the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act.

(f) *Effective date.* This order shall become effective at 8:00 a.m., August 3, 1978.

(g) *Expiration date.* This order shall expire at 11:59 p.m., August 6, 1978, unless otherwise modified, changed, or suspended.

This order shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association., A copy of this order shall be filed with the Director, Office of the Federal Register.

Issued at Washington, D.C., August 3, 1978.

INTERSTATE COMMERCE COMMISSION,
JOEL E. BURNS,
Agent.

[FR Doc. 78-23216 Filed 8-17-78; 8:45 am]

[7035-01]

[I.C.C Order No. 68 under Revised Service Order No. 1252]

REROUTING TRAFFIC

To All Railroads:

In the opinion of Joel E. Burns, Agent, the Fort Worth and Denver Railway Co. is unable to transport promptly all traffic offered for movement over its lines between Seymour, Tex., and Haskell, Tex., because of track damage from flooding.

It is ordered,

(a) *Rerouting traffic.* The Fort Worth and Denver Railway Co. being unable to transport promptly all traffic offered for movement over its lines between Seymour, Tex. and Haskell, Tex., because of track damage from flooding, that line is authorized to divert or reroute such traffic via any available route to expedite the movement. Traffic necessarily diverted by authority of this order shall be rerouted so as to preserve as nearly as possible the participation and revenues of other carriers provided in the original routing.

(b) *Concurrence of receiving roads to be obtained.* The railroad rerouting cars in accordance with this order shall receive the concurrence of other railroads to which such traffic is to be diverted or rerouted, before the rerouting or diversion is ordered.

(c) *Notification to shippers.* Each carrier rerouting cars in accordance with this order, shall notify each shipper at the time each shipment is rerouted or diverted and shall furnish to such shipper the new routing provided under this order.

(d) Inasmuch as the diversion or rerouting of traffic is deemed to be due to carrer disability, the rates applicable to traffic diverted or rerouted by said Agent shall be the rates which were applicable at the time of shipment on the shipments as originally routed.

(e) In executing the directions of the Commission and of such Agent provided for in this order, the common carriers involved shall proceed even though no contracts, agreements, or arrangements now exist between them with reference to the divisions of the rates of transportation applicable to said traffic. Divisions shall be during the time this order remains in force, those voluntarily agreed upon by and between said carriers; or upon failure of the carriers to so agree, said divisions shall be those hereafter fixed by the Commission in accordance with pertinent authority conferred upon it by the Interstate Commerce Act.

(f) *Effective date.* This order shall become effective at 11:55 a.m., August 7, 1978.

(g) *Expiration date.* This order shall expire at 11:59 p.m., September 30, 1978, unless otherwise modified, changed or suspended.

This order shall be served upon the Association of American Railroads, Car Service Division, as agent of all railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association. A copy of this order shall be filed with the Director, Office of the Federal Register.

Issued at Washington, D.C., August 7, 1978.

INTERSTATE COMMERCE COMMISSION,

JOEL E. BURNS,

Agent.

[FR Doc. 78-23217 Filed 8-17-78; 8:45 am]

sunshine act meetings

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409), 5 U.S.C. 552b(e)(3).

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[6320-01]

1

[M-153, Amdt. 1; August 15, 1978]

CIVIL AERONAUTICS BOARD.

Notice of deletion of item from the August 17, 1978, agenda.

TIME AND DATE: 9:30 a.m., August 17, 1978.

PLACE: Room 1027, 1825 Connecticut Avenue NW., Washington, D.C. 20428.

SUBJECT: 11. Docket 33053, Suspension of TWA's normal economy fares proposed for November travel (BPDA).

STATUS: Open.

PERSON TO CONTACT:

Phyllis T. Kaylor, the Secretary, 202-673-5068.

SUPPLEMENTARY INFORMATION: Item 11 is being deleted from the August 17, 1978 agenda in order to provide the staff more time to consider the issues involved. Accordingly, the following Members have voted that agency business requires the deletion of Item 11 from the August 17, 1978 agenda and that no earlier announcement of this deletion was possible:

Chairman, Alfred E. Kahn
Vice Chairman, G. Joseph Minetti
Member, Richard J. O'Melia
Member, Elizabeth E. Bailey

All amendments to previously announced agendas are publicly posted at the Board's offices, sent to the Federal Register for publication, and mailed to parties to docketed cases affected by the change. We regret any inconvenience that may be caused by these changes or the delayed receipt of our notices.

[S-1665-78 Filed 8-16-78; 3:38 pm]

[6325-01]

2

CIVIL SERVICE COMMISSION.

TIME AND DATE OF MEETING: 6 p.m., August 23, 1978.

PLACE: Commissioners' Meeting Room, Room 5H09 (fifth floor), 1900 E Street NW., Washington, D.C.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Consideration of and approval of budget submission to the Office of Management and Budget for fiscal year 1980.

CONTACT PERSON FOR MORE INFORMATION:

Georgia Metropulos, Office of the Executive Assistant to the Commissioners, 202-632-5556.

UNITED STATES CIVIL SERVICE COMMISSION,
JAMES C. SPRY,
Executive Assistant to the Commissioners.

[S-1660-78 Filed 8-16-78; 10 am]

[6351-01]

3

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: 11 a.m., August 25, 1978.

PLACE: 2033 K Street, NW., Washington, D.C., 8th floor conference room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Market surveillance matters.

CONTACT PERSON FOR MORE INFORMATION:

Jane Stuckey, 254-6314.

[S-1658-78 Filed 8-16-78; 10 am]

[6351-01]

4

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: 10 a.m., August 22, 1978.

PLACE: 5th floor hearing room, 2033 K Street NW., Washington, D.C.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Portions open to the public:

1. Application for designation as a contract market in Government Mortgage Securities/Amex Commodities Exchange.
2. Application for designation as a contract market in 1-year U.S. Treasury Bills/Chicago Mercantile Exchange.
3. Section 5a(12) approval of Chapter 150/Petroleum Contract, New York Mercantile Exchange.
4. Title III.

Portions closed to the public.

Enforcement matters.

CONTACT PERSON FOR MORE INFORMATION:

Jane Stuckey, 254-6314.

[S-1659-78 Filed 8-16-78; 10 am]

[6570-06]

5

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

TIME AND DATE: 9:30 a.m. (eastern time), Monday, August 21, 1978.

PLACE: Chairman's Conference Room, No. 5240, on the fifth floor of the Columbia Plaza Office Building, 2401 E Street NW., Washington, D.C. 20506.

STATUS: Part of the meeting will be open to the public and part will be closed to the public.

MATTERS TO BE CONSIDERED:

Open to the public:

1. Proposed guidelines on employee selection procedures.
2. Designation of the following five State or local agencies as "706" agencies: Lincoln (Nebraska) Commission on Human Rights, Commonwealth of Puerto Rico Department of Labor, Florida Commission on Human Relations, Augusta/Richmond County (Georgia) Human Relations Commission, and Austin (Texas) Human Relations Commission.
3. Privacy Act: Approval of proposed cancellation of two systems of records and approval of publication of annual compilation.
4. Proposed new section 411 of Compliance Manual, concerning pregnancy benefits.
5. Report on Commission operations by the Executive Director.

Closed to the public:

1. Report on operation of new procedures for seeking temporary relief.
2. Litigation Authorization; General Counsel Recommendations: Matters closed to the public under the Commission's regulations at 29 CFR 1612.13.
3. Presentation of fiscal year 1980 budget.

A majority of the entire membership of the Commission determined by recorded vote that the business of the Commission required that this meeting be held and that no earlier announcement was possible.

The vote was as follows:

In the affirmative: Eleanor Holmes Norton, Chair; Daniel E. Leach, Vice Chair; and Ethel Bent Walsh, Commissioner.
In the negative: None.

NOTE.—Any matter not discussed or concluded may be carried over to a later meeting.

CONTACT PERSON FOR MORE INFORMATION:

Marie D. Wilson, Executive Officer, Executive Secretariat at 202-634-6748.

[S-1661-78 Filed 8-16-78; 11:21 am]

[6715—01]

6

FEDERAL ELECTION COMMISSION.

DATE AND TIME: Wednesday, August 23, 1978, at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Audit Reports, Compliance, Personnel.

* * *

DATE AND TIME: Thursday, August 24, 1978, at 10 a.m.

PLACE: 1325 K Street NW., Washington, D.C.

STATUS: Portions of this meeting will be open to the public and portions will be closed.

MATTERS TO BE CONSIDERED:

Portions open to the public:

Setting of future meetings.
Correction and approval of minutes.
Advisory opinions: AO 1978-32. AO 1978-37. AO 1978-10. AO 1978-45. AO 1978-47. AO 1978-49. AO 1978-40.
Policy regarding transfers to registered entities from unregistered.
Organizations: Office of the General Counsel Analysis of Parts A and B of Agenda Document 78-205 and Agenda Document 78-231.
Resolution of particulars questions.
Budget for fiscal year 1980.
Appropriations and budget.
Interpretation and application of 2 U.S.C. § 438(b) Regarding Clearinghouse.
Pending legislation.
Pending litigation.
Liaison with other Federal agencies.
Classification actions.
Routine administrative matters.

Portions closed to the public (executive session):

Any matters not concluded at the meeting of August 23, 1978.

PERSON TO CONTACT FOR INFORMATION:

Mr. David Fiske, Press Officer, telephone 202-523-4065.

MARGARET E. CHANEY,
Acting Secretary to the Commission.

[S-1666-78 Filed 8-16-78; 3:38 pm]

[6740-02]

7

FEDERAL ENERGY REGULATORY COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: Published August 14, 1978, 43 FR 36030.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10 a.m., August 16, 1978.

CHANGE IN THE MEETING: The following item has been added:

Item No., Docket No., and Company

M-3(A). Establishment of advisory committee to advise commission on revision of its rules of practice and procedure, Part I, Title 18, Code of Federal Regulations.
M-3(B). Revision of Part I, Title 18, Code of Federal Regulations rules of practice and procedure.

KENNETH F. PLUMB,
Secretary.

[S-1662-78 Filed 8-16-78; 11:21 am]

[6740-02]

8

AUGUST 16, 1978.

FEDERAL ENERGY REGULATORY COMMISSION.

TIME AND DATE: August 16, 1978, approximately 11:30 a.m.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Pending civil litigation.

CONTACT PERSON FOR MORE INFORMATION:

Kenneth F. Plumb, Secretary, telephone 202-275-4166.

[S-1664-78 Filed 8-16-78; 3:38 pm]

[8010-01]

9

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of August 21, 1978, in Room 825, 500 North Capitol Street, Washington, D.C.

A closed meeting will be held on Wednesday, August 23, 1978, at 10 a.m. and on Thursday, August 24, 1978, following a 10 a.m. open meeting. An open meeting will be held on Thursday, August 24, 1978, at 10 a.m.

The Commissioners, their legal assistants, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, the items to be considered at the closed meeting may be considered pursuant to one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4)(8)(9)(A) and (10) and 17 CFR 200.402 (a)(8)(9)(i) and (10).

Chairman Williams, and Commissioners Pollack and Karmel determined to hold the aforesaid meetings in closed session.

The subject matter of the closed meeting scheduled for Wednesday, August 23, 1978, at 10 a.m., will be:

Access to investigative files by Federal, State, or Self-Regulatory authorities.
Formal orders of investigation.
Institution of administrative proceedings of an enforcement nature.
Institution of injunctive actions.
Regulatory matter bearing enforcement implications.
Settlement of injunctive actions.
Subpoena enforcement actions.
Other litigation matters.

The subject matter of the closed meeting scheduled for Thursday, August 24, 1978, following the 10 a.m. open meeting, will be:

Opinions.

The subject matter of the open meeting scheduled for Thursday, August 24, 1978, at 10 a.m., will be:

1. Consideration of an application by National Propane Corp. for exemption from the Public Utility Holding Company Act of 1935 pursuant to section 3(a)(3) thereof.
2. Consideration of a proposed rule change filed by the Municipal Securities Rulemaking Board, pursuant to section 19(b) of the Securities Exchange Act of 1934, to establish terms and conditions for the sale of new issue municipal securities during the underwriting period. The proposed rule, among other things, would require a syndicate formed to underwrite municipal securities

to establish allocation procedures and to disclose certain information to syndicate members and, upon request, to others.

3. Affirmation of the action of Commissioner Irving M. Pollack as Duty Officer in sending a letter to the Office of Management and Budget supporting the enactment into law of H.R. 7581, a bill to amend the Internal Revenue Code of 1954.

FOR FURTHER INFORMATION, PLEASE CONTACT:

Michael P. Rogan at 202-755-1638.

AUGUST 15, 1978.

[S-1663-78 Filed 8-16-78; 11:21 am]

Federal Register

FRIDAY, AUGUST 18, 1978
PART II



DEPARTMENT OF LABOR

Employment Standards Administration

■

BLACK LUNG BENEFITS PROGRAM

Standards for Processing, Adjudication, and Payment of Claims

[4510-27]

Title 20—Employees' Benefits

CHAPTER VI—EMPLOYMENT STANDARDS ADMINISTRATION, DEPARTMENT OF LABOR

SUBCHAPTER B—FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, AS AMENDED

BLACK LUNG BENEFITS PROGRAM

Standards for Processing, Adjudication, and Payment of Claims

AGENCY: Employment Standards Administration, Department of Labor.

ACTION: Final rulemaking.

SUMMARY: On April 25, 1978, the Department of Labor published a notice of proposed rulemaking in the FEDERAL REGISTER (43 FR 17732-17765) which set forth proposed procedures to be applied in the filing, adjudication, and payment of claims for benefits under part C of title IV of the Act. The revised part 725 is also applicable in certain respects to claims subject to review under section 435 of the Act (see part 727 of this title published elsewhere in this issue). In several provisions of this part, reference is made to 20 CFR Part 718. Notice of final rulemaking regarding 20 CFR Part 718 will be published following the expiration of the comment period and after a review of the testimonial and documentary comments received. As a result of these revisions, parts 715, 717 and 720 are repealed. This revised part 725 establishes procedures and standards to be applied in the processing, adjudication and payment of claims for black lung benefits under part C of title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977.

DATES: The revision of part 725 and the repeal of parts 715, 717, and 720 are effective August 18, 1978.

FOR FURTHER INFORMATION CONTACT:

Robert B. Dorsey, Chief, Branch of Claims Determination, Division of Coal Mine Workers' Compensation, U.S. Department of Labor, Room C-3526, 200 Constitution Avenue NW., Washington, D.C. 20210, telephone 202-523-6727.

SUPPLEMENTARY INFORMATION: The Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977 significantly amend title IV of the Federal Mine Safety and Health Act. Among other things, the 1977 amendments establish the Black Lung Disability Trust Fund for the payment of all claims predicated upon coal mine employment which terminated prior to January 1, 1970, and for other claims for which no operator liability can be established. This fund is financed by a tax upon coal produced by individual coal mine operators.

Other provisions of the Act as now amended substantially amend the standards for determining eligibility for benefits, modify the evidentiary requirements necessary to establish entitlement to benefits, eliminate certain restrictions on the filing of claims, establish penalties to be imposed if a coal mine operator fails to meet its obligations, and make technical, correcting, and other administrative, procedural, and substantive changes which make it necessary to repeal parts 715, 717, and 720, and completely revise part 725, of this subchapter.

Comments were received on the proposed part 725 from individual black lung claimants, groups which assist claimants in obtaining benefits, claimant representatives, Members of Congress, attorneys, coal mine operators and their representatives, and coal mine construction companies and their representatives. The vast majority of comments received were substantive, detailed and very useful to the Department.

The Department has responded to all relevant and substantive comments and has made changes in the rules where necessary. Following each final rule set forth, the Department has responded, in discussion form, to the comments received and changes made in the rules. These discussions are entitled Comments Received and Discussion and Changes. Our purpose is to respond to all relevant and substantive comments and to specify those changes made in the rules. Wherever possible, comments which are essentially similar are considered together.

The discussion following each rule contained in this document shall not be considered a part of the rule and will not be published in the Code of Federal Regulations.

A few of the revisions made reflect technical, clarifying, and correcting changes felt to be necessary by Department of Labor personnel.

Since these rules implement the recent amendments to title IV of the Act and because of the need to immediately commence the processing and adjudication of claims for benefits, I find that good cause exists for making these rules effective immediately.

Accordingly, 20 CFR Chapter VI, subchapter B is revised as follows:

PART 715—BLACK LUNG BENEFITS PROGRAM UNDER TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT; GENERAL PROVISIONS [REPEALED]

PART 717—FILING AND PRELIMINARY PROCESSING OF CLAIMS FOR BLACK LUNG BENEFITS AFTER JUNE 30, 1973, UNDER TITLE IV, PART B, SECTION 415 OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT AS AMENDED [REPEALED]

PART 720—DETERMINATION OF BLACK LUNG BENEFITS CLAIMS UNDER SECTION 415 OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT AND PAYMENT OF BENEFITS TO CLAIMANTS [REPEALED]

1. Parts 715, 717, and 720 are repealed.

2. Part 725 is revised to read as follows:

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

Subpart A—General

Sec.
725.1 Statutory provisions.
725.2 Purpose and applicability of this part.
725.3 Contents of this part.
725.4 Applicability of other parts in this title.
725.101 Definitions and use of terms.
725.102 Disclosure of program information.

