Federal Register

Monday,
December 15, 2003

Part IV

Department of Labor

Employment Standards Administration

20 CFR Parts 718 and 725

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

DEPARTMENT OF LABOR

Employment Standards Administration

20 CFR Parts 718 and 725

RIN 1215–AB40

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

AGENCY: Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This final rule implements the decision of the United States Court of Appeals for the District of Columbia Circuit resolving a broad challenge to numerous provisions of a final rule, promulgated by the Department of Labor on December 20, 2000, amending the regulations implementing the Black Lung Benefits Act. In its June 14, 2002 opinion, the court reviewed both the substance of many provisions of the rule and the applicability of numerous provisions. It upheld the substance of all but one provision, and held that several other provisions were inapplicable to certain claims. The court therefore affirmed in part the district court's decision upholding the rule in its entirety, reversed in part, and remanded the case for further proceedings consistent with its opinion. The district court, in turn, remanded the case to the Department for further proceedings in accordance with the D.C. Circuit's opinion. This final rule implements the D.C. Circuit's opinion. It makes no other changes.

DATES: Effective December 15, 2003.

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

SUPPLEMENTARY INFORMATION:

I. Regulatory History

On January 22, 1997, the Department issued a proposed rule to amend the regulations implementing the Black Lung Benefits Act. 62 FR 3338–3435 (Jan. 22, 1997). The Department received almost 200 written submissions from interested persons and organizations, and it held two hearings at which over 50 people testified. After carefully reviewing the comments and testimony, the Department issued a second notice of proposed rulemaking. 64 FR 54966–55072 (Oct. 8, 1999). The second notice proposed changing several important provisions in the initial proposal, and explained the Department's decision not to change other regulations. The Department received 37 written submissions during the ensuing 90-day comment period. After carefully reviewing these comments, the Department issued its final rule on December 20, 2000. 65 FR 79920–80107 (Dec. 20, 2000).

The National Mining Association and several other plaintiffs filed suit against the Department in the United States District Court for the District of Columbia, challenging a substantial number of the provisions in the final rule. The court upheld the validity of each of the challenged provisions and rejected the plaintiffs' argument that certain regulations should not apply to claims pending on the rule's effective date. *National Mining Ass'n* v. *Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). It also rejected a challenge to the procedural adequacy of the Department's rulemaking proceeding, holding that the rulemaking record met the procedural requirements of the Administrative Procedure Act. 160 F.Supp.2d at 87–88. The plaintiffs appealed to the D.C. Circuit.

II. D.C. Circuit's Review of the Final Rule

Substantive Challenges

In *National Mining Ass'n* v. *Dep't of Labor,* 292 F.3d 849 (D.C. Cir. 2002), the court upheld the validity of all of the challenged provisions except one. The court upheld the following regulations: 20 CFR 718.104(d), 718.201(a)(2) and (c), 718.204(a), 718.205(c)(5), 725.101(a)(6), 725.309(d), 725.310(b), 725.366(b), 725.408, 725.414, 725.456, 725.457(d), 725.458, 725.495(c), 725.701(e). The court invalidated one provision, however, holding that the Department lacked the specific statutory authorization necessary to shift the cost of cross-examination of an indigent claimant's witness to other parties in the absence of a successfully prosecuted claim. 292 F.3d at 875 (discussion of § 725.459). The Department's revision to § 725.459 is explained in detail under III, Explanation of Changes.

The court upheld the substance of other provisions based upon the plain language of the rules, the preamble explanation of their intended application, the rulemaking record and the government's representations made in the course of briefing and oral argument. The decision outlines the substance and intended application of the challenged rules, as described below.

