JUDGES' BENCHBOOK
OF THE
BLACK LUNG BENEFITS ACT

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OFFICE OF ADMINISTRATIVE LAW JUDGES
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CHAPTER 4
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The amended regulations, published on December 20, 2000, contain a number of significant changes regarding the admissibility of evidence. These limitations will significantly alter the adjudication and processing of the claims.

I. Limitation of documentary medical evidence

A. An original claim or a claim filed pursuant to 20 C.F.R. § 725.309

1. In support of claimant's position

The new regulatory provisions at § 725.414(a)(2) provide the following regarding the limitation on submission of documentary medical evidence by the claimant:

> (i) The claimant shall be entitled to submit, in support of his affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas results, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section.
> (ii) The claimant shall be entitled to submit, in rebuttal of this case presented by the party opposing entitlement, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the designated responsible operator or the fund, as appropriate, under paragraph (a)(3)(i) or (a)(3)(iii) of this section and by the Director pursuant to § 725.406. In any case in which the party opposing entitlement has submitted the results of other testing pursuant to § 718.107, the claimant shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. § 725.414(a)(2)(i) and (ii) (Dec. 20, 2000).

2. In support of responsible operator's or fund's position

The new regulations at § 725.414(a)(3)(i) and (ii) address the limitations on evidence submitted by the responsible operator or the Trust Fund:

> (i) The responsible operator designated pursuant to § 725.410 shall be entitled to obtain and submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of nor more than two arterial blood gas studies, no more than one report of an autopsy, nor more than one report of each biopsy, and no more than two medical reports. Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section. In obtaining such evidence, the responsible operator may not require the miner to travel more than 100 miles from his or her place of residence or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by § 725.406 of this part, whichever is greater, unless a trip of greater distance is authorized in writing by the district director. If a miner unreasonably refuses--
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> > (A) To provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records, or
> >
> > (B) To submit to an evaluation or test requested by the district director or the designated responsible operator, the miner's claim may be denied by reason of abandonment. (See § 725.409 of this part).
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> (ii) The responsible operator shall be entitled to submit, in rebuttal of the case presented by the claimant, no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by the claimant under paragraph (a)(2)(i) of this section and by the Director pursuant to § 725.406. In any case in which the claimant has submitted the results of other testing pursuant to § 718.107, the responsible operator shall be entitled to submit one physician's assessment of each piece of such evidence in rebuttal. In addition, where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the responsible operator, the responsible operator shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

20 C.F.R. § 725.414(a)(3)(i) and (ii) (Dec. 20, 2000).

B. On modification

The revised language at § 725.310(b) contains limitations on the submission of medical evidence on modification and provides, in part, as follows:

> Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate, except that the claimant and the operator, or group of operators or the fund, as appropriate, shall each be entitled to submit no more than one additional chest X-ray interpretation, one additional pulmonary function test, one additional blood gas study, and one additional medical report in support of its affirmative case along with such rebuttal evidence and additional statements as are authorized by paragraphs (a)(2)(ii) and (a)(3)(ii) of § 725.414.

20 C.F.R. § 725.310(b) (Dec. 20, 2000).

C. Hospitalization and treatment records unaffected

The regulations at § 725.414(a)(4) provide that "[n]otwithstanding the limitations of paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. § 725.414(a)(4) (Dec. 20, 2000).

D. "Good cause" standard for admitting evidence over limitations

The provisions at § 725.456 state that "[m]edical evidence in excess of the limitations contained in § 725.414 shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. § 725.456(b)(1) (Dec. 20, 2000).

E. Referral of claim by district director; not required to include all medical evidence

Former proposed regulatory amendments at § 725.414(a)(6) required that the district director transmit all medical evidence submitted in the claim. The final rules, however, dispense with this requirement and permit the district director to exclude certain medical evidence from referral to the Office. In its comments, the Department states the following:

> [T]he 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.

. . .

> At that point, the responsible operator will have an opportunity, if it was not the initially designated responsible operator, to develop its own medical evidence or adopt medical evidence submitted by the initially designated responsible operator. Because the district director will not be able to determine which medical evidence belongs in the record until after this period has expired, the Department has revised §§ 725.415(b) and 725.421(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).

II. Responsible operator designation

A. Limitations on testimony

The regulations restrict any testimony related to the designation of the responsible operator and provide as follows:

> In accordance with the schedule issued by the district director, all parties shall notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator. Absent such notice, the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator shall not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances.

