JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

PREPARED BY THE U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, DC

AUGUST 2001

CHAPTER 24
Multiple Claims Under § 725.309

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I. Generally
[III(F)(2)]

A. Refiling more than one year after prior denial

Often, a claimant will file a new claim *more than one year* after a prior denial and submit new evidence in an attempt to establish entitlement to benefits. The provisions of 20 C.F.R. § 727.309 apply to such claims and are intended to provide the claimant, whose condition has worsened as a result of coal workers' pneumoconiosis, relief from the ordinary principles of *res judicata*. *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990).

The basic premise underlying § 725.309 is that pneumoconiosis is a progressive and irreversible disease. *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997); *LaBelle Processing v. Swarrow*, 72 F.2d 308 (3d Cir. 1996) (the court also held that pneumoconiosis is a latent dust disease which may develop even in the absence of continued exposure to coal dust); *Lane Hollow Coal Co. v. Lockhart*, 137 F.3d 799, 803 (4th Cir. 1992); *Barnes v. Mathews*, 562 F.2d 278, 279 (4th Cir. 1977) ("pneumoconiosis is a slow, progressive disease often difficult to diagnose at early stages"); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 727 (6th Cir. 1986); *Stewart v. Wampler Brothers Coal Co.*, 22 B.L.R. 1-80 (2000) (en banc) (case arising in the Sixth Circuit); *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990). In *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(en banc), the Seventh Circuit held that the question of whether pneumoconiosis can progress in the absence of further exposure to coal dust is a question of legislative fact. However, the court further held that, under the facts of *Spese*, Employer did not create a proper record and "[w]ithout such a record, we are left with Mr. Spese's evidence of the delayed appearance of the disease and the agency's general acceptance of the general theory of progressivity, which was enough" to find that the disease had progressed in the absence of continued coal dust exposure. *See also Old Ben Coal Co. v. Scott*, 144 F.3d 1045 (7th Cir. 1998) (the Department of Labor's view that the disease is progressive "may be upset only by medical evidence of the kind that would invalidate a regulation"; "[m]ine operators must put up or shut up on this issue").

Under the amended regulations, it is noted that § 718.201(c) provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c) (Dec. 20, 2000).

The interest of the claimant in being afforded an opportunity to submit recent evidence of a progressive occupational disease, such as black lung, must be weighed against the interests of administrative finality and the effective administration of claims. The provisions at 20 C.F.R. § 725.309 attempt to strike a balance between these competing interests by permitting the miner to file multiple claims (also referred to as "subsequent" claims) but directing that such claims must be denied on the same grounds as the previously denied claim unless the claimant can demonstrate a

changed condition since the previous denial of the claim.[1]

As noted, § 725.309 applies only where a claimant has filed a new claim more than one year after the final denial of a prior claim. A claim which is filed within one year is treated as a request for modification and is subject to the provisions of 20 C.F.R. § 725.310, *see Chapter 23*.

B. Survivors

1. Prior to applicability of December 2000 regulations

Although § 725.309 allows a miner to file a subsequent claim where he or she can establish a change in his or her condition, survivors are barred from filing more than one claim. 20 C.F.R. § 725.309(d). Specifically, the provisions at subsections 725.309(c) and (d) provide that, if an earlier survivor's claim has been denied, then any subsequent claim shall also be denied unless the later claim is a request for modification which (1) is based only upon an allegation of a "mistake in a determination of fact" and (2) meets the one-year time requirements of 20 C.F.R. § 725.310. *Watts v. Peabody Coal Co.*, 17 B.L.R. 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 B.L.R. 1-197 (1989); *Clark v. Director, OWCP*, 9 B.L.R. 1-205 (1986), *rev'd on other grounds*, 838 F.2d 2197 (6th Cir. 1988). Multiple claims by a survivor are barred because there can be no "change" in a deceased miner's condition.

2. After applicability of December 2000 regulations

The bright-line prohibition of multiple survivors' claims at § 725.309(b) has been deleted under the amended regulations. The new language at § 725.309(d)(3) provides, in part, the following:

> A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.