Treating Physicians' Opinions—20 CFR 718.104(d)

Section 718.104(d) requires the adjudicator to give consideration to the relationship between the miner and any treating physician whose report is admitted into the record, and provides that, in appropriate cases, the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudicator's decision to give that physician's opinion controlling weight. In upholding the substance of the provision, the court recognized that the rule permits, but does not mandate, that the adjudicator give controlling weight to a treating physician's opinion. A decision to give a treating physician's opinion controlling weight must be ''based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.'' 292 F.3d at 870 (quoting 20 CFR 718.104(d)(5)). Just as the Department had explained in the preamble to the final rule (65 FR at 79933–79934, ¶ (h) (Dec. 20, 2000)), the court stated that the provision is not a presumption that ''relieves claimants of the burden of proving both pneumoconiosis and the credibility of the doctor's opinion.'' 292 F.3d at 870. Indeed, the court stated specifically that neither the regulation's plain language nor the Secretary's interpretation relieves claimants of the burden of proof. *Id.*

Definition of ''Pneumoconiosis''—20 CFR 718.201

Section 718.201(a) defines pneumoconiosis as ''a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.'' It further provides that ''this definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.'' *Id.* Section 718.201(a)(2) provides that the definition includes ''any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.'' Section 718.201(c) provides that pneumoconiosis ''is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.''

The court upheld § 718.201(a), stating that, by recognizing both ''clinical'' and ''legal'' pneumoconiosis, the regulation ''merely adopts a distinction embraced by all six circuits to have considered the issue,'' and ''neither 'expand[s]' nor 'redefine[s]' the meaning of pneumoconiosis beyond its statutory definition.'' 292 F.3d at 869. The court also noted that even if the regulation could be read to change the definition, the Black Lung Benefits Act gives the Secretary the authority to supplement

statutory terms. *Id.* The court upheld § 718.201(c), holding it had sufficient support in the rulemaking record. The court cited scientific evidence in the rulemaking record indicating that pneumoconiosis can be latent and progressive. The court cited two studies, one ''indicating that pneumoconiosis is latent and progressive in—at most—eight percent of cases,'' and the other ''indicating that pneumoconiosis is latent and progressive as much as 24% of the time.'' 292 F.3d at 869. Consistent with the Department's argument, the court therefore interpreted the regulation to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. *Id.* There is no irrebuttable presumption that each miner's pneumoconiosis is latent or progressive. The burden of proving the presence of pneumoconiosis is always on the miner. As the Department explained in the preamble to the final rule, ''the miner continues to bear the burden of establishing all of the statutory elements of entitlement.'' 65 FR at 79972 (Dec. 20, 2000).

Total Disability Rule—20 CFR 718.204(a)

Section 718.204(a) provides, in part, that ''any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.'' In upholding this provision, the court stated that there is ''an obvious rational basis for the rule: the statute only pertains to whether a miner is disabled 'due to pneumoconiosis,' and evidence of nonpulmonary conditions has no relevance to that inquiry.'' 292 F.3d at 873. Recognizing that the rule is consistent with the holdings of three circuits and abrogates the holding of another, *see* 65 FR 79947, ¶ (c) (Dec. 20, 2000), the court explained that ''regulations promulgated to clarify disputed interpretations of a regulation are to be encouraged. Tidying-up a conflict in the circuits with a clarifying regulation permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable regulation.''' 292 F.3d at 873 (quoting *Pope* v. *Shalala*, 998 F.2d 473, 486 (7th Cir. 1993)).

Establishing Death Due to Pneumoconiosis—20 CFR 718.205(c)

Section 718.205(c)(2) provides, in part, that for the purpose of adjudicating survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis ''[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. * * *'' Section 718.205(c)(5), in turn, provides that ''[p]neumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death.'' In upholding this provision, the court noted that the rulemaking record supported the Department's conclusion that ''pneumoconiosis [can] weaken the body's defenses to infections and increase susceptibility to other disease processes.'' 292 F.3d at 871 (quoting 65 FR 79950 (Dec. 20, 2000)). The court recognized that the provision ''nowhere mandates the conclusion that pneumoconiosis be regarded as a hastening cause of death,'' and that it ''expressly requires claimants to prove that pneumoconiosis is the hastening cause'' of death. 292 F.3d at 871. As the Department explained in the preamble to the final rule: (1) the survivor must ''submit credible medical evidence establishing a detectable hastening of the miner's death on account of pneumoconiosis,'' 65 FR 79949, ¶ (b) (Dec. 20, 2000); and (2) ''the burden of persuasion remains with the survivor to prove that the miner's death was due to pneumoconiosis.'' 65 FR 79951, ¶ (f) (Dec. 20, 2000).

