



Chapter 9

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Defending Federal Black Lung Claims Under the New Regulations

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§ 9.01. Introduction.

On December 20, 2000, the United States Department of Labor issued a Final Rule¹ to overhaul the regulatory framework governing claims filed under the Black Lung Benefits Act (the “Act”). After nearly four calendar years of extensive rulemaking,² the new black lung regulations emerged at the conclusion of the Clinton Administration. The new black lung regulations promulgated under the Final Rule purport to streamline claims handling procedures and ease entitlement standards. A critical review of the thoroughly debated amended regulations compels the conclusion that the changes, if fully implemented, will likely extend the availability of black lung benefits to those not entitled under the Act. Even more extraordinarily, the Final Rule constitutes a “significant regulatory action”³ that acknowledges and expects to wreak substantial hardships on small underground coal mines.⁴

In an effort to obtain guidance from the Final Rule, this chapter sets forth the statutory bases for claims adjudication under the Act, analyzes the more pertinent provisions of the Final Rule, and concludes that the

¹ “Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as amended.” 65 F.R. 79920-80107 (Dec. 20, 2000)(cited to herein as “the Final Rule”). Unless otherwise noted, all citations to Title 20, C.F.R. contained in this chapter are to the revisions promulgated and republished under the Final Rule.

² The Final Rule was issued only after two previous rulemaking efforts suffered severe criticism from both miners (claimants) and the coal industry. *See* Proposed Rule, 62 F.R. 3338-3435 (Jan. 22, 1997), which was substantially revised in “Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969; Proposed Rule,” 64 F.R. 54966-55072 (Oct. 8, 1999). A full discussion of both proposed rules is outside the scope of this Chapter.

³ 65 F.R. 80029 (Dec. 20, 2000)(Section 3(f)(4) of Executive Order 12866 compelled the Office of Management and Budget to classify the Final Rule as a “significant regulatory action.”).

⁴ 65 F.R. 80029-45 (Dec. 20, 2000)(Regulatory Flexibility Act analysis). The Final Rule admits many smaller mines (less than 20 employees and coal production of less than 100,000 short tons) face an acute risk of closure due to increased costs of complying with the amended regulations. 65 F.R. 80032-41. With the overall claim approval rate expected to rise from 7.33 percent to 12.18 percent, an initial two-year claim filing increase of 3,440, and claim defense costs expected to rise \$6,000 per claim, the coal industry faces an estimated annual insurance premium increase of \$57.56 million.

Final Rule’s major revisions are either inconsistent with the Act or unnecessary under current case law. As set forth below, most of the new black lung regulations either conform the regulations to current case law or expand the regulations beyond its statutory support in order to assist claimants.

§ 9.02. The Black Lung Benefits Act and Related Statutes.

Claims adjudication for federal black lung benefits is governed by the Black Lung Benefits Act (promulgated under the Mine Safety Act), and the Administrative Procedures Act (the APA).

[1] — Federal Mine Safety and Health Act, Title IV, as Amended.

In 1969, Congress enacted Title IV of the Federal Mine Safety and Health Act in order to provide benefits to coal miners⁵ totally disabled from pneumoconiosis (commonly known as “black lung disease”) and to widows whose husbands have died from black lung.⁶ Title IV has been amended several times and is commonly referred to as the Black Lung Benefits Act.⁷ The Act creates a general framework outlining a rudimentary claims process. More essentially, the Act operates as an enabling act and delegates authority to the Secretary of Labor to

⁵ The Act defines a “miner” as “any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.” 30 U.S.C. § 901(d).

⁶ 30 U.S.C. § 901(a). The Black Lung Benefits Act appears at Title 30, U.S.C. Sections 901 through 962.

⁷ Title IV of the FMSH Act, P.L. 91-173 (1969) was amended by the Black Lung Benefits Act of 1972, P.L. 92-303, 86 Stat. 150 (1972). Further amendments were enacted under the Federal Mine Safety and Health Amendments Act of 1977, P.L. 95-164 (1977), the Black Lung Benefits Revenue Act of 1977, P.L. 95-227 (1977), the Black Lung Benefits Reform Act of 1977, P.L. 95-239 (1978), the Black Lung Benefits Amendments of 1981, P.L. 91-119 (1981), and the Black Lung Benefits Revenue Act of 1981, P.L. 97-119 (1981). The relevant purposes of each legislative enactment are set forth at 20 C.F.R. § 725.1(a)-(i).

promulgate regulations necessary to carry out the essential purpose of providing benefits to entitled claimants.⁸ While the Secretary of Labor is authorized to devise regulations governing matters of medical entitlement,⁹ the Act itself provides primary guidance for a claimant's¹⁰ eligibility and the liability of coal mine operators¹¹ for payment of benefits to eligible claimants.¹² The Act's iterations arrange several statutory presumptions to lessen the claimant's burden of proof on entitlement.¹³

Notably, Congress has amended the Act several times to alter the claims procedure, elements of medical entitlement, or the party liable for payment of benefits. Thus, the Secretary of Health, Education and Welfare initially processed and adjudged claims until Congress entrusted these responsibilities to the Department of Labor (DOL).¹⁴ Congress and DOL unsuccessfully attempted to shift responsibility for black lung claims to

⁸ 30 U.S.C. §§ 921 & 957. Congress intended legal challenges to the Act's constitutionality be determined by the appropriate United States Courts of Appeal, not the adjudicating agency. *United States Steel Corp. v. Marshall*, 471 F. Supp. 438 (W. D. Pa. 1979). Designated responsible operators and potentially liable operators should properly raise and preserve constitutional arguments for all claims adjudicated under the revised black lung regulations promulgated by the Final Rule.

⁹ 30 U.S.C. § 921(b). As used in this Chapter, the terms "eligibility" and "entitlement" (and their roots) connote distinct concepts. A miner is "eligible" for benefits if he performed qualifying coal mine employment, while an eligible miner will be considered "entitled" to benefits if his medical condition demonstrates that he is totally disabled due to pneumoconiosis. Thus, claims adjudication requires the claimant to prove both eligibility and entitlement in order to be awarded benefits under the Act.

¹⁰ A "claimant" is a former eligible coal mine employee ("miner") or the miner's surviving spouse. 20 C.F.R. §§ 725.101(11) & 725.301(a).

¹¹ The regulations define "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal mine, including a prior or successor operator as defined in Section 422 of the Act and certain transportation and construction employers." 20 C.F.R. § 725.101(23).

¹² 30 U.S.C. § 932.

¹³ The statutory presumptions are set forth in relevant part at 30 U.S.C. § 921(c)(1)-(5). Of these, only the 10-year presumption that pneumoconiosis arose out of coal mine employment and the complicated pneumoconiosis presumption apply to claims filed after January 1, 1982.

¹⁴ See 20 C.F.R., Part 410. Claims filed between July 1, 1973 and December 31, 1973 were adjudicated under Part B, 30 U.S.C. §§ 921 *et seq.*

the pertinent state workers' compensation programs.¹⁵ Under the authority of the Black Lung Benefits Reform Act of 1977, DOL established new standards for entitlement¹⁶ and for administration of the black lung program.¹⁷ The Black Lung Benefits Reform Act also required automatic reconsideration of all pending or previously denied claims under the more claimant amenable standards.¹⁸ The Black Lung Benefits Revenue Act of 1977 created the Black Lung Disability Trust Fund (the "Trust Fund") which imposed an excise tax on coal to finance the claims program and payment of benefits in cases where no responsible operator exists.¹⁹ In 1981, Congress passed the Black Lung Benefits Amendments of 1981, which eliminated several claimant favoring presumptions.²⁰

Thus, Congress has considered and enacted numerous amendments to the Act, and most of the amendments – most notably the 1981 amendments (Congress' last expression of legislative intent) – severely curtailed claimants' entitlement.

[2] — History of DOL's Black Lung Regulations.

The DOL has adjudicated claims under two vastly different regulatory schemes. Initially, claimants relied on presumption-laden Part 727 regulations, which presumed entitlement to benefits upon an un rebutted

¹⁵ All claims filed after January 1, 1974 were to be adjudicated under approved state workers' compensation laws. 30 U.S.C. § 931(a). The federal Black Lung Benefits Act and regulations were intended to apply only in cases where the applicable state workers' compensation law did not provide "adequate coverage for pneumoconiosis." 30 U.S.C. § 932. Currently, there are no state workers' compensation programs qualified under section 931 and, resultantly, no state programs appear on the Secretary's list required by this section. 20 C.F.R. § 722.4.

¹⁶ 20 C.F.R., Part 727 (2000). The Final Rule deleted Part 727 from the Code of Federal Regulations. The April 2000 edition of Title 20, which contains Part 727, can be accessed at < www.access.gpo.gov >.

¹⁷ 20 C.F.R., Part 725 (2000).

¹⁸ 30 U.S.C. § 945.

¹⁹ The Black Lung Benefits Revenue Act of 1977 imposed a tax on each ton of coal produced in the United States after March 31, 1978. *See* 26 U.S.C. § 9501. The Fund is liable for all benefits awarded on claims filed after January 1, 1974 where liability cannot be assessed against the miner's most recent coal mine employer of at least one year.

²⁰ 20 C.F.R. § 725.1(h)(2001).

showing of a coal dust related medical condition or of a lengthy coal mine employment history. Shortly thereafter, the Part 718 regulations transformed the black lung claims program into a truer adjudication system with the claimant bearing the burden of proof (rather than presumptive proof) on all elements of entitlement.

