

**DEPARTMENT OF LABOR****Office of Workers' Compensation Programs****20 CFR Parts 718 and 725**

RIN 1240-AA04

**Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act: Determining Coal Miners' and Survivors' Entitlement to Benefits****AGENCY:** Office of Workers' Compensation Programs, Labor.**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** This document contains proposed regulations implementing amendments to the Black Lung Benefits Act (BLBA or Act) made by the Patient Protection and Affordable Care Act (ACA). The ACA amended the BLBA in two ways. First, it revived a rebuttable presumption of total disability or death due to pneumoconiosis for certain claims. Second, it reinstated derivative entitlement to benefits for certain eligible survivors of coal miners whose lifetime benefit claims were awarded because they were totally disabled due to pneumoconiosis. These survivors need not also prove that the miner died due to coal workers' pneumoconiosis. The proposed rules would clarify how the statutory presumption may be invoked and rebutted and the application and scope of the derivative-survivor-entitlement provision. The proposed rules also eliminate several unnecessary or obsolete provisions.

**DATES:** The Department invites written comments on the proposed regulations from interested parties. Written comments must be received by May 29, 2012.

**ADDRESSES:** You may submit written comments, identified by RIN number 1240-AA04, by any of the following methods. To facilitate receipt and processing of comments, OWCP encourages interested parties to submit their comments electronically.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions on the Web site for submitting comments.

- *Facsimile:* (202) 693-1395 (this is not a toll-free number). Only comments of ten or fewer pages, including a fax cover sheet and attachments, if any, will be accepted by Fax.

- *Regular Mail:* Submit comments on paper, disk, or CD-ROM to the Division of Coal Mine Workers' Compensation Programs, Office of Workers' Compensation Programs, U.S.

Department of Labor, Room C-3520, 200 Constitution Avenue NW., Washington, DC 20210. The Department's receipt of U.S. mail may be significantly delayed due to security procedures. You must take this into consideration when preparing to meet the deadline for submitting comments.

- *Hand Delivery/Courier:* Submit comments on paper, disk, or CD-ROM to Division of Coal Mine Workers' Compensation Programs, Office of Workers' Compensation Programs, U.S. Department of Labor, Room C-3520, 200 Constitution Avenue NW., Washington, DC 20210.

*Instructions:* All submissions received must include the agency name and the Regulatory Information Number (RIN) for this rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Michael McClaran, Deputy Director, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, U.S. Department of Labor, 200 Constitution Avenue NW., Suite N-3464, Washington, DC 20210. Telephone: (202) 693-0978 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-800-877-8339 for further information.

**SUPPLEMENTARY INFORMATION:****I. Background of This Rulemaking**

The BLBA, 30 U.S.C. 901-944, provides for the payment of benefits to coal miners and certain of their dependent survivors on account of total disability or death due to coal workers' pneumoconiosis. 30 U.S.C. 901(a); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 5 (1976). Benefits are paid by either an individual coal mine operator that employed the coal miner (or its insurance carrier), or the Black Lung Disability Trust Fund. *Director, OWCP v. Bivens*, 757 F.2d 781, 783 (6th Cir. 1985). The purpose of this rulemaking is to implement the amendments to the BLBA made by the ACA, Public Law 111-148, 1556, 124 Stat. 119, 260 (2010). These amendments reinstate two BLBA entitlement provisions—Section 411(c)(4) and Section 422(l), 30 U.S.C. 921(c)(4); 932(l)—that had been repealed with respect to claims filed on or after January 1, 1982. The history of these provisions is described below.

*A. Section 411(c)(4): the "Fifteen-Year Presumption"*

In 1972, Congress amended the BLBA to include Section 411(c)(4), known as the "15-year presumption," 30 U.S.C. 921(c)(4) (1970 ed., Supp. IV), which assisted claimants in proving that a totally disabled miner's disability or death was due to pneumoconiosis. The presumption could be invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines in which conditions were "substantially similar to conditions in an underground mine" and (2) suffered from "a totally disabling respiratory or pulmonary impairment[.]" *Id.* If those criteria were met, the claimant invoked a rebuttable presumption that the miner "is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis." *Id.* The presumption could be rebutted by demonstrating that the miner "does not, or did not, have pneumoconiosis" or that "his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id.* Based on the Surgeon General's testimony that the prevalence of pneumoconiosis increased significantly after 15 years of coal dust exposure, the presumption's purpose was to "[r]elax the often insurmountable burden of proving eligibility" that claimants had faced. S. Rep. No. 92-743, at 1 (1972).

*B. Section 422(l): Derivative Survivor's Entitlement*

Section 422(l) was added to the BLBA by the Black Lung Benefits Reform Act of 1977, Public Law 95-239, 7(h), 92 Stat. 95, 100 (1978). Section 422(l) originally provided that "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this title at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." *Id.* This provision allowed an eligible survivor of a miner to establish entitlement to benefits based solely on the fact that the miner had been awarded benefits on a claim filed during his lifetime because he was totally disabled due to pneumoconiosis. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1327 (3d Cir. 1988).

*C. Effect of the 1981 BLBA Amendments on Sections 411(c)(4), 422(l), and Other Provisions*

The Black Lung Benefits Amendments of 1981, Public Law 97-119, 202(b)(1),

203(a)(6), 95 Stat. 1635, 1644 (1981), prospectively eliminated both the 15-year presumption and the provision for derivative-survivors' entitlement. Congress restricted the 15-year presumption by adding the following sentence to Section 411(c)(4): "The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981." 30 U.S.C. 921(c)(4) (1982). Accordingly, the presumption did not apply to claims filed on or after January 1, 1982, the effective date of the 1981 amendments. For such claims, miners and their survivors were required to prove a causal nexus between the miner's respiratory impairment or death and pneumoconiosis by a preponderance of the evidence (unless aided by one of the remaining presumptions).

Congress added similar language to Section 422(l) to eliminate derivative entitlement for survivors who filed claims on or after the effective date of the 1981 amendments. 30 U.S.C. 932(l) (1982). At the same time, the 1981 amendments eliminated a survivor's ability to establish entitlement by demonstrating that the miner was totally disabled due to pneumoconiosis at the time of his death. As a consequence of these amendments, a survivor who filed a claim on or after January 1, 1982 could establish entitlement only by proving (either through direct evidence or the remaining presumptions) that the miner's death was due to pneumoconiosis, with one limited exception. *Mancia v. Director, OWCP*, 130 F.3d 579, 584 n.6 (3d Cir. 1997). That exception was for survivors who filed a claim prior to June 30, 1982, who could establish eligibility under the Section 411(c)(5) presumption of entitlement, 30 U.S.C. 921(c)(5).

In addition to the changes to Sections 411(c)(4) and 422(l), the 1981 amendments revised two other statutory presumptions, both of which are relevant to the rules the Department now proposes. First, for survivors who filed claims on or after January 1, 1982, Congress eliminated a rebuttable presumption that the miner's death was due to pneumoconiosis if the miner worked in coal mines for at least 10 years and died from a respirable disease. 30 U.S.C. 921(c)(2). Second, for survivors who filed claims on or after June 30, 1982, Congress eliminated a rebuttable presumption of entitlement to benefits where the miner worked at least 25 years in coal mine employment prior to June 30, 1971 and died prior to March 1, 1978. 30 U.S.C. 921(c)(5).

The 1981 amendments left intact only two entitlement presumptions

contained in Section 411(c). One provides a rebuttable presumption that a miner's pneumoconiosis arose out of his coal mine employment if the miner worked in such employment for at least 10 years. 30 U.S.C. 921(c)(1). And the other provides that a miner with "complicated" pneumoconiosis, the most advanced form of the disease, *see Usery*, 428 U.S. at 7, is irrefutably presumed to be totally disabled due to, or to have died from, pneumoconiosis, 30 U.S.C. 921(c)(3).

#### *D. Patient Protection and Affordable Care Act*

In 2010, Section 1556 of the ACA restored the Section 411(c)(4) 15-year presumption and Section 422(l)'s provision for derivative survivors' entitlement for certain claims. Public Law 111-148, 1556, 124 Stat. 119, 260 (2010). ACA Section 1556 has three subsections. Subsection (a), entitled "Rebuttable Presumption," amended Section 411(c)(4) by deleting the section's last sentence—the language inserted by the 1981 amendments—which had restricted the presumption's application to claims filed before January 1, 1982. Subsection (b), entitled "Continuation of Benefits," amended Section 422(l) by deleting the similarly restrictive language added to that section by the 1981 amendments. Finally, subsection (c), entitled "Effective Date," provides that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 *et seq.*, 931 *et seq.*) after January 1, 2005, that are pending on or after the date of enactment of this Act." The ACA was enacted on March 23, 2010, when the President signed it into law.

As a result of these amendments, a miner or survivor who files his or her claim after January 1, 2005 may now rely on the 15-year presumption in establishing entitlement to benefits, provided that the claim was pending on or after March 23, 2010 and the presumption's requirements for invocation are met. In addition, survivors whose claims meet the effective-date requirements may not be required to prove that the miner's death was due to pneumoconiosis to be entitled to benefits. Assuming that the BLBA's other conditions of entitlement (such as relationship and dependency) are met, the survivor is entitled to benefits if the miner was awarded benefits based on a lifetime claim because he was totally disabled due to pneumoconiosis.

## II. Summary of the Proposed Rule

The proposed regulations are primarily intended to implement amended Sections 411(c)(4) and 422(l) by revising existing regulations. The Department has also reviewed these rules in accordance with Executive Order 13563 (January 18, 2011), which, among other requirements, instructs agencies to review "rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them." Thus, in addition to implementing the ACA amendments, the Department proposes revising or ceasing publication of several related rules that are obsolete or unnecessary.

#### *A. Effective Date of Amendments and Retroactive Impact*

Throughout the proposed rules, the Department has delineated the claims to which the ACA amendments apply in accordance with the plain language of the ACA's effective-date provision. As noted, ACA Section 1556(c) provides that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act \* \* \* after January 1, 2005, that are pending on or after [March 23, 2010]." The ACA therefore unambiguously provides that the amendments apply to all claims filed prospectively (*i.e.*, on or after March 23, 2010) because they necessarily meet the effective-date criteria, namely, claims that are filed after January 1, 2005 and are pending on or after March 23, 2010.

Section 1556(c) also explicitly applies the ACA amendments retroactively to a limited group of claims. This group includes any claim filed between January 1, 2005 and March 23, 2010, provided that the claim remained pending on or after March 23, 2010. It is within Congress' authority to determine that legislation be applied retroactively. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 266-270 (1994). Because the ACA expressly requires retroactive application of these amendments, the Department is obligated to promulgate implementing regulations that have similar retroactive effect. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (DC Cir. 2002) (agency may promulgate regulations having retroactive effect if Congress expressly so authorizes).

Thus, a miner or survivor whose claim falls into either of these two groups may now rely on the statute as amended by the ACA to establish entitlement to benefits. These miners and survivors may use the 15-year

presumption to establish entitlement to benefits, provided that the invocation requirements are met. In addition, survivors whose claims fall into either group may be derivatively entitled to benefits if the miner was totally disabled due to pneumoconiosis as evidenced by a final award of benefits on a BLBA claim filed during the miner's lifetime.

### B. Section-by-Section Explanation

#### 20 CFR 718.1 Statutory provisions

Current § 718.1(a) lists, by popular title, the initial statute and the various amendments which comprise the BLBA. The section also describes criteria for establishing miners' and survivors' entitlement to benefits based on the date of claim filing. Finally, current § 718.1(a) sets forth two of the statutory provisions, Sections 402(f) and 413(b) of the Act, 30 U.S.C. 902(f), 923(b), which authorize the Secretary of Labor to establish medical criteria for determining total disability and death due to pneumoconiosis.

The Department proposes to discontinue publication of most of current § 718.1(a) because the information it provides is either contained in other regulations or is no longer relevant to current claims. Current § 718.1(a)'s list of statutory provisions that comprise the Act is also contained in proposed § 725.1(a). Similarly, current § 718.1(a)'s discussion of the conditions necessary for establishing entitlement to benefits duplicates information contained in current §§ 725.202, 725.212, 725.218 and 725.222. Although the Department is proposing to revise §§ 725.212, 725.218 and 725.222, all information related to the requirements for establishing entitlement will appear in those regulations. There is no need to repeat this information in a separate regulation.

Moreover, current § 718.1(a) addresses, in part, criteria applicable only to claims filed prior to June 30, 1982. Few, if any, claims filed prior to that date remain in litigation. Thus, it is no longer necessary to publish the criteria governing these claims, and the Department is proposing to remove it from other regulations (including §§ 725.212, 725.218 and 725.222). Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June

30, 1982, results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. *See* discussion under § 718.2.

Other sentences in current § 718.1(a) are unnecessary because they merely provide historical information and are not relevant to the adjudication of any current claim. These sentences state that originally the Secretary of Health, Education and Welfare (now the Secretary of Health and Human Services) had authority to establish standards for miner and survivor eligibility under the Act and that these standards were originally adopted by the Secretary of Labor to adjudicate claims. While these statements are correct, since March 1, 1978, the Secretary of Labor has had independent authority to establish entitlement criteria, 30 U.S.C. 902(f), Public Law 95–239, 2(c), 92 Stat. 95, 1 (1978), and has exercised that authority with respect to all claims filed since March 31, 1980, 20 CFR 718.2 (2011); 45 FR 13677, 13679 (Feb. 29, 1980).

The proposed rule does, however, retain three informational sentences from current § 718.1(a), and re-designates the paragraph as § 718.1. The first sentence explains that Section 402(f) of the Act, 30 U.S.C. 902(f), grants the Secretary of Labor authority to establish criteria for determining total disability or death due to pneumoconiosis for claims filed under Part C of the Act, 30 U.S.C. 931–44; *i.e.*, claims filed after December 31, 1973. The second sentence of proposed § 718.1 explains that Section 402(f) also grants the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, authority to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. The third sentence explains that Section 413(b) of the Act, 30 U.S.C. 923(b), authorizes the Secretary of Labor to establish criteria for x-ray techniques in claims filed under the Act. These statutory provisions are all directly relevant to the rules adopted in Part 718.

Although fully consistent in meaning with current § 718.1(a), the first sentence in proposed § 718.1 reflects some editorial changes made to update the regulation and eliminate information only of historical interest. Thus, a reference to “partial” disability in current § 718.1(a) is omitted because it is a reference to the method of survivor entitlement found in § 718.306 of the regulations and 30 U.S.C.

921(c)(5), both of which are relevant only to claims filed before June 30, 1982. *See* discussion under § 718.306. Similarly, language referring to the statutory amendments that gave the Secretary of Labor authority to establish criteria for entitlement is omitted in favor of a simple reference to the current statutory section.

The Department also proposes to discontinue publication of current § 718.1(b). This section addresses claims filed prior to April 1, 1980, and claims reviewed pursuant to Section 435 of the Act, 30 U.S.C. 945 (2000), and directs that all such claims be reviewed under the criteria at part 727 of Title 20 of the Code of Federal Regulations. Section 435 of the Act required the Department to review all Part C claims denied on or before March 1, 1978 or that were pending as of that date. It also required the Department to review certain Part B claims under the Part 727 criteria. Section 435 of the Act was repealed in 2002, however. Black Lung Consolidation of Administrative Responsibility Act, Public Law 107–275, 2(c)(1), 116 Stat. 1925 (2002). Because few, if any, such claims remain, the Department discontinued annual publication of the 20 CFR Part 727 criteria in the Code of Federal Regulations in 2000. *See* 65 FR 79920, 80029 (Dec. 20, 2000); 20 CFR 725.4(d) (2011). Consequently, there is no reason to continue publication of current § 718.1(b).