20 C.F.R. § 725.309(d)(3) (Dec. 20, 2000). In its comments to this amendment, the Department states the following:

> [I]n response to several comments, the Department restored a provision requiring the denial of an additional survivor's claim, but limited the circumstances in which such a denial was appropriate. The Department proposed the automatic denial of an additional survivor's claim in cases in which the denial of the previous claim was based solely on a finding or findings that were not subject to change. For example, if the earlier claim was denied solely because the miner did not die due to

[1] In its comments to the new regulations, the Department states that "[a]dditional or subsequent claims must be allowed in light of the latent, progressive nature of pneumoconiosis. Thus, the additional claim is a different case, with different facts (if the claimant is correct that his condition has progressed)." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,974 (Dec. 20, 2000).

> pneumoconiosis, the regulations would require the denial of any additional claim as well.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,968 (Dec. 20, 2000).

C. Filing requirements are more formal than for modification

In *Stacy v. Cheyenne Coal Co.*, 21 B.L.R. 111 (1999), the Board upheld a finding that Claimant failed to file a timely petition for modification. Although the record contained a November 1996 letter from Claimant requesting that the district director respond to his December 1994 modification petition, the administrative law judge concluded that "the DOL had no record of the document until a copy" was attached to the November 1996 correspondence and that, without any corroboration that the petition was received in December 1994, the administrative law judge properly found that it was untimely. However, the Board further held that the administrative law judge erred in adjudicating the claim under 20 C.F.R. § 725.309. In so holding, the Board reasoned that Claimant's letter to the district director did not satisfy the requirements of 20 C.F.R. §§ 725.305(b) and (d) which require that subsequent claims be filed on a specific form and such claims are not "perfected" until the specified form is filed. Because Claimant's request was not filed on the "prescribed form," the Board concluded that "there was no claim before the administrative law judge to adjudicate."

D. Lack of continued exposure to coal dust does not preclude filing of duplicate claim

1. Prior to applicability of December 2000 regulations

By unpublished decision in *Daniel v. Jeffco Mining*, BRB No. 97-1267 BLA (June 11, 1998), the Board held that the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S. Ct. 1953 (1997), does not preclude the filing of a duplicate claim on grounds that the miner "has had no coal dust exposure since the previous denial." The Board stated the following:

> We reject employer's preliminary contention on appeal that the Supreme Court's decision in *Rambo II* bars the filing of the instant duplicate claim. *Rambo II*, a case on modification, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether, and under what circumstances, a longshore worker who was experiencing no present post-injury reduction in wage-earning capacity could nonetheless be entitled to nominal benefits so as to toll the one-year time limitation of filing for modification. The Supreme Court in *Rambo II* did not indicate that its holding had any bearing whatsoever on duplicate black lung claims.

Slip op. at 3-4.

2. After applicability of December 2000 regulations

In its comments to the December 2000 regulatory amendments, the Department noted objections to § 725.309 on grounds that the record "lacked adequate justification of the latency and progressivity of pneumoconiosis." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,969 (Dec. 20, 2000). Citing to numerous circuit court decisions, physicians' opinions, and articles on the subject, the Department stated the following:

> To the extent that the commenter would require each miner to submit scientific evidence establishing that the change in his specific condition represents latent, progressive pneumoconiosis, the Department disagrees and has therefore not imposed such an evidentiary burden on claimants. Rather, the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by two statutory presumptions, 30 U.S.C. § 921(c)(2) and (c)(3). The revised regulations continue to afford coal mine operators an opportunity to introduce contrary evidence weighing against entitlement.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,972 (Dec. 20, 2000). Indeed, under § 718.201(c) of the amended regulations, "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. § 718.201(c) (Dec. 20, 2000).

II. Providing a complete pulmonary evaluation by DOL

An administrative law judge may require that the district director provide a complete pulmonary evaluation to the miner who files a subsequent claim. *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990).