The Part 727 regulations represented DOL's initial adjudication program. Part 727 denoted an "interim presumption" which presumed entitlement if the miner worked in the mines for 10 years and produced medical evidence indicative of pneumoconiosis.²¹ Rebuttal could be accomplished if the coal mine operator proved the miner did not suffer from pneumoconiosis or that pneumoconiosis did not cause his disability or death.²² In 1981, the DOL enacted Part 718 to govern all claims filed after January 1, 1982. The unrevised Part 718 required the claimant to not only proffer medical evidence tending to support his medical entitlement, but the claimant also bore the burdens of proof and persuasion unaided by the liberal presumptions.

The Final Rule extensively revises the Part 718 regulations. The Final Rule is the first regulatory²³ change to the program since 1982. Under Part 718, claimants obtained an award of benefits in only about seven percent of all claims filed.²⁴ The Final Rule projects that the new black lung regulations will increase the claimants' success rate to twelve percent

²¹ 20 C.F.R. § 727.203 (Interim presumption). The medical element was established via chest x-ray, pulmonary function test, arterial blood gas test, or other competent qualifying medical evidence. *Id.* § 727.203(a).

²² 20 C.F.R. § 727.203(b)(2000). The claimant must submit at least one piece of qualifying evidence and bear the burden of proof with respect to that type of evidence. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987).

²³ Numerous substantive statutory amendments have failed to survive congressional scrutiny, while most amendments to the Act since 1980 have been technical in nature. For example, in 1994, the 104th Congress considered sweeping changes similar in many respects to those proposed by the Final Rule. While the House passed H.R. 2108, the Senate adjourned without voting on the legislation. 64 F.R. 54971.

²⁴ *See* 64 F.R. 54969 (first time applicants prevailed on 7.47 percent of claims filed between January 1, 1982 and July 16, 1998, compared to 10.56 percent of claims filed by miners filing a duplicate claim). Claimants have appealed approximately 30 percent of claim denials to the ALJ level. 65 F.R. 79984.

(12%).²⁵ Other significant impacts to the coal industry include an increase in claim handling and investigation costs, claim defense costs, and insurance premium increases.²⁶

[3] — Administrative Procedure Act.

The third essential but often overlooked guidepost for the federal black lung program is the Administrative Procedure Act (APA), which also governs claims processing and adjudication under the Act. The two main components of the APA relevant to black lung claims are the requirement that all relevant evidence be considered by the factfinder²⁷ and the requirement that the proponent of a claim or defense bear the burden of proof with respect to that element.

Thus, all claim adjudications must comply with two distinct APA requirements. First, Section 7(c) of the APA mandates, “[e]xcept as otherwise provided by statute,²⁸ the proponent of a rule or order has the burden of proof.”²⁹ The United States Supreme Court rejected DOL’s

²⁵ See United Mine Workers’ of America, Press Release, “United Mine Workers of America and Black Lung Claimants Outraged at Bush Administration and Coal Industry’s Action that Delays Implementation of New Black Lung Rules,” (visited March 23, 2001) <<http://www.umwa.org/pressreleases/feb01/021301.shtml>>.

²⁶ DOL acknowledges the Final Rule will have a significant impact on underground mine operators that employ fewer than twenty (20) employees. 65 F.R. 80032-41.

²⁷ The term “factfinder,” as used in this chapter, means an “administrative law judge” (ALJ) authorized to conduct hearing and adjudicate claims or the “District Director” of the Division of Coal Mine Workers’ Compensation in the Office of Workers’ Compensation Programs (OWCP) authorized to develop and adjudicate claims. 20 C.F.R. §§ 725.101(4)&(16).

²⁸ Compare 30 U.S.C. § 956 (rendering APA inapplicable to administrative proceedings under the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801 *et seq.*) with 30 U.S.C. § 932(a) (incorporating Section 19 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 919(b), which expressly applies the APA to Longshore Act claims adjudication). The OALJ conducts formal hearings under both the Act and the Longshore Act.

²⁹ 5 U.S.C. § 556(d). See also 30 U.S.C. §923(b). APA Section 7(c) also provides that an ALJ may exclude from consideration any “irrelevant, immaterial or unduly repetitious evidence.” 5 U.S.C. § 556(d). *But see*, Underwood v. Elkay Mining, 105 F.3d 946 (4th Cir. 1997)(ALJ may not exclude repetitious evidence unless it has no probative value). Further, “[a] party is entitled to present his case or defense by oral or documentary

“true doubt rule”³⁰ as inconsistent with the APA’s burdens of proof and held the true doubt rule invalid.³¹ Second, the APA requires the ALJ to consider all relevant evidence and issue a reasoned decision awarding or denying benefits. In particular, the ALJ’s decision must:

show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of all the facts.” *Id.* at 556(d).

³⁰ 20 C.F.R. 718.3(c)(2000) formerly read, “(c) In enacting title IV of the Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. This part shall be construed and applied in that spirit and is designed to reflect that intent. However, no claim shall be approved unless the record considered as a whole, in light of any applicable presumptions, provides a reasonable basis for determining that the criteria for eligibility under the Act and this part have been met.” Section 718.3 required a finding in claimant’s favor when the evidence for and against an element was evenly balanced, or “in equipoise.” The evidence in a black lung claim should rarely if ever be considered to stand in equipoise for several reasons. First, the fact-finder is required to consider the quality of the evidence submitted and may not engage in quantitative head-counting. *See, e.g.,* Woodward v. Director, Office of Workers’ Compensation Programs, 991 F.2d 314 (6th Cir. 1993)(ALJ cannot consider numerical superiority of competing evidence without consideration of non-quantitative factors, such as experts’ qualifications). As a result, truly equipoise evidence – such as two positive interpretations and two negative interpretations of a single chest x-ray – exists only where all other variables, such as physician qualification, are identical. Second, the fact-finder must consider all relevant evidence, meaning that only in rare circumstances will there be a true disagreement concerning the conclusion to be drawn from objective medical testing. Factors such as qualifications, documentation, analysis, all require provision of additional weight to one physician over the other. For example, if the fact-finder were to analyze every possible factor considered by each physician, the physician opinion evidence would only stand in equipoise if, and only if, two competing physicians considered or failed to consider identical factors with the difference between the two being their ultimate conclusion.

³¹ Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U. S. 267, 271 (1994)(holding claimant must bear burden of proof on all substantive matters).

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief or denial thereof.³²

The Black Lung Benefits Act contains similar language³³ mandating the ALJ to consider all relevant evidence.³⁴ Time and again, parties have utilized the APA to vacate an award or denial of benefits when the ALJ failed to document consideration and analysis of all relevant evidence.³⁵

Case law under the Act and the APA provide countless examples of the adjudicator's obligations, and the Final Rule does not displace these standards of accountability. For example, the ALJ must provide reasons for crediting and rejecting all evidence.³⁶ Similarly, the decision must consider all aspects of the medical opinions that disagree with the ALJ's conclusion on entitlement.³⁷ The APA further requires the decision and order to identify all evidence submitted, provide findings of fact and law,

³² 5 U.S.C. § 557(c).

³³ The Act mandates that every *denial* of benefits be accompanied by "a written statement of the reasons for denial of such claim, and a summary of the administrations hearing record or, upon good cause shown, a copy of any transcript thereof." 30 U.S.C § 944. The Act does not contain a direct counterpart requiring a reasoned opinion supporting an *award* of benefits — an adverse decision to the miner's former employer or the Trust Fund. The APA operates to nullify this omission.

³⁴ 30 U.S.C. § 923(b).

³⁵ *See, e.g.,* Lane Hollow Coal Co. v. Director, Office of Workers' Compensation Programs, 137 F.3d 799 (4th Cir. 1998)(ALJ owes duty of explanation and must provide reasoning supporting decision in order to enable court review); Barren Creek Coal Co. v. Witmer, 111 F.3d 352 (3d Cir. 1997)(ALJ must explain reasons for according more or less weight to competing evidence); Freeman United Coal Mining Co. v. Benefits Review Bd., 879 F.2d 245 (7th Cir. 1989)(ALJ must articulate reasons for crediting single x-ray interpretation over two competing interpretations of same x-ray film).

³⁶ *Wensel v. Director, Office of Workers' Compensation Programs*, 888 F.2d 14, 16 (3d Cir. 1989). *Accord* *Diaz v. Charter*, 55 F.3d 300, 307 (7th Cir. 1995)("An ALJ may not select and discuss only that evidence that favors his ultimate conclusion, but must articulate, at some minimum level, his analysis of the evidence to allow the appellate court to trace the path of his reasoning.").

³⁷ *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 822 (4th Cir. 1995).

accompanied by the factual basis and logical reasoning for each conclusion necessary for an element of the claim. In this regard, the APA takes on increased significance in older and larger claims with voluminous medical or employment histories, or extensive diagnostic testing.³⁸

Practitioners should view the APA as a tool requiring the fact-finder to consider and explain every argument raised or defended in the claims adjudication under the new black lung regulations. The ALJ must fully consider all relevant evidence and the interrelation between such evidence before assigning probative weight to the evidence.³⁹ In this manner, the ALJ must provide a reasoned decision in the same way a physician must provide a reasoned medical opinion. In the event that the ALJ awards benefits without discussion of a physician's factual basis or medical reasoning against entitlement, then the ALJ has violated the APA and the award will be vacated on appeal with the claim remanded for further consideration.