#### 20 CFR 718.2 Applicability of This Part

Current § 718.2 addresses the applicability of the Part 718 regulations. The first two sentences state that Part 718 applies to claims filed after March 31, 1980, except for the second sentence of § 718.204(a), which applies only to claims filed after January 19, 2001. The third sentence of current § 718.2 states that Part 718 also applies to claims reviewed but not approved under 20 CFR part 727. Finally, the last sentence of current § 718.2 states that the provisions of Part 718 should be construed together in the adjudication of claims.

Proposed § 718.2 changes the effective date in the first sentence from March 31, 1980 to June 30, 1982. This revision reflects the Department's proposal to discontinue publication of § 718.306, which provides a survivor with a presumption of entitlement in certain circumstances, but only if the claim was filed before June 30, 1982. *See* discussion under § 718.306. It further reflects the Department's proposal to cease publication of other statutory presumptions and criteria for

establishing entitlement available only to claims filed before January 1, 1982. See discussion under §§ 718.1; 718.205; 718.303; and 718.305. Few, if any, of these claims filed (at the latest) before June 30, 1982 remain in litigation and therefore continued publication of these provisions in the Code of Federal Regulations is unnecessary. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any miner or survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982 results in litigation after the effective date of these regulations, the claim will continue to be governed by the criteria in the 2011 version of the Code of Federal Regulations.

The Department also proposes to discontinue publication of the third sentence of current § 718.2, which states that any claim not approved under the criteria in 20 CFR Part 727 may be reviewed under Part 718. This sentence pertains to claims filed prior to April 1, 1980, and claims reviewed pursuant to Section 435 of the Act. Section 435, which was repealed in 2002, Public Law 107-275, 2(c)(1), 116 Stat. 1925 (2002), required the Department to review all claims pending on March 1, 1978 and all claims previously denied on or before March 1, 1978. It also required the Department to review certain Part B claims under the Part 727 criteria. Because few, if any, such claims remain, the Department discontinued annual publication of the 20 CFR Part 727 criteria in the Code of Federal Regulations in 2000. See 65 FR 79920, 80029 (Dec. 20, 2000); 20 CFR 725.4(d) (2011). Consequently, this sentence is obsolete and there is no reason to continue its publication.

For clarity, the Department has divided proposed § 718.2 into three paragraphs. Proposed § 718.2(a) changes the effective date of Part 718 from March 31, 1980 to June 30, 1982, and retains the current exception that the second sentence of § 718.204(a) applies only to claims filed after January 19, 2001. See 68 FR 69930, 69933 (Dec. 15, 2003). Proposed § 718.2(a) also contains new language that briefly describes the contents of Part 718. Proposed § 718.2(b) states that the 2011 version of Part 718 would apply to the adjudication of any claim filed prior to June 30, 1982. This paragraph thus fills in the gap left by the change in Part 718's effective date. Finally, proposed § 718.2(c) retains the fourth sentence of current § 718.2 without alteration.

#### 20 CFR 718.3 Scope and Intent of This Part

Section 718.3 generally outlines the issues and statutory provisions the Part 718 criteria address. Current § 718.3(a) includes a reference to partial disability in connection with a claim subject to § 718.306, which implements the Section 411(c)(5) statutory presumption. The proposed rule discontinues publication of § 718.306 because it is obsolete: It applies only to claims filed prior to June 30, 1982. See discussion under § 718.306. Thus, proposed § 718.3(a) removes the reference to § 718.306 and partial disability. The rest of the rule remains unchanged.

#### 20 CFR 718.202 Determining the Existence of Pneumoconiosis

Section 718.202 addresses how a claimant may establish the existence of pneumoconiosis. Current § 718.202(a)(3) lists the presumptions that, when invoked, allow the existence of pneumoconiosis to be presumed; the list includes § 718.306. The proposed rule discontinues publication of § 718.306 because it is obsolete: It applies only to claims filed prior to June 30, 1982. See discussion under § 718.306. Thus, proposed § 718.202(a)(3) removes the reference to § 718.306. The rest of the rule remains unchanged.

#### 20 CFR 718.205 Death Due to Pneumoconiosis

Section 718.205 sets forth the criteria for establishing that a miner's death was due to pneumoconiosis. The proposed rule revises § 718.205 to clarify that some survivors need not prove the miner died due to pneumoconiosis to be entitled to benefits given the ACA-revived Section 422(l) derivative-entitlement provision; expands the criteria to include the Section 411(c)(4) 15-year presumption of death due to pneumoconiosis for claims governed by the ACA amendments; and eliminates outmoded provisions. Each of these changes is described below.

Current § 718.205(a) provides a general overview of the elements a miner's survivor must prove "[i]n order to receive benefits:" (1) the miner had pneumoconiosis; (2) the miner's pneumoconiosis arose out of coal mine employment; and (3) the miner's death was due to pneumoconiosis. For survivor claims that meet ACA Section 1556(c)'s effective-date requirements (*i.e.*, filed after January 1, 2005 and pending on or after March 23, 2010), proving these elements may no longer be required. As previously discussed, the ACA amendments revive Section 422(l) for these claims, which provides

for derivative survivor entitlement when the miner was totally disabled due to pneumoconiosis and entitled to receive benefits based on a claim filed during his or her lifetime. In that instance, the survivor does not have to prove that the miner died due to pneumoconiosis to establish his or her own entitlement to benefits. Current § 718.205(a) therefore requires revision. To eliminate any potential misunderstanding, the proposed rule expands the current rule's phrase "[i]n order to receive benefits" to read "[i]n order to receive benefits based on a showing of death due to pneumoconiosis[.]" This change will ensure that § 718.205 accurately reflects the statute.

The Department proposes to cease publication of current § 718.205(b), which summarizes the criteria for establishing death due to pneumoconiosis in claims filed before 1982. Few, if any, such claims remain in litigation. Thus, it is no longer necessary to publish the criteria governing such entitlement. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before January 1, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any pre-1982 claim results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. See discussion under § 718.2.

Current § 718.205(c) describes the criteria for establishing death due to pneumoconiosis in survivors' claims filed on or after January 1, 1982. The proposed rule redesignates this paragraph as § 718.205(b) and makes several revisions to the text. First, the proposed rule eliminates the language restricting the criteria to claims filed on or after January 1, 1982. This distinction is no longer necessary under the rule as proposed because § 718.205 will no longer contain criteria for claims filed before 1982. Moreover, § 718.2, as proposed, already provides that the Part 718 regulations apply to the adjudication of all claims filed on or after June 30, 1982 under Part C of the Act.

Second, proposed § 718.205(b) adds a new subsection (4) to include the Section 411(c)(4) 15-year presumption as an additional method of proving that the miner's death was due to pneumoconiosis for claims governed by the ACA amendments. As previously discussed, the ACA amendments

revived the 15-year presumption for claims meeting the ACA's effective-date requirements. If the survivor proves that the miner had at least 15 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, the survivor is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis. Accordingly, proposed § 718.205(b)(4) provides that for a survivor's claim filed after January 1, 2005, and pending on or after March 23, 2010, death will be considered due to pneumoconiosis where the 15-year presumption is invoked and not rebutted. The proposed rule refers to § 718.305, which is the regulation that implements Section 411(c)(4) of the Act. See discussion under § 718.305.

Third, proposed § 718.205(b) retains the thrust of current § 718.205(c)(4), which precludes entitlement where death is due to a traumatic injury or unrelated medical condition unless the claimant proves that pneumoconiosis substantially contributed to death; the language is revised to clarify that a survivor may establish the required causal connection by presumption. The proposed rule redesignates the revised paragraph as § 718.205(b)(5). Fourth, proposed § 718.205(b) retains current § 718.205(c)(5) (defining pneumoconiosis as a "substantially contributing cause" when it "hastens the miner's death") and redesignates it as § 718.205(b)(6).

Finally, the Department proposes to cease publication of current § 718.205(d). That section provides for expedited consideration of survivors' claims filed on or after January 1, 1982 if the miner was receiving benefits at the time of death. The Department first promulgated it after enactment of the Black Lung Benefits Amendments of 1981, Public Law 97-119, 95 Stat. 1635 (1981), which limited survivors' entitlement based on a miner's award to claims filed before January 1, 1982. As a result, survivors who filed claims on or after January 1, 1982 had to prove that the miner's death was due to pneumoconiosis in order to receive benefits. The Department directed expedited consideration of such survivors' claims to prevent lengthy disruptions in benefit payments between the miner's death and the final adjudication of the survivor's claim. Because the ACA reinstated Section 422(l)'s derivative-entitlement provision for prospective survivors' claims, there is no longer a need to adjudicate the cause of the miner's death in all survivors' cases. Thus, § 718.205(d) is obsolete, and the Department proposes to remove it. Nevertheless, prompt

payment of benefits to the survivors of entitled miners remains a goal of the Department. To that end, the Department has proposed revising § 725.418(a) to provide for expedited consideration of survivor claims governed by Section 422(l). See discussion under § 725.418.

#### 20 CFR 718.301 Establishing Length of Employment as a Miner

Section 718.301 addresses how, for purposes of applying the statutory presumptions implemented in the regulations, a miner's length of employment should be determined. The first sentence of current § 718.301 lists those presumptions; the list includes §§ 718.303 and 718.306. The proposed rule discontinues publication of both §§ 718.303 and 718.306 because they are obsolete: they apply only to claims filed (at the latest) prior to June 30, 1982. See discussion under §§ 718.303 and 718.306. Thus, proposed § 718.301 deletes the references to these two regulations. The rest of the rule remains unchanged.

#### 20 CFR 718.303 Death From a Respirable Disease

The Department proposes to discontinue publication of this provision because it is obsolete. Current § 718.303 implements a statutory presumption applicable only to claims filed prior to January 1, 1982. 30 U.S.C. 921(c)(2). The provision presumed that the miner's death was due to pneumoconiosis if the miner worked for 10 years or more in coal mine employment and died due to a respirable disease. Because the presumption applies only to claims filed approximately 30 or more years ago, it affects few if any claims currently being paid, much less in litigation. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before January 1, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982, results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. See discussion under § 718.2.

#### 20 CFR 718.305 Presumption of Pneumoconiosis

Current § 718.305 implements the Section 411(c)(4) 15-year presumption previously described in the background section. As noted there, this statutory

section provides a rebuttable presumption of total disability or death due to pneumoconiosis if the miner "was employed for fifteen years or more in one or more underground coal mines" or in a coal mine other than an underground mine in conditions "substantially similar to conditions in an underground mine" and suffers or suffered from "a totally disabling respiratory or pulmonary impairment." 30 U.S.C. 921(c)(4). As currently written, § 718.305 describes the presumption's requirements using language largely taken verbatim from the statute and offers little additional guidance regarding how the presumption may be invoked or rebutted. Moreover, current § 718.305 contains effective dates that are no longer accurate in light of the ACA amendments. Accordingly, proposed § 718.305 clarifies both the applicability of the presumption and the manner in which it may be invoked and rebutted, and eliminates obsolete provisions.

#### Applicability

As outlined previously, the rebuttable presumption provided by Section 411(c)(4) of the Act now applies both to claims filed before January 1, 1982 and to claims meeting ACA Section 1556(c)'s effective-date requirements: those claims filed after January 1, 2005, that are pending on or after March 23, 2010, the effective date of the ACA amendments. Current § 718.305(e), however, specifically limits the applicability of the presumption to claims filed prior to January 1, 1982. The Department has deleted § 718.305(e) from the proposed rule because it is no longer accurate. Instead, proposed § 718.305(a) states that the provision is applicable to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

The Department has not included a similar provision for claims filed before January 1, 1982 in the proposed regulation. Current § 718.305, as published in the 2011 edition of the Code of Federal Regulations, will remain as a guide to establishing entitlement pursuant to Section 411(c)(4) of the Act for these claims. Few, if any, such claims remain in litigation, making the continued publication of the current section unnecessary. Thus, the Department proposes to cease publishing a regulation governing the application of the Section 411(c)(4) presumption to claims filed before January 1, 1982. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any individual who filed

a claim before January 1, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any pre-1982 claim results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. See discussion under § 718.2.

#### Invocation

Proposed § 718.305(b)(1) sets out the facts a claimant must prove to invoke the presumption: (1) The miner worked for fifteen or more years in one or more underground coal mines or in mines other than underground mines in conditions “substantially similar to conditions in an underground mine;” (2) the claimant cannot establish entitlement under § 718.304 of the regulations by establishing the presence of complicated pneumoconiosis by chest x-ray; and (3) the miner has or had a totally disabling respiratory or pulmonary impairment. Proposed § 718.305(b)(1)(iii) also states that the existence of a totally disabling respiratory or pulmonary impairment must be established pursuant to the criteria contained in § 718.204, except that § 718.204(d), which addresses the use of lay evidence, is not applicable. Instead, the permissible use of lay evidence in the 15-year presumption context is outlined in proposed §§ 718.305(b)(3) and (b)(4). Each of these provisions is described in detail below.

**Length of Coal Mine Employment.** Section 411(c)(4) of the Act provides that the presumption may be invoked if the miner worked for fifteen years in one or more underground coal mines, but also states that the presumption may be invoked if the “conditions of a miner’s employment in a coal mine other than an underground mine was substantially similar to conditions in an underground mine.” 30 U.S.C. 921(c)(4). Neither the statute nor current § 718.305 state how the required similarity between underground coal-mine employment and non-underground coal mine employment may be demonstrated. This omission has caused litigation.

To fill the gap left by the statute, proposed § 718.305(b)(2) sets forth what a claimant must show to meet the “substantially similar” requirement. A claimant must demonstrate that the miner was exposed to coal-mine dust during employment at a non-underground mine. The claimant need not also produce evidence addressing the level of dust exposure in underground coal mines. Instead, it is

incumbent upon the fact finder to compare the evidence regarding conditions in the miner’s non-underground coal mine employment with those conditions known to exist in underground mines to determine whether substantial similarity has been established. The proposed standard reflects the Director’s longstanding interpretation of the “substantially similar” language, and one that has been adopted by the Court of Appeals for the Seventh Circuit, the only court that has decided the question. *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988); see also *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479–80 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319 (7th Cir. 1995). After issuance of these decisions, the Benefits Review Board similarly held, even in cases arising outside of the Seventh Circuit’s jurisdiction, that an administrative law judge should resolve the “substantially similar” issue under the standard enunciated in *Midland Coal*. See, e.g., *Harris v. Cannelton Indus., Inc.*, 24 BLR 1–217, 1–223 (2011); *Hansbury v. Reading Anthracite Co.*, 2011 WL 6140714, \*2, BRB No. 11–236 BLA (Nov. 29, 2011); *Prater v. Bevens Branch Res., Inc.*, 2011 WL 4454952, \*3, BRB Nos. 10–667 BLA; 10–668 BLA (Aug. 26, 2011). Including this standard in § 718.305 will clarify how the presumption may be invoked.

**Chest X-ray Negative for Complicated Pneumoconiosis.** The second condition Section 411(c)(4) sets out for invocation is that “there is a chest roentgenogram submitted in connection with [the] claim \* \* \* and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection[.]” 30 U.S.C. 921(c)(4). “[P]aragraph (3) of this subsection” refers to Section 411(c)(3) of the Act, which provides an irrebuttable presumption of total disability or death due to pneumoconiosis where there is chest x-ray evidence of “one or more large opacities[.]” 30 U.S.C. 921(c)(3). The condition addressed by Section 411(c)(3) is commonly referred to as “complicated pneumoconiosis.”