III. Entitlement to a hearing

A. Before an administrative law judge

Prior to the Board's decision in *Lukman v. Director*, OWCP, 10 B.L.R. 1-71 (1988)(*Lukman II*), there was no clear authority on the issue of where jurisdiction lay to review the district director's finding concerning material change under § 725.309. In *Lukman II*, the Board held that a district director's findings under § 725.309 were not reviewable by an administrative law judge. Instead, an aggrieved party could appeal directly to the Board which was empowered to conduct a substantial evidence review of the district director's findings.

The Tenth Circuit Court of Appeals rejected this approach in *Lukman v. Director*, 896 F.2d 1248 (10th Cir. 1990). The court held that, based on the plain language of § 22 and historical practice under the Longshore and Harbor Workers' Compensation Act as well as the plain language of the black lung regulations and underlying purpose of § 725.309, claimants are entitled to a hearing by the administrative law judge on the issue of "material change of condition."

Subsequently, in *Dotson v. Director, OWCP*, 14 B.L.R. 1-10 (1990)(*en banc*), the Board

adopted the Tenth Circuit's holding in *Lukman* and concluded that it would thenceforth be applied in all judicial circuits.

B. Survivor's claim--no hearing

In *Kilbourne v. Director, OWCP*, BRB No. 98-0788 BLA (Mar. 5, 1999)(unpublished), the Board held that the administrative law judge properly canceled the hearing in a duplicate survivor's claim which was automatically denied pursuant to 20 C.F.R. § 725.309(c). The Board held that "[c]onducting a hearing would have served no meaningful purpose, therefore, as resolution of the issue was accomplished solely by examination of the record." The Board further held that the administrative law judge was not required to separately consider the widow's petition for modification of the district director's denial of her multiple claim.[2]

IV. Proper review of the record

A. Prior to applicability of December 2000 regulations--"material change in conditions"

In assessing whether the miner has demonstrated a "material change in conditions," the inquiry is directed to changes in the miner's physical condition. However, the extent of the "change" required has been the point at which the circuit courts and Board have issued significantly disparate standards for weighing medical evidence in a subsequent claim. In any jurisdiction, if a "material change" is established based upon the newly submitted evidence, then the entire record must be reviewed *de novo* to determine whether the claimant is entitled to benefits. If, however, no "material change" is demonstrated by the newly submitted evidence, the claim is denied under § 725.309.

The following listing of case summaries sets forth the divergent standards of the Board and circuit courts in determining whether a "material change in conditions" has occurred since the denial of the miner's prior claim:

- ***Benefits Review Board.*** The Benefits Review Board set forth its definition of "material change of conditions" under 20 C.F.R. § 725.309(d) in *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). In *Allen*, the Board overruled its holding in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992) and adopted the Director's position for establishing a material change in conditions under § 725.309, *to wit*: a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. As a result, where the administrative law judge concluded that the newly submitted evidence did not establish the presence of pneumoconiosis, but failed to address the issue of whether the evidence supported a finding that the miner was totally disabled, a ground upon which the prior claim was denied, the administrative law judge's decision was vacated. On remand, the administrative law judge was directed to analyze the newly submitted evidence to determine whether Claimant was totally disabled under § 718.204(c) before finding no material change in conditions.

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[2] See the discussion of multiple claims filed by survivors on page 2 of this Chapter, *supra*.

Moreover, the Board made clear that a "material change" may only be based upon an element which was previously denied. In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.), the Board held that a "material change in conditions" cannot be established based upon an element of entitlement which was not specifically adjudicated against the claimant in prior litigation. Specifically, the original administrative law judge in *Caudill* concluded that the miner did not suffer from coal workers' pneumoconiosis, but he did not conclude whether the miner had a totally disabling respiratory or pulmonary impairment. As a result, the Board held that the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions . . .." In so holding, it adopted the arguments of the Director and Employer to state that the "material change" standard "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." The Board further stated that, unless an element has been previously adjudicated against the claimant, "new evidence cannot establish that the miner's condition has changed with respect to that element."