The promulgation of the Final Rule warrants renewed reliance on and assertion of these statutory standards designed to achieve fair adjudications. While the Final Rule's sweeping benevolence in favor of claimants is not likely to withstand judicial scrutiny unscathed, the enabling Act and the APA must continue to serve as the guideposts in defending claims under the Act.

§ 9.03. Current Status of New Black Lung Regulations – Preliminary Injunction.

The Employment Standards Administration issued the Final Rule on December 20, 2000 with an effective date of January 19, 2001. The Final Rule contemplated that all claims filed on or after January 19, 2001 would be adjudicated under the more lenient revised standards. Full

³⁸ For these reasons, the ALJ should provide added or even controlling probative weight to the physician providing the most comprehensive, most current, and most logical discussion of the medical evidence of record.

³⁹ For hypothetical example, if Dr. Smith reviews and analyzes three pulmonary function studies in determining whether the claimant's subjective symptoms relate to smoking or coal mine employment, while Dr. Jones only reviews two PFSs, then the factfinder must consider and explain whether the difference in quantity of evidence makes Dr. Smith's medical opinion worthy of more probative weight.

implementation of the revised standards appears doubtful, as the mining industry is challenging the major provision of the Final Rule as inconsistent with the enabling act.

On February 9, 2001, the National Mining Association (NMA) obtained a Preliminary Injunction Order to prevent implementation of the Final Rule until NMA's legal challenges could be duly heard and the district court reaches a decision on the merits.⁴⁰ In particular, 47 of the revised or new rules are suspended.⁴¹ A larger number of substantive revisions remain unaffected by the preliminary injunction.⁴² The United Mine Workers of America (UMWA) has intervened in the civil action and

⁴⁰ National Mining Ass'n v. Chao, No. 1:00CV03086 (EGS)(D.C.D.C. Feb. 9, 2001)(E. G. Sullivan, J.). With respect to claims filed after January 19, 2001, the district director is permitted to (1) develop evidence (employment and public records) and notify responsible operators of their potential liability, (2) schedule miners for complete pulmonary examinations, (3) gather existing medical evidence in survivor's claims, and (4) process claims up to but not including the schedule for submission of additional evidence. *Id.* at 2. Further, all claims pending before the OALJ and BRB are stayed pending the district court's decision, unless the adjudicator determines that the regulations promulgated by the Final Rule will not affect the outcome of the claim. *Id.* at 3-4. As of the date of submitting this chapter, the district court had not issued a decision on NMA's summary judgment motion.

⁴¹ Regulations suspended under the preliminary injunction: 20 C.F.R. Sections 718.104(d), 718.201(a)(2), 718.201(c), 718.204(a), 718.205(c)(5), 718.205(d), 725.2(c), 725.4, 725.101(a)(6), 725.103, 725.202(b), 725.209, 725.212(b), 725.213(c), 725.219(d), 725.309, 725.310, 725.366(b), 725.366(c), 725.367, 725.406, 725.407 through 725.419, 725.456 through 725.459, 725.465(b), 725.456(d), 725.502, 725.503, 725.607, 725.608, 725.701, 726.8(d), and 726.203(a).

⁴² Substantive revisions unaffected by the preliminary injunction: 20 C.F.R., Sections 718.3, 718.101, 718.102, 718.103, 718.105, 718.106, 718.107, 718.202, 718.301, Appendix B to Part 718, Appendix C to Part 718, Part 722, 725.1, 725.2, 725.203, 725.204, 725.214, 725.215, 725.221, 725.222, 725.223, 725.306, 725.311, 725.351, 725.362, 725.367, 725.403, 725.405, 725.421, 725.423, 725.452, 725.454, 725.478, 725.479, 725.490 through 725.495, 725.515, 725.522, 725.530, 725.533, 725.537, 725.543, 725.544, 725.547, 725.548, 725.606, 725.609, 725.620, 725.621, 725.706, 726.2, 726.3, 726.101, 726.104, 726.105, 726.106, 726.109, 726.110, 726.111, 726.114, 726.300 through 726.320.

is the strongest proponent for the new regulations.⁴³ UMWA considers the Final Rule favorable in 12 significant respects.⁴⁴ Conversely, UMWA finds objectionable only six (6) regulatory amendments.⁴⁵ No party has challenged the elimination of the Part 727 regulations.

⁴³ NMA argues, in part, that the Final Rule eases entitlement criteria contrary to the documented decline in the number of miners suffering from pneumoconiosis and impermissibly provides retroactive application of certain provisions. *See* National Mining Association, Press Release, “New Black-Lung Rules Ignore Science, Place Miners’ Jobs in Jeopardy,” (visited December 21, 2000) <[http://www.nma.org/re1%20-%20black%20lung%20regs%20\(2\)%2012-00.htm#anchor17730](http://www.nma.org/re1%20-%20black%20lung%20regs%20(2)%2012-00.htm#anchor17730)> (noting a decline in radiographic evidence of pneumoconiosis from 11 percent in the early 1970s to 3 percent of all miners tested in the 1990s).

⁴⁴ UMWA considers the following twelve (12) revisions favorable to miners and their widows: (1) quantity limitations on medical evidence under 20 C.F.R. Sections 725.414, 725.456 and 725.457; (2) the treating physician rule under 20 C.F.R. Section 718.104(d); (3) streamlined claims process under 20 C.F.R. Sections 725.405 through 725.418; (4) definitional changes to “pneumoconiosis” under 20 C.F.R. Section 718.201; (5) non-mining related disabilities will no longer preclude an award of benefits under 20 C.F.R. Section 718.204, reversing the position taken by the U.S. Court of Appeals for the Seventh Circuit [*Peabody Coal Co. v. Vigna*, 22 F.3d 1388 (7th Cir. 1994)]; (6) eased causation standards for widow’s claims under 20 C.F.R. Section 205; (7) eased duplicate claim standard under 20 C.F.R. Section 725.309; (8) more lenient medical benefits for eligible miners under 20 C.F.R. Section 725.701; (9) eased pulmonary function testing under 20 C.F.R. Section 718.103, Appendix B; (10) expanded recovery of attorney fees under 20 C.F.R. Section 725.367; (11) broader waiver of overpayments under 20 C.F.R. Section 725.457; and, (12) broader class of eligible dependents under 20 C.F.R. Section 725.209, 725.212, 725.213, and 725.223. *See* United Mine Workers of America, “UMWA Summary Of The Department Of Labor Black Lung Regulations Issued December 20, 2000,” (viewed March 1, 2001) <<http://www.umwa.org/blacklung/summregs.shtml>>.

⁴⁵ These include (1) elimination of the true doubt rule under 20 C.F.R. Section 718.3; (2) strict compliance with medical evidence quality standards under 20 C.F.R. Section 718.101 through 718.106; (3) coal companies’ ability to require two complete medical examinations under 20 C.F.R. Sections 725.414 and 725.456; (4) initial complete medical examination must be by physician from OWCP maintained list pursuant to 20 C.F.R. Section 725.406; (5) initial conference still required when claimant represented by counsel under 20 C.F.R. Section 725.409 & 725.416; and, (6) non-mining related pulmonary impairment cannot establish total disability under 20 C.F.R. Section 718.204. *See* United Mine Workers of America, “UMWA Summary Of The Department Of Labor Black Lung

During the stay, the regional district directors of the Office of Workers' Compensation Programs (OWCP) have accepted new claims and proceeded through the initial stages of evidentiary development. For claims filed after January 19, 2001, claims processing and medical examinations will go forward, although no entitlement decisions will be made while the preliminary injunction remains in force. For claims filed before the effective date of the Final Rule, the OWCP district director will make initial entitlement determinations. For any case pending before the Office of Administrative Law Judge or the Benefits Review Board, no decision shall be issued if application of the Final Rule would change the claim outcome.

§ 9.04. The Final Rule's New Black Lung Regulations.

The Final Rule's substantive revisions to the federal black lung program purport to streamline the claims process, relax medical entitlement to benefits, shift responsibility to coal companies to disprove their liability, create a broader class of eligible dependents, and increase entitlement to recover attorney's fees. While several revisions face strong constitutional and APA arguments, other revised regulations represent mere codification of the prevailing, interpretive case law. The focus of this chapter does not analyze the Final Rule from a constitutional standpoint, rather, effective representative under the Act depends on full knowledge of each prospective change regardless of its ultimate fate. Thus, in any claim adjudicated under the new black lung regulations, DOL should not be tolerated to espouse any position inconsistent with the rationales set forth in the Final Rule's voluminous preamble.

[1] — Medical Entitlement.

The medical criteria for entitlement to benefits remain outlined in Part 718. The Final Rule expressly and exclusively delegates medical evidence development and production to OWCP's district directors.⁴⁶ All medical evidence developed by the district director or later submitted

Regulations Issued December 20, 2000," (viewed March 1, 2001) <http://www.umwa.org/blacklung/summregs.shtml>.

⁴⁶ 20 C.F.R. §§ 718.101 ("[OWCP] shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who

by any party must strictly comply with the evidentiary quality standards.⁴⁷ The four basic elements of entitlement for a miner's claim stay unchanged: (1) the existence⁴⁸ of the miner's coal workers' pneumoconiosis (CWP);⁴⁹ (2) pneumoconiosis arose, at least in part, out of coal mine employment;⁵⁰ (3) the miner is totally disabled from performing his former coal mine employment;⁵¹ and (4) the miner's disability is due to or materially related to pneumoconiosis.⁵² Similarly, the elements of

files a claim for benefits under the Act shall be provided a complete pulmonary evaluation including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.”). *See also* 20 C.F.R. § 725.405(b)(requiring the district director to schedule miner for a medical examination).