Section 411(c)(4)’s reference to a negative chest x-ray in the language quoted above simply means that Section 411(c)(4) may be considered as a means of establishing entitlement if a claimant cannot establish the presence of complicated pneumoconiosis through chest x-ray evidence and, as a result, is unable to invoke the Section 411(c)(3) irrebuttable presumption of entitlement. See, e.g., *Blakley*, 54 F.3d at 1319. Litigation has disclosed some confusion on this point. See, e.g., *U.S. Steel Corp.*

*v. Gray*, 588 F.2d 1022, 1025 (5th Cir. 1979) (noting that claimant had to rely on statutory presumption because x-ray evidence was “negative as to pneumoconiosis”). To prevent such confusion in the future, proposed § 718.305(b)(1)(ii) clarifies that the 15-year presumption is an alternate method for establishing entitlement when a claimant is unable to establish entitlement under § 718.304 (the regulation that implements the Section 411(c)(3) irrebuttable presumption) because lacking chest x-ray evidence of complicated pneumoconiosis.

**Establishing Total Disability.** Current § 718.305(c) provides that the existence of a totally disabling respiratory or pulmonary impairment must be established under the criteria contained in § 718.204. Section 718.204 defines total disability and describes how medical evidence and lay evidence may be used to establish the existence of a totally disabling respiratory or pulmonary impairment. The proposed rule retains this requirement with one exception. Proposed § 718.305(b)(1)(iii) continues to cross-reference § 718.204 as the means to establish a totally disabling respiratory impairment using medical evidence. It specifically excludes, however, § 718.204’s provisions governing the use of lay testimony because those provisions are incomplete for purposes of implementing the Section 411(c)(4) presumption. Instead, provisions governing the use of lay testimony are set forth separately in proposed §§ 718.305(b)(3) and (b)(4).

Proposed § 718.305(b)(3) prohibits using a spouse’s affidavit or testimony by itself to establish that the miner has a totally disabling respiratory or pulmonary impairment in a living miner’s claim. A similar prohibition appears in current § 718.305(a) and in the statutory presumption as well. Thus, the proposed language reflects long established—and statutorily mandated—principles that were used to implement the presumption in claims filed prior to January 1, 1982.

In addition, proposed § 718.305(b)(3) prohibits the use, in a living miner’s claim, of a miner’s affidavit or testimony by itself to establish a totally disabling respiratory or pulmonary impairment. This language is also in the current regulations defining total disability at § 718.204(d)(5) and is equally relevant to establishing a totally disabling respiratory or pulmonary impairment pursuant to § 718.305.

Current § 718.305(b) addresses the use of lay affidavits to establish the existence of a totally disabling respiratory or pulmonary impairment in both miners’ and survivors’ claims

involving deceased miners where there is no medical or other relevant evidence. The current rule is no longer accurate because it does not reflect an important restriction on the use of lay evidence Congress added to the Act in 1981 and made applicable to all claims filed on or after January 1, 1982. Public Law 97–119, 202(c), 95 Stat. 1635 (1981). That restriction limits the use of lay testimony in these circumstances to that provided by individuals who would not be eligible to receive benefits in the case. 30 U.S.C. 923(b) (stating that “[w]here there is no medical or other relevant evidence in the case of a deceased miner, such affidavits [addressing the miner’s physical condition], from persons not eligible for benefits in such case \* \* \* shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis.”). Current § 718.305(b) was never amended to reflect this additional restriction because the entire regulation ceased to apply to claims filed on or after January 1, 1982. See 20 CFR 718.305(e) (2011).

Further, while § 718.204(d)(3) implements this restriction on lay evidence for miners’ claims filed after January 1, 1982, § 718.204(d) contains no corollary provision for survivors’ claims. The reason is simple. Prior to the ACA amendments, survivors had to establish that the miner’s death was due to pneumoconiosis. There was no need to regulate lay evidence on the total disability and disability causation issues in survivors’ claims. The ACA’s reinstatement of the 15-year presumption now makes such regulation necessary.

Accordingly, proposed § 718.305(b)(4) adds language implementing the Act’s restrictions on the use of lay evidence in deceased miners’ claims where there is no medical or other relevant evidence. Proposed § 718.305(b)(4) states that affidavits (or testimony) from individuals who would be entitled to benefits, either as a primary beneficiary or as an individual entitled to augmented benefits, are not sufficient, by themselves, to support a finding of total disability due to a respiratory or pulmonary impairment. This proposed language is in § 718.204(d)(3) and is equally relevant to establishing the existence of a totally disabling respiratory or pulmonary impairment under § 718.305.

#### The Presumptions Invoked

Current § 718.305(a) provides that once invoked, “there shall be a rebuttable presumption that such miner

is totally disabled due to pneumoconiosis, that such miner’s death was due to pneumoconiosis, or that at the time of death such miner was totally disabled by pneumoconiosis.” These varying presumptions also appear in the statutory language, 30 U.S.C. 921(c)(4). They do not all apply in every claim, however.

Proposed § 718.305(c) clarifies that if the presumption is invoked in a miner’s claim, the fact presumed is that the miner is totally disabled due to pneumoconiosis or that he was totally disabled due to pneumoconiosis at the time of death. This later presumed fact would apply when a miner’s claim has not been finally adjudicated at the time of his or her death.

If a survivor successfully establishes invocation, he or she is entitled only to a presumption of death due to pneumoconiosis. This result is mandated by the 1981 amendments to the Act. In those amendments, Congress eliminated a survivor’s ability to establish entitlement by demonstrating that the miner was totally disabled due to pneumoconiosis at the time of his death. For example, Congress amended the Act’s statement of findings and declaration of purpose and deleted language stating that the survivors of miners “who were totally disabled by [pneumoconiosis] at the time of their deaths” were entitled to benefits, Public Law 97–119, 203(a)(4), 95 Stat. 1635 (1981).

Similarly, in 1981 Congress added language to Section 411(a) of the Act, which instructs the Secretary to “make payments of benefits” to certain classes of claimants. Congress directed the payment of benefits to miners totally disabled due to pneumoconiosis and to survivors on account of death due to pneumoconiosis. The section also states that benefit payments were to be made in cases in which the miner was totally disabled at the time of death only in claims filed before Jan. 1, 1982. 30 U.S.C. 921(a), Public Law 97–119, 203(a)(5), 95 Stat. 1635 (1981). If a survivor was not entitled to derivative benefits because the miner’s claim was filed on or after January 1, 1982, that individual had to prove that the miner’s death was due to pneumoconiosis in a separate survivor’s claim. See 20 CFR 718.1(a) (2011). Thus, in the 1981 amendments, Congress eliminated the ability of a survivor to establish entitlement by demonstrating that the miner was totally disabled prior to death. *Mancia*, 130 F.3d at 584 n.6.

The more recent ACA amendments to the Act reversed the 1981 amendments only in part. Congress mandated the award of survivors’ benefits if the miner

was entitled to benefits on a claim filed during his or her lifetime, *i.e.*, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. Public Law 111–148, 1556(b), (c), 124 Stat. 119 (2010). If the miner was not entitled to benefits, however, a survivor’s claim may be awarded only if the miner died due to pneumoconiosis. Thus, proposed § 718.305(c)(2) makes clear that, upon invocation, a survivor is entitled only to a presumption that the miner’s death was due to pneumoconiosis.

#### Rebuttal

Proposed § 718.305(d) outlines the burden of proof on the party opposing entitlement. It sets out the specific methods of rebuttal in a miner’s claim and a survivor’s claim. The proposed rebuttal standards are modeled on language contained in both the statutory presumption itself and current § 718.305(d). These rebuttal standards were therefore used in the adjudication of claims filed before January 1, 1982. Each is explained in detail below.

In a miner’s claim, invocation results in a presumption of total disability due to pneumoconiosis. Section 411(c)(4) itself provides that the presumption may be rebutted by showing that the “miner does not, or did not, have pneumoconiosis[.]” Thus, as in the current rule, proposed § 718.305(d)(1)(i) allows the party opposing entitlement to rebut the presumption by showing that the miner does not, or did not, have pneumoconiosis. The proposed rule further clarifies what that proof burden entails by cross-referencing the regulatory definition of pneumoconiosis. The Act recognizes two forms of pneumoconiosis—“clinical” and “legal.” 30 U.S.C. 902(b); see, *e.g.*, *Gunderson v. U.S. Sec’y of Labor*, 601 F.3d 1013, 1018 (10th Cir. 2010). Current black lung program regulations expressly define both forms of the disease: (1) clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses and involves a fibrotic reaction of the lung tissue to dust deposition from coal mine employment; and (2) legal pneumoconiosis includes any chronic lung disease or impairment arising out of coal mine employment. 20 CFR 718.201(a)(1)–(a)(2) (2011). A disease arises out of coal mine employment if it is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 CFR 718.201(b) (2011). Given this definition of pneumoconiosis, the party opposing entitlement must demonstrate that the miner does not suffer from



either clinical or legal pneumoconiosis to rebut the presumption. *See, e.g., Barber v. Director, OWCP*, 43 F.3d 899, 901 (4th Cir. 1995) (holding that party opposing entitlement must disprove both forms of the disease to establish rebuttal of Section 411(c)(4) presumption); *Consolidation Coal Co. v. Hage*, 908 F.2d 393, 395–96 (8th Cir. 1990) (recognizing that party opposing entitlement must prove that miner's chronic obstructive lung disease was unrelated to coal dust exposure to rebut Section 411(c)(4) presumption by disproving existence of pneumoconiosis); *see also Underhill v. Peabody Coal Co.*, 687 F.2d 217, 222–23 and n.10 (7th Cir. 1982) (holding Part 727 interim presumption rebutted by medical opinion establishing that miner did not have clinical pneumoconiosis and that his chronic obstructive lung disease was not related to coal mine employment). To make this requirement clear, proposed § 718.305(d)(1)(i) states that the party opposing entitlement in a miner's claim must prove that the miner does not or did not have pneumoconiosis as defined in § 718.201.

Proposed § 718.305(d)(1)(ii) sets out a second, alternate method to rebut the presumption in a miner's claim. Section 411(c)(4) provides that rebuttal may be established by demonstrating that the miner's totally disabling "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Proposed § 718.305(d)(1)(ii) implements this provision by stating that the party opposing entitlement must show that the miner's impairment "did not arise in whole or in part out of dust exposure in the miner's coal mine employment." The proposed regulatory rebuttal language is taken directly from current § 718.305(d) and therefore was used in the adjudication of claims filed before January 1, 1982.

Based on the statutory and regulatory language, courts have held that a party opposing entitlement must rule out the miner's coal mine employment as a contributing cause of the totally disabling respiratory or pulmonary impairment in order to rebut the presumption. *Blakely v. Amax Coal Co.*, 54 F.3d 1313, 1320 (7th Cir. 1995) (employer must prove coal mine employment did not contribute to disability to rebut § 718.305 presumption); *Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1481 (10th Cir. 1989) (Section 411(c)(4) presumption is established by proving miner is totally disabled and rebutted if party opposing entitlement "affirmatively establishes the lack of \* \* \* a link with [the miner's] coal mine employment"); *Rose*

*v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980) (party opposing entitlement must rule out connection between miner's disability and his coal mine employment to rebut Section 411(c)(4) presumption); *Colley & Colley Coal Co. v. Breeding*, 59 Fed. Appx. 563, 567 (4th Cir. Mar. 11, 2003) (rebuttal of § 718.305 presumption requires that connection between disability and coal mine employment be ruled out). Thus, in order to rebut the presumption under § 718.305(d)(1)(ii), the party opposing entitlement must prove that there is no connection between the miner's totally disabling respiratory or pulmonary impairment and his or her dust exposure in coal mine employment.

This conclusion is also supported by a line of cases interpreting the rebuttal method available pursuant to 20 CFR 727.203(b)(3) after invocation of the interim presumption of entitlement at 20 CFR 727.203(a) (1999). This presumption was applicable to claims filed before April 1, 1980 and to claims reviewed under Section 435 of the Act. 20 CFR 718.1(b) (2011). The § 727.203(b)(3) rebuttal provision mirrors that of Section 411(c)(4). *See Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 78 (3d Cir. 1984) (noting that § 727.203(b)(3) is consistent with Section 411(c)(4)); *Defore v. Alabama By-Prod., Corp.*, 12 BLR 1–27, 1–29 (1988) (holding that § 727.203(b)(3) and current § 718.305(d) create identical rebuttal standards). Courts have interpreted § 727.203(b)(3) as requiring the party opposing entitlement to rule out any connection between the miner's disability and his coal mine employment. *See Rosebud Coal Sales v. Weigand*, 831 F.2d 926, 928–29 (10th Cir. 1987) (noting six courts of appeals have interpreted § 727.203(b)(3) as requiring that "any relationship between the disability and coal [mine] employment be ruled out"); *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1–169, 1–173 (1989) (adopting rule-out standard under § 727.203(b)(3)). Thus, this presumption, too, could be rebutted by a showing that a miner's coal mine employment did not contribute to his disability. *See Wright v. Island Creek Coal Co.*, 824 F.2d 505, 508–09 (6th Cir. 1987) (affirming finding of rebuttal based on evidence that miner's disability was due solely to heart disease). There is no reason to depart from this consistent and longstanding precedent when interpreting the standard for rebuttal under amended Section 411(c)(4). Accordingly, proposed § 718.305(d)(1)(ii) adopts the rule-out standard.

In the survivor's context, a claimant who establishes the invocation criteria

receives a presumption that the miner died due to pneumoconiosis. *See* proposed § 718.305(c)(2). Thus, proposed § 718.305(d)(2) provides that, in order to rebut the presumption, the party opposing entitlement must prove either that the miner did not have pneumoconiosis, or that his death did not arise in whole or in part out of dust exposure in the miner's coal mine employment. Once again, these rebuttal methods echo the rebuttal methods applied to claims filed before January 1, 1982. A party may rebut the presumption by demonstrating the absence of pneumoconiosis in the same manner as in a miner's claim. To establish that the miner's death was not due to pneumoconiosis, the party opposing entitlement must establish that the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment. This language imposes the same "rule out" standard as is required to rebut the presumption of total disability due to pneumoconiosis. *See Consolidation Coal Co. v. Smith*, 837 F.2d 321, 323 (8th Cir. 1988) (interpreting § 727.203(b)(3)). Accordingly, the party opposing entitlement establishes rebuttal by proving that the miner's death was not caused, even in part, by coal mine dust exposure in his coal mine employment. *See Colvin v. Director, OWCP*, 838 F.2d 192, 194 (6th Cir. 1988) (affirming finding that § 727.203 presumption of death due to pneumoconiosis rebutted by evidence that miner's death was due solely to lung cancer unrelated to coal mine employment).

Finally, proposed § 718.305(d)(3) retains the language found in current § 718.305(d) stating that "evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin" is insufficient to rebut the presumption. Section 718.201(a)(2), part of the regulatory definition of pneumoconiosis, makes clear that the term "pneumoconiosis" includes obstructive lung diseases significantly related to or substantially aggravated by dust exposure in coal mine employment. Thus, if the presumption is invoked, any obstructive disease from which the miner suffers or suffered is presumed to be due to coal mine dust exposure. A medical opinion stating only that the etiology of the miner's disease is unknown is therefore insufficient to disprove either the existence of pneumoconiosis or a causal connection between a miner's death or disability and his coal-mine-dust exposure. Proposed § 718.305(c)(3)



simply makes this point clear and does not impose any additional rebuttal requirements on the party opposing entitlement. Specifically, it does not require that party to identify the specific cause of a miner's lung disease in order to establish rebuttal; it is sufficient if the party proves, based on credible medical evidence, that the miner's totally disabling respiratory or pulmonary disease is not related to his coal mine employment. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1–85, 1–87 (1987) (agreeing with Director that “the specific etiology of claimant's totally disabling respiratory impairment need not be established by the party opposing entitlement” under current § 718.305(d)).

