayments since operators must pay benefits during the litigation. Based on these contrasts, the comment argues that the limitations imposed on the operator's right to recover overpayments by § 725.547 should be abandoned because the operator has no effective means of defending its interests. In effect, the commenter argues that the inherent delays in BLBA claims adjudication raise due process concerns because the delays generate large overpayments which will be uncollectible under § 725.547.

The comment rests on the premise that inherent delays exist in the adjudication of black lung claims, and that the delays amount to *per se* denial of due process. Delay alone, however, is not a due process violation. *C & K Coal Co.* v. *Taylor,* 165 F.3d 254, 259 (3d Cir. 1999). ''It is not the mere fact of the government's delay that violates due process, but rather the prejudice from such delay.'' *Consolidation Coal Co.* v. *Borda,* 171 F.3d 175, 183 (4th Cir. 1999). In the context of black lung entitlement litigation, delays have prompted courts to transfer liability from operators to the Black Lung Disability Trust Fund because agency errors have deprived the operators of the ability to defend themselves in a meaningful manner as required by due process. *Island Creek Coal Co.* v. *Holdman,* 202 F.3d 873, 883–84 (6th Cir. 2000); *Borda,* 171 F.3d at 183–84; *Lane Hollow Coal Co.* v. *Director, OWCP [Lockhart],* 137 F.3d 799, 808 (4th Cir. 1998). In each of those cases, unwarranted delays by the agency precluded the operators from asserting defenses to liability; in effect, the claimant won by default. Accordingly, delay at some point in the opportunity for adjudication of a case may constitute a denial of due process, but a mere allegation of delay without any explanation why the delay is unreasonable does not substantiate a due process violation. *Abbott* v. *Louisiana Ins. Guaranty Assoc.,* 889 F.2d 626, 632–33 (5th Cir. 1989), citing *Cleveland Bd. of Education* v. *Loudermill,* 470 U.S. 532, 547 (1985).

The commenter implies that the prejudice which establishes the denial

of due process is the unrecoverable overpayments generated by the time-consuming litigation over entitlement. The possibility exists that some claims will be approved and require years of litigation before final denial, thereby generating large overpayments that may be waived in overpayment proceedings under § 725.547. Such a possibility, however, does not establish a general violation of due process. First, the Department is not solely responsible for the delays in black lung benefits litigation, and the caselaw is clear that only prejudicial delays caused by the government are the basis for due process concerns. Second, the prejudicial effect of delay must be considered in the factual context of actual cases, and not simply in the abstract. Third, the existence of large overpayments is not necessarily evidence of due process violations. If the underlying entitlement adjudication process works in a fair manner, then due process has been provided and the size of the resulting overpayment is irrelevant. ''The Due Process Clause does not create a right to *win* litigation; it creates a right *not to lose* without a fair opportunity to defend oneself.'' *Lane Hollow Coal Co.,* 137 F.3d at 807 (emphasis in original). Finally, the fact that large overpayments may eventually be waived does not necessarily amount to a due process violation. Section 725.547 provides operators with the opportunity to recover overpayments through an adjudicatory scheme similar to the entitlement process, with rights to evidentiary development, hearing and appeal. The comment does not explain why elimination of the waiver process will enhance the operators' ability to recover overpayments. The comment does not state a sufficient basis for abandoning the regulation.

(e) One comment supports § 725.547.

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

20 CFR 725.548

(a) Formerly, in any case involving an underpayment or an overpayment, § 725.547(c) and (d) empowered district directors to issue orders protecting the parties' interests and to resolve disputes over the orders using the procedures applicable to entitlement issues. 20 CFR 725.547. Based on its title, ''Applicability of overpayment and underpayment provisions to operator or carrier,'' section 725.547 applied only to cases involving responsible operators. The Department intends that these provisions should apply to overpayment and underpayment cases involving both responsible operators and the Black Lung Disability Trust Fund. Accordingly, the Department proposed § 725.548 in the second notice of proposed rulemaking as a regulation of general applicability, and moved § 725.547(c) and (d) to the proposed regulation. 64 FR 55003, 55056–57 (Oct. 8, 1999).

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

Subpart I

20 CFR 725.606

(a) In its initial notice of proposed rulemaking, the Department proposed revising § 725.606 in order to require that uninsured operators, including coal mine construction and coal transportation employers, secure the payment of benefits in individual claims that have been awarded and for which they have been determined liable. 62 FR 3367 (Jan. 22, 1997). The regulation establishes a procedure under which such an operator may be compelled to post the necessary security in the absence of evidence demonstrating that the operator has taken other action to secure the benefit payments. In addition, the regulation distinguishes between operators who were required to, but did not, comply with the security requirement in 30 U.S.C. 933, and coal mine construction and coal transportation employers, who are not required to comply with that requirement. An uninsured employer that failed to comply with 30 U.S.C. 933 is required to post security worth no less than $175,000, while an uninsured employer that is either a coal mine construction or transportation employer is entitled to an individualized assessment of the amount of security required based on actuarial projections. That company also must secure the payment of all future benefits, however. The Department corrected a typographical error in subsection (c) in its second notice of proposed rulemaking, and responded to a comment regarding coal mine construction employers. The commenter argued that the proposal inappropriately imposed personal liability on the corporate officers of a coal mine construction employer that fails to comply with the post-award security requirement, and further stated that the proposal was unnecessary with respect to coal mine construction employers, who comply with their obligations to pay benefits. The Department responded by demonstrating the legal basis for its imposition of personal liability on the officers of corporate coal mine construction employers. The Department also observed that, notwithstanding compliance by coal mine construction employers, there was no basis for excluding construction companies from the requirements imposed by the Black Lung Benefits Act. 64 FR 55003 (Oct. 8, 1999).

(b) One comment continues to disagree with the requirement that coal mine construction employers secure the payment of awarded claims, arguing that the Department's experience with construction employers has been satisfactory. In its second notice of proposed rulemaking, the Department discussed a similar comment at length. 64 FR 55003 (Oct. 8, 1999). The Department did not dispute the observation that coal mine construction employers generally complied with their obligations to pay awarded claims. The Department explained, however, that the proposed revision to § 725.606 represented the Department's attempt to fulfill its responsibility to identify all parties' obligations under the Black Lung Benefits Act. The Department also noted that proposed § 725.606 represented an efficient means of enforcing the obligations of all parties.

The commenter now states that the proposal would impose an onerous and punitive burden on coal mine construction employers. The Department disagrees. The regulation does not require an uninsured employer to deposit funds with a Federal Reserve Bank in every case. Instead, such a deposit is required only if the employer cannot satisfy the adjudication officer that the award is otherwise secured. For example, a large, well-established coal mine construction employer may be able to demonstrate that its current size and assets are sufficient to allow it to pay benefits for the lifetime of the claimant. In such a case, the adjudication officer may permit the employer to meet the security requirement in a manner other than depositing funds with a Federal Reserve Bank. An employer, for example, may purchase an indemnity bond, one of the methods specifically listed in subsection (a), or may request that the adjudication officer approve another mechanism that will guarantee the payment of benefits in case the employer ever becomes unable to meet its obligations.

In addition, the Department does not accept the premise that it must allow coal mine construction employers to avoid the security requirement simply because most of them are current in their payment obligations. If even one such employer currently paying benefits seeks bankruptcy protection, all of the awarded claims for which that employer