Definition of ''Benefits''—20 CFR 725.101(a)(6)

Section 725.101(a)(6) includes in the definition of ''benefits'' the ''expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406.'' The costs of such medical examination and testing are paid by the Black Lung Disability Trust Fund and are reimbursed by the employer only if benefits are ultimately awarded. *See* 20 CFR 725.406(e); 292 F.3d at 865–866. In upholding the substance of this provision, the court noted ''the Black Lung Benefits Act's express authorization to '[t]he Secretary * * * to charge the cost of examination * * * to the employer.' '' 292 F.3d at 875 (quoting 33 U.S.C. 907(e), as incorporated by 30 U.S.C. 932(a)).

Subsequent Claims—20 CFR 725.309(d)

Section 725.309(d) provides, in part, that a subsequent claim ''shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement * * * has changed since the date upon which the order denying the prior claim became final.'' A subsequent or additional claim is a claim filed more than one year after the denial of a claim previously filed by the same claimant. The court upheld this provision because: (1) The regulatory language squarely places the burden of proving a change in a condition of entitlement on the claimant; and (2) § 725.309(d) does not violate res judicata or traditional notions of finality because proof of the change must be based on evidence of the claimant's current condition. 292 F.3d at 870. *See also* 65 FR 79973, ¶ (d) (Dec. 20, 2000) (explaining that ''new evidence establish[ing] that [a miner's] condition has worsened'' is required to establish the necessary change). The claimant's condition at the time the previous claim was denied is not relevant to proving a change in a condition of entitlement. 292 F.3d at 870. Moreover, even after establishing a change in one condition of entitlement, the miner still bears the burden of proving the remaining conditions of entitlement. 292 F.3d at 861.

Attorneys' Fees—20 CFR 725.366(b)

Section 725.366(b) provides that in calculating an award of an attorney's fees, the ALJ ''shall take into account'' a number of factors, including ''the quality of the representation, the qualifications of the representative, [and] the complexity of the legal issues involved.'' The court upheld this provision, noting it required consideration of no factors not already included in the calculation of shifted attorneys' fees by the Supreme Court. In response to the argument that the rule would result in the ''double counting'' of some factors, the court stated that ''the factors identified in § 725.366(b) do not supplant the 'lodestar' method of calculating reasonable fees, or enhance the lodestar fee once it is calculated.'' 292 F.3d at 875 (quoting government's brief).

Evidence Limitations—20 CFR 725.310(b), .414, .456, .457(d), .458

Sections 725.310(b), 725.414, 725.456, 725.457(d), and 725.458 place various limits on the amount and timing of evidence admissible in claims proceedings. The court upheld all of these provisions, stating that the Administrative Procedure Act and the Black Lung Benefits Act authorize them. In holding that the new evidentiary limits are not at all ''artificial,'' the court quoted the Department's explanation for these limitations: they ''will enable ALJs to focus their attention 'on the quality of the medical evidence in the record before [them].' '' 292 F.3d at 874 (quoting 64 FR 54994 (Oct. 8, 1999)).

Criteria for Determining a Responsible Operator—20 CFR 725.408, .495(c)

Section 725.408 establishes a deadline for a coal mine operator named a ''potentially liable operator'' in a specific claim to submit evidence regarding its financial status and employment of the miner if it disagrees with its identification. Upholding the validity of this provision, the court stated that the section shifted only the burden of production, not the burden of proof, and that ''it requires nothing more than that operators must submit evidence rebutting an assertion of liability within a given period of time.'' 292 F.3d at 871. ''[T]he 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.'' 65 FR at 79986, ¶ (e) (Dec. 20, 2000)).

Section 725.495(c) provides that once an operator has been designated as the ''responsible operator'' (the operator responsible for a specific claim) from among the companies named potentially liable operators, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability or that another potentially liable operator more recently employed the miner and is capable of assuming liability. The court upheld this provision, recognizing that it shifted the burden of proof, because it applies only after the operator has been designated as the responsible operator. 292 F.3d at 872. *See also* 65 FR 80009, ¶ (e) (Dec. 20, 2000); 64 FR at 54973 (Oct. 8, 1999); 62 FR at 3365 (Jan. 22, 1997). In seeking to be excused from liability in such circumstances, the court noted ''the operator becomes the 'proponent' of a remedial order of the ALJ and, therefore, the party to which [the APA] assigns the burden of proof.'' 292 F.3d at 872 (quoting 160 F.Supp.2d at 71). Given that the provision ''affords a mine operator liable for a claimant's black lung disease the opportunity to shift liability to another party, it is hardly irrational to require the operator to bear the burden of proving that the other party is in fact liable.'' 292 F.3d at 872.