The Board has also held that lay testimony alone is insufficient to establish a "material change in conditions." In *Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999), the Board concluded that it was proper for the administrative law judge to deny the miner's second claim for benefits on grounds that he did not establish a "material change in conditions." On appeal, the miner argued that he testified as to his worsened physical condition at the hearing which would support a finding of "material change." The Board disagreed to state that lay testimony, standing alone, is insufficient to establish a material change in the absence of corroborating medical evidence.

In *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997), the Board remanded for application of the Fourth Circuit's holding in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402 (4th Cir. 1995), *cert. denied*, 117 S. Ct. 763 (1997), which was issued subsequent to the administrative law judge's decision. The Board further held that, in reviewing the evidence to determine whether a "material change in condition" is established, it was proper for the administrative law judge to refuse to consider evidence "in existence at the time the first claim was decided on grounds that such evidence 'is not applicable in determining whether there has been a change in condition since the denial."

! ***Third Circuit***. In *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995), the Third Circuit held that if a "material change in conditions" is "asserted and established, " the claim is not barred by § 725.309 because it involves a new cause of action:

> Of course, new factual allegations supporting a previously denied claim will not create a new cause of action for the same injury previously adjudicated. (citation omitted). In contrast, new facts . . . may give rise to a new claim, which is not precluded by the earlier judgment.

The court noted that pneumoconiosis is a "latent dust disease" which "may not become manifest until long after exposure to the causative agent . . .." *Id.* at 314. In this vein, the court rejected Employer's argument that a miner's "simple" pneumoconiosis cannot be progressive without continued exposure to coal dust, stating that such a finding was not supported by the record and that "[l]egal pneumoconiosis (*i.e.* pneumoconiosis within the meaning of the BLBA) is defined more broadly than the medical (clinical) definition of pneumoconiosis." *Id.* at 315. Thus, the court adopted the Director's position and followed the Sixth Circuit's *Sharondale* standard for demonstrating a "material change in conditions" under 20 C.F.R. § 725.309 and concluded that the administrative law judge must determine whether, upon consideration of all of the new evidence, the miner has proven at least one element of entitlement previously adjudicated against him. *Id.* at 317.

In *Troup v. Reading Anthracite Coal Co.*, 22 B.L.R. 1-11 (1999) (en banc), the Board rejected Employer's argument that the Third Circuit's standard in *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cr. 1995) for establishing a "material change in conditions" violated the Supreme Court's holdings in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121 (1997) and *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267 (1994). Employer maintained that the "material change" standard set forth in *Swarrow* impermissibly provided Claimant with an irrebuttable presumption of material change in violation of Section 7(c) of the Administrative Procedure Act, which requires that Claimant establish a material change by a preponderance of the evidence. The Board held to the contrary and noted that the one-element standard does not create an irrebuttable presumption; rather, if a claimant establishes one element of entitlement previously adjudicated against him, then the administrative law judge *may* find that the standard has been met. The Board further held that the Court's decision in *Rambo II* was inapplicable as it did not address the proper standard to be applied in a duplicate black lung claim. In addition, the Board concluded that the Supreme Court's decision in *Onderko* was not applicable because, while the standard set forth in *Swarrow* increases the burden imposed on a claimant, the employer's evidentiary burden or the type of evidence relevant to the issue did not change.

! ***Fourth Circuit***. In *Lisa Lee Mines v. Director, OWCP*, 57 F.3d 402 (1995), *aff'd.*, 86 F.3d 1358 (4th Cir. 1996)(en banc), *cert. denied*, 117 S. Ct. 763 (1997), the Fourth Circuit rejected the Board's *Spese* standard for establishing a "material change in conditions" in a subsequent claim. *Id.* at 406. The court determined that "[t]he purpose of section 725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather only to show that his condition has materially changed since the earlier denial." *Id.* at 406. As such, the court concluded that *Spese* "is an impermissible reading of section 725.309(d)." *Id.* at 406. In its en banc review of the case, the court concluded that it would apply the standard set forth by the Sixth Circuit's position in *Sharondale* for establishing a "material change in conditions" which requires that the judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements previously adjudicated against him. The Fourth Circuit declined, however, to adopt the Sixth Circuit's additional requirement that the judge examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted.