⁴⁷ 20 C.F.R. §§ 718.101, 718.102 (chest X-ray), 718.103 (pulmonary function tests), 718.104 (report of physical examination), 718.105 (arterial blood-gas studies), 718.106 (autopsy and biopsy), and 718.107 (other medical evidence).

⁴⁸ During the rulemaking period, at least two circuit courts have held that all evidence probative of pneumoconiosis, regardless of form, be weighed together in determining whether claimant has demonstrated the existence of pneumoconiosis. *See, e.g., Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23 (3d Cir. 1997)(requiring factfinder to weigh all radiographic, autopsy, biopsy, and physician opinion evidence together pursuant to 20 C.F.R. § 718.202). The effect of this new evidentiary weighing standard is that a claimant cannot simply establish pneumoconiosis through mere chest X-ray evidence without the factfinder's consideration of all record probative evidence, such as the reasoned medical reports. The new regulations have not addressed this interpretation of the pneumoconiosis element.

⁴⁹ 20 C.F.R. § 718.202. The existence of pneumoconiosis may be demonstrated by chest X-ray, biopsy evidence, autopsy evidence, the presumptions of Section 718.304, 718.305, or 718.306, or a physician's reasoned medical opinion. *Id.* § 718.202(a).

⁵⁰ 20 C.F.R. § 718.203. The causal nexus between CWP and coal mine employment is presumed if the miner worked more than ten (10) years in the nation's coal mines. *Id.* § 718.203(b). *See also* § 718.302 (same presumption). Otherwise, the causal nexus to the miner's employment must be established through competent evidence. *Id.* § 718.203(c).

⁵¹ 20 C.F.R. § 718.204(b)(1). Generally, pneumoconiosis must be a “substantial contributor” to the disabling impairment. *Beatty v. Danri Corp.*, 49 F.3d 993 (3d Cir. 1995). The miner will be considered totally disabled only if he suffers from a pulmonary and respiratory impairment, or, upon proper evidence, if a non-respiratory or a non-pulmonary condition causes such an impairment. 20 C.F.R. § 718.204(a). An irrebuttable presumption of total disability arises from evidence establishing complicated pneumoconiosis. *Id.* §§ 718.204(b)(1) & 718.304.

entitlement for a widow or other survivor's claim remain constant,⁵³ however, the new regulations codify the prevailing circuit court interpretation of “substantially contributing cause” to mean that pneumoconiosis must have “hastened” the miner's death.⁵⁴

[a] — Regulatory Definition of Pneumoconiosis.

Of the numerous regulatory changes, perhaps most significantly, CWP is redefined in both “legal” and “clinical” contexts and the new regulations consider CWP to be both a latent, progressive, and, thus, irreversible disease process.⁵⁵ The Final Rule creates and distinguishes between two

⁵² 20 C.F.R. § 718.204(c). The regulatory requirement of disability causation is established if CWP is a “substantially contributing cause” of the miner's pulmonary or respiratory impairment proven under Section 718.204(b). *Id.* § 718.204(c)(1). The Final Rule adds a “materiality” element to disability causation. Therefore, a claimant meets the disability causation element if CWP has a “material adverse effect” on the miner's respiratory or pulmonary impairment. *Id.* § 718.204(c)(1)(i). The disability causation element is also established if the miner establishes CWP has “materially worsened” a pulmonary or respiratory impairment *unrelated* to coal mine employment. *Id.* § 718.204(c)(1)(ii). Most frequently, the pulmonary or respiratory impairment described in this section will be a cigarette-induced disease or a heart condition. In all cases, the claimant must establish disability causation through “a physician's documented and reasoned medical report.” 20 C.F.R. § 718.204(c)(2). *See also* 20 C.F.R. § 725.202(d)(conditions of entitlement).

⁵³ 20 C.F.R. § 718.205. The survivor must establish: (1) the miner had pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; and (3) the miner's death was “due to” pneumoconiosis. *Id.* § 718.205(a). The death causation element is established if pneumoconiosis was, of course, the cause of death, or, more problematically, a substantially contributing causal factor of death. *Id.* § 718.205(c)(1)&(2).

⁵⁴ 20 C.F.R. § 718.205(c)(5). *Accord*, *Lukosevicz v. Director, OWCP*, 888 F.3d 1001, 1006 (3d Cir. 1989); *Shuff v. Cedar Creek Coal Co.*, 967 F.2d 977, 980 (4th Cir. 1992), *cert. den.*, 506 U.S. 1050 (1993); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 183 (7th Cir. 1992).

⁵⁵ The Act defines pneumoconiosis as “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). *See* 65 F.R. 79971 for medical evidence supporting proposition that a miner's pulmonary and respiratory functions deteriorate even after cessation of coal mine employment, as well as courts recognizing the latent and irreversible nature of pneumoconiosis.

categories of CWP: (1) “clinical pneumoconiosis”⁵⁶ and (2) “legal pneumoconiosis.”⁵⁷ No medical justification exists to define “pneumoconiosis” in clinical and legal terms, as the Act affords entitlement for any respiratory or pulmonary disease arising from exposure to coal mine dust. The apparent impetus for the “legal” definition is to preclude the claim opponent’s merited reliance on cigarette smoking relating impairment, which ostensibly mimic CWP symptomatology and diagnostic testing results, in assessing the etiology of the miner’s clinical symptoms and test findings.⁵⁸

Further, finding a “clear relationship” between coal mine dust and obstructive pulmonary disease, the Final Rule expands entitlement to miners demonstrating chronic obstructive pulmonary disease even though clinical CWP is considered a restrictive disease.⁵⁹ The definitions are unnecessary when proper claims development produces well-documented and well-reasoned medical opinions based on the objective medical evidence of record.⁶⁰ Nonetheless, the new CWP regulatory definition requires an even more careful consideration of the causative nexus between

⁵⁶ 20 C.F.R. § 718.201(a)(1). “Clinical pneumoconiosis” is defined as “those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrasilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.” *Id.*

⁵⁷ 20 C.F.R. § 718.201(a)(2). “Legal pneumoconiosis” is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” *Id.*

⁵⁸ Frequently, the medical evidence includes a lengthy coal mine employment history and an equally lengthy cigarette-smoking habit, with symptomatology common to both etiological factors.

⁵⁹ 20 C.F.R. § 718.201. *See also* 65 F.R. 79937-44. *Generally*, COPD is associated with non-coal mining conditions such as chronic bronchitis, emphysema, and asthma, all of which might arise from a history of cigarette smoking.

⁶⁰ The new definitions require careful consideration of the physician’s medical reasoning, which must be consistent with the Act and the regulation’s medical assumption concerning

etiological factors (coal dust or cigarette smoking) and the precise objective manifestations of the miner's pulmonary or respiratory disease.

Accordingly, the Final Rule will likely extend entitlement to previously unqualified claimants, because the new black lung regulations blur the medical distinctions between coal dust-induced and smoking-induced impairments.

[b] — Evidentiary Quantity Limitations.

Perhaps the most alarming revision arising out of this four-year rulemaking is the strict limitation on the amount of evidence an operator can submit to defend against an award of benefits. Under new Section 725.414, the Final Rule strictly limits the quantity of evidence that a party may submit for the factfinder's consideration.⁶¹ In general, each party may only submit two pieces of each type of evidence,⁶² including physician opinion reports.⁶³ The two-piece limitation, however, enables the operator to have two complete pulmonary examinations of the miner.⁶⁴ Each party may submit only one-piece of responsive rebuttal evidence.⁶⁵ A physician's deposition or live testimony will count as a medical report, thereby further limiting the operator's ability to explore the miner's precise pulmonary or respiratory condition.⁶⁶

pneumoconiosis. *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 109-110 (3d Cir. 1989)(medical opinion that fails to recognize Act's medical assumptions may not form the basis for denying a claim).

⁶¹ 20 C.F.R. § 725.414.

⁶² Each party may only submit two chest X-ray interoperations, two pulmonary functions tests, two arterial blood gas tests, one autopsy report, one biopsy report, and two medical reports. 20 C.F.R. § 725.414(a)(2)&(a)(3).

⁶³ The Final Rule defines a "medical report" as "a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. § 725.414(a)(1). All evidence that appear in the medical report must "each be admissible" under this section. 20 C.F.R. §§ 725.414(a)(2)(i)&(a)(3)(i).

⁶⁴ 20 C.F.R. § 725.414(a)(3).

⁶⁵ 20 C.F.R. § 725.414(a)(2)(ii)&(a)(3)(ii). In cases when the claimant submits rebuttal evidence, the operator may submit a rehabilitating report from its criticized physician. 20 C.F.R. § 725.414(a)(3)(ii).

⁶⁶ 20 C.F.R. § 725.414(c)(limiting the quantity of testimony to two, unless the adjudication officer finds good cause exists for additional testimony). *See also*, 20

The most problematic and unnecessary revision to the black lung program is the Final Rule's quantity limitation of medical evidence.⁶⁷ The Final Rule's adoption of this evidentiary principle assumes a nexus between the quantity of evidence produced by responsible operators and the low claim entitlement rate, yet, the lengthy regulatory preamble fails to weigh in the APA's controlling adjudication standards. Nonetheless, never before has any statute, regulation or court case arbitrarily restricted the amount of evidence a party could develop in support of its position on entitlement to benefits under the Act. The clear purpose of this regulation, coupled with the new regulatory definition of CWP, is to increase the number of claims awarded. In this regard, the Final Rule excludes consideration of relevant evidence in favor of an intended results-oriented purposefulness normally reserved for legislation action.