Medical Benefits Presumption—20 CFR 725.701(e)

Section 725.701(e) provides that if a miner who is totally disabled due to pneumoconiosis receives treatment for a pulmonary disorder, there is a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis. If the presumption is not rebutted, the cost of the treatment is compensable. The court upheld this provision, noting that the Department explained in the preamble to the final rule that the provision ''shifts only the burden of *production* to operators to produce evidence that the treated disease was unrelated to the miner's pneumoconiosis; the ultimate burden of proof remains on claimants at all times.'' 292 F.3d at 872 (citing 65 FR 80022 (Dec. 20, 2000)). The court also agreed with the Department's preamble explanation, stating that ''there is a clear rational relationship between the fact proved (that a miner suffered from totally disabling pneumoconiosis in the past) and the fact presumed (that the miner's treated pulmonary disorder is related to that pneumoconiosis).'' 292 F.3d at 873 (citing 65 FR 80023 (Dec. 20, 2000)). The court concluded that this rational relationship ''suffices for purposes of our review.'' 292 F.3d at 873.

Retroactivity Challenges

The court also addressed the contention that some of the new provisions were impermissibly retroactive, that is, could not be applied to claims for benefits pending on January 19, 2001, the effective date of the final rule. The court agreed with this contention as to eight provisions—the second sentence of § 718.204(a), as well as §§ 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), and 725.701(e). The court noted, as had the Department in the preamble to the initial notice of proposed rulemaking (*see* 62 FR at 3347 (Jan. 22, 1997)), that the Department is not authorized to promulgate retroactive black lung benefits regulations. The court explained that application of a regulation to a claim pending on the regulation's effective date would be impermissibly retroactive if the regulation ''change[d] the legal landscape.'' 292 F.3d at 859. The court determined that the eight provisions listed above did change the legal landscape, and that application of these provisions to claims pending on the effective date of the final rule was therefore improper. 292 F.3d at 864–868. The Department's revisions to effectuate the court's holdings are found at 20 CFR 718.2 and 725.2(c), and are explained in detail under III, Explanation of Changes.

In rejecting challenges to the applicability of 20 CFR 718.104(d), 718.201(a)(2) and (c), 725.101(a)(6), and 725.309(d), the court reasoned as follows:

Treating Physicians' Opinions—20 CFR 718.104(d)

In holding that the treating physician rule, § 718.104(d), is not impermissibly retroactive, the court explained that the rule ''codifies judicial precedent and does not work a substantive change in the law.'' 292 F.3d at 861.

Definition of ''Pneumoconiosis''—20 CFR 718.201

Holding that § 718.201(a)(2)—which includes ''chronic restrictive or obstructive pulmonary disease arising out of coal mine employment'' in the definition of ''pneumoconiosis''—is not impermissibly retroactive, the court concluded that the provision ''does not alter the requirement that individual miners must demonstrate that their obstructive lung disease arose out of their work in the mines.'' 292 F.3d at 863 (citing 65 FR 79938 (Dec. 20, 2000)). The court noted that the rulemaking record supports the premise that obstructive lung disease may be caused by coal mining exposure, and that this provision ''does no more than reflect this reality.'' 292 F.3d at 862. It rejected the argument that the provision creates a presumption that a miner's obstructive lung disease is caused by exposure to coal dust. It held, consistent with the Department's preamble explanation, that the provision requires ''that each miner bear the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment.'' 65 FR at 79938 (Dec. 20, 2000). *See* 292 F.3d at 862–863. The court also rejected as ''meritless'' the contention that the regulation permits an adjudicator to ''ignore a medical report if the reporting doctor concludes that a miner's obstructive lung disease was caused by smoking, rather than mining.'' 292 F.3d at 863. ''The regulation's plain text in no way indicates that medical reports will be excluded if they conclude that a particular miner's obstructive disease was caused by smoking, rather than mining.'' *Id.*