Subpart B—Persons Entitled to Benefits, Conditions, and Duration of Entitlement

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

CONDITIONS AND DURATION OF ENTITLEMENT

725.202 Miner defined, condition of entitlement; miner.
725.203 Duration of entitlement; miner.

BENEFITS ON ACCOUNT OF LIVING DEPENDENTS (AUGMENTED BENEFITS)

725.204 Determination of relationship; spouse.
725.205 Determination of dependency; spouse.
725.206 Determination of relationship; divorced spouse.
725.207 Determination of dependency; divorced spouse.
725.208 Determination of relationship; child.
725.209 Determination of dependency; child.
725.210 Duration of augmented benefits.
725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

SURVIVORS' ENTITLEMENT

Sec.

725.212 Conditions of entitlement; surviving spouse or surviving divorced spouse.
725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.
725.214 Determination of relationship; surviving spouse.
725.215 Determination of dependency; surviving spouse.
725.216 Determination of relationship; surviving divorced spouse.
725.217 Determination of dependency; surviving divorced spouse.
725.218 Conditions of entitlement; child.
725.219 Duration of entitlement; child.
725.220 Determination of relationship; child.
725.221 Determination of dependency; child.
725.222 Conditions of entitlement; parent, brother or sister.
725.223 Duration of entitlement; parent, brother or sister.
725.224 Determination of relationship; parent, brother or sister.
725.225 Determination of dependency; parent, brother or sister.
725.226 "Good cause" for delayed filing of proof of support.
725.227 Time of determination of relationship and dependency of survivors.
725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

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725.230 Legal impediment.
725.231 Domicile.
725.232 Member of the same household—"living with," "living in the same household," and "living in the miner's household," defined.
725.233 Support and contributions.

Subpart C—Filing of Claims

725.301 Who may file a claim.
725.302 Evidence of authority to file a claim on behalf of another.
725.303 Date and place of filing of claims.
725.304 Forms and initial processing.
725.305 When a written statement is considered a claim.
725.306 Withdrawal of a claim.
725.307 Cancellation of a request for withdrawal.
725.308 Time limits for filing claims.
725.309 Duplicate claims.
725.310 Modification of awards and denials.
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Subpart D—Adjudication of Claims; Adjudication Officers

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725.351 Powers of adjudication officers.
725.352 Disqualification of adjudication officers.

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725.360 Parties to proceedings.
725.361 Party amicus curiae.
725.362 Representation of parties.
725.363 Qualification of representative.
725.364 Authority of representative.

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725.365 Approval of representative's fees; lien against benefits.
725.366 Fees for representatives.
725.367 Payment of a claimant's attorney's fee by responsible operator.
725.401 Claims development—general.
725.402 Approved State workers' compensation law.
725.403 Requirement to file under State workers' compensation law—section 415 claims.
725.404 Development of evidence—general.
725.405 Development of medical evidence; scheduling of medical examinations and tests.
725.406 Medical examinations and tests.
725.407 Additional medical evidence.
725.408 Refusal to submit to medical examinations or tests.
725.409 Denial of a claim by reason of abandonment.

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725.410 Initial findings by the deputy commissioner.
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725.413 Operator's response to notification.
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725.476 Issuance of decision and order.
725.477 Form and contents of decision and order.
725.478 Filing and service of decision and order.
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725.511 Use and benefit defined.
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725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.
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725.540 Overpayments.
725.541 Notice of waiver of adjustment or recovery of overpayment.
725.542 When waiver of adjustment or recovery may be applied.
725.543 Standards for waiver of adjustment or recovery.
725.544 Collection and compromise of claims for overpayment.
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725.701A Claims for medical benefits only under section 11 of the Reform Act.
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725.704 Arrangements for medical care.
725.705 Authorization to provide medical services.
725.706 Reports of physicians and supervision of medical care.
725.707 Disputes concerning medical benefits.
725.710 Objective of vocational rehabilitation.
725.711 Requests for referral to vocational rehabilitation assistance.

AUTHORITY: 5 U.S.C. 301, Reorganization Plan No. 6 of 1950, 15 FR 3174, 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq.

Subpart A—General

§ 725.1 Statutory provisions.

(a) *General.* Title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977, provides for the payment of benefits to a coal miner who is totally disabled due to pneumoconiosis (black lung desease) and to certain survivors of a miner who was totally (or in accordance with section 411(c)(5) of the Act, partially) disabled due to pneumoconiosis, or who died due to pneumoconiosis.

(b) *Part B.* Part B of title IV of the Act provided that all claims filed between December 30, 1969, and June 30, 1973, are to be filed with, processed, and paid by the Secretary of Health, Education, and Welfare through the Social Security Administration; claims filed by the survivor of a miner before January 1, 1974, or within 6 months of the miner's death if death occurred before January 1, 1974, and claims filed by the survivor of a miner who was receiving benefits under part B of title IV of the Act at the time of death, if filed within 6 months of the miner's death, are also adjudicated and paid by the Social Security Administration.

(c) *Section 415.* Claims filed by a miner between July 1 and December 31, 1973, are adjudicated and paid under section 415. Section 415 provides that a claim filed between the appropriate dates shall be filed with and adjudicated by the Secretary of Labor under certain incorporated provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.). A claim approved under section 415 is paid under part B of title IV of the Act for periods of eligibility occurring between July 1 and December 31, 1973, by the Secretary of Labor and for periods of eligibility thereafter, is paid by a coal mine operator which is determined liable for the claim or the Black Lung Disability Trust Fund if no operator is identified or if the miner's last coal mine employment terminated prior to January 1, 1970. An operator which may be found liable for a section 415 claim is notified of the claim and allowed to participate fully in the adjudication of such claim. A claim filed under section 415 is for all purposes considered as if it were a part C claim (see paragraph (d) of this section) and the provisions of part C of title IV of th Act are fully applicable to a section 415 claim except as is otherwise provided in section 415.

(d) *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 title 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 and paid by a coal mine operator. 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 Longshoremen's and Harbor Workers' Compensation Act.

(e) *Section 435.* Section 435 of the Act affords each person who filed a claim for benefits under part B, section 415, or part C, and whose claim had been denied or was still pending as of March 1, 1978, the effective date of the Black Lung Benefits Reform Act of 1977, the right to have his or her claim reviewed on the basis of the 1977 amendments to the Act, and under certain circumstances to submit new evidence in support of the claim.

(f) *Changes made by the Black Lung Benefits Reform Act of 1977.* In addition to those changes which are reflected in paragraphs (a)–(e) of this section, 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 which limits the denial of a claim solely on the basis of employment in a coal mine; (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) a new presumption which requires the payment of benefits to the survivors of a miner who was employed for 25 or more years in the mines under certain conditions; (6) 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 (7) other clarifying, procedural, and technical amendments.

(g) *Changes made by the Black Lung Benefits Revenue Act of 1977.* The Black Lung Benefits Revenue Act of 1977 establishes the Black Lung Disability Trust Fund which is financed by a specified tax imposed upon each ton of coal (except lignite) sold 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 is liable for the payment of all claims approved under section 415, part C and section 435 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 cannot be assessed against a coal mine operator due to bankruptcy, insolvency, or the like. The fund is also authorized to pay certain claims which a responsible operator has refused to pay within a reasonable time, and seek reimbursement from such operator. The purpose of the fund and the Black Lung Benefits Revenue Act of 1977 is to insure that coal operators or the coal industry will fully bear the cost of black lung dis-

ease for the present time and in the future. The Black Lung Benefits Revenue Act of 1977 also contains other provisions relating to the fund and authorizes a coal mine operator to establish its own trust fund for the payment of certain claims.

(h) *Longshoremen's Act provisions.* The adjudication of claims filed under sections 415, 422, and 435 of the Act is governed by various procedural and other provisions contained in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended from time to time, which are incorporated within the Act by sections 415 and 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 of 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 or part 727 of this subchapter. No other departure from the incorporated provisions of the LHWCA is intended.

Comments received: One comment suggests that the definition of pneumoconiosis in paragraph (f) should more accurately reflect the language of the Act.

Discussion and changes: The suggestion is accepted although the Department does not consider this a substantive change.

§ 725.2 Purpose and applicability of this part.

(a) It is the purpose of this part to set forth the procedures to be followed and standards to be applied in the filing, processing, adjudication, and payment of claims filed under part C of title IV of the Act.

(b) This part is applicable to all claims filed under part C of title IV of the Act on or after the effective date of this part and shall also be applicable to claims pending on the effective date of this part as provided in part 727 of this subchapter. This part is applicable to claims considered under section 435 of the Act and part 727 of this subchapter.

Comments received: None.

§ 725.3 Contents of this part.

(a) This subpart A describes the statutory provisions which relate to claims considered under this part, the purpose and scope of this part, definitions and usages of terms applicable to this part, and matters relating to the availability of information collected by the Department of Labor in connection with the processing of claims.

(b) Subpart B contains criteria for determining who may be found entitled to benefits under this part and other provisions relating to the conditions and duration of eligibility of a particular individual.

(c) Subpart C describes the procedures to be followed and action to be taken in connection with the filing of a claim under this part.

(d) Subpart D of this part sets forth the duties and powers of the persons designated by the Secretary of Labor to adjudicate claims, provisions relating to the rights of parties and representatives of parties, and the procedure to be followed in the informal processing and adjudication of a claim under this part.

(e) Subpart E describes the procedures to be followed if a hearing is required with respect to a claim.

(f) Subpart F contains provisions governing the identification of a coal mine operator which may be liable for the payment of a claim under this part.

(g) Subpart G contains provisions governing the payment of benefits with respect to an approved claim.

(h) Subpart H describes the statutory mechanisms provided for the enforcement of a coal mine operator's liability, sets forth the penalties which may be applied in the case of a defaulting coal mine operator, and describes the obligation of coal operators and their insurance carriers to file certain reports.

(i) Subpart I describes the right of certain beneficiaries to receive medical treatment benefits and vocational rehabilitation under the Act.

Comments received: None.

§ 725.4 Applicability of other parts in this title.

(a) *Part 718.* Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is or was totally disabled due to pneumoconiosis, or whether a miner died due to pneumoconiosis, shall be applicable to the determination of claims under this part. Until a revised part 718 is promulgated by the Secretary in accordance with section 402(f)(1) of the act, the criteria contained in subpart C of part 727 of this subchapter shall be applicable in determining claims under this part, and such criteria shall be applicable at all times with respect to claims filed under this part and under section 11 of the Black Lung Benefits Reform Act of 1977.

(b) *Parts 715, 717, and 720.* Parts 715, 717, and 720 of this subchapter, which established the procedures for the filing, processing, and payment of claims filed under section 415 of the Act, are repealed and pertinent provisions of these parts which retain significance are incorporated within this part as appropriate.

(c) *Part 726.* Part 726 of this subchapter, which sets forth the obligations imposed upon a coal operator to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part as appropriate.

(d) *Part 727.* Part 727 of this subchapter, which governs the review, adjudication and payment of pending and denied claims under section 435 of the Act, is applicable to this part as provided in such part 727. The criteria contained in subpart C of part 727 for determining a claimant's eligibility for benefits shall be applicable under this part with respect to all claims filed before a revised part 718 of this subchapter is promulgated by the Secretary in accordance with section 402(f)(1) of the Act, and shall also be applicable to all claims filed under this part, and under section 11 of the Black Lung Benefits Reform Act of 1977.

(e) *Part 410.* Part 410 of this title, which sets forth provisions relating to a claim for black lung benefits under part B of title IV of the Act, is inapplicable to this part except as is provided in this part, or in part 718 of this subchapter.

Comments Received: None for which a response is required.

§ 725.101 Definitions and use of terms.

(a) *Definitions.* For purposes of this subchapter, except where the content clearly indicates otherwise, the following definitions apply:

(1) The "Act" means the Federal Coal Mine Health and Safety Act, Pub. L. 91-173, 83 Stat. 742, 30 U.S.C. 801-960, as amended by the Black Lung Benefits Act of 1972, the Mine Safety and Health Act of 1977, the Black Lung Benefits Reform Act of 1977, and the Black Lung Benefits Revenue Act of 1977.

(2) The "Longshoremen's Act" or "LHWCA" means the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U.S.C. 901-950, as amended from time to time.

(3) The "Social Security Act" means the Social Security Act, Act of August 14, 1935, c. 531, 49 Stat. 620, 42 U.S.C. 301-431, as amended from time to time.

(4) A "workers' compensation law" means a law providing for payment of benefits to employees, and their dependents and survivors, for disability on account of injury, including occupational disease, or death, suffered in connection with their employment.

(5) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, and prior to January 3, 1959, and August 21, 1959, respectively, the territories of Alaska and Hawaii.

(6) "Department" means the United States Department of Labor.

(7) "Secretary" means the Secretary of Labor, United States Department of Labor, or a person, authorized by him or her to perform his or her functions under title IV of the Act.

(8) "Office" or "OWCP" means the Office of Workers' Compensation Programs, United States Department of Labor.

(9) "Director" means the Director, OWCP, or his or her designee.

(10) "Division" of "DCMWC" means the Division of Coal Mine Workers' Compensation in the OWCP, United States Department of Labor.

(11) "Deputy Commissioner" means a person appointed as provided in Sections 39 and 40 of the LHWCA, or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter (see § 725.350).

(12) "Office of Administrative Law Judges" means the Office of Administrative Law Judges, U.S. Department of Labor.

(13) "Chief Administrative Law Judge" means the Chief Administrative Law Judge of the Office of Administrative Law Judges, U.S. Department of Labor, 1111 20th Street, NW., Washington, D.C. 20036.

(14) "Administrative law judge" means a person qualified under 5 U.S.C. 3105 to conduct hearings and adjudicate claims for benefits filed pursuant to section 415 and part C of the Act. Until March 1, 1979, it shall also mean an individual appointed to conduct such hearings and adjudicate such claims under Pub. L. 94-504.

(15) "Benefits Review Board" or "Board" means the Benefits Review Board, U.S. Department of Labor, an appellate tribunal appointed by the Secretary of Labor pursuant to the provisions of section 21(b)(1) of the LHWCA. See parts 801, 802 of this title.

(16) "Claim" means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

(17) "Claimant" means an individual who files a claim for benefits under this part.

(18) "Benefits" means all money or other benefits paid or payable under section 415 or part C of title IV of the Act on account of disability or death due to pneumoconiosis.

(19) "Beneficiary" means a miner or any surviving spouse, divorced spouse, child, parent, brother or sister, who is entitled to benefits under either section 415 or part C of title IV of the Act.

(20) "Pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment (see part 718 of this subchapter).

(21) "Total disability" and "partial disability," for purposes of this part, have the meaning given them as provided in part 718 of this subchapter.

(22) "The Nation's coal mines" means all coal mines located in any State.

(23) "Coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

(24) "Underground coal mine" means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e., overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, appurtenant thereto.

(25) "Coal preparation" means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

(26) "Miner" or "coal miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment (see § 725.202(a)).

(27) "Operator" means any owner, lessee, or other person who operates, controls or supervises a coal mine, including a prior or successor operator as defined in section 422 of the Act and certain transportation and construction employers (see subpart F of this part).

(28) "Responsible operator" means an operator which has been determined to be liable for the payment of benefits to a claimant for periods of eligibility after December 31, 1973, with respect to a claim filed under section 415 or part C of title IV of the Act or reviewed under section 435 of the Act.

(29) "Person" means an individual, partnership, association, corporation, firm, subsidiary or parent of a corporation, or other organization or business entity.

(30) "Insurer" or "carrier" means any private company, corporation, mutual association, reciprocal or interinsurance exchange, or any other person or fund, including any State fund, authorized under the laws of a State to insure employers' liability under workers' compensation laws. The term also includes the Secretary of Labor in the exercise of his or her authority under section 433 of the Act.

(31) "Black Lung Disability Trust Fund" or the "Fund" means the Black Lung Disability Trust Fund established by the Black Lung Benefits Revenue Act of 1977 for the payment of certain claims adjudicated under this part (see subpart G of this part).

(b) *Statutory terms.* The definitions contained in this section shall not be construed in derogation of terms of the Act.

(c) *Dependents and survivors.* Dependents and survivors are those persons described in subpart B of this part.

Comments received: (a) One comment suggests that paragraph (a)(27) be clarified to indicate the inclusion of independent contractors in the term "operator." (b) One comment argues that operator liability is not allowed in the case of a claim originally filed under part B of title IV and reviewed and approved under section 435 of the Act. (c) A few comments were supportive.