The Final Rule also ignores existing mechanisms and an ALJ's sound discretion to eliminate the introduction and consideration of redundant or irrelevant evidence. This medical evidence quantity restriction, if upheld by the reviewing courts, will lead to more litigation than any other administrative rule promulgated since the Act's inception.⁶⁸ Further, parties will be forced to shop for the best packaged evidence to the

C.F.R. § 725.456(b)(1)(evidence exceeding the numerical limitations may only be submitted upon a showing of good cause); 20 C.F.R. § 725.457(c)(2)(no physician may testify unless s/he has prepared a report admissible under 20 C.F.R. § 725.414).

⁶⁷ 20 C.F.R. § 725.414.

⁶⁸ The potential and likely pragmatic dilemmas are endless. A party may consider essential the cross-examination of the district director's selected pulmonologist or the miner's treating physician. A party may also consider essential the medical opinion of a physician caring for the miner during a period of hospitalization for a pulmonary or respiratory ailment unrelated to coal mine employment. *See* 20 C.F.R. § 725.414(a)(4)(hospital records from pulmonary or respiratory admissions will be received into evidence). Other medical records may support the conclusion that the miner does not meet one or more elements of entitlement. The operator must also assess whether a deposition of the claimant's two experts will elicit probative medical opinions. Of course, all of this evidence is otherwise competent, relevant, and probative of claimant's entitlement to benefits and should not be excluded from the factfinder's consideration. If the district director continues current practice of accepting as sufficient the examining physician's mere completion of a standard examination form without significant discussion of medical

mandated exclusion of otherwise competent, relevant, and probative evidence.

This quantity limitation is completely unnecessary,⁶⁹ as the factfinder's assignment of probative weight is governed by numerous principles, including the Act, the APA, and the plentiful jurisprudence of the United States Supreme Court, the United States Courts of Appeal, the Benefits Review Board, and the Office of Administrative Law Judges. There appears no valid reason to assume these reviewing courts will not assign cumulative evidence a commensurate level of probative weight.

[c] — Treating Physician Rule.

The Final Rule sets in place a mechanism for affording additional or controlling weight to the medical opinion submitted by the miner's treating physician.

Current claims adjudication practice allows the factfinder to consider the nature of a physician's ongoing relationship to the miner and to provide additional probative weight to the claimant's treating physician. The Final Rule allows the ALJ to accord additional probative weight to a physician who treats the claimant for respiratory or pulmonary conditions,⁷⁰ has treated the miner for a longer period of time,⁷¹ has treated the miner more frequently,⁷² and has conducted diagnostic testing.⁷³ These factors will be conclusively established by the physician's statement, unless contradicted by the claim opponent.⁷⁴ If these four factors are weighed against all other relevant factors and evidence, the ALJ may accord controlling weight to a treating physician's opinion.⁷⁵

evidence, then the designated responsible operator may be deprived of any cross-examination of that physician's conclusory allegations supporting entitlement.

⁶⁹ Arguably, these limitations may prove useful for the district directors, who might not be well-versed in the legal principles underpinning the APA or the applicable rules of evidence.

⁷⁰ 20 C.F.R. § 718.104(d)(1).

⁷¹ 20 C.F.R. § 718.104(d)(2).

⁷² 20 C.F.R. § 718.104(d)(3).

⁷³ 20 C.F.R. § 718.104(d)(4).

⁷⁴ 20 C.F.R. § 718.104(d)(5).

⁷⁵ 20 C.F.R. § 718.104(d)(5).

The fact-finder has always been able to accord additional weight to a treating physician, because the miner may present to this physician more often thereby enabling a more complete consideration of the miner's pulmonary and respiratory conditions. Of course, the ALJ must consider the physician's diagnostic reasoning.⁷⁶ In any case, controlling weight should be accorded only to physician opinions demonstrating a complete analysis of all symptoms, diagnostic testing, medical reasoning, differential diagnoses, and all potential causative factors.⁷⁷ Notably, any evidentiary weighing requires adequate consideration of the physician's qualifications and expertise in the proffered area of medicine.⁷⁸

[d] — Elimination (Again) of “True Doubt Rule.”

The Final Rule confirms that claimants can no longer claim any benefit to the “true doubt rule.” The UMWA pushed heavily for a change to the regulations to reinstate the validity of this adjudication tool. The “true doubt rule” is summarized as follows: When both the evidence for and against an element of entitlement stand in equipoise or virtually equal, then true doubt exists and the claimant has met his burden of proof. DOL's reasoning for not including the “true doubt rule” in the Final Rule is that rarely, if ever, will evidence truly stand in equipoise,⁷⁹ thereby eliminating the need for a *de facto* presumption of entitlement in close cases. A more compelling and accurate reason for not including the “true doubt rule” is that the United States Supreme Court has already rejected its use as violative of the APA. Further, the factfinder might be tempted to utilize this legal fiction when faced with a sympathetic claimant whose peers have historically fared poorly under the Part 718 regulations.

Formal elimination of the “true doubt rule” affirms the regulatory requirement that the factfinder thoroughly analyze all relevant evidence, basing resolution of the entitlement decision on the physician's credibility, which may include qualification, clinical documentation, reasoning, and consideration of all record evidence. Further, the regulations affirm that

⁷⁶ *Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997).

⁷⁷ *Church v. Eastern Assoc. Coal Co.*, 20 BLR 1-9 (B.R.B. 1996).

⁷⁸ *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536 (4th Cir. 1998).

⁷⁹ 65 F.R. 79925.

“the burden of proving a fact alleged in connection with any provision shall rest with the party making such allegation.”⁸⁰

[2] — Claims Procedure.

The Final Rule purports to “streamline” the claims procedure by eliminating some needless steps in the admittedly cumbersome process. The claims procedure consists of several concurrent processes: medical evidence development, employment history evidence development, and identification and designation of the responsible operator.

[a] — Medical Evidence Development.

A claimant’s application for benefits requires a detailed listing of all past coal-mine-related employers.⁸¹ Upon receipt of a miner’s claim, the OWCP will schedule the miner’s medical examination with a “highly qualified physician”⁸² from a list to be maintained by OWCP.⁸³

The district director is required to provide the claimant with a complete pulmonary evaluation. The examination should be conducted by a highly qualified physician selected from a list maintained by OWCP. The Final Rule mandates inclusion of six (6) required elements in the medical report

⁸⁰ 20 C.F.R. § 725.103.

⁸¹ OWCP is responsible for providing and ensuring completion of the forms necessary to collect all information needed to adjudicate the claim. 20 C.F.R. § 725.304. The district director is required also to collect all evidence concerning the “nature and duration of the miner’s employment.” 20 C.F.R. § 725.405(d)(1).

⁸² 65 F.R. 79982-83 (December 20, 2000)(“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.”). DOL intends to develop “rigorous standards” for the selection of physicians qualified to perform the Section 725.406 complete pulmonary evaluation.

⁸³ 20 C.F.R. § 725.406(b). A complete pulmonary evaluation includes “a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study.” 20 C.F.R. § 725.406(a). This physical examination may not be performed by a physician who has examined or treated the claimant within

provided in conjunction with OWCP's initial examination.⁸⁴ Therefore, the district director has an affirmative duty to ensure the "complete pulmonary evaluation" complies with the quality standards and contains all required elements.⁸⁵

Notably, the regulations do not use or define the phrase "highly qualified physician" and, as of the date of this chapter, OWCP does not maintain a list of "highly qualified physicians." Significantly, any report memorializing the mandatory complete pulmonary evaluation does not count towards either party's limited evidentiary production quota.⁸⁶ This initial medical examination must provide complete information required to adjudicate the claim and must strictly conform to the medical evidence quality standards.⁸⁷

The Final Rule retains the 20-day rule, which enables all parties to develop and submit medical evidence up to 20 days before the ALJ hearing.⁸⁸

[b] — Employment History Evidence Development.

Any meaningful claims adjudication will require a full and complete examination of the miner's employment history at the initial stages.

the prior twelve months. 20 C.F.R. § 725.406(b). The miner may elect to have the results of the initial exam transmitted to his treating physician for preparation of a medical opinion, which will count towards the claimant's limited evidentiary production quota. 20 C.F.R. § 725.406(d).

⁸⁴ 20 C.F.R. § 718.104(a). These include the miner's complete medical and employment history, all manifestations of chronic respiratory disease, all pertinent findings, all heart disease symptomatic findings secondary to lung disease, chest x-ray and qualified interpretation, and a qualifying pulmonary function study.

⁸⁵ See 20 C.F.R. § 718.101 ("The Office of Workers' Compensation Programs . . . shall develop the medical evidence necessary for a determination with respect to each claimant's entitlement to benefits. Each miner who files a claim for benefits under the Act shall be provided the opportunity to substantiate his or her claim by means of a complete pulmonary evaluation, including, but not limited to, a chest roentgenogram (X-ray), physical examination, pulmonary function tests and a blood-gas study.").

⁸⁶ 20 C.F.R. § 725.406(b). *See also*, 20 C.F.R. § 725.414.

⁸⁷ 20 C.F.R. § 725.406(c).

⁸⁸ 20 C.F.R. § 725.456(b)(2). Medical evidence provided within 20 days of the hearing may be admitted upon a showing of good cause.