Section 718.201(c) provides that pneumoconiosis is ''recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.'' Holding that this regulation is not impermissibly retroactive, the court rejected the argument that the rule assumes that all pneumoconiosis is latent and progressive as ''based on a false reading of the rule.'' 292 F.3d at 863. The court explained that ''[t]he rule simply prevents operators from claiming that pneumoconiosis is never latent and progressive. The medical literature

makes it clear that pneumoconiosis may be latent and progressive. * * *'' *Id.*

Definition of ''Benefits''—20 CFR 725.101(a)(6)

In holding that § 725.101(a)(6)—which defines ''benefits'' to include ''any expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406''—is not impermissibly retroactive, the court stated that the operators ''have not pointed to anything in the new definition that departs from the system already in place under the old § 725.406(c). Thus, the new definition changes nothing and is not impermissibly retroactive.'' 292 F.3d at 866.

Subsequent Claims—20 CFR 725.309(d)

Holding that the subsequent claims rule, § 725.309(d), is not impermissibly retroactive, the court stated that the regulation ''applies only to claims filed after the regulations' effective date'' and, in any event, is not substantively new and therefore ''does not change the legal landscape.'' 292 F.3d at 863–864.

III. Explanation of Changes

In order to conform to the D.C. Circuit's holding invalidating the witness-fee-shifting provision in § 725.459, the Department must revise that regulation. Similarly, to conform the regulations to the court's retroactivity holdings, the Department must revise both § 718.2 and § 725.2(c). Those sections address the applicability of the regulations in Parts 718 and 725. Since the court ruled that one provision in Part 718 and several regulations in Part 725 were impermissibly retroactive if applied to claims pending on January 19, 2001, both § 718.2 and § 725.2(c) must be revised.

20 CFR 718.2

(a) In the final rule promulgated on December 20, 2000, the Department revised § 718.204(a) by adding the following sentence: ''For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.'' This revision clarified that non-respiratory/pulmonary impairments are not relevant to the total disability determination; thus, a miner who suffers from disabling pneumoconiosis is totally disabled for purposes of the Black Lung Benefits Act notwithstanding the existence of any independently disabling non-respiratory/pulmonary impairments. The change codified the holdings in *Cross Mountain Coal Co.* v. *Ward*, 93 F.3d 211, 216–217 (6th Cir. 1996); *Youghiogheny & Ohio Coal Co.* v. *McAngues*, 996 F.2d 130, 134–135 (6th Cir. 1993), *cert. den.* 510 U.S. 1040 (1994); *Twin Pines Coal Co.* v. *U.S. Dept. of Labor*, 854 F.2d 1212, 1215 (10th Cir. 1988); and *Peabody Coal Co.* v. *Director, OWCP* [*Huber*], 778 F.2d 358, 363 (7th Cir. 1985), and emphasized the Department's disagreement with *Peabody Coal Co.* v. *Vigna,* 22 F.3d 1388, 1394–1395 (7th Cir. 1994) (holding claimant's entitlement precluded by disabling stroke which was unrelated to coal mine employment and occurred before evidence of disability due to pneumoconiosis). *See* 62 FR at 3344–3345 (Jan. 22, 1997); 64 FR at 54979, ¶ (b) (Oct. 8, 1999); 65 FR at 79947, ¶ (c) (Dec. 20, 2000). By virtue of § 718.2, this provision, located in the second sentence of § 718.204(a), applied to the adjudication of all claims filed after March 31, 1980, including those pending on January 19, 2001. 20 CFR 718.2 (''This part is applicable to the adjudication of all claims filed after March 31, 1980. * * *'').

(b) Because the second sentence of § 718.204(a) is a departure from the Seventh Circuit's *Vigna* decision, the D.C. Circuit held the rule impermissibly retroactive as applied to claims pending on January 19, 2001, the regulation's effective date. 292 F.3d at 864–865. The court stressed, however, that it did not ''intend to affect the law in circuits that have adopted or might adopt positions that conform with the Secretary's interpretation. * * * Instead, the effect of our ruling is to leave the state of the law on this question exactly as it was prior to the regulations' promulgation'' for pending cases. *Id.* The court otherwise upheld the substance of the regulation, holding that the ''regulation has a rational basis and is consistent with the APA.'' 292 F.3d at 873.