Discussion and changes: (a) The Act and subpart F of this part 725 clarify the liability of certain independent contractors. While the Department agrees that certain independent contractors may be considered operators and held liable for claims under the Act, no change in this general definition section is necessary to reflect that view.

(b) The argument that coal operators may not be found liable for claims reviewed by the Secretary of HEW under section 435 of the Act is incorrect. The language of the Act and the report of the conferees leave no doubt that an operator may be found liable for the payment of a part B reviewed claim, if the miner's employment occurred on or after January 1, 1970. The further argument in this regard that operators will be denied the right to contest such claims is similarly incorrect. An HEW determination is binding only as an "initial determination" of eligibility. This determination can be re-

versed upon the presentation of an operator's evidence to an administrative law judge, the Benefits Review Board, or an appropriate court.

§ 725.102 Disclosure of program information.

(a) All reports, records, or other documents filed with the OWCP with respect to claims are the records of the OWCP. The Director or his or her designee shall be the official custodian of those records maintained by the OWCP at its national office.

(b) The official custodian of any record sought to be inspected shall permit or deny inspection in accordance with the Department of Labor's regulations pertaining thereto (see 29 CFR Part 70). The original record in any such case shall not be removed from the Office of the custodian for such inspection. The custodian may, in his or her discretion, deny inspection of any record or part thereof which is of a character specified in 5 U.S.C. 552(b) if in his or her opinion such inspection may result in damage, harm, or harassment to the beneficiary or to any other person. For special provisions concerning release of information regarding injured employees undergoing vocational rehabilitation, see § 702.508, of this title.

(c) Any person may request copies of records he or she has been permitted to inspect. Such requests shall be addressed to the official custodian of the records sought to be copied. The official custodian shall provide the requested copies under the terms and conditions specified in the Department of Labor's regulations relating thereto (see 29 CFR Part 70).

(d) Any party to a claim (§ 725.360) or his or her duly authorized representative shall be permitted upon request to inspect the file which has been compiled in connection with such claim. Any party to a claim or representative of such party shall upon request be provided with a copy of any or all material contained in such claim file. A request for information by a party or representative made under this paragraph shall be answered within a reasonable time after receipt by the Office. Internal documents prepared by the deputy commissioner which do not constitute evidence of a fact which must be established in connection with a claim shall not be routinely provided or presented for inspection in accordance with a request made under this paragraph.

Comments received: A number of comments criticize this section for not clearly establishing a claimant's right to inspect and copy his or her file soon after a request to do so is made.

Discussion and changes: This section was not intended to govern a claimant's access to his or her own file. It is intended only to indicate that the Department of Labor's regulations (20 CFR Part 70) governing disclosure to the public generally are applicable to black lung files. This section is revised to clarify a claimant's right to inspect his or her file.

Subpart B—Persons Entitled to Benefits, Conditions and Duration of Entitlement

General comments received on this subpart: (a) One comment argues that the provisions which authorize the payment of benefits in certain circumstances to or on behalf of, a surviving divorced spouse (§§ 725.201, 725.206, 725.207, 725.212-725.217) are not in accordance with law. (b) A few comments strongly disagree with the provisions of the proposed rules which eliminate sex-based classifications, arguing the such rules amend that statutory language and are therefore not authorized.

Discussion and changes: (a) Section 402(e) of the Act defines the term "widow" to include a surviving divorced wife. The comment is rejected.

(b) The Department has carefully reviewed the Act, applicable case law, and the policy and intent of the law in determining that sex-based discriminations in providing benefits to coal miners and their survivors are not justified or intended as a matter of law. In 1969, when the Act was first set in motion, there were virtually no women coal miners in the United States. That is no longer the case. The Department has recently undertaken a program to prohibit discrimination against women who wish to work as coal miners for operators who have certain Federal Government contracts. In order to carry forth the Department's view of congressional intent manifested in the Act, it has been determined that the Secretary has adequate authority to end sex-based discrimination in black lung benefits.

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

(a) Section 415 and part C of the Act provide for the payment of periodic benefits in accordance with this part to:

(1) A miner (see § 725.202) who is determined to be totally disabled due to pneumoconiosis; or

(2) The surviving spouse or surviving divorced spouse or, where neither exists, the child of a deceased miner, where the deceased miner:

(i) Was receiving benefits under section 415 or part C of title IV of the Act; or

(ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis (see part 718 of this chapter); or

(3) The child of a miner's surviving spouse who was receiving benefits under section 415 or part C of title IV of the Act at the time of such spouse's death; 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 was receiving benefits under section 415 or part C of title IV of the Act at the time of death; or who was totally or partially disabled due to pneumoconosis at the time of death; or whose death was due to pneumoconiosis.

(b) Section 411(c)(5) of the Act provides for the payment of benefits to the eligible survivors of a miner employed for 25 or more years in the mines prior to June 30, 1971, if the claim for benefits was filed before March 1, 1978, unless it is established that at the time of death, the miner was not totally or partially disabled due to pneumoconiosis. For the purposes of this part the term "total disability" shall mean partial disability with respect to a claim for which eligibility is established under section 411(c)(5) of the Act.

(c) The provisions contained in this subpart describe the conditions of entitlement to benefits applicable to a miner, or a surviving spouse, child, parent, brother, or sister, and the events which establish or terminate entitlement to benefits.

(d) In order for an entitled miner or surviving spouse to qualify for augmented benefits because of one or more dependents, such dependents must meet relationship and dependency requirements with respect to such beneficiary prescribed by or pursuant to the Act. Such requirements are also set forth in this subpart.

Comments received: See general comments received on this subpart.

Conditions and Duration of Entitlement

§ 725.202 Miner defined; condition of entitlement, miner.

(a) *Miner defined.* A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparatrion facility. In the case of an individual employed in coal transportation or coal mine construction, there shall be a rebuttable presumption that such individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine or coal preparation facility for purposes of: (1) Determining whether such individual is or was a miner; (2) establishing the applicability of any of the presumptions described in section 411(c)

of the Act and part 718 of this subchapter; and (3) determining the identity of a coal mine operator liable for the payment of benefits in accordance with § 725.493. The presumption may be rebutted by evidence which demonstrates: (1) That the individual was not regularly exposed to coal mine dust during his or her employment in or around a coal mine or preparation facility; or (2) that the individual was not regularly employed in or around a coal mine or coal preparation facility. An individual employed by a coal mine operator, regardless of the nature of such individual's employment, shall be considered a miner unless such individual was not employed in or around a coal mine or coal preparation facility.

A person who is or was a self-employed miner or independent contractor, and who otherwise meets the requirements of this paragraph, shall be considered a miner for the purposes of this part (see § 725.494).

(b) *Conditions of entitlement; miner.* An individual is eligible for benefits under this subchapter if the individual:

(1) Is a miner as defined in this section; and

(2) Is totally disabled due to pneumoconiosis (see part 718 of this subchapter; see also § 725.503A); and

(3) Has filed a claim for benefits in accordance with the provisions of this part.

Comments received: (a) A number of coal mine construction employers argue that their employees are not exposed to coal mine dust and should not, therefore, be covered by the Act. It is suggested in this connection that a construction employer's liability should be made contingent upon proof of exposure to dust conditions which are "substantially similar" to those encountered in underground mining. (b) The construction employers also argue that the presumption of continuous exposure is both unreasonable and unauthorized for the reason that only the miner has knowledge of the conditions under which he or she has worked. (c) One comment requests that the language of this section be clarified to clearly indicate that surface miners and auger miners are covered by the Act. (d) One comment urges that the term "coal dust" be changed to "coal mine dust." (e) Many comments support this provision and urge its retention.

Discussion and changes: (a) Congress has determined that coal mine construction workers are to be included within the Act's definition of "miner" and has clearly so indicated in section 402(d) of the Act. There is no statutory authority to limit the coverage of construction employees only to situations in which there is exposure to dust conditions substantially similar to those encountered in underground mining. (See discussion and changes following § 725.491.)

(b) The presumption of continuous exposure is neither contrary to law nor unfair to coal mine construction employers. Section 422(h) of the Act authorizes the Secretary of Labor to "by regulation establish standards, which may include appropriate presumptions, for determining whether pneumoconiosis arose out of employment in a particular coal mine, or mines." Under this presumption, the coal mine construction employer need only show that the employee was not exposed to coal dust for a cumulative 1-year period during his or her employment with the contractor, in order to avoid liability (see § 725.493). It is the employer rather than the employee who is expected to keep records of where the employee worked, and it is the supervisory personnel employed by the employer who are responsible for controlling and supervising the conditions under which an employee works. The presumption should not be eliminated. The burden of coming forward with information is properly with the employer, who can more easily obtain such information.

Continuous or long-term employment in or around a coal mine or preparation facility forms a reasonable basis for presuming exposure to coal dust. If the exposure presumption were not included, the construction employer would be likely to demand strict proof of a year of employment, with a day-by-day description of exposure. Such an approach would not be in keeping with the language and intent of the Act. The construction employer is capable of developing enough information, using the discovery mechanisms contained in this part, to either verify or refute the claimant's allegation of years of exposure and whether such exposure took place entirely while the claimant was employed by the construction employer.

In extending the coverage of the Act to construction employees, Congress was aware of special problems this would create for construction employers and accordingly exempted them from both the coal tax and the obligation to purchase insurance. This action by no means detracts from Congress' committment to extend the Act's coverage to construction employees who regularly work in or around coal mines or preparation facilities.

(c) The Act is clear on the point that all coal miners (underground, surface, auger, etc.) are covered regardless of the type of mine in which employment took place. The 1972 amendments to the Act eliminated the term "underground" from the definition of "miner" and that change is included throughout these rules by the absence of any language limiting the term "miner" to any type of mine. The Department believes that the addition of the terms "strip," "surface" or "auger" to define the type of mine in which employment must occur would itself limit the broad meaning of the term mine, and declines to make such a change.

(d) The Department accepts the comment that the term "coal dust" should be changed to "coal mine dust." The Act defines pneumoconiosis as a "dust disease of the lung * * * arising out of coal mine employment." Accordingly, exposure to any coal-mine-generated dust and ensuing disease or disability form a proper basis for entitlement.

§ 725.203 Duration of entitlement; miner.

(a) An individual is entitled to benefits as a miner for each month beginning with the first month in which all of the conditions for entitlement prescribed in § 725.202 are satisfied.

(b) The last month for which such individual is entitled to benefits is the month before the month during which either of the following events first occurs:

(1) The miner dies; or

(2) The miner's total disability ceases (see § 725.503A).

Comments received: A few comments recommend that this section make clear that the first month of eligibility is the month of onset of total disability rather than the month in which evidence of total disability is received.

Discussion and changes: The month of onset of total disability is nowhere limited to the date when evidence of total disability is obtained. However, the actual date of onset must be determined on a case-by-case basis and the Department does not consider a general rule on this point necessary.

Benefits on Account of Living Dependents (Augmented Benefits)

§ 725.204 Determination of relationship; spouse.

For the purpose of augmenting benefits, an individual will be considered to be the spouse of a miner if:

(a) The courts of the State in which the miner is domiciled would find that such individual and the miner validly married; or

(b) The courts of the State in which the miner is domiciled would find, under the law they would apply in determining the devolution of the miner's intestate personal property, that the individual is the miner's spouse; or

(c) Under State law, such individual would have the right of a spouse to share in the miner's intestate personal property; or

(d)(1) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which, but for a legal impediment, would have been a valid marriage, unless the individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household in the month in which a request is filed that the miner's benefits be augmented because such individual qualifies as the miner's spouse. The provisions of this paragraph shall not apply, however, if the miner's benefits are or have been augmented under § 725.520(c) because another person qualifies or has qualified as the miner's spouse and such other person is, or is considered to be, the spouse of such miner under paragraph (a), (b), or (c) of this section at the time such request is filed.

(2) The qualification of an individual for augmentation purposes under this paragraph shall end with the month before the month in which:

(i) The Office determines that the benefits of the miner should be augmented on account of another person,

if such other person is (or is considered to be) the spouse of the miner under paragraph (a), (b), or (c) of this section, or

(ii) If the individual who previously qualified as a spouse for purposes of § 725.520(c), entered into a valid marrage without regard to this paragraph, with a person other than the miner.

Comments received: See *General comments received on this subpart.*

§ 725.205 Determination of dependency; spouse.

For the purposes of augmenting benefits, an individual who is the miner's spouse (see § 725.204) will be determined to be dependent upon the miner if:

(a) The individual is a member of the same household as the miner (see § 725.232); or

(b) The individual is receiving regular contributions from the miner for support (see § 725.233(c)); or

(c) The miner has been ordered by a court to contribute to such individual's support (see § 725.233(c)); or

(d) The individual is the natural parent of the son or daughter of the miner; or

(e) The individual was married to the miner (see § 725.204) for a period of not less than 1 year.

Comments received: See *General comments received on this subpart.*

§ 725.206 Determination of relationship; divorced spouse.

For the purposes of augmenting benefits with respect to any claim considered or reviewed under this part or part 727 of this subchapter, an individual will be considered to be the divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to the miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final.

Comments received: (a) Many comments suggest that this section be changed to reflect the 1977 amendments to the Social Security Act, which reduce the original 20 years of marriage requirement to 10 years on or after January 1, 1979. A few comments suggest an across-the-board 10-year rule. A few others suggest that a reapplication for benefits should be allowed if the prospective change in the law operates to deny benefits to persons who would otherwise be eligible under the 10-year provision but were denied while eligibility was governed by the 20-year provision. (b) See also *General comments received on this subpart.*

Discussion and changes: On December 20, 1977, Pub. L. 95-216 amended, among other provisions, section 216(d)(2) of the Social Security Act (which is incorporated in the later-enacted Black Lung Benefits Reform Act of 1977) to reduce from 20 to 10 the number of years of marriage necessary to qualify a surviving divorced wife for certain benefits under title II of the Social Security Act. These incorporated provisions of the Social Security Act materially alter a surviving divorced wife's entitlement to benefits. However, because black lung payments, unlike Social Security payments, are ordinarily made retroactively, the Department believes that the 10-years-of-marriage requirement should be adopted for all claims, whether newly filed or subject to review under section 435 of the Act.

§ 725.207 Determination of dependency; divorced spouse.

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§ 725.206) will be determined to be dependent upon the miner if:

(a) The individual is receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

(b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233 (c), (f)); or

(c) A court order requires the miner to furnish substantial contributions to the individual's support (see § 725.233(c)).

Comments received: A few comments urge the Department to consider third party payments to a divorced spouse in determining dependency.

Discussion and changes: The Department will consider third party payments on a case-by-case basis as necessary.

§ 725.208 Determination of relationship; child.

As used in this section, the term "beneficiary" means only a surviving spouse entitled to benefits at the time of death (see § 725.212), or a miner. An individual will be considered to be the child of a beneficiary if:

(a) The courts of the State in which the beneficiary is domiciled (see § 725.231) would find, under the law they would apply, that the individual is the beneficiary's child; or

(b) The individual is the legally adopted child of such beneficiary; or

(c) The individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent or adopting parent to such beneficiary; or

(d) The individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section if the beneficiary and the mother or the father, as the case may be, of the individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) The individual is the natural son or daughter of a beneficiary but is not a child under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of the beneficiary if:

(1) The beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the parent of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(c)) because the individual is his or her son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father of the individual and was living with or contributing to the support of the individual at the time the beneficiary became entitled to benefits.

Comments received: Only supportive comments received.

§ 725.209 Determination of dependency; child.

(a) For purposes of augmenting the benefits of a miner or surviving spouse, the term "beneficiary" as used in this section means only a miner or surviving spouse entitled to benefits (see § 725.202 and § 725.212). An individual who is the beneficiary's child (§ 725.208) will be determined to be, or to have been dependent on the beneficiary, if the child:

(1) Is unmarried; and

(2)(i) Is under 18 years of age; or

(ii) Is 18 years of age or older and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or

(iii) Is 18 years of age or older and is a student.

(b)(1) The term "student" means a "full-time student" as defined in section 202(d)(7) of the Social Security Act, 42 U.S.C. 402(d)(7) (see § 404.320(c) of this title), or an individual under 23 years of age who has not completed 4 years of education beyond the high school level and who is regularly pursuing a full-time course of study or training at an institution which is:

(i) A school, college, or university operated or directly supported by the United States, or by a State or local government or political subdivision thereof; or

(ii) A school, college, or university which has been accredited by a State

or by a State-recognized or nationally-recognized accrediting agency or body; or

(iii) A school, college, or university not so accredited but whose credits are accepted, on transfer, by at least three institutions which are so accredited; or

(iv) A technical, trade, vocational, business, or professional school accredited or licensed by the Federal or a State government or any political subdivision thereof, providing courses of not less than 3 months' duration that prepare the student for a livelihood in a trade, industry, vocation, or profession.