The claimant and the district director share an obligation to ensure that a full, accurate and complete coal mine employment history is prepared and submitted to the notified operators.⁸⁹ The district director must investigate whether any former employer meets the criteria of an operator.⁹⁰ From the list of former coal mine employers, the district director will notify each employer of its potential liability under the Act.⁹¹ Concurrently, the district director should also obtain independent verification of claimant's coal mine employment history.⁹²

All evidence pertaining to responsible operator designation must be submitted at the district director level, unless the proponent demonstrates "extraordinary circumstances" to the ALJ.⁹³

Notably, these sources of information will not necessarily elicit proof of "informal" coal mine employment, which will only be uncovered through independent factual investigation.

[c] — District Director's Claims Procedures and Determination.

The district director issues a notification to any of the miner's former coal mine employers, indicating that the operator is potentially responsible for the payment of the miner's claim.⁹⁴ The notification must include the miner's application, the miner's complete employment history and all

⁸⁹ 20 C.F.R. § 725.405(d)(1).

⁹⁰ 20 C.F.R. § 725.407(a). The five "operator" criteria are (1) the mining company operated after June 30, 1973; (2) the operator employed the miner for one year or more; (3) the miner was exposed to coal mine dust while working for the operator; (4) the miner worked at least one day after December 31, 1969; and, (5) the operator is capable of assuming liability for the payment of benefits. 20 C.F.R. §§ 725.408(a)(2) & 725.492.

⁹¹ 20 C.F.R. § 725.407(b).

⁹² For example, a *current* version of the claimant's Social Security Administration earnings history would determine the existence of other potentially responsible operators. The district director must also verify its search of OWCP records. 20 C.F.R. § 725.495(d).

⁹³ 20 C.F.R. § 725.414. Compare this standard to the good cause standard for medical evidence submitted in violation of the 20-day rule. 20 C.F.R. § 725.456(b)(2).

⁹⁴ 20 C.F.R. § 725.407(a)&(b).

evidence developed.⁹⁵ Within thirty (30) days of the notification of its status as a potentially responsible operator, the operator must file with the district director a response accepting or contesting its identification as a responsible operator.⁹⁶ The Final Rule provides the operator only ninety (90) days to submit evidence challenging its designation.⁹⁷

In appropriate cases, following the complete pulmonary evaluation and the receipt of the operator's response, the district director may require the submission of additional evidence by issuing an evidentiary schedule.⁹⁸ The schedule for submission of additional evidence will also include a summary of the initial complete pulmonary evaluation,⁹⁹ a preliminary analysis of the medical evidence including which elements of entitlement are not established by the evidence,¹⁰⁰ a responsible operator designation,¹⁰¹ and notification of the rights to obtain further adjudication and to submit additional evidence.¹⁰² The schedule will provide all parties at least sixty (60) days to submit additional evidence probative of either the claimant's entitlement or the responsible operator

⁹⁵ 20 C.F.R. § 725.407(c). Further, the district director may request the operator to provide additional information concerning the nature of the operator's mining business and financial status. 20 C.F.R. § 725.407(c).

⁹⁶ 20 C.F.R. § 725.408(a)(1). The operator must admit or deny each of the operator criteria contained at 20 C.F.R. § 725.492. 20 C.F.R. § 725.408(a)(2). This initial response is equivalent to the operator's controversion under prior practice. An operator's failure to file a timely response waives its right to challenge the operator criteria. 20 C.F.R. § 725.409(a)(3).

⁹⁷ 20 C.F.R. § 725.408(b)(1). All operator evidence must be submitted first to the district director. 20 C.F.R. §§ 725.408(b)(2), 725.414(d) & 725.457(c)(1).

⁹⁸ 20 C.F.R. § 725.410.

⁹⁹ 20 C.F.R. § 725.410(a)(1).

¹⁰⁰ 20 C.F.R. § 725.410(a)(2). If any element is not established, the district director will advise the claimant that the claim will be denied. 20 C.F.R. § 725.410(a)(2).

¹⁰¹ 20 C.F.R. § 725.410(a)(3). If the designated responsible operator is not the miner's last employer of more than one year, then the Schedule must provide all statements required by Section 725.495(d). *Id.* § 725.410(a)(3). The Schedule will also dismiss all other potentially liable operators. *Id.*

¹⁰² 20 C.F.R. § 725.410(a)(4).

designation.¹⁰³ The designated responsible operator must, once again, accept or reject the district director's designation.¹⁰⁴

Within twenty (20) days following the close of the Schedule period,¹⁰⁵ the district director issues a proposed decision and order ("Proposed D&O").¹⁰⁶ The Proposed D&O must contain findings of fact and conclusions of law,¹⁰⁷ as well as a notice of appeal rights.¹⁰⁸ The Proposed D&O must also contain OWCP's determination of claimant's eligibility and entitlement, designate the responsible operator, and dismiss all potentially responsible operators from the claim.¹⁰⁹

The ALJ's adjudication procedures are, for the most part, unaffected by the Final Rule.¹¹⁰ The principal exception is the quantity limitations on medical evidence, discussed *infra*.

¹⁰³ 20 C.F.R. § 725.410(b). The opposing party is given at least thirty (30) days to submit rebuttal evidence. *Id.* Any "additional" evidence submitted must comply with the limited evidentiary production quota of Section 725.414. Further, the operator should identify any potential evidentiary witness relevant to liability designation. 20 C.F.R. § 725.414(c).

¹⁰⁴ 20 C.F.R. § 725.412(a)(1). Failure to challenge designation as responsible operator constitutes a waiver. 20 C.F.R. § 725.412(a)(2). If the district director determines claimant is entitled to benefits, the designated responsible operator may file its acceptance of such liability; however, failure to challenge claimant's entitlement is deemed a challenge to claimant's entitlement. 20 C.F.R. § 725.410(b).

¹⁰⁵ Before taking further action, the district director is empowered to issue a second Schedule designating a different responsible operator. 20 C.F.R. § 725.415(b). The district director will continue to hold "informal conferences" when the claimant is represented by counsel with the only apparent purpose of stipulating to facts and legal conclusions, but, due to unavoidable conflicts of interest in Trust Fund Cases, informal conferences will not be scheduled if claimant is not represented. 20 C.F.R. §§ 725.416 & 725.417. Any stipulation produced at the informal conference will be submitted to the ALJ. 20 C.F.R. § 725.417(a).

¹⁰⁶ 20 C.F.R. § 725.418(a).

¹⁰⁷ 20 C.F.R. § 715.418(b).

¹⁰⁸ 20 C.F.R. § 715.418(c). In cases where the record contains the losing party's request for a hearing, the claim will be forwarded to the Office of Administrative Law Judges. 20 C.F.R. §§ 715.418(c) & 725.421. Otherwise, an aggrieved party has thirty (30) days to appeal to OALJ. 20 C.F.R. § 715.419.

¹⁰⁹ 20 C.F.R. § 715.418(d).

¹¹⁰ 20 C.F.R. §§ 725.450 through 725.483. Significantly, no person may testify at the hearing, by deposition, or by interrogatory unless the requirements of Section 725.414(c) are met.

[3] — Responsible Operator Determination.

The Act and the regulations require the coal mine operator that most recently employed the miner to provide for the payment of any benefits awarded to the claimant. Coal companies must secure payment for potential claim awards by providing proof of insurance, qualifying as a self-insured, or possessing sufficient assets.¹¹¹ The Final Rule makes several significant changes to the responsible operator designation procedure and broadens the category of operators.¹¹² The Final Rule's increased claims costs and greater exposure to claim awards necessarily elevates coal operators' interest in avoiding designation as the responsible operator.

First, the responsible operator designation procedure is relegated to the district director level. For this reason, the Final Rule requires operators to produce all evidence relevant to responsible operator designation while the claim is pending at the district director level. Curiously, the designated responsible operator may not produce additional operator evidence at the ALJ hearing absent "extraordinary circumstances," even though the hearing is *de novo*. Moreover, limiting evidence production to the district director level strikes an odd chord because the ALJ, who must possess a law degree and trial experience, would be better equipped to sort through issues hinging on corporate transactions, reorganizations, and liquidations. Nonetheless, OWCP's failure to properly designate the correct responsible operator at the district director level, as determined by the ALJ, will result in liability for the claim being transferred to the Trust Fund.

More significantly, the Final Rule partially reallocates the burden of proof regarding the proper responsible operator identity and designation.¹¹³ Under existing precedent, OWCP bears the burden of properly identifying the correct responsible operator with the Trust Fund assuming responsibility for claims when OWCP misses the mark.¹¹⁴

¹¹¹ 30 U.S.C. § 933(a). Failure to comply with this requirement subjects the coal operator and its officers to severe civil penalties. *Id.* § 933(d).

¹¹² 20 C.F.R. §§ 725.490 through 725.497.

¹¹³ 20 C.F.R. § 725.495.

¹¹⁴ *See, e.g.,* Director, OWCP v. Trace Fork Coal Co., 67 F.3d 503, 507 (4th Cir. 1995).