(c) The Department has revised § 718.2 to reflect the D.C. Circuit's conclusion that the second sentence of § 718.204(a) may not be applied to claims pending on the effective date of the regulations: January 19, 2001.

20 CFR 725.2(c)

(a)(i) In the final rule issued on December 20, 2000, the Department amended the definition of ''workers' compensation law'' (previously codified at 20 CFR 725.101(a)(4) (2000)) in § 725.101(a)(31) to clarify its longstanding interpretation of the statute that payments made from a state's general revenues are not workers' compensation benefits subject to offset under the Black Lung Benefits Act. 62 FR 3348–3349 (Jan. 22, 1997); 64 FR 54982–54983, ¶ (e) (Oct. 8, 1999); 65 FR 79958–79959, ¶ (e) (Dec. 20, 2000). The revision responded to a Third Circuit decision rejecting the Department's position as inconsistent with the language of the prior implementing regulation. *Director, OWCP* v. *Eastern Associated Coal Co.* [*O'Brockta*], 54 F.3d 141, 148–150 (3d Cir. 1995). Despite its holding, the Third Circuit agreed that the Department's position reflected a permissible interpretation of the statute, and noted that the Department ''has the means and obligation to amend its regulations to provide for'' its interpretation. 54 F.3d at 150. (ii) Because the Third Circuit had rejected the Department's position under the prior regulations, the D.C. Circuit held the revised rule impermissibly retroactive when applied ''to claims that were already pending when the new regulation took effect'' or to ''adjust payments being made on settled or resolved claims.'' 292 F.3d at 866. The court emphasized that ''other circuits remain free to apply the Secretary's longstanding interpretation of the prior regulation to pending claims.'' *Id.* (iii) To reflect the D.C. Circuit's decision, the Department has revised § 725.2(c) in two ways. First, the Department has included § 725.101(a)(31) in the list of regulations that do not apply to claims pending on January 19, 2001. Second, the Department has revised the first two sentences of the subsection to clarify that the regulations included in the list do not apply to benefit payments made on claims pending on January 19, 2001, even where the benefit payments are made after January 19, 2001. Thus, § 725.101(a)(31) applies only to claims filed after January 19, 2001.

(b)(i) In the final rule issued on December 20, 2000, the Department revised a number of provisions relating to the criteria for determining the relationship and dependency of a miner's dependents and survivors, including §§ 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d). These revisions were necessary to reflect certain amendments to the underlying incorporated Social Security Act provisions and to the Black Lung Benefits Act, and to clarify the Department's policy with regard to the issues involved. 62 FR 3349–3351 (Jan. 22, 1997); 65 FR 79963–79967 (Dec. 20, 2000). (ii) The D.C. Circuit concluded that these revisions are impermissibly retroactive ''as applied to claims other than those filed after the regulations'

effective date'' because they ''expand the scope of coverage by making more dependents and survivors eligible for benefits.'' 292 F.3d at 866–867. The court recognized that the Department's regulations also contemplated application of these revisions to ''all benefits payments made'' after January 19, 2001, even payments made on claims finally adjudicated prior to that time. The court rejected the Department's approach and reiterated that ''it would be unlawfully retroactive to apply the definitions to any claims other than those filed on or after the regulations' effective date.'' 292 F.3d at 867. (iii) To reflect the D.C. Circuit's decision, the Department has revised § 725.2(c) in two ways. First, the Department has included §§ 725.204, 725.212(b), 725.213(c), 725.214(d), and 725.219(d) in the list of regulations that do not apply to claims pending on January 19, 2001. Second, the Department has revised the first two sentences of the subsection to clarify that the regulations included in the list do not apply to benefits payments made on claims pending on January 19, 2001, even where the benefit payments are made after January 19, 2001. Through these two revisions, the Department has ensured that the regulations deemed impermissibly retroactive by the D.C. Circuit will not be applied either to claims filed before the effective date of the regulations or to any benefits paid on those claims. Under the plain language of the revised regulation, the regulations that are not listed will continue to apply to all benefits payments made, including those paid pursuant to claims filed prior to the effective date of the regulations. The regulations listed in § 725.2(c) apply only to claims filed after January 19, 2001.