(2) A student will be considered to be "pursuing a full-time course of study or training at an institution" if the student is enrolled in a noncorrespondence course of at least 13 weeks duration and is carrying a subject load which is considered full-time for day students under the institution's standards and practices. A student beginning or ending a full-time course of study or training in part of any month will be considered to be pursuing such course for the entire month.

(3) A child is considered not to have ceased to be a student:

(i) During any interim between school years, if the interim does not exceed 4 months and the child shows to the satisfaction of the office that he or she has a bona fide intention of continuing to pursue a full-time course of study or training; or

(ii) During periods of reasonable duration in which, in the judgment of the office, the child is prevented by factors beyond the child's control from pursuing his or her education.

(4) A student whose 23d birthday occurs during a semester or other enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period, unless eligibility is otherwise terminated.

Comments received: None.

§ 725.210 Duration of augmented benefits.

Augmented benefits payable on behalf of a spouse or divorced spouse, or a child, shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. Augmentation of benefits on account of a dependent continues through the month before the month in which the dependent ceases to satisfy these conditions, except in the case of a child who qualifies as a dependent because such child is a student. In the latter case, benefits continue to be augmented through the month before the first month during no part of which such child qualifies as a student.

Comments received: None.

§ 725.211 Time of determination of relationship and dependency of spouse or child for purposes of augmentation of benefits.

With respect to the spouse or child of a miner entitled to benefits, and with respect to the child of a surviving spouse entitled to benefits, the determination as to whether an individual purporting to be a spouse or child is related to or dependent upon such miner or surviving spouse shall be based on the facts and circumstances present in each case, at the appropriate time.

Comments received: See general comments received on this subpart.

SURVIVORS' ENTITLEMENT

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

An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death; or

(ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis (see part 718 of this subchapter).

Comments received: See general comments received on this subpart.

§ 725.213 Duration of entitlement; surviving spouse or surviving divorced spouse.

(a) An individual is entitled to benefits as a surviving spouse, or as a surviving divorced spouse, for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.212 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which either of the following events first occurs:

(1) The surviving spouse or surviving divorced spouse marries; or

(2) The surviving spouse or surviving divorced spouse dies; or

(3) Where the individual qualifies as the surviving spouse of a miner under § 725.212(d), such individual ceases to qualify as provided in that paragraph.

Comments received: See general comments received on this subpart.

§ 725.214 Determination of relationship; surviving spouse.

An individual shall be considered to be the surviving spouse of a miner if:

(a) The courts of the State in which the miner was domiciled (see § 725.231) at the time of his or her death would find that the individual and the miner were validly married; or

(b) The courts of the State in which the miner was domiciled (see § 725.231) at the time of the miner's death would find that the individual was the miner's surviving spouse; or

(c) Under State law, such individual would have the right of the spouse to share in the miner's intestate personal property; or

(d) Such individual went through a marriage ceremony with the miner resulting in a purported marriage between them and which but for a legal impediment (see § 725.330) would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner's death. The provisions of this paragraph shall not apply if another person is or has been entitled to benefits as the surviving spouse of the miner and such other person is, or is considered to be, the surviving spouse of such miner under paragraph (a), (b), or (c) of this section at the time such individual files a claim for benefits.

Comments received: See *General comments received on this subpart.*

§ 725.215 Determination of dependency; surviving spouse.

An individual who is the miner's surviving spouse (see § 725.214) shall be determined to have been dependent on the miner if, at the time of the miner's death:

(a) The individual was living with the miner (see § 725.232); or

(b) The individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (see § 725.233); or

(c) The individual was living apart from the miner because of the miner's desertion or other reasonable cause; or

(d) The individual is the natural parent of the miner's son or daughter; or

(e) The individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or

(f) The individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g) (1) The individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (2) of this subsection), or

(ii) Occurs in line of duty while the miner is a member of a uniformed service serving on active duty (as defined in § 404.1013(f) (2) and (3) of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which such miner died.

(2) For purposes of paragraph (g) (1) (i) of this section, the death of a miner is accidental if such individual received bodily injuries solely through violent, external, and accidental means, and as a direct result of the bodily injuries and independently of all other causes, dies not later than 3 months after the day on which such miner receives such bodily injuries. The term "accident" means an event that was unpremeditated and unforeseen from the standpoint of the deceased individual. To determine whether the death of an individual did, in fact, result from an accident the adjudication officer will consider all the circumstances surrounding the casualty. An intentional and voluntary suicide will not be considered to be death by accident; however, suicide by an individual who is so incompetent as to be incapable of acting intentionally and voluntarily will be considered to be a death by accident. In no event will the death of an individual resulting from violent and external causes be considered a suicide unless there is direct proof that the fatal injury was self-inflicted.

(3) The provisions of this section shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

Comments received: See *General comments received on this subpart.*

§ 725.216 Determination of a relationship; surviving divorced spouse.

An individual will be considered to be the surviving divorced spouse of deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter, if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

Comments received: See § 725.206.

§ 725.217 Determination of dependency; surviving divorced spouse.

An individual who is the miner's surviving divorced spouse (see § 725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(1) The individual was receiving at least one-half of his or her support from the miner (see § 725.733(g)); or

(2) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233 (e) and (f)); or

(3) A court order required the miner to furnish substantial contributions to the individual's support (see § 725.233 (c) and (f)).

Comments received: See § 725.207.

§ 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) Was receiving benefits under section 415 or part C of title IV of the act; or

(2) Is determined to have been totally disabled due to pneumoconiosis at the time of his or her death, or to have died due to pneumoconiosis (see part 718 of this chapter).

(b) A child is not entitled to benefits for any month for which a miner, or the surviving spouse or surviving divorced spouse of a miner, establishes entitlement to benefits.

Comments received: None.

§ 725.219 Duration of entitlement; child.

(a) An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement prescribed in § 725.218 are satisfied.

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(1) The child dies;

(2) The child marries;

(3) The child attains age 18; and

(i) Is not under a disability at that time, and

(ii) Is not a student (as defined in § 725.221) during any part of the month in which the child attains age 18;

(4) If the child's entitlement is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the individual is a student; or

(ii) The month in which the individual attains age 23 and is not under a disability at that time;

(5) If a child's entitlement is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

Comments received: None.

§ 725.220 Determination of relationship; child.

For purposes of determining whether an individual may qualify for benefits as the child of a deceased miner, the provisions of § 725.208 shall be applicable. As used in this section, the term "beneficiary" means only a surviving spouse entitled to benefits at the time of such surviving spouse's death (see § 725.212), or a miner. For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for a legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to

such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living at the time such beneficiary became entitled to benefits.

Comments received: None.

§ 725.221 Determination of dependency; child.

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained age 18, or in the case of a student, before the child ceased to be a student.

Comments received: None.

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

(a) An individual is eligible for benefits as a surviving parent, brother or sister if all of the following requirements are met:

(1) The individual is the parent, brother, or sister of a deceased miner;

(2) The individual was dependent on the miner at the pertinent time;

(3) Proof of support is filed within 2 years after the miner's death, unless the time is extended for good cause (§ 725.226);

(4) In the case of a brother or sister, such individual also:

(i) Is under 18 years of age; or

(ii) Is 18 years of age or older and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), which began before such individual attained age 18, or in the case of a student, before the student ceased to be a student; or

(iii) Is a student (see § 725.209(b)); or

(iv) Is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), at the time of the miner's death;

(5) The deceased miner:

(i) Was entitled to benefits under section 415 or part C of title IV of the Act; or

(ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis (see part 718 of this chapter).

(b)(1) A parent is not entitled to benefits if the deceased miner was survived by a spouse or child at the time of such miner's death.

(2) A brother or sister is not entitled to benefits if the deceased miner was survived by a spouse, child, or parent at the time of such miner's death.

Comments received: See *General comments received on this subpart.*

§ 725.223 Duration of entitlement; parent, brother, or sister.

(a) A parent, sister, or brother is entitled to benefits beginning with the month all the conditions of entitlement described in § 725.222 are met.

(b) The last month for which such parent is entitled to benefits is the month in which the parent dies.

(c) The last month for which such brother or sister is entitled to benefits is the month before the month in which any of the following events first occurs:

(1) The individual dies;

(2)(i) The individual marries or remarries; or

(ii) If already married, the individual received support in any amount from his or her spouse;

(3) The individual attains age 18, and

(i) Is not under a disability at that time, and (ii) Is not a student (see § 725.209(b)) during any part of the month in which such individual attains age 18;

(4) If the individual's entitlement is based on his or her status as a student, the earlier of:

(i) The first month during no part of which he or she is a student; or

(ii) The month in which he or she attains age 23 and is not under a disability at that time;

(5) If the individual's entitlement is based on disability, the first month in no part of which the individual is under a disability.

Comments received: None.

§ 725.224 Determination of relationship; parent, brother, or sister.

(a) An individual will be considered to be the parent, brother, or sister of a miner if the courts of the State in which the miner was domiciled (see § 225.231) at the time of death would find, under the law they would apply, that the individual is the miner's parent, brother, or sister.

(b) Where, under State law, the individual is not the miner's parent, brother, or sister, but would, under State law, have the same status (i.e., right to share in the miner's intestate personal property) as a parent, brother, or sister, the individual will be considered to be the parent, brother, or sister as appropriate.

Comments received: None.

§ 725.225 Determination of dependency; parent, brother, or sister.

An individual who is the miner's parent, brother, or sister will be determined to have been dependent on the miner if, during the 1-year period immediately prior to the miner's death:

(a) The individual and the miner were living in the same household (see § 725.232); and

(b) The individual was totally dependent on the miner for support (see § 725.232(b)).

Comments received: None.

§ 725.226 "Good cause" for delayed filing of proof of support.

(a) *What constitutes "good cause."* "Good cause" may be found for failure to file timely proof of support where the parent, brother, or sister establishes to the satisfaction of the Office that such failure to file was due to:

(1) Circumstances beyond the individual's control, such as extended illness, mental, or physical incapacity, or communication difficulties; or

(2) Incorrect or incomplete information furnished the individual by the Office; or

(3) Efforts by the individual to secure supporting evidence without a realization that such evidence could be submitted after filing proof of support.

(b) *What does not constitute "good cause."* "Good cause" for failure to file timely proof of support (see § 725.222(a)(3)) does not exist when there is evidence of record in the Office that the individual was informed that he or she should file within the prescribed period and he or she failed to do so deliberately or through negligence.

Comments received: (a) One comment recommends a more detailed statement of what constitutes good cause for filing proof of support. (b) One comment suggests that the claimant be contacted before a finding of a failure to show good cause is made.

Discussion and changes: Good cause must be determined on a case-by-case basis and general rules will hinder the application of this principle.

(b) Every effort will be made to assist claimants to file necessary documents, including telephone and personal contact where appropriate. This is an internal matter, and no change in the rule is necessary.

§ 725.227 Time of determination of relationship and dependency of survivors.

The determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

Comments received: A few commentators express concern that a miner's illness immediately before death should not preclude a finding of dependency at the time of death.

Discussion and changes: It is not intended that extraordinary circumstances immediately before death should affect a dependency determination. A change is made to reflect this intent.

§ 725.228 Effect of conviction of felonious and intentional homicide on entitlement to benefits.

An individual who has been convicted of the felonious and intentional homicide of a miner of other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary, and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

Comments received: None.

TERMS USED IN THIS SUBPART

§725.229 Intestate personal property.

References in this subpart to the "same right to share in the intestate personal property" of a deceased miner (or surviving spouse) refer to the right of an individual to share in such distribution in the individual's own right and not the right of representation.

Comments received: None.

§725.230 Legal impediment.

For purposes of this subpart, "legal impediment" means an impediment resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution or resulting from a defect in the procedure followed in connection with the purported marriage ceremony—for example, the solemnization of a marriage only through a religious ceremony in a country which requires a civil ceremony for a valid marriage.

Comments received: None.

§725.231 Domicile.

(a) For purposes of this subpart, the term "domicile" means the place of an individual's true, fixed, and permanent home.

(b) The domicile of a deceased miner or surviving spouse is determined as of the time of death.

(c) If an individual was not domiciled in any State at the pertinent time, the law of the District of Columbia is applied.

Comments received: None.

§725.232 Member of the same household—"living with," "living in the same household," and "living in the miner's household," defined.

(a) *Defined.* (1) The term "member of the same household" as used in section 402(a)(2) of the Act (with respect to a spouse); the term "living with" as used in section 402(e) of the Act (with respect to a surviving spouse); and the term "living in the same household" as used in this subpart, means that a husband and wife were customarily living together as husband and wife in the same place. (2) The term "living in the miner's household" as used in section 412(a)(5) of the Act (with respect to a parent, brother, or sister) means that the miner and such parent, brother, or sister were sharing the same residence.

(b) *Temporary absence.* The temporary absence from the same residence of either the miner, or the miner's spouse, parent, brother, or sister (as the case may be), does not preclude a finding that one was "living with" the other, or that they were "members of the same household." The absence of one such individual from the residence in which both had customarily lived shall, in the absence of evidence to the contrary, be considered temporary:

(1) If such absence was due to service in the Armed Forces of the United States; or

(2) If the period of absence from his or her residence did not exceed 6 months and the absence was due to business or employment reasons, or because of confinement in a penal institution or in a hospital, nursing home, or other curative institution; or

(3) In any other case, if the evidence establishes that despite such absence they nevertheless reasonably expected to resume physically living together.

(c) *Relevant period of time.* (1) The determination as to whether a surviving spouse had been "living with" the miner shall be based upon the facts and circumstances as of the time of the death of the miner.

(2) The determination as to whether a spouse is a "member of the same household" as the miner shall be based upon the facts and circumstances with respect to the period or periods of time as to which the issue of membership in the same household is material.

(3) The determination as to whether a parent, brother, or sister was "living in the miner's household" shall take account of the 1-year period immediately prior to the miner's death.

Comments received: (a) One comment recommends that the definitions of "Death during absence," and "Absences other than temporary" which appeared in the Department's earlier rules but which are omitted from these rules should be revived. (b) See *General comments received on this subpart.*

Discussion and changes: The terms "Death during absence" and "Absences other than temporary" are common terms which can be defined on a case-by-case basis by an appropriate finder of fact. Inflexible definitions are unnecessary.

§ 725.233 Support and contributions.

(a) *"Support" defined.* The term "support" includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.

(b) *"Contributions" defined.* The term "contributions" refers to contributions actually provided by the contributor from such individual's property, or the use thereof, or by the use of such individual's own credit.

(c) *"Regular contributions" and "substantial contributions" defined.* The terms "regular contributions" and "substantial contributions" mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual's support.

(d) *Contributions and community property.* When a spouse receives and uses for his or her support income from services or property, and such income, under applicable State law, is the community property of the wife and her husband, no part of such income is a "contribution" by one spouse to the other's support regardless of the legal interest of the donor. However, when a spouse receives and uses for support, income from the services and the property of the other spouse and, under applicable State law, such income is community property, all of such income is considered to be a contribution by the donor to the spouse's support.

(e) *"Court order for support" defined.* References to a support order in this subpart means any court order, judgement, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual's support and which is in effect at the applicable time. If such contributions are required by a court order, this condition is met whether or not the contributions were actually made.

(f) *"Written agreement" defined.* The term "written agreement" in the

phrase "substantial contributions pursuant to a written agreement", as used in this subpart means an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable.

(g) *"One-half support" defined.* The term "one-half support" means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual's support at such time or during such period.

(h) *"Totally dependent for support" defined.* The term "totally dependent for support" as used in § 725.225(b) means that the miner made regular contributions to the support of the miner's parents, brother, or sister, as the case may be, and that the amount of such contributions at least equalled the total cost of such individual's support.

Comments received: See § 725.207.

Subpart C—Filing of Claims

§ 725.301 Who may file a claim.

(a) Any person who believes he or she may be entitled to benefits under the Act may file a claim in accordance with this subpart.

(b) A claimant who has attained the age of 18, is mentally competent and physically able, may file a claim on his or her own behalf.

(c) If a claimant is unable to file a claim on his or her behalf because of a legal or physical impairment, the following rules shall apply:

(1) A claimant between the ages of 16 and 18 years who is mentally competent and not under the legal custody or care of another person, or a committee or institution, may upon filing a statement to the effect, file a claim on his or her own behalf. In any other case where the claimant is under 18 years of age, only a person, or the manager or principal officer of an institution having legal custody or care of the claimant may file a claim on his or her behalf.

(2) If a claimant over 18 years of age has a legally appointed guardian or committee, only the guardian or committee may file a claim on his or her behalf.

(3) If a claimant over 18 years of age is mentally incompetent or physically unable to file a claim and is under the care of another person, or an institution, only the person, or the manager or principal officer of the institution responsible for the care of the claimant, may file a claim on his or her behalf.