However, the Final Rule fills a perceived crevice in the Part 725 burdens of proof.¹¹⁵ As a result, the Final Rule requires OWCP merely to demonstrate the designated responsible operator meets the criteria of a “potentially responsible operator.” The potentially responsible operator is presumed to have sufficient assets and, then, must prove that some other entity subsequently employed the miner for more than one year and meets the criteria for designation of a responsible operator.¹¹⁶ The Final Rule explains that OWCP will meet its initial burden of proof by verifying its records contain no proof of insurance or self-insurance for other potentially responsible operators.¹¹⁷ Therefore, the potentially responsible operator will always carry the burden of exculpation in cases where OWCP determines it possesses sufficient assets to assume liability for payment of benefits.¹¹⁸

¹¹⁵ See both 62 F.R. 3364-65 and 64 F.R. 54999. The Benefits Review Board construed OWCP’s obligation to “vigorously enforce” operator payment obligations (20 C.F.R. § 725.601) as imposing on the Director the burden of proof to prove the responsible operator, and reasoned that OWCP’s mere *prima facie* evidence does not create an operator’s duty to exculpate itself from liability. *Matney v. Trace Fork Coal Co.*, 17 B.L.R. 1-145 (B.R.B. 1993), *aff’d*, 67 F.3d 503, 507-08 (4th Cir. 1995).

¹¹⁶ 20 C.F.R. § 725.495(c)(1). Notably, this provision smacks directly into the APA requirement that the proponent of a claim bear the burden of proof, as well as the Act’s regulation requiring the same. 20 C.F.R. § 725.103 (“Except as otherwise provided in this part and part 718, the burden of proving a fact alleged in connection with any provision shall rest with the party making such allegation.”). It is difficult to perceive any meaningful distinction requiring a potentially responsible operator to bear a burden of proof assigned to OWCP under the Act. 30 U.S.C. § 932. Unless and until OWCP meets this burden, the responsible operator should have no liability. Under the Final Rule, Section 725.494 provides OWCP *carte blanche* to assign this burden to a potentially responsible operator after OWCP produces only meager evidence that a miner’s subsequent employer is incapable of assuming payment of benefits. The nearly absolute bar of presenting evidence on the responsible operator issue virtually assures the probable result of an operator being compelled to provide benefits in claims even though the miner worked for a subsequent employer for more than one year. In this regard, the Final Rule exceeds both the Act and the APA by impermissibly shifting an affirmative burden to a defending party.

¹¹⁷ 20 C.F.R. § 725.495(d).

¹¹⁸ Precedent of the Benefits Review Board holds that corporate existence is presumptive evidence of an operator’s ability to assume payment for benefits. *Borders v. A.G. P. Coal Co.*, 9 B.L.R. 1-32, 1-34 (B.R.B. 1986).

Second, the Final Rule confirms the Act's intention to broadly impose liability against coal mine related entities. Under the Final Rule, coal companies will defend classifications as an operator, successor operator, potentially liable operator, and responsible operator. Basically, an operator is any entity that owns, controls or supervises a coal mine, as well as its independent contractors,¹¹⁹ either directly or indirectly.¹²⁰ Accordingly, any such entity is deemed to have employed miners as defined by the regulations.¹²¹ Liability for claims filed by self-employed operators extends to the entity that "substantially controls, supervises or is financially

¹¹⁹ 20 C.F.R. § 725.491. "Operator" is defined as "(1) any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine; . . .". The regulations also define operator to include any entity that employs miners in the transportation of coal or the construction of coal mines. The regulations define "independent contractor" as "any person who contracts to perform services. Such contractor's status shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities." 20 C.F.R. § 725.491(c). *See* 64 F.R. 54997-98 & 65 F.R. 80006-07 (reasoning provided for adopting broad interpretation of independent contractor liability); or (2) another person who: (i) employs.

¹²⁰ 20 C.F.R. § 725.491(e). Thus, a lessor may be considered an operator if it retains authority to make decisions concerning extraction or preparation. *Id.* However, a lessor's potential liability is secondary to the lessee's, and the lessor only assumes liability for the payment "only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant." 20 C.F.R. § 725.493(b)(3). In denying the notion that even a mere holder of mineral rights would be subject to liability under the more elastic definition of successor operator, the Department stated "the acquirer of mining property must continue to derive an economic benefit from the coal on the property. Thus, 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." 65 F.R. 80007.

¹²¹ 20 C.F.R. § 725.493(a). The existence of any employment relationship between the miner and an operator or successor is sufficient to create potential liability under the Final Rule. The employment relationship is broadly defined, regardless of the business relationship or business entity utilized by the operator. *Id.* § 725.493(a)(1). An entity will be presumed to have employed the miner, *i.e.*, supervised or controlled his work, if it has paid wages or salary to that individual.

responsible for the activities of the self-employed operator.”¹²² The Final Rule presumes that an operator’s employees were exposed to coal mine dust.¹²³

A “successor operator” is any entity, regardless of form, that acquires an operator or an operator’s coal mine(s).¹²⁴ The Final Rule extends successor liability to cases of corporate reorganization, liquidation, and asset sales.¹²⁵ However, the “prior” operator retains liability if it can be deemed a potentially liable operator.¹²⁶ Thus, an entity acquiring a coal mine after the claimant’s last employment will find solace only if the prior operator has maintained its responsibility for the payment of benefits.¹²⁷

The district director will determine an operator to be a “potentially liable operator” if five conditions are met.¹²⁸ First, the miner’s death or disability arose out of employment in or around a mine controlled by the operator.¹²⁹ Second, the operator controlled a mine after June 30, 1973.¹³⁰ Third, the operator employed the miner for a cumulative period of at least one-year.¹³¹ Fourth, the miner’s coal mine employment contained at least

¹²² 20 C.F.R. § 725.493(b)(4).

¹²³ 20 C.F.R. § 725.491(d). This presumption is rebuttable based on a showing that the miner was exposed to coal mine dust “for significant periods during such employment.” *Id.*

¹²⁴ 20 C.F.R. § 725.492(a).

¹²⁵ 20 C.F.R. § 725(b). In these cases, the “resulting entity shall be considered a ‘successor operator’ with respect to any miners previously employed by such operator.” *Id.* § 725.492(c). When a mine is transferred more than once, *i.e.*, multiple successor operators exist, then the entity that most recently acquired the mine will be the successor operator. *Id.* § 725.492(d)(3).

¹²⁶ 20 C.F.R. § 725.492(d).

¹²⁷ 20 C.F.R. § 725.493(b)(1).

¹²⁸ 20 C.F.R. § 725.494(a)-(e).

¹²⁹ 20 C.F.R. § 725.494(a). The Final Rule presumes death or disability arose out of such employment.

¹³⁰ 20 C.F.R. § 725.494(b).

¹³¹ 20 C.F.R. § 725.494(c). One year means 125 consecutive or intermittent working days within a single calendar year. 20 C.F.R. 725.101(32). This one-year definition applies both to application of presumptions, 20 C.F.R. Section 718.301, and determining length of coal mine employment under Section 725.493(b).

one day after December 31, 1969.¹³² Finally, the operator is capable of assuming liability for the payment of benefits, which is presumed by the existence of an insurance policy, qualification as a self-insured, or possession of sufficient assets to secure payment of benefits.¹³³ The potentially liable operator determination is made without reference to the miner's other coal mine employers and whether they are capable of assuming the payment of benefits.

Payment of benefits on awarded claims is the responsibility of the potentially liable operator that most recently employed the miner¹³⁴ and is designated the "responsible operator." If the miner's most recent employer of more than one year has not provided for the payment of benefits, then the miner's next most recent employer will be held liable for the claim.¹³⁵ Liability for payment of benefits rests with the Trust Fund if no operator can be considered a potentially responsible operator.¹³⁶

The inherent flaw in the potentially liable operator designating process is the district director's abdication of accountability for ensuring that the most recent potentially liable operator will be held answerable in any given claim. The Final Rule accomplishes this inequitable result via two means. First, the district director has eased its own obligations by merely establishing "potentially liable operator" status, as opposed to "responsible operator" status under the prior regulations.¹³⁷ Thus, the Final Rule preserves the temptation to settle on the most convenient or available operator in cases where a more recent employer's liability requires better

¹³² 20 C.F.R. § 725.494(d).

¹³³ 20 C.F.R. § 725.494(e)(1)-(3). Title 20, Part 726 governs the requirements of insurance policies and self-insurance sufficient to meet an operator's obligation to assume liability for payment of benefits. If not, an operator's assets must meet the requirements of 20 C.F.R. § 725.606.

¹³⁴ 20 C.F.R. § 725.495.

¹³⁵ 20 C.F.R. § 725.495(a)(3).

¹³⁶ 20 C.F.R. § 725.495(a)(4).

¹³⁷ Notably, both the district director and the ALJ have authority to issue subpoenas for the production of documents necessary to defend the RO designation 20 C.F.R. § 725.351(a)&(b). Violators of any order or process are subject to contempt proceedings. 20 C.F.R. § 725.351(c).

or more proof. Second, the designated responsible operator bears the ultimate burden of disproving its liability and confirming that a more recent employer is capable of assuming liability for the claim.¹³⁸ Thus, the designated responsible operator assumes the district director's former burden. Extraordinarily, the Final Rule displaces the ultimate burden even though the district director performs a dual role – litigating party against the operator *and* adjudicator. This inequity is not overcome by the district director's statement that its files contain no record of the more recent employer's insurance or self-insurance.¹³⁹

[4] — Modifications and Subsequent/Duplicate Claims.

The revisions to Sections 725.309 and 725.310 are primarily to effect the prevailing and controlling case law governing additional requests for benefits filed after a final denial of benefits. Modifications are claims filed within one (1) year of a final denial,¹⁴⁰ while “subsequent claims” are filed more than one (1) year after a final denial of benefits.¹⁴¹

A claimant can seek modification from a final denial in order to correct a mistake of fact or to prove a change in conditions¹⁴² by filing a petition for modification with the district director.¹⁴³ In essence, the claimant must show the factfinder made an error or that the miner's physical condition now entitles him to benefits.¹⁴⁴ The only significant revision to the modification procedure is the limitation of the quantity of evidence submitted in support and opposing the petition to modify a prior award or denial.¹⁴⁵

¹³⁸ 20 C.F.R. § 725.495(c).