20 C.F.R. § 725.414(c) (Dec. 20, 2000). Moreover, subsection (d) states the following:

> Except to the extent permitted by § 725.456 and § 725.310(b), the limitations set forth in this section shall apply to all proceedings conducted with respect to a claim, and no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director in accordance with this section.

20 C.F.R. § 725.414(d) (Dec. 20, 2000).

B. Evidence related to responsible operator excluded absent "extraordinary circumstances"

Subsection 725.456(b)(1) provides that "[d]ocumentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. § 725.456(b)(1) (Dec. 20, 2000). For example, in its comments, the Department "intends that a party will have shown extraordinary circumstances to present the testimony of a previously unidentified witness whose testimony is relevant to the issue of operator liability when the witness originally identified by the party is no longer available to testify." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,001 (Dec. 20, 2000). *See* 20 C.F.R. § 725.456(c)(1) (Dec. 20, 2000).

C. Dismissal by administrative law judge not permitted

Finally, it is noted that § 725.465(b) provides that "[t]he administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." 20 C.F.R. § 725.465(b) (Dec. 20, 2000). In its comments, the Department states the following:

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

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,005 (Dec. 20, 2000). However, the regulations also provide that, if the district director fails to dismiss all operators except one operator which is designated as responsible for the payment of benefits, the administrative law judge has the authority to dismiss the additional operators at any time. 20 C.F.R. § 725.418(d) (Dec. 20, 2000).

D. Remand by administrative law judge not permitted

In its comments to the amended regulations, the Department makes clear that the administrative law judge is not empowered to remand a claim for designation of an operator:

> Once all of (the) evidence is forwarded to the Office of Administrative Law Judges for a formal hearing, the administrative law judge assigned to the case will determine, in light of the evidentiary burdens imposed by section 725.495, whether the district director designated the proper responsible operator. If the administrative law judge

> determines that the district director did not designate the proper responsible operator, liability will fall on the Trust Fund. No remand for further development of the responsible operator issue is permissible.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,008 (Dec. 20, 2000).

E. On modification

With regard to identification of the proper responsible operator on modification, the Departments states the following in its comments to the amended regulations:

> The Department disagrees that the regulations will always prevent an operator from seeking modification of a responsible operator determination based on newly discovered evidence. It is true, however, that the regulations limit the types of additional evidence that may be submitted on modification and, as a result, an operator will not always be able to submit new evidence to demonstrate that it is not a potentially liable operator.
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> The Department explained in its previous notices of proposed rulemaking that the evidentiary limitations of §§ 725.408 and 725.414 are designed to provide the district director with all of the documentary evidence relevant to the determination of the responsible operator liable for the payment of benefits. The regulations recognize, and accord different treatment to, two types of evidence: (1) Documentary evidence relevant to an operator's identification as a potentially liable operator, governed by § 725.408; and (2) documentary evidence relevant to the identity of the responsible operator, governed by §§ 725.414 and 725.456(b)(1).
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> . . .
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> The operator's ability to seek modification based on additional documentary evidence will thus depend on the type of evidence that it seeks to submit. Where the evidence is relevant to the designation of the responsible operator, it may be submitted in a modification proceeding if extraordinary circumstances exist that prevented the operator from submitting the evidence earlier. For example, assume that the miner's most recent employer conceals evidence that establishes that it employed the miner for over a year, and that as a result an earlier employer is designated the responsible operator. If that earlier employer discovers the evidence after the award becomes final, it would be able to demonstrate that extraordinary circumstances justify the admission of the evidence in a modification proceeding.
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> That same showing, however, will not justify the admission of evidence relevant to the employer's own employment of the claimant. Under § 725.408, all documentary evidence pertaining to the employer's employment of the claimant and its status as a financially capable operator must be submitted to the district director.

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 79,976 (Dec. 20, 2000).

F. Upon filing a subsequent claim under § 725.309

In its comments to the amended regulations, the Department states the following with regard to naming a new operator in 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).

III. Witness testimony

A. Limitations on expert medical testimony

The amended regulations contain new restrictions on expert testimony, both in terms of scope and content. Subsection 725.414(c) addresses expert testimony and provides the following:

> (c) Testimony. A physician who prepared a medical report admitted under this section may testify with respect to the claim at any formal hearing conducted in accordance with subpart F of this part, or by deposition. If a party has submitted fewer than two medical reports as part of that party's affirmative case under this section, a physician who did not prepare a medical report may testify in lieu of such a medical report. The testimony of such a physician shall be considered a medical report for purposes of the limitations provided in this section. A party may offer the testimony of no more than two physicians under the provisions of this section unless the adjudication officer finds good cause under paragraph (b)(1) of § 725.456 of this part.