(4) For good cause shown, the Office may accept a claim executed by a person other than one described in paragraphs (2) or (3) of this section.

(b) Except as provided in § 725.305 of this part, in order for a claim to be considered, the claimant must be alive at the time the claim is filed.

Comments received: None.

§ 725.302 Evidence of authority to file a claim on behalf of another.

A person filing a claim on behalf of a claimant shall submit evidence of his or her authority to so act at the time of filing or at a reasonable time thereafter in accordance with the following:

(1) A legally appointed guardian or committee shall provide the Office with certification of appointment by a proper official of the court.

(2) Any other person shall provide a statement describing his or her relationship to the claimant, the extent to which he or she has care of the claimant, or his or her position as an officer of the institution of which the claimant is an inmate. The Office may, at any time, require additional evidence to establish the authority of any such person.

Comments received: None.

§ 725.303 Date and place of filing of claims.

(a) (1) Claims for benefits shall be delivered, mailed to, or presented at, any of the various district offices of the Social Security Administration, or any of the various offices of the Department of Labor authorized to accept claims, or, in the case of a claim filed by or on behalf of a claimant residing outside the United States, mailed or presented to any office maintained by the Foreign Service of the United States. A claim shall be considered filed on the day it is received by the office in which it is first filed.

(2) A claim submitted to a Foreign Service Office or any other agency or subdivision of the U.S. Government shall be forwarded to the Office and considered filed as of the date it was received at the Foreign Service Office or other governmental agency or unit.

(b) A claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark. In the absence of a legible postmark, other evidence may be used to establish the mailing date.

Comments received: None.

§ 725.304 Forms and initial processing.

(a) Claims shall be filed on forms prescribed and approved by the Office. The district office at which the claim is filed will assist claimants in completing their forms.

(b) If the place at which a claim is filed is an office of the Social Security Administration, such office shall forward the completed claim form to an office of the DCMWC, which is authorized to process the claim.

Comments received: None.

§ 725.305 When a written statement is considered a claim.

(a) The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part under the following circumstances:

(1) The claimant or a proper person on his or her behalf (see § 725.301) executes and files a prescribed claim form with the Office during the claimant's lifetime within the period specified in paragraph (b) of this section.

(2) Where the claimant dies within the period specified in paragraph (b) of this section without filing a prescribed claim form, and a person acting on behalf of the deceased claimant's estate executes and files a prescribed claim form within the period specified in paragraph (c) of this section.

(b) Upon receipt of a written statement indicating an intention to claim benefits, the Office shall notify the signer in writing that to be considered the claim must be executed by the claimant or a proper party on his or her behalf on the prescribed form and filed with the Office within six months from the date of mailing of the notice.

(c) If before the notice specified in paragraph (b) of this section is sent, or within six months after such notice is sent, the claimant dies without having executed and filed a prescribed form, or without having had one executed and filed in his or her behalf, the Office shall upon receipt of notice of the claimant's death advise his or her estate, or those living at his or her last known address, in writing that for the claim to be considered, a prescribed claim form must be executed and filed by a person authorized to do so on behalf of the claimant's estate within six months of the date of the later notice.

(d) Claims based upon written statements indicating an intention to claim benefits not perfected in accordance with this section shall not be processed.

Comments received: None.

§ 725.306 Withdrawal of a claim.

(a) A claimant or an individual authorized to execute a claim on a claimant's behalf or on behalf of claimant's

estate under § 725.305, may withdraw a previously filed claim provided that:

(1) He or she files a written request with the appropriate adjudication officer indicating the reasons for seeking withdrawal of the claim;

(2) The appropriate adjudication officer approves the request for withdrawal on the grounds that it is in the best interests of the claimant or his or her estate, and;

(3) Any benefits previously paid with respect to the claim are reimbursed.

(b) When a claim had been withdrawn under paragraph (a) of this section, the claim will be considered not to have been filed.

Comments received: A few comments recommended that a claimant should not be required to refund any benefits paid before a request for withdrawal can be approved.

Discussion and changes: A withdrawn claim is as a matter of law considered as though it was never filed. The Act does not authorize the payment of benefits to an individual who refuses, for any reason, to allow a full and complete adjudication of a claim.

§ 725.307 Cancellation of a request for withdrawal.

At any time prior to approval, a request for withdrawal may be canceled by a written request of the claimant or a person authorized to act on the claimant's behalf or on behalf of the claimant's estate.

Comments received: None.

§ 725.308 Time limits for filing claims.

(a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

(b) A miner who is receiving benefits under part B of title IV of the Act and who is notified by HEW of the right to seek medical benefits, may file a claim for medical benefits under part C of title IV of the Act and this part. The Secretary of Health, Education, and Welfare is required to notify each miner receiving benefits under part B of this right. Notwithstanding the provisions of paragraph (a) of this section, a miner notified of his or her rights under this paragraph may file a claim under this part within 6 months from the date such notice was mailed unless the period is extended for good cause shown.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

Comments received: (a) A few comments recommend that the time limits for filing claims should be waived or tolled for good cause shown. (b) One comment suggests that an individual who files for medical benefits under Section 11 of the Act should be presumed entitled to those benefits and should not have to contend with the fear that a Part C adjudication of medical benefits entitlement could jeopardize an earlier part B award.

Discussion and changes: (a) The 1977 Act eliminates those limitations on filing which previously caused an inequitable denial of many claims. All other limitations on filing, except those applicable to medical benefits claims, are suspended until March 1, 1981. The six month period allowed for medical benefits filings may be extended for good cause shown. The only remaining limitation, apart from the limitation on medical benefit filings, is that a miner must file by March 1, 1981, or within three years from a medical determination of total disability due to pneumoconiosis, whichever is later. The language of the provision is changed to permit a waiver or tolling of the limitation in extraordinary circumstances, and to require knowledge by the claimant of the medical determination before the three year period begins to run.

(b) See § 725.701A.

§ 725.309 Duplicate claims.

(a) A claimant whose claim for benefits was previously approved under part B of title IV of the Act may file a claim for benefits under this part as provided in § 725.308(b) and § 725.701A.

(b) A claimant who has filed a claim for benefits under both parts B and C of title IV of the Act or who has filed more than one claim for benefits under part C of title IV of the Act before March 1, 1978, and whose claims are pending or have been denied (§ 727.102 of this subchapter) shall have his or her claims considered in accordance with § 727.103 of this subchapter.

(c) A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act before March 1, 1978, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under part 727 of this subchapter. If an earlier claim subject to review under part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

(c) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

(e) Notwithstanding any other provision of this part or part 727 of this subchapter, a person may exercise the right of review provided in paragraph (c) of § 727.103 at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator, as appropriate.

(f) In a case involving duplicate claims, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. Any duplicate benefits paid shall be subject to collection or offset under subpart G of this part.

Comments received: (a) Many commentators argue that this section prohibits the filing of a new claim by a miner who has previously been denied, and whose condition has worsened or progressed to total disability. (b) Some commentators urge the Department to simultaneously adjudicate a claim which is also pending under part B.

Discussion and changes: (a) The Department agrees that a miner whose claim has once been finally denied either by the Social Security Administration or the Department should be allowed to file a new claim on the grounds of a progression to total disability. Changes to reflect this result are contained in the revised provision.

(b) See *Discussion and changes* in connection with § 727.103 of this subchapter. Conforming changes are reflected in this section.

§ 725.310 Modification of awards and denials.

(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

(b) Modification proceedings shall be conducted in accordance with the provisions of this part as appropriate. Additional evidence may be submitted by any party or requested by the deputy commissioner. Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.

(c) At the conclusion of modification proceedings the deputy commissioner may issue a proposed decision and order (§ 725.418), forward the claim for a hearing (§ 725.421) or, if appropriate, deny the claim by reason of abandonment (§ 725.409).

(d) An order issued following the conclusion of modification proceedings may terminate, continue, reinstate, increase or decrease benefit payments or award benefits. Such order shall not affect any benefits previously paid, except that an order increasing or decreasing the amount of benefits payable may be made effective on the date from which benefits were determined payable by the terms of an earlier award. In the case of an award which is decreased, any payment made in excess of the decreased rate shall be subject to collection or offset under subpart G of this part.

Comments received: Many comments criticize the provisions in this section which allow 1 year for the modification of a denial but an indefinite time for the modification of an award.

Discussion and changes: This section reflects the incorporation by the Act of section 22 of the Longshoremen's Act. Moreover, in the case of an approved claim, the Department has a continuing responsibility to insure that the correct amount of benefits is being paid. This section provides a mechanism to adjust benefit payments in the case of termination of an augmentee's status or the occurrence of an event, such as a State compensation award for pneumoconiosis, which otherwise affects a claimant's eligibility for benefits or the amount of benefits payable. The section does not authorize a readjudication of any fact already established unless there has been a mistake or a material change in conditions.

A miner whose claim has been finally denied may file a new claim at any time, and such claim may be approved if new evidence establishes that the miner has become totally disabled due to pneumoconiosis.

§ 725.311 Communications with respect to claims; time computations.

(a) Unless otherwise specified by this part, all requests, responses, notices, decisions, orders, or other communications required or permitted by this part shall be in writing.

(b) If required by this part, any document, brief, or other statement submitted in connection with the adjudication of a claim under this part shall be sent to each party to the claim by the submitting party. If proof of service is required with respect to any communication, such proof of service shall be submitted to the appropriate adjudication officer and filed as part of the claim record.

(c) Whenever any notice, document, brief or other statement is served by mail, 7 days shall be added to the time within which a reply or response is required to be submitted.

(d) In computing any period of time described in this part, by any applicable statute, or by the order of any adjudication officer, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday. "Legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States.

Comments received: (a) A few comments urge the Department to indicate in this section whether the date of mailing or receipt of a document begins the running of any applicable time period. (b) One comment recommends that the date of receipt, in the case of a document serviced by mail, should be considered to be 7 rather than 3 days after the date of mailing.

Discussion and changes: (a) In connection with various response times, this document indicates where appropriate whether the date of receipt or mailing is the operative date. It is not necessary to reflect each of these time periods in this section.

(b) In view of the difficulties encountered in mail deliveries in many rural coal mining areas, the Department agrees that the date of receipt should be considered to occur 7 days after the mailing date. It should be noted that this change does not affect time periods prescribed in connection with proceedings before the Benefits Review Board or a United States court of appeals.

Subpart D—Adjudication of Claims; Adjudication Officers

§ 725.350 Who are the adjudication officers.

(a) *General.* The persons authorized by the Secretary of Labor to accept evidence and decide claims on the basis of such evidence are called "adjudication officers." This section describes the status of black lung claims adjudication officers.

(b) *Deputy commissioner.* The deputy commissioner is that official of the DCMWC or his designee who is authorized to perform functions with respect to the development, processing, and adjudication of claims in accordance with this part.

(c) *Administrative law judge.* An administrative law judge is that official appointed pursuant to 5 U.S.C. 3105 (or Pub. L. 94-504) who is qualified to preside at hearings under 5 U.S.C. 557 and is empowered by the Secretary to conduct formal hearings with respect to, and adjudicate, claims in accordance with this part. A person appointed under Pub. L. 94-504 shall not be considered an administrative law judge for purposes of this part for any period after March 1, 1979.

Comments received: None for which a response is required.

§ 725.351 Powers of adjudication officers.

(a) *Deputy commissioner.* The deputy commissioner is authorized to: (1) make determinations with respect to claims as is provided in this part; (2) conduct conferences and informal discovery proceedings as provided in this part; (3) compel the production of documents by the issuance of a subpoena, with the written approval of the Director; (4) prepare documents for the signature of parties; (5) issue appropriate orders as provided in this part; (6) do all other things necessary to enable him or her to discharge the duties of the office.

(b) *Administrative Law Judge.* An administrative law judge is authorized to: (1) conduct formal hearings in accordance with the provisions of this part; (2) administer oaths and examine witnesses; (3) compel the production of documents and appearance of witnesses by the issuance of subpoenas; (4) issue decisions and orders with respect to claims as provided in this part; and (5) do all other things necessary to enable him or her to discharge the duties of the office.

(c) If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner with the approval of the Director, or the administrative law judge responsible for the adjudication

of the claim, shall certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting (or to the U.S. District Court for the District of Columbia if he or she is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

Comments received: (a) A few comments suggest that the deputy commissioner should be granted the power to compel a claimant to authorize an operator to obtain pertinent medical records, without the use of compulsory process (subpoenas). (b) One comment recommends that a deputy commissioner or claims examiner be required to obtain the approval of the Director before contempt proceedings may be instituted.

Discussion and changes: (a) Any party to a claim has the right to obtain relevant evidence in the possession of any other party to the same claim. All evidence submitted to the deputy commissioner will be routinely submitted to all parties to the claim. However, where a party seeks to withhold evidence or will not voluntarily authorize an adverse party to obtain relevant evidence, the subpoena is the proper device to use in securing this evidence. Compulsory process protects the rights of all parties and allows the claims adjudicator to prevent a "fishing expedition" by a party or an unjustified delay in the adjudication of the claim.

(b) The Department agrees that a claims examiner or deputy commissioner should not be authorized to institute contempt proceedings without the approval of the Director. Only the deputy commissioner may request such approval. A change is made to reflect this view.

§ 725.352 Disqualification of adjudication officer.

(a) No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision. A decision to withdraw from the consideration of a claim shall be within the discretion of the adjudication officer. If that adjudication officer withdraws, another officer shall be designated by the Director or the Chief Administrative Law Judge, as the case may be, to complete the adjudication of the claim.

(b) No adjudication officer shall be permitted to appear or act as a representative of a party under this part while such individual is employed as an adjudication officer. No adjudication officer shall be permitted at any time to appear or act as a representative in connection with any case or claim in which he or she was personally involved. No fee or reimbursement shall be awarded under this part to an individual who acts in violation of this paragraph.

(c) No adjudication officer shall act in any claim involving a party which employed such adjudication officer within one year before the adjudication of such claim.

(d) Notwithstanding paragraph (a) of this section, no adjudication officer shall be permitted to act in any claim involving a party who is related to the adjudication officer by consanguinity or affinity within the third degree as determined by the law of the place where such party is domiciled. Any action taken by an adjudication officer in knowing violation of this paragraph shall be void.

Comments received: (a) One comment recommends that an adjudication officer should be required to automatically withdraw upon the request of a claimant and a showing of good cause. (b) Other comments point out that the blanket prohibition barring an adjudicator from appearing as a representative of a party for two years after the termination of such individual's employment as an adjudicator is inconsistent with Department of Labor regulations applicable to all other areas.

Discussion and changes: (a) A claims adjudicator should not be required to automatically withdraw at the request of a claimant. The decision to withdraw from an adjudication is traditionally reserved to the judgment of the adjudicator.

(b) The Department agrees that the black lung conflict of interest provisions should be consistent with the several provisions applicable to Department of Labor employees (29 CFR Part O), and conforming changes are made.

PARTIES AND REPRESENTATIVES

§ 725.360 Parties to proceedings.

(a) Except as provided in § 725.361, no person other than the Secretary of Labor and authorized personnel of the Department of Labor shall participate at any stage in the adjudication of a claim for benefits under this part, unless such person is determined by the appropriate adjudication officer to qualify under the provisions of this section as a party to the claim. The following persons shall be parties:

(1) The claimant;

(2) A person other than a claimant, authorized to execute a claim on such claimant's behalf under § 725.301;

(3) Any coal mine operator notified under § 725.412 of its possible liability for the claim;

(4) Any insurance carrier of such operator; and

(5) The Director in all proceedings relating to a claim for benefits under this part.

(b) A widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party.

(c) Any coal mine operator or prior operator or insurance carrier which has not been notified under § 725.412 and which makes a showing in writing that its rights may be prejudiced by a decision of an adjudication officer may be made a party.

(d) Any other individual may be made a party if that individual's rights with respect to benefits may be prejudiced by a decision to be made.

Comments received: None for which a response is required.

§ 725.361 Party amicus curiae.

At the discretion of the Chief Administrative Law Judge or the administrative law judge assigned to the case, a person or entity which is not a party may be allowed to participate amicus curiae in a formal hearing only as to an issue of law. A person may participate amicus curiae in a formal hearing upon written request submitted with supporting arguments prior to the hearing. If the request is granted, the administrative law judge hearing the case will inform the party of the extent to which participation will be permitted. The request may, however, be denied summarily and without explanation.

Comments received: One comment requests the deletion of this section.

Discussion and changes: The comment is rejected.

§ 725.362 Representation of parties.