#### 20 CFR 718.306 Presumption of Entitlement Applicable to Certain Death Claims

The Department proposes to discontinue publication of this provision because it is obsolete. Current § 718.306 implements a rebuttable statutory presumption of entitlement available to survivors of miners who worked in coal mine employment for 25 years or more prior to June 30, 1971 and died on or before March 1, 1978. 30 U.S.C. 921(c)(5). The presumption applies only to claims filed prior to June 30, 1982 and thus affects few, if any, claims currently in litigation. The Secretary therefore proposes to discontinue publication of this provision. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982, results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. *See* discussion under § 718.2.

#### Appendix C to Part 718 Blood Gas Tables

Appendix C contains three tables of “qualifying” values for arterial-blood gas studies, one of the standard medical tests administered to miners who apply for benefits. A test that produces “qualifying” values is deemed, in the absence of contrary evidence, indicative of a totally disabling respiratory or pulmonary impairment. The current version of Appendix C refers to both §§ 718.204 and 718.305 as methods of establishing total disability. That

characterization is accurate with regard to § 718.204, which sets forth the methods by which total disability may be established. But it is misleading with regard to § 718.305. Section 718.305 implements the Section 411(c)(4) presumption. To invoke that presumption, the claimant is required to establish that the miner is or was totally disabled due to a respiratory or pulmonary impairment. Section 725.305 does not provide an independent means of establishing disability. Instead, in both its current and revised versions, § 718.305 expressly states that total disability must be established pursuant to § 718.204. *See* discussion under § 718.305. Given that a claimant seeking to invoke the § 718.305 presumption must establish total disability under § 718.204, there is no basis for Appendix C's characterization of § 718.305 as a separate means of establishing total disability. The Department has therefore eliminated those references in the proposed rule. Otherwise, no change has been made to Appendix C.

#### 20 CFR 725.1 Statutory Provisions

Section 725.1 provides an overview of the various statutory enactments that comprise the Black Lung Benefits Act. The proposed rule adds two statutory amendments, clarifies and streamlines the rule's language, and eliminates obsolete or duplicative provisions.

Current § 725.1(a) lists the statutory provisions that have amended the original statute, Subchapter IV of the Federal Coal Mine Health and Safety Act of 1969, Public Law 91–173, 83 Stat. 742 (1969). It also generally describes the criteria for entitlement to both miners' and survivors' benefits. Since this regulation was last revised, the Act has been amended twice. First, in 2002 Congress passed the Black Lung Consolidation of Administrative Responsibility Act (BLCARA), Public Law 107–275, 116 Stat. 1925 (2002). BLCARA transferred responsibility for administering claims under part B of the Act (*i.e.*, claims filed before July 1, 1973) from the Social Security Administration to the Department. Because of the time limitation on filing part B claims, the group of part B beneficiaries is limited and has diminished over time. Thus, Congress determined that it was more efficient to consolidate administrative responsibility for Part B claims with those claims administered by the Department under part C of the Act (*i.e.*, claims filed after December 31, 1973). BLCARA also repealed Sections 404, 414a and 435 of the Act, 30 U.S.C. 904, 924a and 945. Second, in 2010 Congress passed the ACA, which amended the

Act as described in the background section above.

Proposed § 725.1(a) adds BLCARA and the ACA to the list of statutes that comprise the Act. The proposed rule also streamlines § 725.1(a) by eliminating language that describes what a miner or survivor must prove to establish entitlement to benefits. That information is available in other provisions in Part 725. Consequently, proposed § 725.1(a) refers the reader to § 725.201, which describes who is entitled to benefits under the Act. Finally, proposed § 725.1(a) substitutes the term “subchapter IV” for “title IV” in the current provision. This is a technical change made throughout proposed § 725.1 to conform the regulation to the Act's current codification.

Current § 725.1(b) addresses claims administered by the Social Security Administration under part B of the Act—*i.e.*, claims filed before July 1, 1973. Proposed § 725.1(b) revises the current rule to reflect BLCARA's transfer of responsibility for these claims to the Department of Labor. The proposed rule also streamlines § 725.1(b) by eliminating language that describes the time limits for filing part B survivor claims. Given the limited scope of this regulation, there is no reason to include such information here.

Current § 725.1(c) addresses claims filed under Section 415 of the Act, 30 U.S.C. 925. This provision governed the transition period from part B claims (filed before July 1, 1973 and administered by the Social Security Administration) to part C claims (filed after December 31, 1973 and administered by the Department). Section 415 thus applies only to claims filed between July 1, 1973 and December 31, 1973. That transition period is long expired and few, if any, claims governed by Section 415 remain in litigation. Thus, the Department proposes to discontinue publication of current § 725.1(c) because it is obsolete.

Current § 725.1(d) addresses claims filed under part C of the Act (*i.e.*, filed after December 31, 1973), and administered by the Department of Labor. The Department proposes to redesignate this provision as paragraph (c) and edit it for clarity. The third and fourth sentences require revision to better inform the reader of their intended meaning. The third sentence states that part C claims are administered by the Department “and paid by a coal mine operator” while the fourth sentence states that the Black Lung Disability Trust Fund will pay benefits in claims where the miner's coal-mine employment ended before

1970, or where an operator liable for the payment of benefits cannot be identified. 20 CFR 725.1(d) (2011); 26 U.S.C. 9501(d)(1)(B). Proposed § 725.1(c) combines and clarifies these statements in a new sentence. Proposed § 725.1(c) also revises the current rule's reference to the "Longshoremen's and Harbor Workers' Compensation Act" to reflect that statute's current title, the "Longshore and Harbor Workers' Compensation Act." The title was changed when Congress amended this statute in 1984. See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Public Law 98-426, 27(d)(1), 98 Stat. 1639 (1984).

Current § 725.1(e) addresses former Section 435 of the Act. Section 435 required the Department to review, under the criteria set forth in 20 CFR Part 727, all part C claims that were denied on or before March 1, 1978 or that were pending as of that date. It also required the Department to review under the Part 727 criteria certain part B claims. Section 435 was repealed in 2002 by the BLCARA. Public Law 107-275, 2(c)(1), 116 Stat. 1925 (2002). Few, if any, claims governed by Section 435 remain in litigation. Moreover, the Department discontinued annual publication of the 20 CFR Part 727 criteria in the Code of Federal Regulations in 2000. See 65 FR 79920, 80029 (Dec. 20, 2000); 20 CFR 725.4(d) (2011). Thus, the Department proposes to discontinue publication of current § 725.1(e).

Current § 725.1(f) describes changes made by the Black Lung Benefits Reform Act of 1977. The Department proposes to redesignate this provision as § 725.1(d) and make three revisions to promote clarity and eliminate outdated information. First, the opening clause of current § 725.1(f) refers to changes outlined in current §§ 725.1(a)–(e). This statement is no longer accurate given the revisions proposed to those subsections. Thus, the proposed rule eliminates this clause. Second, § 725.1(f)(3) states that the 1977 Reform Act added "[a] provision which limits the denial of a claim solely on the basis of employment in a coal mine[.]" While technically accurate, this broad statement could be misleading. It refers to Section 402(f)(1)(B) of the Act, 30 U.S.C. 902(f)(1)(B), which provides that a living miner's continued employment in a mine, or a deceased miner's employment in a mine at time of death, is not conclusive proof that the miner is not or was not totally disabled. Proposed § 725.1(d)(5) replaces the quoted sentence with language that focuses on the relationship between a

miner's continued employment and a finding of total disability.

Third, current § 725.1(f)(5) states that the 1977 Reform Act introduced a presumption of entitlement for certain survivors. Section 411(c)(5) of the Act, 30 U.S.C. 921(c)(5), provided a rebuttable statutory presumption of entitlement to survivors of miners who worked in coal mine employment for 25 years or more prior to June 30, 1971 and died on or before March 1, 1978. The Black Lung Benefits Amendments of 1981 later limited application of this presumption to claims filed prior to June 30, 1982. Public Law 97-119, 202(b)(2), 95 Stat. 1635 (1981). Few, if any, claims governed by this presumption remain in litigation. Moreover, the proposed rules discontinue publication of § 718.306, the presumption's implementing regulation. See discussion under § 718.306. Thus, the Department proposes to discontinue publication of current § 725.1(f)(5) because it is obsolete.

Current § 725.1(g) addresses the Black Lung Benefits Revenue Act of 1977. The proposed rule redesignates this provision as § 725.1(e) and omits the current rule's references to Sections 415 and 435 of the Act. As previously discussed, Section 415 of the Act applies only to claims filed between July 1, 1973 and December 31, 1973, and the now-repealed Section 435 required review of claims originally filed prior to March 1, 1978. There is therefore no reason to continue to publish references to these provisions in the Code of Federal Regulations.

Current § 725.1(h) addresses changes made by the Black Lung Benefits Amendments of 1981. The Department proposes to redesignate this provision as 725.1(f), edit it for clarity, eliminate outmoded provisions, and update it to reflect the ACA amendments. First, the opening clause of current § 725.1(h) refers to changes outlined in current § 725.1(a). This statement is no longer accurate given the revisions proposed to § 725.1(a). Thus, the proposed rule eliminates this clause.

Second, current § 725.1(h)(2) states that the 1981 Amendments prospectively eliminated a presumption of entitlement for certain survivors. Section 411(c)(2) of the Act, 30 U.S.C. 921(c)(2), provided a rebuttable statutory presumption that the miner's death was due to pneumoconiosis if the miner worked for 10 years or more in coal mine employment and died due to a respirable disease. The 1981 Amendments limited application of this presumption to claims filed prior to January 1, 1982. Public Law 97-119,

202(b)(1), 95 Stat. 1635 (1981). Few, if any, claims governed by this presumption remain in litigation. Moreover, the proposed rules discontinue publication of 20 CFR 718.303, the presumption's implementing regulation. See discussion under § 718.303. Thus, the Department proposes to discontinue publication of current § 725.1(h)(2) because it is obsolete.

Third, current §§ 725.1(h)(3) and (h)(5) could be misleading in light of the ACA amendments. Current § 725.1(h)(3) states that the 1981 Amendments limited the applicability of the Section 411(c)(4) 15-year presumption of disability or death due to pneumoconiosis to claims filed before January 1, 1982. Similarly, current § 725.1(h)(5) states that the 1981 Amendments limited survivors' derivative entitlement under Section 422(l), to those cases where the miner was found entitled to benefits on a claim filed prior to January 1, 1982. As discussed above, the ACA amendments revived both of these provisions for claims filed on or after January 1, 2005, that are pending on or after March 23, 2010. Proposed §§ 725.1(f)(2) and (f)(4) clarify this change and provide a cross-reference to § 725.1(i), which, as proposed, discusses the ACA amendments.

Current § 725.1(i) addresses the Black Lung Benefits Revenue Act of 1981. The proposed rule redesignates this provision as § 725.1(g) and omits the current rule's second sentence, which refers to claims paid by the Department pursuant to Section 435 of the Act. As discussed above, Section 435 required the Department to review certain part B and part C claims originally filed prior to March 1, 1978. Few, if any, such claims remain in litigation, and Section 435 was repealed by the BLCARA. Thus, the Department proposes to discontinue publication of this sentence because it is obsolete.

Proposed § 725.1(h) is a new paragraph that addresses the changes made by the BLCARA, which transferred administrative responsibility for claims under part B of the Act from the Social Security Administration to the Department of Labor, effective January 31, 2003. BLCARA also repealed Sections 404, 414a and 435 of the Act, 30 U.S.C. 904, 924a and 945. These sections applied only in the case of claims originally filed prior to March 1, 1978. With the transfer of responsibility for part B claims to the Department and with the passage of time, these provisions had all become obsolete. Proposed § 725.1(h) reflects their repeal.

Similarly, proposed § 725.1(i) is a new paragraph that addresses the changes made by the ACA. As summarized in the background section above, the ACA reinstated the Section 411(c)(4) 15-year presumption and the Section 422(l) derivative-survivors'-entitlement provision for claims filed after January 1, 2005, that are pending on or after March 23, 2010. Proposed § 725.1(i) reflects these changes.

Current § 725.1(j) addresses the incorporation into the Act of certain provisions of the Longshore and Harbor Workers' Compensation Act. Proposed § 725.1(j) changes all references to the "Longshoremen's and Harbor Workers' Compensation Act" to the "Longshore and Harbor Workers' Compensation Act," the current title of that statute. For the reasons discussed above, proposed § 725.1(j) omits the current rule's reference to Sections 415 and 435 of the Act. Proposed § 725.1(j) also omits the current rule's reference to the 20 CFR part 727 regulations. Because the Part 727 regulations apply to an increasingly smaller number of claims, they are no longer annually published. *See* 20 CFR 725.4(d) (2011). Consequently, there is no need to continue to publish a reference to them in § 725.1(j). In addition, one grammatical change is proposed to clarify the phrase "time definite of traumatic injury or death."

Finally, current § 725.1(k) addresses the incorporation into the Act of certain provisions of the Social Security Act. Other than revising this subsection's reference to the title of the Longshore and Harbor Workers' Compensation Act, the Department does not propose any changes to this subsection.

#### 20 CFR 725.2 Purpose and Applicability of This Part

Section 725.2 addresses the purpose and applicability of the Part 725 regulations. Proposed § 725.2(b) changes the effective date for Part 725 from August 18, 1978 to June 30, 1982. This revision reflects the Department's proposal to discontinue publication of § 718.306, which provides a survivor with a presumption of entitlement in certain circumstances, but only if the survivor filed his or her claim before June 30, 1982. *See* discussion under § 718.306. It further reflects the Department's proposal to cease publication of other statutory presumptions and criteria for establishing entitlement available only to claims filed before January 1, 1982. *See* discussion under § 718.2; *see also* §§ 725.1; 725.201; 725.212; 725.218; 725.222; and 725.309. Few, if any, of these claims filed (at the latest) before June 30, 1982 remain in litigation and

therefore continued publication of these provisions in the Code of Federal Regulations is unnecessary. Omission of these criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any miner or survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982 results in litigation after the effective date of these regulations, the claim will continue to be governed by the criteria in the 2011 version of the Code of Federal Regulations. Thus, proposed § 725.2(b) states that the 2011 version of Part 725 would apply to the adjudication of any claim filed prior to June 30, 1982, filling the gap left by the change in Part 725's effective date.

Finally, proposed §§ 725.2(a) and (b) substitute the term "subchapter IV" for "title IV" in the current provisions. This is a technical change made to conform the regulations to the Act's current codification. The rest of the rule remains unchanged.

#### 20 CFR 725.101(a) Definition and Use of Terms

Section 725.101 defines various terms used in the Part 725 regulations. Current § 725.101(a)(1) defines the term "the Act" and current § 725.101(a)(2) defines the terms "the Longshoremen's Act" and "LHWCA." These subsections, respectively, address the Black Lung Benefits Act, 30 U.S.C. 901–44, and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–50.