¹³⁹ 20 C.F.R. § 725.495(d).

¹⁴⁰ 20 C.F.R. § 725.310(a).

¹⁴¹ 20 C.F.R. § 725.309(d).

¹⁴² 20 C.F.R. § 725.310(a).

¹⁴³ 20 C.F.R. § 725.210(b).

¹⁴⁴ 20 C.F.R. § 725.310(c).

¹⁴⁵ 20 C.F.R. § 725.310(b). Under this section, any party may submit no more than one each additional chest X-ray, pulmonary function test, arterial blood-gas test, and physician opinion report. 20 C.F.R. § 725.310(b). Modification rebuttal evidence may be submitted as provided in Section 725.414(a)(2)(ii)&(a)(3)(ii).

Any claim filed more than one year after a final denial of benefits will be rejected as a duplicate claim, unless the claimant produces new evidence establishing “one-element” of entitlement previously adjudicated against the claimant.¹⁴⁶ Prior to even the initial 1997 proposed rule, all major coal-mining circuits had adopted the one-element standard.¹⁴⁷ Therefore, the revision should not be considered a regulatory change, but, rather, an adaptation of required procedure to the controlling and prevailing case law.

[5] — Widows, Dependents and Other Beneficiaries.

The Act provides black lung benefits to eligible miners,¹⁴⁸ the miner’s surviving spouse or divorced spouse,¹⁴⁹ the miner’s child if no spouse exists, and, in limited cases, parents or siblings.¹⁵⁰ Benefits are increased, or augmented,¹⁵¹ for each eligible dependent of the claimant.¹⁵² A claimant’s or augmentee’s qualifications will be determined under state law where the person is domiciled.¹⁵³ More than any other eligibility provision, determination of dependency will be a fact specific inquiry.

¹⁴⁶ 20 C.F.R. § 725.309(d). The referenced “conditions of entitlement” for a miner include the four entitlement criteria contained at 20 C.F.R. Sections 718.201 through 718.204.

¹⁴⁷ For example, the U.S. Court of Appeals for the Third Circuit requires claimants to produce new evidence supporting one element of entitlement previously adjudicated against the claimant. *Labelle Processing v. Swarrow*, 72 F.3d 308 (3d Cir. 1997) (adopting the standard first enunciated by the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), *cert. den.*, 117 S. Ct. 763 (1997)). The one element standard has been adopted in substantial part by all major coal mining circuits. Five courts of appeal have jurisdiction over 90 percent of claims filed under the Act). 64 F.R. 54972.

¹⁴⁸ 20 C.F.R. § 725.202.

¹⁴⁹ 20 C.F.R. §§ 725.204(a) & 725.202.

¹⁵⁰ 20 C.F.R. § 725.201(a).

¹⁵¹ The regulations creating entitlement to augmented benefits based on the miner’s dependents are set forth at 20 C.F.R. §§ 725.204 through 725.211. The regulations creating eligibility for a miner’s spouse and dependents are set forth at 20 C.F.R. Sections 725.212 through 725.228.

¹⁵² 20 C.F.R. § 725.201(d). In this context, the claimant may be the miner, the miner’s current or divorced spouse, or the miner’s dependent. For a dependent must meet the regulatory dependency criteria.

¹⁵³ *See, e.g.*, 20 C.F.R. §§ 725.204 & 725.208.

The Final Rule generally increases the class of persons eligible to receive benefits as a result of the miner's total disability due to pneumoconiosis or death due to pneumoconiosis. The Final Rule extends dependents to include "deemed" spouses, in addition to "legal" spouses,¹⁵⁴ in order to conform to the incorporated definition of "wife" set forth in the Social Security Act.¹⁵⁵ Therefore, under certain circumstances, the Fund or a responsible operator will be required to provide benefits augmented by more than one spouse.¹⁵⁶ Remarriage no longer operates as a permanent bar to collection of survivor's benefits. Eligible widows may resume collecting benefits after the termination of an intervening marriage, which permanently ceased eligibility for benefits under existing regulations.¹⁵⁷ Similarly, a miner's "child" can become re-eligible for benefits at the termination of marriage, provided the remaining eligibility criteria exist.¹⁵⁸

Accordingly, responsible operators will be required to pay benefits to a larger class of beneficiaries, in addition to the Final Rule's underlying purpose of increasing the overall award of claims.

[6] — Attorneys' Fees.

The Final Rule expands recovery of attorney fees in order to harmonize effective representation of claimants with the new significant evidentiary limitations applicable to claims adjudication at the district director level.¹⁵⁹ Apparently, the Final Rule contemplates potentially responsible operators will be required to assume an adversarial posture earlier than

¹⁵⁴ 20 C.F.R. §§ 725.204 through 725.207.

¹⁵⁵ 42 U.S.C. § 416(h).

¹⁵⁶ 65 F.R. 79963-965 (December 20, 2000).

¹⁵⁷ 20 C.F.R. § 725.213. A widow, once remarried, regains eligibility for benefits upon terminating the subsequent marriage. This modification and duplicate claim procedures of Sections 725.309 and 725.310 contemplate this circumstance as ground for modifying a denial or awarding a subsequent claim.

¹⁵⁸ A miner's child is eligible as a dependent if the child is unmarried and (1) under 18 years of age, (2) disabled pursuant to 42 U.S.C. § 423(d), or (3) a full-time student up to the child's twenty-third (23rd) birthday. 20 C.F.R. § 718.209(a).

¹⁵⁹ 65 F.R. 79979.

under prior regulatory enactments. Thus, the responsible operator must promptly accept its designation as responsible operator or, otherwise, risk creating an adversarial relationship, thereby triggering claimant's entitlement to attorney fees.

Any attorney or lay representative may recover a fee from the party responsible for the payment of benefits.¹⁶⁰ If the claimant establishes both eligibility and entitlement and thereafter receives an award of benefits, then attorney fees will be awarded to the claimant and assessed against the designated responsible operator or the Trust Fund.¹⁶¹

The Final Rule now requires that claimant may recover attorney fees from the moment an adversarial relationship is created.¹⁶² The claimant will recover all reasonable fees and costs incurred even before the adversarial relationship is created.¹⁶³ The Final Rule identifies five (5) governing factors triggering an "adversarial relationship": (1) the designated responsible operator fails to accept the district director's determination that the claimant is entitled to benefits;¹⁶⁴ (2) the district director issues a schedule of additional evidence in cases where there is no operator;¹⁶⁵ (3) a party declines to pay a medical bill submitted, even if the treatment is unreasonable or not compensable;¹⁶⁶ (4) a party contests

¹⁶⁰ Any attorney admitted in any State may represent a claimant, provided the attorney adheres to the rules governing the practice of law in that jurisdiction. 20 C.F.R. § 725.363(a). A lay representative may be appointed with the approval of the adjudication officer. 20 C.F.R. § 725.363(b).

¹⁶¹ 20 C.F.R. § 725.365 through 725.367.

¹⁶² 20 C.F.R. § 725.367(a) ("the operator or fund liable for the payment of benefits shall be liable for the payment of the claimant's attorney's fees where the operator or fund, as appropriate, took action, or acquiesced in action, that created an adversarial relationship between itself and the claimant."). Arguably, an adversarial relationship is created at the moment the claimant files a claim and lists the operator as a former employer and the operator need not take any affirmative action to trigger entitlement to attorney's fees.

¹⁶³ 20 C.F.R. § 725.367(a).

¹⁶⁴ 20 C.F.R. § 725.367(a)(1). The designated responsible operator must accept the Section 725.410(a)(3) determination within the thirty (30) day period allowed by Section 725.412(b).

¹⁶⁵ 20 C.F.R. § 725.367(a)(2).

¹⁶⁶ 20 C.F.R. § 725.367(a)(3).

a beneficiary's request for increased benefits;¹⁶⁷ and, (5) a party unsuccessfully seeks a decrease in the amount of benefits payable.¹⁶⁸

Thus, the Final Rule's expansion of attorney fee awards forces an omnipresent choice between requiring the claimant and OWCP to meet their burdens of proof in defense of the claim, on the one hand, and paying claims that might not have been considered legitimate under the former regulations. Combined with expected increase in award rates from 7 percent to 12 percent, the new attorney fee rules will represent a significant additional cost shouldered by operators who have ever employed miners.

§ 9.05. Conclusion.

In sum, the Final Rule contains many potentially significant challenges in the defense of claims under the federal Black Lung Benefits Act. Undoubtedly, many of the substantive revisions contravene Congressional intent, the Act, the APA, and sound medicine, and, therefore, should be ruled unenforceable. In the event that the Final Rule's revisions are upheld and enforced, then operators are likely to see an increase in the number of claimants awarded benefits, a corresponding increase in attorney fee awards, an increase in insurance premiums, and an increase in claim defense costs. Additionally, the Final Rule will expand entitlement to former miners who do not meet the medical criteria established under the Act, expanding further coal mine operators' obligations resulting from employment of coal miners.

¹⁶⁷ 20 C.F.R. § 725.367(a)(4).

¹⁶⁸ 20 C.F.R. § 725.367(a)(5).