(a) Except for the Secretary of Labor, whose interests shall be represented by the Solicitor of Labor or his or her designee, each of the parties may appoint an individual to represent his or her interest in any proceeding for determination of a claim under this part. Such appointment shall be made in writing or on the record at the hearing. A written notice appointing a representative shall be signed by the party or his or her legal guardian and shall be sent to the Office or, for representation at a formal hearing, to the Chief Administrative Law Judge. In any case, such representative must be qualified under § 725.363. No authorization for representation or agreement between a claimant and representative as to the amount of a fee, filed with the Social Security Administration in connection with a claim under Part B of Title IV of the Act, shall be valid under this part. A claimant who has previously authorized a person to represent him or her in connection with a claim originally filed under Part B of Title IV may renew such authorization by filing a statement to such effect with the Office or appropriate adjudication officer.

(b) Any party may waive his or her right to be represented in the adjudication of a claim. If an adjudication officer determines, after an appropriate inquiry has been made, that a claimant who has been informed of his or her right to representation does not wish to obtain the services of a representative, such adjudication officer shall proceed to consider the claim in accordance with this part, unless it is apparent that the claimant is, for any reason, unable to continue without the help of a representative. However, it shall not be necessary for an adjudication officer to inquire as to the ability of a claimant to proceed without representation in any adjudication taking place without a hearing. The failure of a claimant to obtain representation in an adjudication taking place without a hearing shall be considered a waiver of the claimant's right to representation. However, at any time during the processing or adjudication of a claim, any claimant may revoke such waiver and obtain a representative.

Comments received: (a) One comment recommends that the language of the repealed 20 CFR § 720.252, which required the administrative law judge to inquire into the claimant's ability to proceed without a representative, be substituted for similar language in this section. (b) A few comments express concern that this provision will prohibit a claimant from obtaining a representative if there has been an earlier waiver of that right. (c) A few comments object to a waiver of the right to representation under any circumstances.

Discussion and changes: It is not the purpose of this section to deprive any claimant of the right to obtain representation at any time during the processing or adjudication of a claim. Moreover, it is intended that the requirement that an administrative law judge fully inquire into a claimant's ability to proceed without representation, before conducting a hearing, is unchanged in substance. In order to clarify these points changes have been made.

However, the provision is intended to preclude a readjudication of a claim in those cases where the claimant knowingly waives the right to representation, and it is determined by an administrative law judge that the claimant is reasonably capable of proceeding without representation. In the case of a claim which may be adjudicated without a hearing, it is not feasible to personally inquire into the claimant's ability to proceed, and the Department and administrative law judges must rely on the claimant's own judgement. All claimants are informed by the Department of their right to obtain representation, and in especially complex cases, Department of Labor officials may encourage a claimant to obtain representation.

§ 725.363 Qualification of representative.

(a) *Attorney.* Any attorney in good standing who is admitted to practice before a court of a State, territory, district, or insular possession, or before the Supreme Court of the United States or other Federal court and is not, pursuant to any provision of law, prohibited from acting as a representative, may be appointed as a representative.

(b) *Other person.* With the approval of the adjudication officer, any other person may be appointed as a representative so long as that person is not, pursuant to any provision of law, prohibited from acting as a representative.

Comments received: None.

§ 725.364 Authority of representative.

A representative, appointed and qualified as provided in §§ 725.362 and 725.363, may make or give on behalf of the party he or she represents, any request or notice relative to any proceeding before an adjudication officer, including formal hearing and review, except that such representative may not execute a claim for benefits, unless he or she is a person designated in § 725.301 as authorized to execute a claim. A representative shall be entitled to present or elicit evidence and make allegations as to facts and law in any proceeding affecting the party represented and to obtain information with respect to the claim of such party to the same extent as such party. Notice given to any party of any administrative action, determination, or decision, or request to any party for the production of evidence shall be sent to the representative of such party and such notice or request shall have the same force and effect as if it had been sent to the party represented.

Comments received: One comment urges that this section specify the right of a representative to promptly obtain information from the Department.

Discussion and changes: The representative's right to promptly obtain requested information from the Department is fully set forth in § 725.102. No change in this section is necessary.

§ 725.365 Approval of representative's fees; lien against benefits.

No fee charged for representation services rendered to a claimant with respect to any claim under this part shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid. In cases where the obligation to pay the attorney's fee is upon the claimant, the amount of the fee awarded may be made a lien upon the benefits due under an award and the adjudication officer shall fix, in the award approving the fee, such lien and the manner of payment of the fee. Any representative who is not an attorney may be awarded a fee for services under this subpart, except that no lien may be imposed with respect to such representative's fee.

Comments received: (a) A number of comments urge the Department to impose a lien on compensation with respect to the fees of representatives who are not attorneys. (b) One comment requests clarification of this provision with respect to a fee charged by an attorney representing a coal operator or insurance carrier.

Discussion and changes: (a) Section 28(c) of the Longshoremen's Act provides that in any case in which the obligation to pay an attorney's fee is on the claimant, a lien on compensation payable may be imposed in favor of the attorney. The Department does not have the authority to extend by regulation the statutory lien, provided for attorneys only, to representatives who are not attorneys.

(b) This section does not govern the payment of an operator's or carrier's attorney's fee. A correcting change is made.

§ 725.366 Fees for representatives.

(a) A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed. The application shall be filed and served upon the claimant and all other parties within the time limits allowed by the deputy commissioner, administrative law judge, or appropriate appellate tribunal. The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of a representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

(b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested. No fee approved shall include payment for time spent in preparation of a fee application. No fee shall be approved for work done on claims filed between December 30, 1969, and June 30, 1973,

under part B of title IV of the Act, except for services rendered on behalf of the claimant in regard to the review of the claim under section 435 of the Act and part 727 of this subchapter.

(c) In awarding a fee, the appropriate adjudication officer shall consider, and shall add to the fee, the amount of reasonable and unreimbursed expenses incurred in establishing the claimant's case. Reimbursement for travel expenses incurred by an attorney shall be determined in accordance with the provisions of § 725.459(a). No reimbursement shall be permitted for expenses incurred in obtaining medical or other evidence which has previously been submitted to the Office in connection with the claim.

(d) Upon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued. Any party may request reconsideration of a fee awarded by the adjudication officer. A revised or modified fee award may then be issued, if appropriate.

(e) Each request for reconsideration or review of a fee award shall be in writing and shall contain supporting statements or information pertinent to any increase or decrease requested. If a fee awarded by a deputy commissioner is disputed, such award shall be appealable directly to the Benefits Review Board. In such a fee dispute case, the record before the Board shall consist of the order of the deputy commissioner awarding or denying the fee, the application for a fee, any written statement in opposition to the fee and the documentary evidence contained in the file which verifies or refutes any item claimed in the fee application.

Comments received: (a) A few comments urge the Department to reinstate the prohibition contained in the earlier rules, to the effect that no representative would be awarded a fee for time spent preparing a fee petition or pursuing a fee awarded. (b) A number of comments object to the prohibition against awarding a fee for work done between December 30, 1969 and June 30, 1973. (c) A few comments urge the deletion of the prohibition against the reimbursement of a representative for expenses incurred in obtaining evidence already submitted in connection with the claim.

Discussion and changes: (a) The Department agrees that no reimbursement should be permitted for time spent by a representative in the preparation of a fee application. This expense is ordinarily included as a part of a representative's hourly charge for services rendered, together with clerical time and overhead expenses, and special reimbursement for it would be duplicative. A change is made to reflect this view. If a representative is required to pursue a fee award in court, the court will determine whether fees can be properly awarded.

(b) Fees may be awarded by a Department of Labor claims adjudicator only for work done before such adjudicator. This view is supported by the Act's requirement that no benefits are payable under section 435, part C of the Act "for any period prior to January 1, 1974." No payments of any kind are authorized under the Act by either the fund or an operator for any period prior to January 1, 1974. The Department does not feel that an exception for representatives fees is permitted.

(c) The Department believes that reimbursement should not be permitted for expenses incurred in obtaining evidence or information already submitted in connection with the claim. All information previously submitted in connection with a claim can, under this part, be retrieved upon request.

§ 725.367 Payment of a claimant's attorney's fee by responsible operator.

If an operator declines to pay any benefits on or before the 30th day after receiving written notice of its liability for a claim on the ground that there is no liability for benefits within the provisions of the Act, and the person seeking benefits shall thereafter have utilized the services of an attorney in the successful prosecution of the claim, there shall be awarded, in addition to the award of benefits, in an order, a reasonable attorney's fee against the operator or carrier in an amount approved by the deputy commissioner, administrative law judge, Board, or court as the case may be, which shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final.

Comments received: (a) A number of comments urge that this section be changed to require an operator or carrier to pay the fee of a representative who is not an attorney at law. (b) One comment suggests that the section should specify that fee awards may be made to legal aid societies. (c) A few comments urge deletion of the limiting term "on the ground that there is no liability for benefits." (d) Comments recommend that a time limit be placed upon payment of attorney's fees following a favorable decision. (e) Some comments argue that operators should be required to pay a fee for the work done by a claimant's attorney in receiving medical benefits, past due benefits and the like. (f) Some comments recommend clarification of the fund's liability for a claimant's attorney's fee.

Discussion and changes: (a) Section 28 of the Longshoremen's Act, which authorizes an award of fees in addition to compensation, provides that under specified circumstances, an employer may be required to pay the fee of an attorney at law. This provision authorizes an exception to the general rule that each party to an action must bear the cost of his or her own attorney's fees. While the Department recognizes the excellent service to claimants provided by nonattorney representatives, it does not believe that an award of fees to be paid by the operator to such individuals in addition to compensation is authorized by statute.

(b) The Department does not regard it appropriate to single out legal aid attorneys for special rules. The Act contains no distinction affecting legal aid attorneys, and, no such distinction is appropriate in these rules.

(c) The term "on the ground that there is no liability for benefits" is a statutory term which conditions an award of attorney's fees in addition to compensation and cannot be altered by the Department.

(d) Section 28 of the Longshoremen's Act provides that attorney's fees are payable after an award of benefits becomes final. No earlier liability is imposed. It is the Department's view that payment should be made promptly and a change is made to effect this result.

(e) An operator's liability for the work done by an attorney on behalf of a claimant is not limited only to the initial award of benefits. Neither this section nor the Longshoremen's Act provision authorizing an award of an attorney's fee contains any such limitation, and it is the Department's view that an award of an attorney's fee under this section might be appropriate in connection with an adjudication concerning medical benefits, nonpayment of monthly benefits, or like matters. No change is necessary.

(f) It is the position of the Department that the Black Lung Disability Trust Fund is not authorized under any circumstances to pay a claimant's attorney's fee in addition to compensation. There is no statutory authorization for such expenses in determining the amount of the tax necessary to keep the Fund solvent. The obligations of the fund are carefully set forth in the act and legislative history, and no mention of a claimant's attorney's fees is made. In the absence of specific statutory authority, a claimant's attorney's fees cannot and will not be paid by the fund (see also 28 U.S.C. 2412).

§ 725.401 Claims development—General.

After a claim has been received by the deputy commissioner, the deputy commissioner shall take such action as is necessary to develop, process, and make determinations with respect to the claim as provided in this subpart.

Comments received: None.

§ 725.402 Approved State workers' compensation law.

If a deputy commissioner determines that any claim filed under this part is one subject to adjudication under a workers' compensation law approved under part 722 of this subchapter, he or she shall advise the claimant of this determination and of the Act's requirement that the claim must be filed under the applicable State workers' compensation law. The deputy commissioner shall then prepare a proposed decision and order dismissing the claim for lack of jurisdiction pursuant to § 725.418 and proceed as appropriate.

Comments received: None.

§ 725.403 Requirement to file under State workers' compensation law—Section 415 claims.

(a) No benefits shall be payable to or on behalf of a claimant who has filed a claim under section 415 of part B of title IV of the Act, for any period of

eligibility occurring between July 1, and December 31, 1973, unless the claimant has filed and diligently pursued a claim for benefits under an applicable State workers' compensation law. A State workers' compensation claim need not be filed where filing would be futile. It shall be determined that the filing of a State claim would be futile when:

(1) The period within which the claim may be filed under such law has expired; or

(2) Pneumoconiosis as defined in part 718 of this subchapter is not compensable under such law; or

(3) The maximum amount of compensation or the maximum number of compensation payments allowable under such law has already been paid; or

(4) The claimant does not meet one or more conditions of eligibility for workers' compensation payments under applicable State law; or

(5) The claimant otherwise establishes to the satisfaction of the Office that the filing of a claim under State law would be futile.

(b) Where the Office determines that a claimant is required to file a State claim under this section, the Office shall so notify the claimant. Such notice shall instruct the claimant to file a State claim within 30 days of such notice. If no such State claim is filed within the 30-day period, no benefits shall be payable under this part to the claimant for any period between July 1, and December 31, 1973.

(c) The failure of a claimant to comply with paragraph (a) of this section shall not absolve any operator of its liability for the payment of benefits to a claimant for periods of eligibility occurring on or after January 1, 1974.

(d) The deputy commissioner may determine that a claimant is ineligible for benefits under section 415 of part B of title IV of the Act without requiring the claimant to file a claim under a State workers' compensation law.

Comments received: (a) A few comments recommend deletion of this section in view of a section 435 claimant's inability to obtain benefits for the July 1-December 31, 1973 period. (b) One comment argues that an operator should be allowed the benefit of this section.

Discussion and changes: (a) Although a claimant whose claim is reviewed and approved under section 435 of the act is unaffected by this section (20 CFR § 727.303), there are some claims with respect to which benefits for the July 1-December 31, 1973 period were awarded prior to the enactment of the Black Lung Benefits Reform Act of 1977 (i.e., March 1, 1978). The State filing requirement remains applicable to those claims, as may be appropriate.

(b) This section precludes an operator from asserting the State filing requirement as a defense to liability, in recognition of the fact that this filing requirement was intended only to diminish the liability of the Federal treasury if an alternate source of black lung benefits was available under a State compensation law. There is no authorization in the act to allow an operator to adjust its liability for periods after January 1, 1974, on account of the operator's obligation to meet the requirements of a State law. An operator, in any event, is adequately protected by the act's offset provisions from the possibility of duplicate payments.

§ 725.404 Development of evidence—General.

(a) *Employment history.* Each claimant shall furnish the deputy commissioner with a complete and detailed history of the coal miner's employment and, upon request, supporting documentation.

(b) *Matters of record.* Where it is necessary to obtain proof of age, marriage or termination of marriage, death, family relationship, dependency (see subpart B of this part), or any other fact which may be proven as a matter of public record, the claimant shall furnish such proof to the deputy commissioner upon request.

(c) *Documentary evidence.* If a claimant is required to submit documents to the deputy commissioner, the claimant shall submit either the original, a certified copy or a clear readable copy thereof. The Deputy commissioner or administrative law judge may require the submission of an original document or certified copy thereof, if necessary.

(d) *Submission of insufficient evidence.* In the event a claimant submits insufficient evidence regarding any matter, the deputy commissioner shall inform the claimant of what further evidence is necessary and request that such evidence be submitted within a specified reasonable time which may, upon request, be extended for good cause.

Comments received: (a) Comments recommend that the Department not require the submission of original documents. (b) One comment recommends that the Department specify the evidence necessary to establish a claim.

Discussion and changes: (a) the Department agrees that original documents may not be necessary and conforming changes are made.

(b) The Department does not consider it appropriate to specify in these rules exactly what evidence is necessary for establishing an individual claim. No changes are made.

§ 725.405 Development of medical evidence; scheduling of medical examinations and tests.

(a) Upon receipt of a claim, the deputy commissioner shall ascertain whether the claim was filed by or on account of a miner as defined in § 725.202(a), and in the case of a claim filed on account of a deceased miner, whether the claim was filed by an eligible survivor of such miner as defined in subpart B of this part.

(b) In the case of a claim filed by or on behalf of a miner, the deputy commissioner shall, where necessary, schedule the claimant for a medical examination and testing under § 725.406.

(c) In the case of a claim filed by or on behalf of a survivor of a miner, the deputy commissioner shall obtain whatever medical evidence is necessary and available for the development and evaluation of the claim.

(d) The deputy commissioner shall, where appropriate, collect other evidence necessary to establish:

(1) The nature and duration of the miner's employment; and

(2) All other matters relevant to the determination of the claim.

(e) If at any time during the processing of the claim by the deputy commissioner, the evidence establishes that the claimant is not entitled to benefits under the Act, the deputy commissioner may terminate evidentiary development of the claim and proceed as appropriate.

Comments received: One comment recommends that the Department specify guidelines for the resolution of conflicting medical evidence.

Discussion and changes: The resolution of conflicting medical evidence is solely within the discretion of the adjudicator. The adjudicator will weigh the evidence and consider the qualifications of the physician or other person submitting the evidence, and any other relevant information. Guidelines are not appropriate.

§ 725.406 Medical examinations and tests.

(a) Medical examinations and tests authorized by the deputy commissioner shall be conducted, if possible, in the vicinity of the miner's residence by physicians or in medical facilities selected from a list compiled by the Secretary, or by a physician or medical facility approved by the deputy commissioner at the miner's request.