20 C.F.R. § 725.414(c) (Dec. 20, 2000).

B. At the hearing

The regulatory provisions at § 725.457(a) have been amended to provide that "[a]ny party who intends to present the testimony of an expert witness at a hearing, *including any physician, regardless of whether the physician has previously prepared a medical report*, shall so notify all other parties to the claim at least 10 days before the hearing." 20 C.F.R. § 725.457(a) (Dec. 20, 2000) (emphasis added). The regulations also contain the following additional restrictions:

> (c) No person shall be permitted to testify as a witness at the hearing, or pursuant to

deposition or interrogatory under § 725.458, unless that person meets the requirements of § 725.414(c).

> (1) In the case of a witness offering testimony relevant to the liability of the responsible operator, in the absence of extraordinary circumstances, the witness must have been identified as a potential hearing witness while the claim was pending before the district director.
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> (2) In the case of a physician offering testimony relevant to the physical condition of the miner, such physician must have prepared a medical report. Alternatively, in the absence of a showing of good cause under § 725.456(b)(1) of this part, a physician may offer testimony relevant to the physical condition of the miner only to the extent that the party offering the physician's testimony has submitted fewer medical reports than permitted by § 725.414. Such physician's opinion shall be considered a medical report subject to the limitations of § 725.414.

(d) A physician whose testimony is permitted under this section may testify as to any other medical evidence of record, but shall not be permitted to testify as to any medical evidence relevant to the miner's condition that is not admissible.

20 C.F.R. § 725.457 (Dec. 20, 2000).

In its comments, the Department noted that inclusion of subsection (d) was necessary to ensure the parties adherence to the evidentiary limitations. Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,002 (Dec. 20, 2000).

C. By deposition

It is noted that § 725.458 provides that "[t]he testimony of any physician which is taken by deposition shall be subject to the limitations on the scope of testimony contained in § 725.457(d)." 20 C.F.R. § 725.458 (Dec. 20, 2000).

D. Notice to opposing party

The regulations continue to require that adequate notice be given to the opposing party of any expert witness which will testify at the hearing or by deposition. 20 C.F.R. § 725.458 (Dec. 20, 2000) (30 days' notice of a deposition must be provided); 20 C.F.R. § 725.457(a) (Dec. 20, 2000) (10 days' notice of any witness to be called to testify at the hearing).

E. Expert witness fees, apportionment of

The witness fees continue to be based upon the fees and mileage received by witnesses before the courts of the United States. 20 C.F.R. § 725.459(a) (Dec. 20, 2000). However, § 725.459(b) provides, in part, as follows:

> If such witness is required to attend the hearing, give a deposition or respond to interrogatories for cross-examination purposes, the proponent of the witness shall pay the witness' fee. If the claimant is the proponent of the witness whose cross-examination is sought, and demonstrates, within time limits established by the administrative law judge, that he would be deprived of ordinary and necessary living expenses if required to pay the witness fee and mileage necessary to produce the witness for cross-examination, the administrative law judge shall apportion the costs of such cross-examination among the parties to the case. The administrative law judge shall not apportion any costs against the fund in a case in which the district director has designated a responsible operator, except that the fund shall remain liable for any costs associated with the cross-examination of the physician who performed the complete pulmonary evaluation pursuant to § 725.406.

20 C.F.R. § 725.459(b) (Dec. 20, 2000). Further, subsection (d) provides that "[a] claimant shall be considered to be deprived of funds required for ordinary and necessary living expenses for purposes of paragraph (b) of this section where payment of the projected fee and mileage would meet the standards set forth at 20 C.F.R. § 404.508." 20 C.F.R. § 725.459(d) (Dec. 20, 2000). The amended regulations encourage the administrative law judge to "authorize the least intrusive and expensive means of cross-examination . . .." 20 C.F.R. § 725.459(d) (Dec. 20, 2000).

In support of its apportionment requirements, the Department commented that "[a]bsent a mechanism permitting the apportionment of costs, the claimant may be faced with the administrative law judge's refusal to consider his doctor's opinion because the doctor was not made available for cross examination. The Department does not believe that Congress intended this result, and does not believe that a party's right to cross-examination should be used to exclude evidence offered by an opposing party that cannot afford the costs of expert testimony." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, 65 Fed. Reg. 80,003 (Dec. 20, 2000).