The Department proposes to streamline the definition of the term "the Act" contained in current § 725.101(a)(1). The current definition lists the several statutes that have amended the Act over the years and thus unnecessarily duplicates information contained in § 725.1(a). Proposed § 725.101(a)(1) defines the Act simply by reference to its popular title and statutory citation. Further, current § 725.101(a)(2) refers to the Longshore Act as the "Longshoremen's and Harbor Workers' Compensation Act." Proposed § 725.101(a)(2) changes this reference to the Longshore and Harbor Workers' Compensation Act, the current title of that statute. The rest of the rule remains unchanged.

#### 20 CFR 725.201 Who Is Entitled to Benefits; Contents of This Subpart

Current § 725.201 lists the categories of individuals who are potentially entitled to benefits under the Act and briefly describes the circumstances under which each may be found

entitled. It also briefly describes the contents of Part 725. The proposed rule revises current § 725.201 to remove provisions that are either obsolete or are duplicated in other regulations, and to edit it for clarity.

Proposed § 725.201(a) omits the reference in the current rule to Section 415 of the Act. That section governed claims filed from July 1, 1973 through December 31, 1973, the transition period between the end of SSA's administration of the program and the beginning of the Department's. *See* discussion under § 725.1(c). Because Section 415 governs very few remaining claims, and because there is no longer any practical distinction between claims filed under Section 415 and Part C, the proposed rule deletes this reference.

Current §§ 725.201(a)(1), (a)(2) and (a)(4) state that miners, surviving spouses, children, parents and siblings may be entitled to benefits under the Act and identifies some of the conditions necessary for such individuals to establish entitlement. The conditions for establishing entitlement to benefits for each of these categories of claimants are also described in §§ 725.202 (miners), 725.212 (surviving spouses and surviving divorced spouses), 725.218 (surviving children), and 725.222 (surviving parents, brothers and sisters). There is no reason to duplicate this information in a separate regulation. Thus, proposed §§ 725.201(a)(1)–(4) simply lists each of the four categories of claimants and provides a cross-reference to the regulation that describes the conditions of entitlement for that category. For clarity, surviving spouses and surviving children, included in a single paragraph in current § 725.201, are placed in separate provisions in proposed §§ 725.201(a)(2) and (3). Current § 725.201(a)(3), which states that benefits are payable to the child of a miner's surviving spouse under certain circumstances, is retained and redesignated as § 725.201(a)(5). No cross-reference is included because there is no specific regulation that identifies the conditions of entitlement for this category of claimant.

The Department also proposes to discontinue publication of current § 725.201(b), which describes a rebuttable statutory presumption of entitlement to survivors of miners who worked in coal mine employment for 25 years or more prior to June 30, 1971 and died on or before March 1, 1978. 30 U.S.C. 921(c)(5), implemented by 20 CFR 718.306. This change reflects the Department's proposal to discontinue publication of § 718.306 because it is obsolete: It applies only to claims filed

before June 30, 1982. *See* discussion under § 718.306. There is similarly no reason to continue to publish any reference to this presumption. Omission of references to the presumption in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982, results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. *See* discussion under §§ 718.2; 725.2.

Current §§ 725.201(c) and (d) are retained and redesignated as §§ 725.201(b) and (c), respectively.

#### 20 CFR 725.212 Conditions of Entitlement; Surviving Spouse or Surviving Divorced Spouse

Section 725.212 prescribes the conditions required for a surviving spouse or a surviving divorced spouse of a deceased miner to establish entitlement to benefits. The proposed rule revises § 725.212 to omit certain conditions of entitlement applicable only to claims filed prior to June 30, 1982 and to add new conditions of entitlement made applicable to certain claims by the ACA amendments. Other applicable conditions of entitlement remain unchanged.

Current §§ 725.212(a)(3)(i) and (ii) set forth conditions of entitlement for surviving spouses and divorced spouses which relate to the miner and which vary depending on the date of claim filing. These provisions state that the survivor will be entitled to benefits if the miner was either receiving benefits as result of a claim filed prior to January 1, 1982, or is determined as a result of a claim filed prior to January 1, 1982 to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. Current § 725.212(a)(3)(ii) also provides that, with one exception, a survivor must establish that the miner's death was due to pneumoconiosis to establish entitlement to benefits if the miner's claim was not filed before January 1, 1982. The exception is for survivors whose claims are filed prior to June 30, 1982. Those survivors may establish entitlement pursuant to Section 411(c)(5) of the Act, which provides a rebuttable presumption of entitlement available to survivors of miners who worked in coal mine employment for 25

years or more prior to June 30, 1971 and died on or before March 1, 1978.

The proposed rule deletes those portions of current §§ 725.212(a)(3)(i) and (ii) that pertain solely to claims filed prior to June 30, 1982. Few, if any, such claims remain in litigation and the Department therefore proposes to discontinue annual publication of these provisions. The criteria in future editions of the Code of Federal Regulations will not affect the benefit entitlement of any survivor who filed a claim before June 30, 1982 and is currently receiving benefits. Claimants who were awarded benefits on such claims will continue to receive them. Moreover, if any claim filed before June 30, 1982, results in litigation after the effective date of these regulations, the claim will continue to be governed by applicable criteria as reflected in the 2011 version of the Code of Federal Regulations. *See* discussion under § 725.2.

Proposed § 725.212(a)(3)(i) retains one condition of entitlement from current § 725.212(a)(3)(ii): it allows a survivor to establish entitlement to benefits by proving that the miner died due to pneumoconiosis. Because the ACA amendments restored Section 422(l)'s derivative-entitlement provision, proving death due to pneumoconiosis is no longer an absolute requirement for all survivors. Thus, proposed § 725.212(a)(3)(ii) sets forth an alternative condition of entitlement to implement the ACA amendment. It states that if the miner filed a lifetime claim that results or resulted in a final benefits award, a survivor whose claim meets ACA Section 1556(c)'s effective-date requirements (*i.e.* filed after January 1, 2005 and pending on or after March 23, 2010) will be entitled to benefits, assuming the survivor meets all other applicable conditions of entitlement. *See West Virginia CWP Fund v. Stacy*, \_\_\_ F.3d \_\_\_, 2011 WL 6062116, \*8 (4th Cir. Dec. 7, 2011); *Mathews v. Pocahontas Coal Co.*, 24 BLR 1–193, 1–196 (2010). The rest of the rule remains unchanged.

#### 20 CFR 725.218 Conditions of Entitlement; Child

Section 725.218 prescribes the conditions required for a surviving child of a deceased miner to establish entitlement to benefits. Current §§ 725.218(a)(1) and (2) provide certain conditions of entitlement for a surviving child that apply only to claims filed before June 30, 1982. These are identical to the conditions of entitlement applicable to surviving spouses and divorced spouses contained in current §§ 725.212(a)(3)(i) and (a)(3)(ii). For the

reasons expressed in the discussion accompanying proposed § 725.212, the proposed rule revises these provisions and adds a new condition of entitlement made applicable by the ACA amendments. Thus, proposed §§ 725.218(a)(1) and (a)(2) state that a surviving child may establish entitlement to benefits if the miner died due to pneumoconiosis or if the miner filed a claim for benefits that is or was awarded and the surviving child filed a claim after January 1, 2005 that was pending on or after the ACA's March 23, 2010 enactment date. The rest of the rule remains unchanged.

#### 20 CFR 725.222 Conditions of Entitlement; Parent, Brother or Sister

Section 725.222 describes the conditions required for a surviving parent, brother or sister of a deceased miner to establish entitlement to benefits. Current §§ 725.222(a)(5)(i) and (a)(5)(ii) provide certain conditions of entitlement for a surviving parent, brother or sister that apply only to claims filed before June 30, 1982. These are identical to the conditions of entitlement applicable to surviving spouses and divorced spouses contained in current §§ 725.212(a)(3)(i) and (a)(3)(ii). For the reasons expressed in the discussion accompanying proposed § 725.212, the proposed rule omits current §§ 725.222(a)(5)(i) and (a)(5)(ii), and adds the same new condition of entitlement as in proposed § 725.212(a)(3)(ii) to implement the ACA amendments. Thus, proposed §§ 725.222(a)(5)(i) and (a)(5)(ii) state that a surviving parent, brother or sister may establish entitlement to benefits if the miner died due to pneumoconiosis or if the miner filed a claim for benefits that is or was awarded and the surviving parent, brother or sister filed a claim after January 1, 2005 that was pending on or after the ACA's March 23, 2010 enactment date. The rest of the rule remains unchanged.

#### 20 CFR 725.309 Additional Claims; Effect of a Prior Denial of Benefits

Section 725.309 addresses both the filing of additional claims for benefits and the effect of a prior denial. The proposed rule omits obsolete information and revises the current rule to implement the ACA amendment to Section 422(l), which restored derivative entitlement for certain survivors.

Current § 725.309(a) states that miners who were found entitled to benefits under part B of the Act may file claims for medical benefits under part C of the Act. The Department proposes to cease the annual publication of this provision

because it no longer applies to newly filed claims. The provision advises claimants who established their entitlement to benefits by filing claims with the Social Security Administration under part B of the Act, *i.e.*, before December 31, 1973, of their right to file a part C claim for medical benefits with the Department of Labor. Congress granted this right to part B beneficiaries in Section 11 of the Black Lung Benefits Reform Act of 1977, Public Law 95–239, 92 Stat. 95 (1978), because unlike part C of the Act, part B did not pay for medical services and supplies necessary to treat totally disabling pneumoconiosis. 33 U.S.C. 907, as incorporated by 30 U.S.C. 932(a). Section 11 directed the Secretary of Health, Education and Welfare to notify each miner receiving benefits under part B of his possible eligibility for medical benefits and to allow a period for filing such claims which “shall not terminate before six months after such notification is made.” The Black Lung Benefits Reform Act became law on March 1, 1978. The time period for filing the requisite claims was extended repeatedly, with the most recent extension going to December 31, 1980. 45 FR 44264 (July 1, 1980). These extensions were granted because the Department wanted to ensure that no otherwise eligible miner was deprived of the right to seek medical benefits. This filing period has long since passed, however, and there have been no new part B applications since the end of 1973. Thus, there is no longer any need to continue to publish a regulatory provision notifying part B beneficiaries of their right to file a part C claim for medical benefits, and the proposed rule omits this information.

Similarly, the Department proposes to cease the annual publication of current § 725.309(e) because it is obsolete. This provision allows certain claimants to request review under 20 CFR part 727. Because few, if any, claims subject to Part 727 review remain in litigation, the Department discontinued annual publication of the 20 CFR part 727 criteria in the Code of Federal Regulations in 2000. 65 FR 79920, 80029 (Dec. 20, 2000). Thus, there is also no reason to continue annual publication of current § 725.309(e). The proposed rule omits this information.

Section 725.309(d) outlines the requirements for the adjudication of a claim filed by a miner or a survivor after a prior claim has been denied and the one-year period for requesting modification has expired. See 20 CFR 725.310 (2010) (implementing modification provision). The proposed rule revises this provision to clarify how

the ACA amendment restoring Section 422(l) derivative-survivors' benefits, discussed above, applies when a survivor files a subsequent claim.

Current § 725.309(d) provides that a claimant who files a subsequent claim must demonstrate that a change has occurred in one of the applicable conditions of entitlement since the date upon which the order denying the prior claim became final. Failure to establish such a change will result in the denial of a subsequent claim. The purpose of this provision is to prevent the relitigation of a prior denied claim, thereby implementing the legal doctrine known as *res judicata* or claim preclusion. This doctrine mandates that a denied claim must be considered final and cannot be disturbed in any later proceedings. See 65 FR 79920, 79968 (Dec. 20, 2000) (explaining that prior final denials are accepted as correct under § 725.309).

This doctrine's impact is easily seen in the case of a subsequent claim filed by a survivor before the ACA's enactment. If the initial survivor's claim was denied because the surviving spouse failed to prove that the miner's death was due to pneumoconiosis, any subsequent survivor's claim would also be denied because it was impossible to prove with “new evidence submitted in connection with the subsequent claim” a change in a condition of entitlement that “relate[s] to the miner's physical condition,” *i.e.*, the cause of the miner's death could not change and had been finally adjudicated in the earlier survivor's claim. 20 CFR 725.309(d)(3) (2011).

However, “claim preclusion bars only an attempt to relitigate a cause of action that was previously resolved; it has no effect on a cause of action which did not exist at the time of the initial adjudication.” 62 FR 3338, 3352 (Jan. 22, 1997) (*citing Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955)). By restoring Section 422(l), the ACA created, for certain survivors, a new cause of action by establishing a new method of demonstrating entitlement to benefits. Aside from the filing date and pendency requirements (*i.e.*, a claim filed after January 1, 2005, that was pending on or after March 23, 2010), the ACA imposes no constraints on Section 422(l)'s application. Consequently, the Department has concluded that Section 422(l) applies to all survivors' claims meeting the effective-date requirements. Amended Section 422(l) therefore fundamentally altered the legal landscape for subsequent survivors' claims and requires revision to current § 725.309(d). See *Stacy v. Olga Coal Co.*, 24 BLR 1–207, 1–211–12 (2010), *aff'd*

*sub nom West Virginia CWP Fund v. Stacy*, \_\_\_\_\_ F.3d \_\_\_\_\_, 2011 WL 6062116 (4th Cir. Dec. 7, 2011) (agreeing with Director that amended Section 422(l) creates new method of establishing benefits entitlement).

Amended Section 422(l) requires the survivor to demonstrate only that the miner filed a claim that was awarded because he or she was totally disabled due to pneumoconiosis. Thus, survivors whose subsequent claims meet the requirements of amended Section 422(l) do not have to establish a change in a condition of entitlement that relates to the miner's physical condition. By restoring Section 422(l), Congress has created a new form of survivor entitlement that is not based on whether the miner died due to pneumoconiosis and therefore does not implicate *res judicata* or claim preclusion principles. The proposed rule therefore adds a new paragraph, § 725.309(d)(1), to clarify that a survivor need not establish a change in a condition of entitlement if the subsequent claim meets the requirements for entitlement under amended Section 422(l). But the proposed rule also states that this exception is limited: It applies only if the survivor's prior claim was finally denied prior to March 23, 2010, *i.e.*, before the ACA was enacted. Once a survivor files a claim subject to the ACA and that claim is denied, any subsequent claim the survivor files is subject to the usual rules of claim preclusion set forth in proposed § 725.309(c) because the subsequent claim asserts the same cause of action as the prior denied claim. The remaining paragraphs included within current § 725.309(d) are redesignated as §§ 725.309(d)(2)–(d)(6), respectively.

Although amended Section 422(l) applies to subsequent survivor claims, nothing in the ACA authorizes re-opening of survivors' claims that have already been denied and for which all rights to appeal or reconsideration have terminated. Consequently, in the case of a subsequent claim governed by amended Section 422(l), the prior denial remains in effect. Current § 725.309(d)(5), which prohibits the payment of benefits “for any period prior to the date upon which the order denying the prior claim became final,” is not altered and applies in the case of subsequent survivors' claims awarded under amended Section 422(l).

The remainder of current § 725.309(d), as well as current §§ 725.309(b), (c), and (f), have been retained in the proposed rule and redesignated as §§ 725.309(a) through (d).

## 20 CFR 725.418 Proposed Decision and Order

Section 725.418 governs issuance of proposed decisions and orders by the district director, the Department of Labor official who is the first level adjudicator for all black lung claims. To ensure that survivors entitled to derivative benefits under ACA-amended Section 422(l) begin to receive benefits as soon as possible after filing a claim, the proposed rule adds a new subsection, § 725.418(a)(3), that provides an expedited procedure for issuance of proposed decisions and orders when Section 422(l) applies. The proposed rule also ensures that coal mine operators will be afforded a meaningful opportunity to challenge their liability for benefits in such claims.