(c) The court mentioned both § 725.209 and § 725.219(c) in the course of discussing whether revisions made to the criteria for determining the relationship and dependency of a miner's dependents and survivors found in Part 725, Subpart B could be applied to pending claims, but did not hold that either regulation is impermissibly retroactive. 292 F.3d at 867. Neither of these regulations was revised in any substantive way in the final rule issued on December 20, 2000. Although the Department initially proposed substantive changes to § 725.209, finally-revised § 725.209 contains only one revision, which eliminated unnecessary words. *Compare* 20 CFR 725.209(a)(2)(ii) (1999) *with* 20 CFR 725.209(a)(2)(ii) (2002); *Compare* 62 FR at 3350 (Jan. 22, 1997) *with* 65 FR at 79963 (Dec. 20, 2000). And § 725.219(c) was not revised at all. *Compare* 20 CFR 725.219(c) (1999) *with* 20 CFR 725.219(c) (2002). Accordingly, the Department has not added either of these regulations to the list set forth in § 725.2(c), and both regulations apply to claims pending on January 19, 2001.

(d)(i) In the final rule issued on December 20, 2000, the Department added § 725.701(e) to establish a rebuttable presumption of medical benefits coverage for the treatment of any pulmonary disorder suffered by a miner totally disabled due to pneumoconiosis arising out of coal mine employment. This presumption is derived from a judicially-created presumption first announced by the Fourth Circuit in *Doris Coal Co.* v. *Director, OWCP*, 938 F.2d 492 (4th Cir. 1991), and later refined by that court in *Gulf & Western Indus.* v. *Ling*, 176 F.3d 226 (4th Cir. 1999), and *General Trucking Corp.* v. *Salyers*, 175 F.3d 322 (4th Cir. 1999). 65 FR at 80021–80022 (Dec. 20, 2000). The Department also recognized the Sixth Circuit had held in *Glen Coal Co.* v. *Seals*, 147 F.3d 502 (6th Cir. 1998), that the administrative law judge and the Benefits Review Board erred in applying the *Doris Coal* presumption to a miner whose coal mine employment took place within the jurisdiction of the Sixth Circuit. 65 FR at 80021–80022, ¶ (a) (Dec. 20, 2000). (ii) Because the D.C. Circuit found the rebuttable presumption established by § 725.701(e) contradicted by the Sixth Circuit's decision in *Seals*, it held that the rule is impermissibly retroactive when applied to pending claims. The court explained that its holding was ''not intended to affect the law in the Fourth Circuit or any other circuit that would have embraced the *Doris Coal* presumption. The judicial presumption remains the law in the circuits that adopt it.'' 292 F.3d at 865. (iii) To reflect the D.C. Circuit's decision, the Department has revised § 725.2(c) to include § 725.701(e) in the list of regulations that do not apply to claims pending on January 19, 2001.

20 CFR 725.459

(a) In the final rule issued on December 20, 2000, the Department revised § 725.459(b) to include a provision relieving an indigent claimant of the cost of producing his or her witnesses for cross-examination, regardless of whether such indigent claimant ultimately prevailed: ''If the claimant is the proponent of the witness whose cross-examination is sought, and demonstrates, within time limits established by the administrative law judge, that he would be deprived of ordinary and necessary living expenses if required to pay the witness fee and mileage necessary to produce that witness for cross-examination, the administrative law judge shall apportion the costs of such cross-examination among the parties to the case.'' The Department also added a new subsection (d) adopting certain criteria for determining indigency in this context. See 64 FR at 54996–54997 (Oct. 8, 1999); 65 FR at 80003, ¶ (a) (Dec. 20, 2000).

(b) The D.C. Circuit held these provisions in § 725.459 invalid under *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 97–100 (1991), because the court found no specific statutory authority for shifting this cost to an employer in the absence of a successfully prosecuted claim. 292 F.3d at 875.