(b) If any medical examination or test conducted under paragraph (a) of this section is not administered or reported in compliance with the provisions of part 718 of this subchapter, the deputy commissioner shall schedule the miner for further examination and testing where necessary and appropriate.

(c) The cost of any medical examination or test authorized under this section, including the cost of travel to and from the examination, shall be paid by the fund. No reimbursement for overnight accommodations shall be authorized unless the deputy commissioner determines that an adequate testing facility is unavailable within one day's round trip travel by automobile from the miner's residence. The fund shall be reimbursed for such payments by an operator, if any,

found liable for the payment of benefits to the claimant.

Comments received: Comments urge that this section specify a miner's right to be examined by a physician or facility selected by such miner. (b) A number of comments recommend that this section specify that payment will be made for travel and overnight accommodation. (c) One comment suggests that an operator should not be required to reimburse the fund for medical reports obtained on behalf of the claimant unless the report is in compliance with 20 CFR Part 718 and is admitted into evidence in the claim.

Discussion and changes: (a) A miner has a right to choose any physician or medical facility to conduct a medical examination. However, medical examinations and tests authorized and paid for by the deputy commissioner shall be conducted by a physician or facility selected by the deputy commissioner, or approved by the deputy commissioner. The deputy commissioner will ordinarily approve any physician or facility selected by the miner. Prior approval is necessary to ensure that good quality evidence is obtained.

(b) Payment will be made for travel which is necessary in connection with approved medical examination or testing. However, payment for overnight accommodations will be authorized only if an adequate medical testing facility is unavailable within one day's round trip travel from the miner's residence. A change is made to reflect this decision.

(c) Under Department of Labor practice, no operator is required to reimburse the fund for poor quality evidence. The Department does not authorize payment for such evidence and there is no reimbursement for an operator to make.

§ 725.407 Additional medical evidence.

(a) If, at any time after the completion of initial medical examinations and tests, unresolved medical questions remain, the deputy commissioner may cause the claimant to be examined by a physician selected by the deputy commissioner.

(b) Any miner dissatisfied with the results of the medical examinations or tests conducted under § 725.406 may obtain further medical examinations or tests and submit them to the deputy commissioner. Such further examinations or tests shall be reimbursable by the fund, or by a responsible coal operator where appropriate, if the claimant is finally adjudicated entitled to benefits and if such further examinations or tests were relevant to the determination of the claim.

(c) If additional medical evidence is obtained in accordance with paragraph (a) of this section, the deputy commissioner may order the physician selected to retest or reexamine the miner to do so without the presence or participation of any other physician who previously examined the miner, and without benefit of the conclusions of any other physician who has examined the miner.

Comments received: Comments request that reimbursement for overnight accommodation should be authorized.

Discussion and changes: See paragraph (b) of *Discussion and changes* following § 725.406.

§ 725.408 Refusal to submit to medical examinations or tests.

If an adjudication officer determines that a miner has unreasonably refused to submit to medical examinations or tests scheduled under §§ 725.406 or 725.407(a), all evidentiary development of the claim shall be suspended and the adjudication officer shall proceed to deny the claim by reason of abandonment (§ 725.409) or by dismissal (§ 725.465) as is appropriate.

Comments received: One comment suggests that a miner should be allowed to explain a refusal to submit to a medical examination or test.

Discussion and changes: No action will be taken with respect to a miner's refusal to submit to examinations or tests until the miner has been offered the opportunity to explain the reasons for the refusal. No change is necessary.

§ 725.409 Denial of a claim by reason of abandonment.

(a) A claim may be denied at any time by the deputy commissioner by reason of abandonment where the claimant fails:

(1) To undergo a required medical examination without good cause; or,

(2) To submit evidence sufficient to make a determination of the claim; or,

(3) To pursue the claim with reasonable diligence.

(b) If the deputy commissioner determines that a denial by reason of abandonment is appropriate, he or she shall notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. If there is no response to the notice within 30 days after such notice is sent, the claim shall be considered denied by reason of abandonment. If the claimant responds in a timely fashion, indicating a desire to pursue the claim, by requesting a hearing or indicating the intent to submit additional evidence, the deputy commissioner shall, if a hearing is requested, proceed in accordance with § 725.412 or allow a reasonable time of not less than 60 days for the claimant to take the specified remedial action. If the claimant completes the action requested within the time allowed, the claim shall be developed, processed and adjudicated as specified in this part. If the claimant does not fully comply with the action requested by the deputy commissioner, the deputy commissioner shall so notify the claimant. If the claimant does not request a hearing or fully comply with the action requested by the deputy commissioner within 30 days of such notification, the claim shall be considered denied by reason of abandonment, except that a new claim may be filed at any time and new evidence submitted where the requirements of § 725.310 are not met.

Comments received: None for which a response is required.

Discussion and changes: This section is changed to reflect the right of a previously denied claimant to file and pursue a new claim at any time.

ADJUDICATION BY THE DEPUTY COMMISSIONER

General comments received on this subpart: Many comments were received concerning the provisions relating to the adjudication of claims by the deputy commissioner. Sections 725.410–725.422 of the proposed rules were considered by some of the commentators to be difficult to understand and too complex for the unrepresented claimant. A number of comments criticize the range of alternatives available to the deputy commissioner in adjudicating claims. Almost all the comments received consider the time periods allowed for submission of evidence, or for taking specified action to be too short and burdensome for claimants and coal operators alike. Throughout the comments, the Department is urged to begin the payment of benefits at the earliest possible time, whether or not a coal operator has been identified and allowed to participate in the claim. The Department is also urged to immediately involve coal operators in a claim.

Discussion and changes: The Department has made some changes in the proposed rules in an effort to remove unnecessarily complex provisions. A particularly difficult problem arises in connection with the early identification and notification of a coal mine operator. When a claim is first filed with the Department, sufficient evidence to permit an identification of a possibly liable coal operator is almost never available. The majority of Department of Labor claimants were last employed in the mines some years before filing, and the task of verifying the identity of the last employer is usually a difficult one. While the 1977 Act imposes operator liability only if there was employment after January 1, 1970, the 1972 Act contained no employer liability cutoff date. The Department was, therefore, in the past required to conduct an extensive investigation before an operator could be identified.

Under the 1977 Act, in view of the January 1, 1970, operator liability cutoff date, the identification process should be substantially contracted and, with respect to new claims, the Department intends to identify and involve an operator at the earliest possible time. However, with respect to claims subject to review under Section 435, many obstacles to early operator involvement will remain. In many of those claims, the Department never completed the operator identification process due to the claimant's choice not to pursue the claim after being informed of an initial denial. In many of those cases, an informal approval will now be possible, in light of the new law, without the submission of any additional evidence. However, the Department must then complete the operator identification process. While the January 1, 1970, cutoff will greatly ease this task, it remains a task which must be completed with respect to may previously filed claims.

With respect to the time periods for the submission of evidence or response to notices etc., the Department has determined that reasonable response periods are necessary to expedite the processing of claims. All such periods are subject to enlargement for good cause; therefore, the rights of all parties are adequately protected. The time periods allowed for the submission of evidence are retained although the partial prohibition against the submission of new evidence to the administrative law judge, contained in § 725.456 is largely eliminated.

A more detailed discussion of particular comments and changes may be found in the "Comments" and "Discussion" sections following each of the provisions between §§ 725.410 and 725.422.

§ 725.410 Initial findings by the deputy commissioner.

(a) Based upon the evidence developed, the deputy commissioner may make an initial finding with respect to the claim.

(b) If the evidence supports an initial finding of eligibility, and it has been determined that a coal mine operator may be liable for the claim, the deputy commissioner shall proceed in accordance with § 725.412. If no operator can be identified, the deputy commissioner shall proceed in accordance with § 725.411.

(c) If the evidence submitted does not support an initial finding of eligibility, the deputy commissioner shall so notify the claimant in writing. This notification shall specify the reasons why the claim cannot be approved, the additional evidence necessary to establish entitlement, the right of the claimant to submit additional evidence, and the right to request a hearing. Within 60 days from the mailing of such notice, unless such period is extended by the deputy commissioner for good cause shown, the claimant may submit new evidence or request a hearing. If the claimant:

(1) Takes no action within the specified 60 day period, the claim shall be considered denied by reason of abandonment (see § 725.409).

(2) Submits new evidence within the specified 60 day period, the deputy commissioner shall reconsider the initial finding, taking into account the additional evidence submitted. If the new evidence supports a finding of entitlement the deputy commissioner shall proceed in accordance with paragraph (b) of this section. If the new evidence does not support a finding of entitlement, the deputy commissioner shall notify the claimant in writing of this fact and the reasons therefor, and that he or she may request a hearing within 60 days after receipt of such notice unless the period is extended by the deputy commissioner for good cause shown. If no hearing is requested, the claim shall be deemed denied by reason of abandonment (see § 725.409).

(d) Unless an earlier operator identification has been made, if a hearing is requested under paragraph (c) of this section, the deputy commissioner shall identify the coal mine operator, if any, which may be liable for the payment of benefits to the claimant and proceed in accordance with § 725.412. If no such operator can be identified, the deputy commissioner may schedule a conference (see § 725.416) or refer the claim to the Office of Administrative Law Judges for appropriate proceedings.

Comments received: (a) A number of comments suggest that the 60 day period following an initial finding of ineligibility within which to submit additional evidence or request a hearing and the 30 day period for requesting a hearing after a second initial finding of ineligibility, should be enlarged to 90 days. (b) One comment argues that this section is too complicated. (c) One comment requests that the deputy commissioner should be required to send the claimant a detailed written analysis of why he or she was considered ineligible, and a detailed list of the additional evidence necessary for the claim to be approved.

Discussion and changes: (a) The 60 day period allowed for a response to an initial denial letter, which period can be extended for good cause shown, is an adequate response period. The 30 day period contained in the proposed rules within which a hearing may be requested after a second initial denial is enlarged to 60 days, and may be further enlarged for good cause shown.

(b) The Department does not agree that this section is particularly complex, after having reviewed it carefully to determine whether any extraneous or complicated language is used. The vast majority of claimants are able to explain why a particular action was or was not taken within a specified time period. Moreover, in the correspondence sent to the claimant, whether represented or not, the claimant is told what he or she may do next in pursuit of the claim.

(c) The Department does not believe that a more detailed analysis of each informal denial is necessary. In the letter which the Department will send to claimants in this posture, the element or elements of proof which the claimant failed to meet will be specified.

§ 725.411 Adjudication upon initial findings of eligibility and no operator responsibility.

Where the deputy commissioner has found that the claimant is eligible and that there is no operator responsible for the payment of benefits, the deputy commissioner shall issue a proposed decision and order including findings of fact and conclusions of law as required by § 725.418 and authorize the payment of benefits. The claimant shall have 30 days after the date of issuance of the proposed decision and order within which to reject any or all of its terms. If the claimant does not reject the proposed decision and order, either in whole or in part, within this 30-day period, it will become final and effective. If for any reason the claimant rejects a proposed decision and order, the deputy commissioner may take such action as is appropriate including adjustment of the benefits to the level authorized by the uncontested portion of the proposed decision and order, if appropriate.

Comments received: (a) One comment argues that the trustees of the Fund should be allowed to contest a determination of entitlement made by the Department. (b) A few comments urge that this section specify when the payment of benefits will begin after a proposed decision and order becomes final in an uncontested case.

Discussion and changes: (a) Section 424(b) of the Act provides in part that "In a case where no operator responsibility is assigned pursuant to section 422 and 423, a determination by the Secretary [of Labor] that the fund is liable for the payment of benefits shall be final." It is incongruous to suggest that the Secretary could contest the Department's determination of eligibility and no such statutory authority exists.

(b) The Department agrees that this section should specify when the payment of benefits will begin in an uncontested approval. A change is made to accomplish this result.

§ 725.412 Identification and notification of responsible operator.

(a) At any time during the processing of a claim under this part, after sufficient evidence has been made available to the deputy commissioner, the deputy commissioner may identify a coal miner operator (see § 725.491) which may be liable for the payment of the claim in accordance with the criteria contained in subpart F of this part. Such identification shall be made as soon after the filing of the claim as the evidence obtained permits. If the claim is subject to review under Part 727 of this subchapter, the deputy commissioner may proceed to make initial findings (§ 725.410) with respect to a claim before identifying a potentially liable coal mine operator. In the case of a claim subject to review under Part 727 of the subchapter which is denied by reason of abandonment (see § 725.409), the deputy commissioner may decline to identify and notify an operator, unless a timely request for a hearing is made by the claimant.

(b) After the deputy commissioner identifies an operator which may be liable for payment of benefits, the deputy commissioner shall notify such operator in writing. Such notification shall include a copy of the claimant's claim form and a copy of all documentary evidence pertaining to the claim obtained by the deputy commissioner, if any, and the initial findings of the deputy commissioner, if any. All documents sent to an operator in accordance with this paragraph shall also be provided by the deputy commissioner to the claimant or his or her authorized representative.

(c) If within one year after the final adjudication of a claim, the adjudication officer determines that an operator which may be liable for the payment of benefits has not been notified under this section, such adjudication officer shall give notice of possible liability and an opportunity to respond to such operator. The adjudication officer shall then take such further action on the claim as may be appropriate. There shall be no time limit applicable to a later identification of an operator under this paragraph if the operator fraudulently concealed its identity as an employer of the miner.

(d) If, in any case, there is a dispute between two or more operators as to which may be liable for the payment of benefits to the claimant, all such operators shall be notified under this section and the issue of which operator is liable shall be determined by the appropriate adjudication officer.

Comments received: (a) Many comments urge the Department to identify and notify an operator as early in the process as is possible. (b) A number of comments recommend that the Department forward the material sent to an operator to the claimant as well.

Discussion and changes: (a) Changes are made in accordance with the discussion of *General Comments Received on this subpart* preceding § 725.410.

(b) The Department agrees that it would be useful to provide claimants with copies of the materials sent to an operator, and a change is made to reflect this view.

§ 725.413 Operator's response to notification.

(a) Within 30 days after receipt of notification issued under § 725.412, unless such period is extended by the deputy commissioner for good cause shown, or in the interest of justice, a notified operator shall indicate an intent to accept or contest liability. If notice is given to the operator after initial findings have been made, the operator shall indicate its agreement or disagreement with each such finding. If notice is given to the operator before initial findings have been made, the operator shall indicate agreement or disagreement with the operator's identification as a potentially liable coal mine operator. An operator's response to notification shall be in writing and shall be sent to the deputy commissioner, the claimant, and all other parties to the claim.

(b)(1) If the operator accepts liability for the claim after initial findings have been made, the deputy commissioner shall issue a proposed decision and order under § 725.418.

(2) If the operator contests its liability or any of the initial findings of the deputy commissioner, if any, or if the deputy commissioner has determined the claimant to be ineligible for benefits, the deputy commissioner shall proceed to adjudicate the claim in accordance with this subpart.

(3) If the operator fails to respond within the specified period, such operator shall be deemed to have accepted the initial findings of the deputy commissioner when made and shall not, except as provided in § 725.463, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim. In a case where an operator has failed to respond to notification, such failure shall be considered a waiver of such operator's right to contest the claim, unless the operator's failure to respond to notice is excused for good cause shown, and the deputy commissioner may proceed to issue a proposed decision and order pursuant to § 725.418, undertake further development, hold a conference, or refer the claim for a hearing.

(c) Any operator or carrier may in writing designate an office or person authorized to receive notice of a claim on behalf of such operator or carrier. All such notices to the operator or carrier shall thereafter be sent to the designated office or person.

Comments received: (a) Comments recommend that this section should be revised to require a notified operator to provide a copy of its response to the claimant. (b) One comment requests that an operator or carrier should be allowed to designate an office or person where notification should be sent. (c) One comment recommends that this section be revised to define the term "good cause." (d) Many comments support the proposition that an operator's failure to respond to notification should be considered a waiver of such operator's right to contest the claim.

Discussion and changes: (a) The Department agrees that an operator or carrier's response to notification should be sent to the claimant or claimant's representative.

(b) The Department agrees that an operator or carrier should be allowed to designate an office or person authorized to receive notice of a claim.

(c) The Department does not agree that a definition of "good cause" is either necessary or useful. The adjudicator must have sufficient flexibility to respond to all factual circumstances on a case-by-case basis.

(d) A change is made to further clarify the consequence of an operator's unexcused failure to respond to notice of a claim, in light of the changes made in § 725.456.

§ 725.414 Development of operator's evidence, claimant's rebuttal evidence.

(a) If an operator notified of its possible liability for a claim after the deputy commissioner has made initial findings (§ 725.410) with respect to the claim contests the claim, such operator shall be allowed a reasonable time, to be determined by the deputy commissioner from the date on which the notice of contest is sent, within which to submit to the deputy commissioner and exchange with all other parties all available evidence relevant to any contested issue in the claim. During this period, a notified operator may have the miner examined by a physician selected by such operator, except that no miner shall be required to travel more than 100 miles from his or her place of residence for the purpose of submitting to a medical examination requested by an operator, unless a trip of greater distance is authorized in writing by the deputy commissioner.