Under the regulatory scheme in effect since 2001, a proposed decision and order constitutes the district director's only determination of the claimant's entitlement to benefits. *See* 65 FR 79920, 79997 (Dec. 20, 2000). Thus, a survivor-claimant cannot begin to receive benefits until after a proposed decision and order awarding benefits is issued in the survivor's claim. For survivors entitled to derivative benefits under Section 422(l), this causes a disruption in benefit payments because the miner's benefits cease the month before the month in which the miner dies. 20 CFR 725.203(b)(1) (2011).

In the normal course, the district director issues a proposed decision and order after the responsible coal mine operator has been notified of its potential liability for a benefits claim and after the parties have had the opportunity to develop medical evidence and evidence addressing the operator's liability. *See* 20 CFR 725.407; 725.408; 725.410 (2011). These procedural steps take time to complete. For example, the regulations provide an operator notified of a claim 90 days in which to submit evidence regarding its liability. 20 CFR 725.408(b)(1) (2011). After that period, each party is given 60 days for evidentiary development, and an additional 30 days to submit evidence in response to the other party's evidence. 20 CFR 725.410(b) (2011). These time periods can be, and often are, enlarged at a party's request. 20 CFR 725.423 (2011).

Although necessary in general, these standard adjudication procedures frustrate the Department's goal of prompt payment of Section 422(l) claims. The procedures are also unnecessary for such claims. Because the miner's physical condition will not be at issue, no medical evidence need be

developed. Nor is there any compelling need to notify the operator of its potential liability or allow it to develop liability evidence before the proposed decision and order is issued. The operator will have received notification of its liability in the miner's claim, and provided a chance to challenge its liability under the same criteria applicable in the survivor's claim. *See generally* 20 CFR 725.408–725.419; 725.494 (2011). It would also have had the right to a formal hearing before an administrative law judge and appellate review of the judge's decision. 20 CFR 725.450; 725.481–725.482 (2011). Similar procedures would have been available to the operator under the regulatory scheme in effect prior to 2001. *See* 20 CFR 725.412–725.415; 725.450; 725.481–725.482 (2000). There is simply no need to delay issuance of the proposed decision and order in a claim governed by amended Section 422(l).

At the same time, an operator may, in rare instances, have a legitimate reason for challenging its liability in a Section 422(l) claim. Proposed § 725.418(a)(3) allows an operator to do so by filing a request for revision under the procedures set forth in current §§ 725.419(a) and (b) within 30 days after the proposed decision and order is issued. In such cases, the district director will vacate the proposed decision and order and allow all parties, including the claimant and the Director, 30 days to submit evidence pertaining to the operator's liability. This may include evidence pertaining to the named operator's status as a potentially liable operator or evidence demonstrating that another coal mine operator is liable for the claim. *See* 20 CFR 725.494; 725.495 (2011). The period may also be extended for good cause. *See* 20 CFR 725.423 (2011). At the end of the 30-day (or extended) period, the district director will evaluate any liability evidence submitted and enter a new proposed decision and order adjudicating the liability question and awarding the survivor benefits, as appropriate.

This procedure balances the Department's goal of reducing the time that elapses between when an entitled-miner's benefits cease and when a Section 422(l) survivor's benefits begin with the need to protect coal mine operators' due process rights. The 30-day period for submitting liability evidence allows the operator sufficient time to defend its interests, given that the operator will have had the opportunity to address the liability issue in the miner's claim. At the same time, this relatively brief period limits the

potential delay in benefit payments to the survivor resulting from the operator's liability challenge.

The Department notes that current § 725.418(a)(2) allows the district director to by-pass the normal adjudication process and issue a proposed decision and order at any time if the "district director determines that its issuance will expedite the adjudication of the claim." 20 CFR 725.418(a)(2) (2011). Based on this provision, after enactment of the ACA, the Department began issuing proposed decisions and orders upon receipt of a survivor's claim governed by amended Section 422(l). Although the general regulatory exception provides sufficient authority for this policy, revising § 725.418 to include an explicit exception to the normal district director adjudication procedures for derivative-entitlement claims, and to set forth defined procedures through which an operator may challenge its liability, gives the public notice as to how the Department will handle these recurrent claims. Accordingly, proposed § 725.418(a)(3) states that a district director may issue a proposed decision and order upon receipt of a claim filed by a survivor who is entitled to benefits under amended Section 422(l). Proposed paragraph (a)(3) also describes the procedures for an operator to challenge its liability in such cases.

Current § 725.418(d) states that a district director cannot identify an operator as responsible for the claim in the proposed decision and order without first providing the operator notice of the claim and the opportunity to submit evidence challenging the claimant's entitlement and its liability. Based on the exception created by current § 725.418(a)(2), the Director has not applied this paragraph in claims awarded under amended Section 422(l). Proposed § 725.418(d) clarifies that this requirement does not apply in the case of a claim awarded under amended Section 422(l). The rest of the rule remains unchanged.

### III. Statutory Authority

Section 426(a) of the BLBA, 30 U.S.C. 936(a), authorizes the Secretary of Labor to prescribe rules and regulations necessary for the administration and enforcement of the Act.

### IV. Information Collection Requirements (Subject to the Paperwork Reduction Act) Imposed Under the Proposed Rule

This rulemaking imposes no new collections of information.

### V. Executive Orders 12866 and 13563 (Regulatory Planning and Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It also instructs agencies to review “rules that may be outdated, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them.” In accordance with this Executive Order, the Department has proposed certain changes to these rules not otherwise required to implement the ACA’s statutory amendments.

The proposed rules are consistent with the statutory mandate, reflecting the policy choices made by Congress in adopting the ACA amendments. Those choices reflect Congress’ rational decision “to spread the costs of the employees’ disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.” *West Virginia CWP Fund v. Stacy*, \_\_\_\_\_ F.3d \_\_\_\_\_, 2011 WL 6062116, \*3 (4th Cir. Dec. 7, 2011) (quoting *Usery*, 428 U.S. at 18)). In restoring Section 411(c)(4), “Congress decided to ease the path to recovery for claimants who could prove at least 15 years of coal mine employment and a totally disabling pulmonary impairment,” thus giving miners and their survivors “a better shot at obtaining benefits.” *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849 (7th Cir. 2011). And in restoring Section 422(l), Congress made “a legislative choice to compensate a miner’s dependents for the suffering they endured due to the miner’s pneumoconiosis or as a means to provide a miner with peace of mind that his dependents will continue to receive benefits after his death.” *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 258 (3d Cir. 2011). The proposed rules merely implement these Congressional directives.

Although additional expenditures associated with these rules primarily flow from the statutory amendments rather than the rules themselves, the Department has evaluated the financial impact of the amendments’ application on coal mine operators. Coal mine operators’ outlays for the workers’

compensation insurance necessary to secure the payment of any benefits resulting from the amendments will likely increase, at least in the short run. Self-insured operators may also be required to pay out more in compensation to entitled miners and survivors.

These operator expenditures are transfer payments as defined by OMB Circular A–4 (*i.e.*, payments from one group to another that do not affect the total resources available to society). To estimate additional workers’ compensation insurance premiums that may result from the ACA amendments, the Department projected new claim filings, award rates and associated insurance premiums both with and without the amendments for the ten-year period 2010 through 2019. Based on the projected differences, the Department estimates that annualized industry insurance premiums will increase \$35 million over this ten-year period as a result of the ACA amendments. This figure likely overstates the premium increase because it is based on two important assumptions designed to consider a maximum-impact scenario: the estimates assume that all coal mine operators purchase commercial workers’ compensation insurance rather than self-insuring, and the insurance rates used are based on the higher rates charged by assigned-risk plans rather than the lower rates generally available in the voluntary market. The Department’s estimate is explained more fully in the Regulatory Flexibility Act discussion below.

Transfers also occur between insurance carriers or self-insured coal mine operators and benefit recipients. These transfers take the form of benefit payments. The amount of benefits payable on any given award depends upon a variety of factors, including the benefit recipient’s identity, the length of the recipient’s life, and whether the recipient has any eligible dependents for whom the basic benefit amount may be augmented. See generally 20 CFR 725.202–725.228; 725.520 (2011).

For example, in FY 2010, the Department oversaw 28,671 active Part C BLBA claims with income and medical benefit disbursements of approximately \$238 million. This translates into an annual benefit rate of \$8,316 per claim, or an average monthly benefit of \$693. Of the total active claims in 2010 payable by coal mine operators and their insurance carriers, an estimated 156 were new awards resulting from the ACA amendments, translating into approximately \$1.3 million in additional income and

medical benefit disbursements in the first year. Accordingly, the Department’s predicted 425 new awards in responsible operator claims for 2011 equates to an estimated \$3.5 million increase in benefit disbursements for the first year.

Payments from the Black Lung Disability Trust Fund will also increase due to a small number of claims awarded under the ACA amendments and for which no coal mine operator may be held liable. The Department estimates that Trust Fund benefit payments will increase a total of approximately \$48.3 million over the 10-year period from 2010–2019. Despite this amendment-related increase, Trust Fund benefit payments as a whole are decreasing annually. The majority of the Trust Fund’s liabilities stem from earlier days of the black lung program, when the Trust Fund bore liability for a much higher percentage of awarded claims. Trust Fund payments cease when these benefit recipients pass away. As a result, the Trust Fund’s expenditures continue to decrease each year.

Claimants who obtain benefits under the ACA amendments will gain a variety of advantages that are difficult to quantify in monetary terms. A disabled miner “has suffered in at least two ways: His health is impaired, and he has been rendered unable to perform the kind of work to which he has adapted himself.” *Usery*, 428 U.S. at 21. Income disbursements give these miners some financial relief and provide a modicum of compensation for the health impairment the miners suffered in working to meet the Nation’s energy needs. Medical treatment benefits provide health care to miners for the injury caused by their occupationally acquired pulmonary diseases and disabilities so as to maximize both their longevity and quality of life. Both income and medical benefits alleviate drains on public assistance resources. And miners awarded benefits under the ACA amendments may also rest assured that their dependent survivors will not be left wholly without financial support.

In exchange, coal mine operators continue to be protected from common law tort actions that could otherwise be brought by these miners or their survivors for pneumoconiosis arising from the miner’s employment and related disabilities or death. See 33 U.S.C. 905(a), incorporated by 30 U.S.C. 932(a). And because the monthly benefit amounts payable are fixed by statute, compensation costs are predictable and feasible for insurers to cover at an affordable rate. This predictability also allows coal mine operators to pass their



costs for insurance (or benefits if self-insured) on to consumers.

From a program-administration viewpoint, the Department will realize some cost savings from the ACA amendment restoring Section 422(l)'s automatic entitlement for survivors. Before the amendment, the Department had to develop each survivor's claim, including obtaining relevant medical evidence, evaluating that evidence, and issuing a detailed decision adjudicating whether the miner's death was due to pneumoconiosis. That administrative work, and the costs associated with it, is no longer necessary where the survivor is entitled under Section 422(l). Instead, the regulations adopt a streamlined process for those cases that eliminates most evidentiary development and evaluation. This process has the dual benefit of delivering compensation to entitled survivors more quickly and reducing the costs associated with that delivery.

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

#### **VI. Small Business Regulatory Enforcement Fairness Act of 1996**

As required by Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, enacted as Title II of Public Law 104-121, 201-253, 110 Stat. 847, 857 (1996), the Department will report promulgation of this rule to both Houses of the Congress and to the Comptroller General prior to its effective date as a final rule. The report will state that the rule is not a "major rule" as defined under 5 U.S.C. 804(2).

#### **VII. Unfunded Mandates Reform Act of 1995**

Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.*, directs agencies to assess the effects of Federal Regulatory Actions on State, local, and tribal governments, and the private sector, "other than to the extent that such regulations incorporate requirements specifically set forth in law." 2 U.S.C. 1531. For purposes of the Unfunded Mandates Reform Act, this rule does not include any Federal mandate that may result in increased expenditures by State, local, tribal governments, or increased expenditures by the private sector of more than \$100,000,000.

#### **VIII. Regulatory Flexibility Act and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)**

The Regulatory Flexibility Act of 1980, as amended, 5 U.S.C. 601 *et seq.*, (RFA), requires an agency to prepare a regulatory flexibility analysis when it proposes regulations that will have "a significant economic impact on a substantial number of small entities," or to certify that the proposed regulations will have no such impact, and to make the analysis or certification available for public comment. 5 U.S.C. 605. As noted above, the Department believes that the BLBA itself accounts for most, if not all, of the costs imposed on the coal mining industry and that the proposed rules do not add to those costs.

The primary cost lies in purchasing commercial workers' compensation insurance or qualifying as a self-insurer to insure workers covered by the BLBA. This requirement is imposed by statute. 30 U.S.C. 933. The Department estimates that the cost of purchasing commercial insurance will increase initially because the BLBA amendments will result in additional awards but will then drop. The Department has conducted an initial regulatory flexibility analysis. A summary of that analysis is set forth below. The complete economic analysis is available for viewing and download at [www.Regulations.gov](http://www.Regulations.gov) or upon written request directed to the Division of Coal Mine Workers' Compensation Programs, Office of Workers' Compensation, U.S. Department of Labor, Room C-3520, 200 Constitution Avenue NW., Washington, DC 20210.

To estimate the maximum financial impact that the amendments and the proposed rule may have on coal mine operators, the Department based its economic analysis on two important assumptions. First, in estimating increases in workers' compensation insurance premiums, the Department used rates charged by more expensive assigned risk plans, where available, rather than standard commercial insurance. These plans reflect rates for mine operators who are unable to secure coverage in the voluntary market and must use this insurer of last resort. Second, although approximately 38% of all coal mine operators are self-insured and will likely have lower costs of complying with the ACA amendments, the Department assumed that all operators purchased commercial insurance. As a result of these assumptions, the Department's estimates likely overstate the actual cost

impact of the ACA amendments and the proposed rule.

#### *A. Description of Reasons That Action by the Agency Is Being Considered*

The Department is proposing these rules to implement the ACA amendments to Sections 422(l) and 411(c)(4) of the BLBA. The amendment to Section 422(l) allows certain eligible survivors to establish entitlement to benefits based on the fact that the miner had been awarded benefits and without having to prove that the miner died due to coal workers' pneumoconiosis. The amendment to Section 411(c)(4) re-establishes a rebuttable presumption of total disability or death due to pneumoconiosis for certain claims.

#### *B. Objectives of, and Legal Basis for, the Proposed Rule*

Section 426(a) of the BLBA authorizes the Secretary to "issue such regulations as [she] deems appropriate to carry out the provisions of this title." 30 U.S.C. 936(a). The ACA amendments are self-effectuating, and the Department has applied the amended statutory provisions in claims arising under the BLBA since their enactment. Although the amendments are legally binding by themselves, the Department believes it appropriate to incorporate those amendments into the existing regulatory scheme to clarify to all parties the manner in which the Department believes the amendments should be applied. Consequently, the proposed rule has two primary goals. First, it will set forth the requirements for derivative entitlement for the survivors of miners who had been awarded benefits on claims filed during their lifetimes. Second, the rule will spell out the requirements for invocation and rebuttal of the statutory presumption of total disability or death due to pneumoconiosis.