(c) To reflect the D.C. Circuit's decision, the Department has revised § 725.459 to eliminate the fourth sentence and the beginning of the fifth sentence of paragraph (b). The Department has also eliminated paragraph (d). Thus, ''the proponent of [a] witness [called for cross-examination] shall pay the witness' fee,'' 20 CFR 725.459(b). This rule applies to all parties, including the claimant.

IV. Rulemaking Analyses

Administrative Procedure Act

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The Department has determined that there is good cause to conclude that notice and public procedure are unnecessary because this action is taken merely to conform the regulations to the D.C. Circuit's decision. Because this action does not change the law, but merely reflects the state of the law as determined by the D.C. Circuit, there is good cause, within the meaning of 5 U.S.C. 553(d)(3), to make the action effective upon publication.

Regulatory Flexibility Act

Because the Department has found good cause to conclude that this action is not subject to notice and public procedure under the Administrative Procedure Act, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

This action is not subject to sections 202 or 205 of the Unfunded Mandates Reform Act (UMRA, Pub. L. 104–4) because the Department has made a good cause finding the action is not subject to notice and public procedure under the Administrative Procedure Act. In addition, this action does not significantly or uniquely affect small governments or impose a significant intergovernmental mandate as described in sections 203 and 204 of UMRA.

Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

Executive Order 12866

This action is not a ''significant regulatory action'' and is therefore not subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735 (Oct. 4, 1993)).

Executive Order 13132

This action will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as described in Executive Order 13132 (64 FR 43255 (Aug. 10, 1999)).

List of Subjects in 20 CFR Parts 718 and 725

Black lung benefits, Claims, Health care, Lung diseases, Miners, Mines, Workers' compensation, X-rays.

For the reasons set forth in the preamble, title 20, Chapter VI, Subchapter B of the Code of Federal Regulations is amended as set forth below:

Signed at Washington, DC, this 26th day of November, 2003.

Victoria Lipnic,

Assistant Secretary for Employment Standards.

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

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

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

■ 2. Section 718.2 is revised to read as follows:

§ 718.2 Applicability of this part.

With the exception of the second sentence of § 718.204(a), this part is applicable to the adjudication of all claims filed after March 31, 1980, and considered by the Secretary of Labor under section 422 of the Act and part 725 of this subchapter. The second sentence of § 718.204(a) is applicable to the adjudication of all claims filed after January 19, 2001. If a claim subject to the provisions of section 435 of the Act and subpart C of part 727 of this subchapter (see 20 CFR 725.4(d)) cannot be approved under that subpart, such claim may be approved, if appropriate, under the provisions contained in this part. The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of all claims.

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

■ 1. The authority citation for Part 725 continues to read as follows:

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

■ 2. Section 725.2 is amended by revising paragraph (c) to read as follows:

§ 725.2 Purpose and applicability of this part.

* * * * *

(c) The provisions of this part reflect revisions that became effective on January 19, 2001. This part applies to all claims filed after January 19, 2001 and all benefits payments made on such claims. With the exception of the following sections, this part shall also apply to the adjudication of claims that were pending on January 19, 2001 and all benefits payments made on such claims: §§ 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), 725.309, 725.310, 725.351, 725.360, 725.367, 725.406, 725.407, 725.408, 725.409, 725.410, 725.411, 725.412, 725.414, 725.415, 725.416, 725.417, 725.418, 725.421(b), 725.423, 725.454, 725.456, 725.457, 725.458, 725.459, 725.465, 725.491, 725.492, 725.493, 725.494, 725.495, 725.547, 725.701(e). The version of those sections set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 1999, apply to the adjudications of claims that were pending on January 19, 2001. For purposes of construing the provisions of this section, a claim shall be considered pending on January 19, 2001 if it was not finally denied more than one year prior to that date.

■ 3. Section 725.459 is amended by revising paragraph (b), and by removing paragraph (d), to read as follows.

§ 725.459 Witness fees

* * * * *

(b) If the witness' proponent does not intend to call the witness to appear at a hearing or deposition, any other party may subpoena the witness for cross-examination. The administrative law judge (ALJ) shall authorize the least intrusive and expensive means of cross-examination as the ALJ deems appropriate and necessary to the full and true disclosure of the facts. If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. The fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

(c) * * *

[FR Doc. 03–30854 Filed 12–12–03; 8:45 am]

BILLING CODE 4510–27–P