! ***Sixth Circuit***. In *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Sixth Circuit declined to embrace either the Seventh Circuit's *McNew* standard or the standard set for by the Board in *Spese* for finding a "material change in condition." Rather, the court adopted the hybrid approach proposed by the Director to hold that:

> [T]o assess whether a material change is established, the ALJ must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the ALJ must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Id. at 997-998. In addition, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly submitted." The court reasoned that such an approach "[a]ffords a miner a second chance to show entitlement to benefits provided his condition has worsened." The court wrote that "entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits but after a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted." *Id.* at 998.

! ***Seventh Circuit.*** The Seventh Circuit Court of Appeals, in *Sahara Coal v. Director, OWCP [McNew]*, 946 F.2d 554 (7th Cir. 1991), held that a claimant must establish with newly submitted evidence that he or she "is now entitled to benefits." In *McNew*, the court stated that the Board's standard "is a plain misreading of the regulation and makes mincemeat of res judicata. . .." *Id.* at 556.

The court held that to demonstrate a "material change of conditions," it is not enough to introduce new evidence of disease or disability as this might only show that the first denial was wrong and would thereby be an impermissible collateral attack on the first denial. Rather, to prevail, a claimant must introduce evidence that demonstrates that his condition has "substantially worsened" since the time of the prior denial to the point where he would now be entitled to benefits. For a thorough discussion regarding application of the "substantially worse" standard in *McNew, see* Judge Sheldon R. Lipson's decision on remand in the case, *McNew v. Sahara Coal Co.*, 18 B.L.R. 3-524 (1993). Judge Lipson's decision was subsequently affirmed by the Benefits Review Board, *McNew v. Sahara Coal Co.*, BRB No. 93-2189 BLA (Aug. 31, 1994)(unpublished) (modifying only the onset month from October to November).

In *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(en banc), the Seventh Circuit held that the "one-element" standard enunciated by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) was not contrary to its holding in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554 (7th Cir. 1991). Specifically, the court examined the standard proposed by the Director and stated the following:

> If . . . the Director means that at least one element that might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the 'one-element' test is the correct one. If the Director means something more expansive, his position would go beyond the principles of res judicata that are reflected in § 725.309(c) and that we endorsed in *Sahara Coal*.

The Seventh Circuit declined to apply its "material change" standard under the particular circumstances presented in *Crowe v. Director, OWCP*, 226 F.3d 609 (7th Cir. 2000). In this case, the Seventh Circuit held that *Sahara Coal* did not apply where the miner's first claim was denied on purely procedural grounds such that his second filing was "'merely (an attempt) to relitigate his original claim.'" The court reasoned that, when the miner's "illiteracy is considered in conjunction with his lack of representation and the misinformation provided by the representative from the social security office, we are of the opinion that it would be unfair and improper to hold that the procedural denial of the petitioner's initial claim is sufficient to deprive him of an opportunity with the assistance of counsel to advance his 1990 claim on the merits of his health condition."

! ***Eighth Circuit.*** In *Lovilia Coal Co. v. Harvey*, 109 F.3d 445 (8th Cir. 1997), the court held that pneumoconiosis is a progressive and irreversible disease such that it may develop in a miner after he has ceased working in the mines. *Id.* at 450. The Eighth Circuit then addressed the "material change in conditions" standard to be applied to subsequent claims under 20 C.F.R. § 725.309 and held that it would apply the "one-element standard" adopted by the Third, Fourth, and Sixth Circuits. Specifically, the administrative law judge must consider "whether the weight of the new evidence of record . . . ., submitted by all the parties, establishes at least one of the elements of entitlement previously adjudicated against the miner." *Id.* at 451. The court further noted that "'the element must be one capable of change,'" *i.e.* the existence of pneumoconiosis or total disability. *Id.* at 451. In this vein, the court also held the following:

> [T]he Director explains that if a miner was found not to have pneumoconiosis at the time of an earlier denial, and he thereafter establishes that he has the disease, in the absence of evidence showing the denial was a mistake, an inference of 'material change' is not only permitted but 'compelled.' We agree.