#### *C. Small Entities to Which the Proposed Rule Will Apply*

The RFA requires an administrative agency to describe, and where feasible, estimate the number of small entities to which a proposed rule will apply. 5 U.S.C. 603(b)(3). Small entities include small businesses, small organizations, and small governmental jurisdictions. 5 U.S.C. 601(6). The BLBA does not apply to or regulate small organizations or governmental jurisdictions. Accordingly, this analysis is limited to the effect of the proposed rule on small businesses. By its terms, the BLBA imposes obligations on coal mine operators, who are liable for and must secure the payment of benefits to their eligible employees, former employees,

and qualified survivors. 30 U.S.C. 932(b) (“each such operator shall be liable for and shall secure the payment of benefits”). An operator is defined as “[a]ny owner, lessee, or other person who operates, controls or supervises a coal mine, or any independent contractor performing services or construction at such mine.” 20 CFR 725.491(a)(1) (2011); see 30 U.S.C. 802(d).

Federal statistical agencies employ the North American Industry Classification System (NAICS) in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. NAICS is also the standard used to classify small businesses for the RFA. See 5 U.S.C. 601(3); 15 U.S.C. 632(a). NAICS was developed under the auspices of the Office of Management and Budget, and adopted in 1997 to replace the Standard Industrial Classification (SIC) system. The NAICS designated sector covering entities regulated by the BLBA is NAICS 2121 Coal Mining. Three detailed industries comprise this sector: NAICS 212111 Bituminous Coal and Lignite Surface Mining; NAICS 212112 Bituminous Coal Underground Mining; and NAICS 212113 Anthracite Mining.

The Small Business Administration (SBA) defines establishment size standards to determine whether a business entity, including all of its affiliates, is “small” and, thus, eligible for government programs and preferences reserved for “small business concerns.” In addition, the RFA requires agencies to consider the impact of their regulatory proposals on small entities. A size standard is usually stated in number of employees for manufacturing industries and average annual receipts for most non-manufacturing industries. The SBA size standard for the three sectors within the coal mining industry (NAICS 2121) is up to and including 500 employees. See U.S. Small Business Administration, Table of Small Business Size Standards, Effective November 5, 2010. <http://www.sba.gov/content/table-small-business-size-standards>.

Virtually all coal mine operators in the United States fall within SBA’s definition of a small business. Based on data supplied by the Mine Safety and Health Administration for 2008, there are 2,109 individual establishments in the coal mining industry. Of these, 2,094 employed 500 or fewer people. Each individual mining sector is also predominately comprised of small businesses under SBA’s definition. Only 4 of the 1,307 surface bituminous mining establishments and 11 of 645 underground bituminous mining

establishments employed more than 500 individuals. Finally, each of the 157 anthracite mining establishments employed 500 or fewer individuals. These results hold true even when individual companies are aggregated into parent companies. Grouping related companies together, the Department found that only 31 of the 1,108 companies employed more than 500 people in 2008. Therefore, even when related mining companies are considered as a single, larger entity, 97.2 percent (1,077 of 1,108) of companies in the coal mining industry employed 500 or fewer people and meet the SBA’s definition of a small business.

*D. Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rules, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record*

The proposed rules do not directly impose any reporting or recordkeeping requirements on any entities, regardless of size. Nor do the rules impose other significant costs beyond those imposed by the BLBA itself. The statute requires coal mine operators to secure the payment of benefits by either purchasing commercial workers’ compensation insurance or qualifying as a Department-approved self-insurer. 30 U.S.C. 933. But because the ACA amendments may make it easier for certain miners and survivors to secure entitlement to benefits, the Department believes there will be a short-term increase in black lung insurance rates.

In particular, the Department anticipates that the rule interpreting amended Section 422(l) will result in a significant increase in the number of survivors entitled to benefits. This increased eligibility, however, simply reflects the clear intent of Congress, which was to benefit a broad set of current and future claimants. As the late Senator Robert C. Byrd, sponsor of Section 1556 explained, amended Sections 411(c)(4) and 422(l) were not meant to benefit only future claimants making initial claims, but also (1) claimants who have had claims denied and will be filing subsequent claims; (2) claimants awaiting or appealing a decision or order; and (3) claimants in the midst of trying to determine whether to seek a modification of a recent order. See 156 Cong. Rec. S2083–84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd).

Any increase in awards attributable to the ACA amendments will be reflected in increased workers’ compensation insurance premiums. As previously

stated, the Department has estimated these increases using more costly assigned risk rates to project the worst-case scenario. In 2009, prior to the ACA’s enactment, the average assigned risk rate for surface bituminous mines was \$1.38 per \$100 of payroll. The rate for underground bituminous mines was \$3.36 per \$100 of payroll. The rate for underground anthracite mines was \$20.95 per \$100 of payroll. Given the downward trend in claim filings, which would result in fewer new claim awards, coupled with a decline in survivors automatically entitled to benefits based on miners’ claims filed prior to 1982, the Department believes that these rates would have steadily decreased over the ten-year period from 2010 to 2019 absent the ACA amendments. The Department projects that the average assigned risk rates in 2019 would have been \$.86 per \$100 of payroll for surface bituminous mines, \$2.10 per \$100 of payroll for underground bituminous mines, and \$13.10 per \$100 of payroll for underground anthracite mines.

The Department projects, however, that the total cost to the coal mining industry for complying with the Act’s insurance requirements will increase due to the ACA amendments. These costs are expected to peak during the first two years after the ACA’s enactment because the new law will spur new claim filings, which will result in more new claim awards, and affords automatic entitlement to an additional group of survivors. The Department projects that the average assigned risk rates in 2011, the peak expense year, will be \$2.21 per \$100 of payroll for surface bituminous mines, \$5.39 per \$100 of payroll for underground bituminous mines, and \$33.60 per \$100 of payroll for underground anthracite mines. After this temporary increase, total approvals against responsible operators are expected to decline, causing a corresponding decline in premium costs. By 2019, the Department projects that the average assigned risk rates will be \$1.07 per \$100 of payroll for surface bituminous mines, \$2.61 per \$100 of payroll for underground bituminous mines, and \$16.28 per \$100 of payroll for underground anthracite mines.

Based on the difference in the Department’s baseline assessment of compliance costs absent the ACA amendments and the expected cost to the coal mining industry for complying with the ACA amendments and implementing regulations, the Department estimates that insurance premium will rise by an annualized cost of \$35 million between 2010 and 2019.

The annualized insurance cost increases for each disaggregated coal mining industry for this ten-year period are expected to be \$8.5 million for the bituminous surface mining sector, \$23.6 million for the bituminous underground mining sector, and \$3 million for the anthracite mining sector.

As noted, the Department expects these cost impacts to be transitory in nature. Historically, the program has experienced a spike in claim filings, and thus new awards, immediately following enactment of statutory amendments or implementation of new program regulations. After these transitory impacts have subsided, the annual cost to the coal mining industry is expected to decrease each year and continue to follow the downward trend in claim filings that existed prior to the ACA amendments. The Department estimates that by 2019, the industry cost for all claims (including those that would have been awarded even without the amendments) will be \$91.6 million, more than \$26 million lower than the 2009 cost of \$117.9 million. The Department emphasizes that these projected costs are likely overstated because they assume that all coal mine operators purchase commercial workers' compensation insurance, which is more costly than self-insuring.

Thus, the Department anticipates that the ACA amendments will carry an annualized cost to the industry of \$35 million over the ten years from 2010 to 2019 with expenses peaking in 2011. Significantly, because this will occur prior to promulgation of any final regulations implementing the ACA amendments, the increased cost can be attributed solely to the amendments. For the industry in the aggregate, \$35 million represents 0.10 percent of annual industry revenues. The additional regulatory costs for the bituminous surface and underground coal mine sectors are expected to represent approximately 0.05 and 0.13 percent of total revenues, respectively. However, given that bituminous coal mining productivity and therefore, production is heavily skewed toward larger establishments, establishments that employ 49 or fewer employees are expected to have the greatest costs relative to revenues. For example, the costs to pay the projected increased insurance rates represent 0.27 and 0.36 percent of revenue respectively for bituminous surface and underground coal mines that employ fewer than 20 workers—substantially greater than the industry averages and their larger firm counterparts. The additional cost for the anthracite industry represents 2.85 percent of total revenues. This relatively

large increase results from the relatively high labor intensity and high existing insurance premiums for anthracite coal mining. It is thus a function of the industry rather than the amendments or the proposed regulations.

Establishments within this sector that employ under 20 workers are expected to have the greatest costs relative to revenues given their relatively lower productivity rate.

#### Identification of Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The Department is unaware of any rule that may duplicate, overlap or conflict with the proposed rule.

#### *E. Description of Any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities*

The RFA requires the Department to consider alternatives to the rule that would minimize any significant economic impact on small businesses without sacrificing the stated objectives of the rule. Several factors make proposing alternatives to the rule exceptionally difficult. First, these rules implement entitlement criteria that Congress has expressly determined be applied to certain claims filed under the BLBA. The Department is not free to disregard the clearly expressed intent of Congress. *Chevron USA Inc., v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842–43 (1984) (“agency [] must give effect to the unambiguously expressed intent of Congress”). Second, the requirement that the amendments apply to claims filed under the BLBA must mean that Congress intended the amendments to be applied in the context of existing claim procedures as specified in the Department’s regulations. Congress is presumed to know the law when it legislates. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In the black lung benefits program, the existing regulations explicitly prescribe the circumstances under which a coal mine operator would be liable for a particular claim and how the Department is required to identify the particular operator liable for each claim. This regulatory liability scheme was designed in accordance with the stated objective of Congress, which was “to ensure that individual coal mine operators rather than the [Black Lung Disability Trust Fund] bear the liability for claims arising out of such operator’s mines, to the maximum extent feasible.” S. Rep. No. 95–209 (1977), *reprinted in* House Comm. on

Educ. and Labor, 96th Cong., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, at 612 (1979).

In amending the BLBA, Congress gave no indication that the Department should alter the long-established rules for imposing liability on individual coal mine operators and relieve a particular operator of liability created by the amendments based solely on its size. Even assuming the Department had authority to alter those requirements, the SBA’s size standard requirements include the vast majority of coal mine operators as small businesses. Consequently, any alteration of the rule to exempt small businesses would necessarily nullify the amendments. There is simply no legal or rational basis that would justify alteration of the existing claim liability scheme with regard to rules implementing the ACA amendments to the BLBA.

The only possible way to lessen the impact of the proposed rules on small businesses would be to ensure that claims resulted in fewer awards. Given that, as noted above, the Department is not free to depart from the expressly stated intent of Congress in implementing legislation, that route is also problematic. The impact and intent of the amendments is clear, and since the ACA’s enactment, the Department has applied them in a manner consistent with these proposed regulations.

The Department is aware of only one rule that could arguably be considered an agency policy choice—the proposed revision to § 725.309 stating that the requirement to demonstrate a change in an applicable condition of entitlement does not apply to re-filed survivors’ claims governed by amended Section 422(l). This rule allows a survivor who had previously filed a claim that was denied under the law in effect before the ACA’s enactment to re-file and obtain benefits pursuant to amended Section 422(l) if the miner was awarded benefits on a claim filed during his or her lifetime. As explained above, the Department believes this rule is fully justified under the plain language of the amendments and is consistent with traditional principles of *res judicata*. See discussion under § 725.309.

In any event, the Department believes the impact of this rule will be minimal. The universe of potential claimants who would benefit by this rule, and whose benefits would be the responsibility of a coal mine operator, is finite. The Department believes that, at most, there are only 445 survivors of awarded miners who have had a prior claim denied and who could not be confirmed as deceased through the SSA Death

Master file. The Department estimates that the actual number of re-filing survivors will be smaller. It is likely that a portion of these survivors are deceased because the Department does not have social security numbers for all dependents, and thus could not check those survivors against the Death Master file. Others may have re-married, and thus be ineligible for survivor's benefits, or will not re-file a claim for some other reason. Moreover, in at least some cases the operator or carrier liable for the miner's benefits will now be bankrupt, and the Black Lung Disability Trust Fund will be liable for the survivor's benefits. Based on these premises, the Department estimates that only 317 survivors will re-file for benefits under amended Section 422(l).

This relatively insignificant figure may even overstate the number of 422(l) re-filings in responsible operator cases. As of May 2, 2011, the Department had received only 75 re-filed claims eligible under amended Section 422(l). For fiscal year 2011, the year in which the largest cost is imposed by the ACA amendments, the number of claims actually re-filed or estimated to be re-filed, is 72. The Department received 42 re-filed claims filed in the first seven months of the year. It estimates that if such claims are filed at the same rate—six per month—the total for the year will be 72. This amounts to only 19.6% of the 368 actual and predicted 422(l) awards for 2011, and only 7% of the 1023 actual and predicted awards for that year.

Finally, the financial impact of proposed § 725.309 on coal mine operators is mitigated in two ways. First, an existing rule limits retroactive benefit payments in any awarded re-filed claim. Ordinarily, a survivor awarded benefits receives them beginning with the month in which the miner died. Under the existing rule, the survivor would not be entitled to benefits for the period prior to the day on which the prior denial became final. Second, an operator who ensures its BLBA liabilities with commercial insurance will not incur any additional costs because it has already purchased the insurance necessary to cover the survivor's claim. For these reasons, the Department does not believe that allowing re-filing survivors to receive benefits under amended Section 422(l) imposes significant hardships on small coal mine businesses. There is thus no reason to alter or abandon this proposed rule.

#### *F. Questions for Comment To Assist Regulatory Flexibility Analysis*

The Department invites all interested parties to submit comments regarding the costs and benefits of the proposed rule with particular attention to the effects of the rule on small entities described in the analysis above.

#### **IX. Executive Order 13132 (Federalism)**

The Department has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” E.O. 13132, 64 FR 43255 (Aug. 4, 1999). The proposed rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government” if promulgated as a final rule. *Id.*

#### **X. Executive Order 12988 (Civil Justice Reform)**

The proposed rule meets the applicable standards in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **XI. Congressional Review Act**

The proposed rule is not a “major rule” as defined in the Congressional Review Act, 5 U.S.C. 801 *et seq.* If promulgated as a final rule, this rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

#### **List of Subjects in 20 CFR Parts 718 and 725**

Claims, Total Disability due to pneumoconiosis; coal miners' entitlement to benefits; survivors' entitlement to benefits, Workers' compensation.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 20 CFR parts 718 and 725 as follows:

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

1. The authority citation for part 718 is revised 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; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 405; Secretary's Order 10–2009, 74 FR 58834.

2. Revise § 718.1 to read as follows:

#### **§ 718.1 Statutory provisions.**

Section 402(f) of the Act authorizes the Secretary of Labor to establish criteria for determining total disability or death due to pneumoconiosis to be applied in the processing and adjudication of claims filed under Part C of the Act. Section 402(f) further authorizes the Secretary of Labor, in consultation with the National Institute for Occupational Safety and Health, to establish criteria for all appropriate medical tests administered in connection with a claim for benefits. Section 413(b) of the Act authorizes the Secretary of Labor to establish criteria for the techniques used to take chest roentgenograms (x-rays) in connection with a claim for benefits under the Act.

3. Revise § 718.2 to read as follows:

#### **§ 718.2 Applicability of this part.**

(a) With the exception of the second sentence of § 718.204(a), this part is applicable to the adjudication of all claims filed on or after June 30, 1982 under Part C of the Act. It provides standards for establishing entitlement to benefits under the Act and describes the criteria for the development of medical evidence used in establishing such entitlement. The second sentence of § 718.204(a) is applicable to the adjudication of all claims filed after January 19, 2001.