Id. at 451. The court further rejected Employer's arguments that its holding violated the Supreme Court's ruling in *Director, OWCP v. Greenwich Collieries [Onderko]*, 512 U.S. 267 (1994) by improperly shifting the burden of persuasion from the claimant to the coal company. The court held that, in the case before it, "the Director's interpretation is akin to the statutory and regulatory presumptions which ease a black lung claimant's burden of production, but do not shift the burden of persuasion, as that term is used in *Greenwich Collieries.*" *Id.* at 452-53.

! ***Tenth Circuit.*** In *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), the Tenth Circuit held that, in order to establish a "material change in conditions" under

§ 725.309, a claimant "must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied." *Id.* at 1511. The court further stated as follows:

> In order to meet the claimant's threshold burden of proving a material change in a particular element, the claimant need not go as far as proving that he or she now satisfies the element. Instead, under the plain language of the statute and regulations, and consistent with res judicata, the claimant need only show that this element has worsened materially since the time of the prior denial. An example of how a claimant might show that a condition has materially worsened, the claimant might offer to compare past and present x-rays reflecting that any conditions suggesting that the claimant has pneumoconiosis have become materially more severe since the last claim was rejected. As another example, the claimant might present more extreme blood gas test results obtained since the prior denial to indicate that his or her disability has become materially more severe since the last claim was rejected. However, a new interpretation of an old x-ray that was taken before the prior denial or a further blood gas result identical to results considered in the prior denial does not demonstrate that a miner's conditions has materially changed.

Id. at 1511. In addition, the court held that, if the adjudicator in the first claim did not decide a particular entitlement issue, then there is no issue preclusion and the claimant need not demonstrate a "material change" in this element upon the filing of a subsequent claim under § 725.309. *Id.* at 1511.

In the past, an administrative law judge may have dispensed with the threshold consideration of whether a "material change in conditions" occurred and, he or she would consider all of the evidence of record to determine whether the miner was entitled to benefits. Logically, any finding regarding "material change in conditions" would be subsumed in the overall findings on entitlement. However, considering the more restrictive threshold standards applied by the circuit courts in determining whether a "material change in conditions" has occurred, coupled with the premise set forth by these courts that a subsequent claim cannot be granted upon a mere showing that the miner was denied benefits in an earlier claim but is now entitled to such benefits, a separate and specific finding of a "material change in conditions" must be made before a *de novo* review of the record may be undertaken. This threshold finding cannot be subsumed in overall findings of entitlement from the record.

B. After applicability of December 2000 regulations

1. Establishing an element of entitlement previously denied

The amended regulations dispense with the "material change in condition" language and contain a threshold standard which the claimant must meet before his claim may be reviewed *de novo*:

> (d) A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see Secs. 725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> > (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
> >
> > (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
> >
> > (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.
>
> . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in the adjudication with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

20 C.F.R. § 725.309(d) (Dec. 20, 2000). It is noted that, pursuant to § 725.409, if a prior claim has been denied by reason of abandonment, then it shall constitute "a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. § 725.409(c) (Dec. 20, 2000).

2. Responsible operator designation

In its comments to the amended regulations, the Department states the following with regard to naming a new operator for a claim filed under § 725.309:

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

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,990 (Dec. 20, 2000).

> In addition, the Department has deleted subsection (a)(6) (of § 725.414). As proposed, subsection (a)(6) would have required the district director to admit into the record all of the evidence submitted while the case was pending before him. As revised, however, the regulation may require the exclusion of some evidence submitted to the district director. In the more than 90 percent of operator cases in which there is no substantial dispute over the identity of the responsible operator, most of the evidence available to the district director will be the medical and liability evidence submitted pursuant to the schedule for the submission of additional evidence, § 725.410. In the remaining cases, however, the district director may alter his designation of the responsible operator after reviewing the liability evidence submitted by the previously designated responsible operator.
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> At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the district director will not be able to determine which medical evidence belongs in the records until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(b0(4) to ensure that the claimant and the party opposing entitlement are bound by the same evidentiary limitations. Accordingly, the Department has deleted the requirement in § 725.414(a)(6) that the district director admit into the record all of the medical evidence that the parties submit.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,990-991 (Dec. 20, 2000).

V. Onset date under § 725.309

Once a "material change in condition" is demonstrated, the subsequent claim is to be considered a new and viable claim. Therefore, the filing date of the subsequent claim determines which substantive regulations apply as well as the earliest date from which benefits may be awarded if the miner is found to be so entitled. *Spese v. Peabody Coal Co.*, 11 B.L.R. 1-174, 1-176 (1988), *dismissed with prejudice,* Case No. 88-3309 (7th Cir. Feb. 12, 1989)(unpub.). *See also Peabody Coal Co. v. Spese,* 117 F.3d 1001 (7th Cir. 1997)(en banc) (the earliest date of onset in a multiple claim under § 725.309 is the date on which that claim is filed; the claim does not merge with earlier claims filed by the miner).

The amended regulations also provide that the filing date of the subsequent claim constitutes the earliest date from which benefits are payable as § 725.309(d)(5) provides that "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d)(5) (Dec. 20, 2000).

VI. Affect of the three-year statute of limitations

Whether the three year statute of limitations set forth at 20 C.F.R. § 725.308 applies to multiple claims filed under § 725.309 of the regulations has not been clearly resolved by the courts. In *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 B.L.R. 1-34 (1990), the Board held that the limitation of action period does not apply to multiple claims. However, the circuit courts have declined to adopt the Board's holding.

In *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502 (10th Cir. 1996), Employer argued that a qualifying blood gas study performed in conjunction with the miner's first claim, along with a diagnosis of chronic bronchitis by a physician at the time, constituted a "medical determination of total disability due to pneumoconiosis" which triggered commencement of the three year statute of limitations. The Director, OWCP argued that "requiring claimants to file duplicate claims within three years of the triggering medical opinion would defeat most miners' ability to bring duplicate claims because it may take more than three years from the issuance of a medical opinion before an ALJ and appellate panels decide the original claim." *Id.* at 1507. The court agreed with the Director that the miner's multiple claim did not violate the three year statute of limitations, but it decided the matter on different reasoning to state:

> When a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. However, a final finding by the Office of Workers' Compensation Program adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations.
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> . . .

> Instead, Section 309 suggests that a claimant should not be barred from bringing a duplicate claim when his or her first claim was premature because the claimant's conditions had not yet progressed to the point where the claimant met the Act's definition of total disability due to pneumoconiosis.

The circuit court concluded that, because the district director had concluded that the miner did not have pneumoconiosis and that he was not totally disabled, then it "need not decide whether Dr. Saiz's 1982 report adequately constituted a medical determination of total disability due to pneumoconiosis . . .."

In *Sharondale Corp.v. Ross*, 42 F.3d 993 (6th Cir. 1994), the Sixth Circuit held the following with regard to application of the three year statute of limitations in multiple claims:

> [W]e need not hold, as did the Board, that Sec. 725.308 only applies to the filing of a miner's initial claim, to decide this case. Under Sec. 725.308(a), the time period in which a miner must file for benefits starts, at a minimum, after each denial of a previous claim, provided the miner works in the coal mines for a substantial period of time after the denial and new medical opinion of total disability due to pneumoconiosis is communicated. The progressive nature of the disease dictates this result; a claimant must be free to reapply for benefits if his first filing was premature. Furthermore, the Act recognizes that sequential claims may be filed; and for the Act to recognize serial applications on the one hand, while limiting to three years the time in which all applications must be filed, on the other, makes no sense.

Id. at 996.