(b) Publication of certain provisions or parts of certain provisions that apply only to claims filed prior to June 30, 1982, or to claims subject to Section 435 of the Act, has been discontinued because those provisions affect an increasingly smaller number of claims. The version of Part 718 set forth in 20 CFR, parts 500 to end, edition revised as of April 1, 2010, applies to the adjudication of all claims filed prior to June 30, 1982, as appropriate.

(c) The provisions of this part shall, to the extent appropriate, be construed together in the adjudication of claims.

4. Revise § 718.3(a) to read as follows:

#### **§ 718.3 Scope and intent of this part.**

(a) This part sets forth the standards to be applied in determining whether a

coal miner is or was totally disabled due to pneumoconiosis or died due to pneumoconiosis. It also specifies the procedures and requirements to be followed in conducting medical examinations and in administering various tests relevant to such determinations.

\* \* \* \* \*

5. Revise § 718.202(a)(3) to read as follows:

**§ 718.202 Determining the existence of pneumoconiosis.**

(a) \* \* \*

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

\* \* \* \* \*

6. Revise § 718.205 to read as follows:

**§ 718.205 Death due to pneumoconiosis.**

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

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

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

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

(b) Death will be considered to be due to pneumoconiosis if any of the following criteria is met:

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

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

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

(4) For survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the presumption at § 718.305 is invoked and not rebutted.

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

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

7. Revise § 718.301 to read as follows:

**§ 718.301 Establishing length of employment as a miner.**

The presumptions set forth in §§ 718.302 and 718.305 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of the miner's coal mine work history must be computed as provided by 20 CFR 725.101(a)(32).

8. Remove and reserve § 718.303.

**§ 718.303 [Reserved]**

9. Revise § 718.305 to read as follows:

**§ 718.305 Presumption of pneumoconiosis.**

(a) *Applicability.* This section applies to all claims filed after January 1, 2005, and pending on or after March 23, 2010.

(b) *Invocation.* (1) The claimant may invoke the presumption by establishing that—

(i) the miner engaged in coal-mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof; and

(ii) the miner or survivor cannot establish entitlement under section 718.304 by means of chest x-ray evidence; and

(iii) the miner has, or had at the time of his death, a totally disabling respiratory or pulmonary impairment established pursuant to § 718.204, except that § 718.204(d) shall not apply.

(2) The conditions in a mine other than an underground mine will be considered "substantially similar" to those in an underground mine if the miner was exposed to coal-mine dust while working there.

(3) In a claim involving a living miner, a miner's affidavit or testimony, or a spouse's affidavit or testimony, may not be used by itself to establish the existence of a totally disabling respiratory or pulmonary impairment.

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

(c) *Facts presumed.* Once invoked, there will be rebuttable presumption—

(1) in a miner's claim, that the miner is totally disabled due to

pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of death; or

(2) in a survivor's claim, that the miner's death was due to pneumoconiosis.

(d) *Rebuttal.* (1) *Miner's Claim.* In a claim filed by a miner, the party opposing entitlement may rebut the presumption by establishing that—

(i) the miner does not, or did not, have pneumoconiosis as defined in section 718.201; or

(ii) the miner's respiratory or pulmonary total disability did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

(2) *Survivor's Claim.* In a claim filed by a survivor, the party opposing entitlement may rebut the presumption by establishing that—

(i) the miner did not have pneumoconiosis as defined in section 718.201; or

(ii) the miner's death did not arise in whole or in part out of dust exposure in the miner's coal mine employment.

(3) In no case shall the presumption be considered rebutted on the basis of evidence demonstrating the existence of a totally disabling obstructive respiratory or pulmonary disease of unknown origin.

10. Remove and reserve § 718.306.

**§ 718.306 [Reserved]**

11. Revise the introductory text of Appendix C to Part 718 to read as follows:

**Appendix C to Part 718—Blood-Gas Tables.**

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

\* \* \* \* \*

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

12. The authority citation for part 725 is revised 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), 921, 932, 936; 33 U.S.C. 901 *et seq.*; 42 U.S.C. 405; Secretary's Order 10-2009, 74 FR 58834.

13. Revise § 725.1 to read as follows:

**§ 725.1 Statutory provisions.**

(a) *General.* Subchapter IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, the Federal Mine Safety and Health Amendments Act of 1977, the Black Lung Benefits Reform Act of 1977, the Black Lung Benefits Revenue Act of 1977, the Black Lung Benefits Amendments of 1981, the Black Lung Benefits Revenue Act of 1981, the Black Lung Consolidation of Responsibility Act of 2002, and the Patient Protection and Affordable Care Act of 2010 (together comprising the Black Lung Benefits Act (*see* § 725.101(a)(1))) provides for the payment of benefits to certain disabled coal miners and their survivors. *See* 725.201.

(b) *Part B.* Part B of subchapter IV of the Act provided that claims filed before July 1, 1973 were to be filed with, and adjudicated and administered by, the Social Security Administration (SSA). If awarded, these claims were paid by SSA out of appropriated funds. The Black Lung Consolidation of Administrative Responsibility Act (*see* subsection (h) of this section) transferred all responsibility for continued administration of these claims to the Department of Labor.

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

(d) *Changes made by the Black Lung Benefits Reform Act of 1977.* The Black Lung Benefits Reform Act of 1977 contains a number of significant amendments to the Act's standards for

determining eligibility for benefits. Among these are:

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

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

(3) A provision that continued employment in a coal mine is not conclusive proof that a miner is not or was not totally disabled;

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

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

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

(e) *Changes made by the Black Lung Benefits Revenue Act of 1977.* The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) produced and sold or used in the United States after March 31, 1978. The Secretary of the Treasury is the managing trustee of the fund and benefits are paid from the fund upon the direction of the Secretary of Labor. The fund was made liable for the payment of all claims approved under part C of the Act for all periods of eligibility occurring on or after January 1, 1974, with respect to claims where the miner's last coal mine employment terminated before January 1, 1970, or where individual liability can not be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund was also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and to seek reimbursement from such operator. The purpose of the fund and the Black Lung Benefits Revenue Act of 1977 was to insure that coal mine operators, or the coal industry, will fully bear the cost of black lung disease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contained other provisions relating to the fund and authorized a coal mine operator to establish its own

trust fund for the payment of certain claims.

(f) *Changes made by the Black Lung Benefits Amendments of 1981.* The Black Lung Benefits Amendments of 1981 made a number of significant changes in the Act's standards for determining eligibility for benefits and concerning the payment of such benefits, and applied the changes to claims filed on or after January 1, 1982. Among these are:

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

(2) The rebuttable presumption that the total disability of a miner with fifteen or more years employment in the coal mines, who has demonstrated a totally disabling respiratory or pulmonary impairment, is due to pneumoconiosis is no longer applicable (but the presumption was reinstated for claims filed after January 1, 2005, and pending on or after March 23, 2010, by the Patient Protection and Affordable Care Act of 2010 (*see* subsection (i) of this section));

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

(4) Unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on and after January 1, 1982, only when the miner's death was due to pneumoconiosis (but for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, an award of a miner's claim may form the basis for a survivor's entitlement under the Patient Protection and Affordable Care Act of 2010 (*see* subsection (i) of this section));

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

(6) Other technical amendments.

(g) *Changes made by the Black Lung Benefits Revenue Act of 1981.* The Black Lung Benefits Revenue Act of 1981 temporarily doubles the amount of the tax upon coal until the fund shall have repaid all advances received from the United States Treasury and the interest on all such advances. With respect to claims filed on or after January 1, 1982, the fund's authorization for the payment of interim benefits is limited to the payment of prospective benefits only.

These changes also define the rates of interest to be paid to and by the fund.

(h) *Changes made by the Black Lung Consolidation of Administrative Responsibility Act.* The Black Lung Consolidation of Administrative Responsibility Act of 2002 transferred administrative responsibility for all claims previously filed with or administered by the Social Security Administration to the Department of Labor, effective January 31, 2003. As a result, certain obsolete provisions in the BLBA (30 U.S.C. 904, 924a, and 945) were repealed. Various technical changes were made to other statutory provisions.

(i) *Changes made by the Patient Protection and Affordable Care Act of 2010.* The Patient Protection and Affordable Care Act of 2010 (the ACA) changed the entitlement criteria for miners' and survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, by reinstating two provisions made inapplicable by the Black Lung Benefits Amendments of 1981.

(1) For miners' claims meeting these date requirements, the ACA reinstated the rebuttable presumption that the miner is (or was) totally disabled due to pneumoconiosis if the miner has (or had) 15 or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment.

(2) For survivors' claims meeting these date requirements, the ACA made two changes. First, it reinstated the rebuttable presumption that the miner's death was due to pneumoconiosis if the miner had 15 years or more of qualifying coal mine employment and was totally disabled by a respiratory or pulmonary impairment at the time of death. Second, it reinstated derivative survivors' entitlement. As a result, an eligible survivor will be entitled to benefits if the miner is or was found entitled to benefits on his or her lifetime claim based on total disability due to pneumoconiosis arising out of coal-mine employment.

(j) *Longshore Act provisions.* The adjudication of claims filed under part C of the Act (*i.e.*, claims filed on or after January 1, 1974) is governed by various procedural and other provisions contained in the Longshore and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by section 422. The incorporated LHWCA provisions are applicable under the Act except as is otherwise provided by the Act or as provided by regulations of the Secretary. Although occupational disease benefits are also payable under

the LHWCA, the primary focus of the procedures set forth in that Act is upon a time-definite-traumatic injury or death. Because of this and other significant differences between a black lung and longshore claim, it is determined, in accordance with the authority set forth in section 422 of the Act, that certain of the incorporated procedures prescribed by the LHWCA must be altered to fit the circumstances ordinarily confronted in the adjudication of a black lung claim. The changes made are based upon the Department's experience in processing black lung claims since July 1, 1973, and all such changes are specified in this part. No other departure from the incorporated provisions of the LHWCA is intended.

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

14. In § 725.2, revise paragraphs (a) and (b) to read as follows:

**§ 725.2 Purpose and applicability of this part.**

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

(b) This part applies to all claims filed under part C of subchapter IV of the Act on or after June 30, 1982. Publication of certain provisions or parts of certain provisions that apply only to claims filed prior to June 30, 1982, or to claims subject to Section 435 of the Act, has been discontinued because those provisions affect an increasingly smaller number of claims. The version of Part 725 set forth in 20 CFR, parts 500 to

end, edition revised as of April 1, 2010, applies to the adjudication of all claims filed prior to June 30, 1982, as appropriate.

\* \* \* \* \*

15. In § 725.101, revise paragraphs (a)(1) and (a)(2) to read as follows:

**§ 725.101 Definition and use of terms.**

(a) \* \* \*

(1) The *Act* means the Black Lung Benefits Act, 30 U.S.C. 901–44, as amended.

(2) The *Longshore Act* or *LHWCA* means the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901–950, as amended from time to time.

\* \* \* \* \*

16. In § 725.201:

- a. Remove paragraph (a);
- b. Remove paragraph (b); and
- c. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c).

The revision reads as follows:

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

(a) Part C of the Act provides for the payment of periodic benefits in accordance with this part to:

(1) A miner who meets the conditions of entitlement set forth in 725.202(d); or

(2) The surviving spouse or surviving divorced spouse of a deceased miner who meets the conditions of entitlement set forth in 725.212; or,

(3) Where neither exists, the child of a deceased miner who meets the conditions of entitlement set forth in 725.218; or

(4) The surviving dependent parents, where there is no surviving spouse or child, or the surviving dependent brothers or sisters, where there is no surviving spouse, child, or parent, of a miner, who meet the conditions of entitlement set forth in 725.222; or

(5) The child of a miner's surviving spouse who was receiving benefits under Part C of the Act at the time of such spouse's death.

\* \* \* \* \*

17. In § 725.212, republish introductory text of paragraph (a)(3) and revise paragraphs (a)(3)(i) and (a)(3)(ii) to read as follows:

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

(a) \* \* \*

(3) The deceased miner either:

(i) Is determined to have died due to pneumoconiosis; or

(ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving spouse or surviving divorced spouse filed a claim for



benefits after January 1, 2005 which was pending on or after March 23, 2010.

\* \* \* \* \*

18. In § 725.218, republish introductory text of paragraph (a) and revise paragraphs (a)(1) and (a)(2) to read as follows:

**§ 725.218 Conditions of entitlement; child.**

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

(1) Is determined to have died due to pneumoconiosis; or

(2) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving child filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

\* \* \* \* \*

19. In § 725.222, republish introductory text of paragraph (a)(5) and revise paragraphs (a)(5)(i) and (a)(5)(ii) to read as follows:

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

(a) \* \* \*

(5) The deceased miner:

(i) Is determined to have died due to pneumoconiosis; or

(ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving parent, brother or sister filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

\* \* \* \* \*

20. In § 725.309:

a. Remove paragraph (a);

b. Redesignate paragraphs (b) through (d) as paragraphs (a) through (c) and revise redesignated paragraph (c);

c. Redesignate paragraphs (d)(1) through (d)(5) as (c)(2) through (c)(6) and add a new paragraph (c)(1);

d. Remove paragraph (e); and

e. Redesignate paragraph (f) as paragraph (d).

The revision and addition read as follows:

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

\* \* \* \* \*

(c) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part. Except as provided in paragraph (1) below, a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§ 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:

(1) The requirement to establish a change in an applicable condition of entitlement shall not apply to a survivor's claim if the requirements of 725.212(a)(3)(ii), 725.218(a)(2), or 725.222(a)(5)(ii) are met, and the survivor's prior claim was finally denied prior to March 23, 2010.

\* \* \* \* \*

21. In § 725.418:

a. Republish introductory text in paragraph (a);

b. Revise paragraphs (a)(1) and (a)(2);

c. Add new paragraph (a)(3);

d. Revise paragraph (d).

The revisions and addition read as follows:

**§ 725.418 Proposed decision and order.**

(a) Within 20 days after the termination of all informal conference proceedings, or, if no informal conference is held, at the conclusion of the period permitted by § 725.410(b) for the submission of evidence, the district director shall issue a proposed decision and order. A proposed decision and order is a document, issued by the district director after the evidentiary development of the claim is completed and all contested issues, if any, are joined, which purports to resolve a claim on the basis of the evidence submitted to or obtained by the district director. A proposed decision and order

shall be considered a final adjudication of a claim only as provided in § 725.419. A proposed decision and order may be issued by the district director at any time during the adjudication of any claim if:

(1) Issuance is authorized or required by this part;

(2) The district director determines that its issuance will expedite the adjudication of the claim; or

(3) The district director determines that the claimant is a survivor who is entitled to benefits under 30 U.S.C. 932(l). In such cases, the district director may designate the responsible operator in the proposed decision and order regardless of whether the requirements of paragraph (d) of this section have been met. Any operator identified as liable for benefits under this paragraph may challenge the finding of liability by timely requesting revision of the proposed decision and order and specifically indicating disagreement with that finding. See 20 CFR 725.419(a), (b). In such cases, the district director shall allow all parties 30 days within which to submit liability evidence. At the end of this period, the district director shall issue a new proposed decision and order.

\* \* \* \* \*

(d) The proposed decision and order shall reflect the district director's final designation of the responsible operator liable for the payment of benefits. Except as provided in paragraph (a)(3) of this subsection, no operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to § 725.407, and the opportunity to submit additional evidence pursuant to § 725.410. The district director shall dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to § 725.407 and that were not previously dismissed pursuant to § 725.410(a)(3).

Signed at Washington, DC, this 22nd day of March, 2012.

**Gary A. Steinberg,**

*Acting Director, Office of Workers' Compensation Programs.*

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