(b) If an operator is notified of its possible liability for a claim before the deputy commissioner has made initial findings with respect to the claim or if no initial findings are made, and such operator indicates its intent to contest the claim, such operator shall promptly undertake the development of its evidence, including any medical evidence which may be obtained, if the operator seeks to have the miner examined by a physician which it selects. Any evidence obtained by an operator shall be sent to the deputy commissioner and all other parties to the claim. On the basis of the operator's evidence and all other evidence submitted to the deputy commissioner, the deputy commissioner may make initial findings with respect to the claim or may take such other action as is appropriate. If the deputy commissioner makes an initial finding that the claimant is ineligible for benefits, the deputy commissioner shall proceed to consider the claim as provided in § 725.410(c). If the deputy commissioner makes an initial finding that the claimant is eligible for benefits and that the notified operator is liable for such benefits, the parties shall be so notified. Within 30 days from the date on which notice of the deputy commissioner's initial findings of eligibility and liability is sent to the parties, each party shall either accept or contest any or all of such initial findings and shall, except as provided in paragraph (d) of this section, submit any available evidence not previously submitted, to the deputy commissioner. The deputy commissioner shall then proceed to adjudicate the claim under § 725.415. The failure by an operator to respond to initial findings of eligibility made under this paragraph shall have the same consequences as an operator's failure to respond to notice of a claim (see § 725.413(b)(3)).

(c) The report of any medical examination or test conducted under this section, or any other evidence submitted, shall be submitted to the deputy commissioner and sent to the other parties to the claim within the applicable period set forth in this section, unless the deputy commissioner enlarges such period for good cause shown or in the interest of justice.

(d) Upon receipt of a medical report obtained by an operator under this section, a claimant shall, upon request,

be allowed a reasonable time, as determined by the deputy commissioner from the date on which the operator's report is received, to obtain additional evidence in support of the claim. Such evidence shall be obtained, submitted to the deputy commissioner, and exchanged with the other parties within the period allowed, unless the period is enlarged by the deputy commissioner for good cause shown.

(e) (1) Any documentary evidence obtained by a party during the time a claim is pending before a deputy commissioner, which is withheld from the deputy commissioner or any other party to the claim, shall not be admitted in any later proceedings held with respect to the claim in the absence of extraordinary circumstances, unless the admission of such evidence is requested by the Director or such other party.

(2) If an operator notified of a claim does not undertake a good faith effort to develop its evidence while the claim is pending before the deputy commissioner, the deputy commissioner shall proceed to adjudicate the claim in accordance with § 725.415. A notified operator which does not undertake a good faith effort to develop its evidence before the deputy commissioner shall be considered to have waived its right to either have the claimant examined by a physician of its choosing or have the claimant's evidence submitted for review by a physician of its choosing.

Comments received: (a) Numerous comments urge the removal of time limitations for the submission of either an operator's or claimant's evidence, and the sanctions imposed for the failure to submit evidence within these time periods. (b) One comment argues that an operator should be limited to obtaining a "cardio-pulmonary" examination of the claimant by a physician selected by the operator.

Discussion and changes: (a) One of the most significant reasons for the delays which have occurred in the adjudication of claims in the past has been the failure of claimants and operators alike to obtain and submit evidence in a timely fashion. In some instances evidence was obtained and withheld pending the transferral of a claim to the Office of Administrative Law Judges. The strategies employed in the presentation of evidence in many cases by both operator and claimant representatives, whether intentional or not, has in the past seriously impaired efforts made by the Department to expedite the processing and adjudication of claims, and has delayed the prompt payment of benefits to eligible claimants.

The comments received on both this section and § 725.456 were uniformly adverse. Operator comments complained that the time periods imposed for the submission of an operator's evidence were unrealistic, unduly restrictive, and were not similarly imposed on claimants and the Director. Moreover, many operator comments expressed the view that the rules excluding the presentation of evidence to an administrative law judge were not in keeping with the Administrative Procedure Act and denied operators an opportunity to present a meaningful defense to liability. A number of comments from claimant groups and representatives note that many claimants do not have the services of a representative until a claim is forwarded for a hearing, and may easily overlook or be unaware of evidence which might be obtained. In view of the universal dissatisfaction with the Department's attempt to speed the claims process by imposing time limits for the submission of evidence, the Department agrees that the specified limitations and sanctions imposed by the proposed rules should be modified.

Some limitations and sanctions must, however, be retained. Except in the case of certain Social Security Administration approvals processed under §§ 727.104–727.105 of this subchapter, no benefits shall be paid by the Fund or otherwise in a claim with respect to which individual operator liability may be determined, until the operator has had an opportunity to present its evidence and arguments to the deputy commissioner. No party should be permitted to obtain and withhold evidence until the hearing. This could impair the ability of any other party to review and respond to such evidence. Neither the act, nor the Administrative Procedure Act, to the extent that it is incorporated, prohibits the Department from designing rules which diminish the element of surprise from black lung claims procedures.

This section is revised to reflect this discussion.

(b) The request that the Department limit an operator to a "cardio-pulmonary" examination of the miner is rejected. In order to prove a claimant's eligibility for benefits, total disability due to pneumoconiosis arising out of coal mine employment must be established. Any medical findings relating to the miner's physical condition may be relevant to a claim determination.

§ 725.415 Action by the deputy commissioner after development of operator's evidence.

(a) At the end of the period permitted under § 725.414 for the submission of evidence, the deputy commissioner shall review the claim on the basis of all evidence submitted.

(b) After review of all evidence submitted, the deputy commissioner may schedule a conference in accordance with § 725.416, issue a proposed decision and order in accordance with § 725.418, forward the claim to the Office of Administrative Law Judges in accordance with § 725.421, or take such other action as the deputy commissioner considers appropriate.

Comments received: A few comments urge the Department to indicate with greater specificity what happens to a claim after the development of an operator's evidence.

Discussion and changes: After the development of a claimant's and operator's evidence is completed, any number of courses of action may be pursued depending upon the facts proved by the evidence and willingness of an operator to accept liability. Moreover, if a claim is to be sent for a hearing, the deputy commissioner must have the flexibility to attempt to narrow the issues, request that the parties fill gaps in the evidence, or if none of these actions would be useful, send the claim directly for a hearing.

§ 725.416 Conferences.

(a) At the conclusion of the period permitted by § 725.414 for the submission of evidence, the deputy commissioner may conduct an informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim. The conference proceedings shall not be stenographically reported and sworn testimony shall not be taken.

(b) The deputy commissioner shall notify the parties of a definite time and place for the conference and may in his or her discretion, or on the motion of any party, cancel or reschedule a conference.

(c) Any representative of an operator, of an operator's insurance carrier, or of a claimant must have sufficient authority to stipulate facts or issues or agree to a final dispositon of the claim.

(d) Procedures to be followed at a conference shall be within the discretion of the deputy commissioner. In the case of a conference involving an unrepresented claimant the deputy commissioner shall fully inform the claimant of the consequences of any agreement the claimant is asked to sign. If it is apparent that the unrepresented claimant does not understand the nature or effect of the proceedings, the deputy commissioner shall not permit the execution of any stipulation or agreement in the claim unless it is clear that the best interests of the claimant are served thereby.

Comments received: (a) A number of comments urge the Department to do away with conferences altogether, or to permit any party to waive a conference. (b) One comment recommends that operators should not be allowed to use a conference for discovery purposes. (c) Some comments suggest that the use of the term "settlement" is improper, and that a claimant's representative should also be requird to have sufficient authority to agree on matters discussed at the conference. Concern is also expressed over an unrepresented claimant's ability to stipulate to facts or issues.

Discussion and changes: (a) The conference is an informal proceeding at which the parties are afforded an opportunity to discuss the evidence and issues and crystalize their positions. Conferences are an integral part of the claims process. Although they are not in themselves adjudicatory, they greatly aid in narrowing issues, eliminating surprise, and in some instances dispensing with the need for formal proceedings. Contrary to some of the comments, in most instances conferences expedite rather than delay the final desposition of claims by achieving the objectives outlined. Moreover, the Department does not agree that a party should be able to waive a conference. Because of his or her experience in dealing with issues and parties, the deputy commis-

sioner is in the best position to determine when a conference would be useful.

(b) While conferences are not intended to provide a discovery forum, it has been the Department's experience that new information coming to light in conferences is often very useful to all parties. The conference is also, in most cases, the only opportunity the parties have to discuss the case before a formal hearing. The Department does not think it appropriate to foreclose the use of the conference as a discovery forum.

(c) The Department agrees that the term "settlement" is inappropriate and a change has been made. However, the Department does not share the view that an unrepresented claimant would be unable to participate intelligently at a conference. Before allowing an unrepresented claimant to stipulate to any matter, it is the responsibility of the deputy commissioner to fully inform the claimant concerning the actions taken, and a change is accordingly made.

§725.417 Action at the conclusion of conference.

(a) At the conclusion of a conference, the deputy commissioner shall prepare a stipulation of contested and uncontested issues which shall be signed by the parties and the deputy commissioner. If a hearing is conducted with respect to the claim, this stipulation shall be submitted to the Office of Administrative Law Judges and placed in claim record.

(b) In any case, where appropriate, the deputy commissioner may permit a reasonable time for the submission of additional evidence following a conference.

(c) Within 20 days after the termination of all conference proceedings, the deputy commissioner shall prepare and send to the parties a memorandum of conference, on a form prescribed by the Office, summarizing the conference and including the following:

(1) Date, time and place of conference;

(2) Names, addresses, telephone numbers, and status (i.e., claimant, attorney, operator, carrier's representative, etc.);

(3) Issues discussed at conference;

(4) Additional material presented (i.e., medical reports, employment reports, marriage certificates, birth certificates, etc.);

(5) Issues resolved at conference; and

(6) Deputy commissioner's recommendation.

(d) Each party shall, in writing, either accept or reject, in whole or in part, the deputy commissioner's recommendation, stating the reasons for such rejection. If no reply is received within 30 days from the date on which the recommendation was sent to parties, the recommendation shall be deemed accepted.

Comments received: (a) One comment questions the ability of an unrepresented claimant to effectively participate in a conference. (b) One comment recommends that additional time be given for response to the memorandum of conference.

Discussion and changes: (a) Many claimants are unrepresented. It would not be useful or appropriate to preclude the unrepresented claimant who is fully able to represent himself or herself from doing so. The changes made in § 725.416 serve to adequately protect the claimant in this regard. We do not agree that a stipulation signed by an unrepresented claimant should be easily discarded.

(b) Additional response time is provided.

§725.418 Proposed decision and order.

(a) A proposed decision and order is a document, issued by the deputy commissioner 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 deputy commissioner. 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 deputy commissioner in any claim and at any time during the adjudication of a claim if:

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

(2) The deputy commissioner determines that its issuance will expedite the adjudication of the claim.

(b) A proposed decision and order shall contain findings of fact and conclusions of law and an appropriate order shall be served on all parties to the claim.

Comments received: None for which a response is required.

Discussion and changes: Clarifying changes are made in this section.

§ 725.419 Response to proposed decision and order.

(a) Within 30 days after the date of issuance of a proposed decision and order, any party may, in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the deputy commissioner shall refer the claim to the Office of Administrative Law Judges (see § 726.421).

(b) Any response made by a party to a proposed decision and order shall specify the findings and conclusions with which the responding party disagrees, and shall be served on the deputy commissioner and all other parties to the claim.

(c) If a timely request for revision of a proposed decision and order is made, the deputy commissioner may amend the proposed decision and order, as circumstances require, and serve the revised proposed decision and order on all parties or take such other action as is appropriate. If a revised proposed decision and order is issued, each party to the claim shall have 30 days from the date of issuance of that revised proposed decision and order within which to request a hearing.

(d) If no response to a proposed decision and order is sent to the deputy commissioner within the period described in paragraph (a) of this section, or if no response to a revised proposed decision and order is sent to the deputy commissioner within the period described in paragraph (c) of this section, the proposed decision and order shall become a final decision and order, which is effective upon the expiration of the applicable 30-day period. Once a proposed decision and order or revised proposed decision and order becomes final and effective, all rights to further proceedings with respect to the claim shall be considered waived, except as provided in § 725.310.

Comments received: (a) Some comments consider this section to be too complex and confusing. The number of alternatives is also criticized. (b) One comment urges the Department to run the 30-day response period from date of receipt of a proposed decision and order.

Discussion and changes: (a) The proposed decision and order is intended to serve as the document which concludes the adjudication of an uncontested approved case. If it accurately reflects the expectations of the parties, the procedure is very simple. The order becomes final and benefits are paid. If, however, there is a remaining dispute, over dependency or attorneys fees for example, it should not be necessary to force the claim into formal proceedings. A further effort to gain an informal final resolution of the case is appropriate. The additional steps in this section relate primarily to the claim where only a few minor contested issues remain. Alternative approaches to resolving these minor disputes are necessary. However, some clarifying language changes are made.

(b) Section 725.419 prescribes the date of mailing plus 7 days as the date which begins the running of a time period. If date of receipt is not presumed by this method, the Department would have no way of knowing, without further inquiry, whether a time period had run. The Department considers the 7-day mailing period fair and appropriate.

§ 725.420 Initial determinations.

(a) Section 424(a)(1)(A)(i) of the Act provides that the Black Lung Disability Trust Fund shall begin the payment of benefits on behalf of an operator in any case in which the operator liable for such payments "has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary * * *."

(b) Except as provided in § 725.105 of this subpart, after the deputy commissioner has determined that a claimant is eligible for benefits, on the basis of all evidence submitted by a claimant and operator, and has determined that a hearing will be necessary to resolve the claim, the deputy commissioner

shall in writing so inform the parties and direct the operator to begin the payment of benefits to the claimant in accordance with § 725.522. The date on which this writing is sent to the parties shall be considered the date of initial determination of the claim.

(c) If a notified operator refuses to commence payment of a claim within 30 days from the date on which an initial determination is made under this section, benefits shall be paid by the fund to the claimant in accordance with § 725.522, and the operator shall be liable to the fund, if such operator is determined liable for the claim, for all benefits paid by the fund on behalf of such operator, and, in addition, such penalties and interest as are appropriate.

Comments received: (a) Many comments criticize this section on the grounds that it is confusing, and can serve only to delay the payment of benefits to an eligible claimant. (b) a few comments argue that the administrative law judge should not be made aware of the initial determination, as this awareness might affect the administrative law judge's impartiality.

Discussion and changes: (a) The initial determination is a device to begin the payment of benefits to claimants who are probably eligible without making the claimant wait for the conclusion of lengthy formal adjudication procedures. In order to achieve this objective, section 424(a)(1)(A)(i) of the Act requires the payment of benefits by the fund in a claim where an operator has refused to begin payments within 30 days "after the date of an initial determination of eligibility by the Secretary" (see also section 435(a)(2)(A) of the Act). "Initial determination" was not a term used in the Department's rules issued under the 1972 Act, nor is the term elsewhere defined by Congress. Accordingly, because of the statutory change, the point in time when an initial determination is made must be fixed. It would not be appropriate to fix the time of an initial determination until all evidence submitted during the informal stage of proceedings is considered, and a decision on the basis of this evidence is made.

While the Department continues in its belief that the procedures specified in the proposed rules are consistent with the law and the Secretary's obligations as a trustee of the fund, it is clear from the public comments that the section was too confusing, and it is simplified in this document.

(b) The Department does not agree that the initial determination should not be communicated to the administrative law judge. The initial determination is the only document which is readily available to support a finding that an operator is liable to reimburse the fund for payments made as a result of such operator's refusal to pay an approved claim at the end of informal proceedings. As such, the inclusion of the initial determination in the record is wholly appropriate. The initial determination does not analyze the merits of the claim or indicate the evidence relied upon by the deputy commissioner in reaching a decision, and consideration of the findings of the deputy commissioner, even if they were known, is precluded (§ 725.455).

§ 725.421 Referral of a claim to the Office of Administrative Law Judges.

(a) In any claim for which a formal hearing is requested or ordered, and with respect to which the deputy commissioner has completed development and adjudication without having resolved all contested issues in the claim, the deputy commissioner shall refer the claim to the Office of Administrative Law Judges for a hearing. If the deputy commissioner with jurisdiction over the claim is located at any place outside Washington, D.C., such deputy commissioner shall forward a claim with respect to which a hearing is required by this part to the DCMWC in Washington, D.C., which shall refer the claim to the Office of Administrative Law Judges for appropriate proceedings.

(b) In any case referred to the Office of Administrative Law Judges under this section, the deputy commissioner shall transmit to that office the following documents, which shall be placed in the record at the hearing subject to the objection of any party: (1) Copies of the claim form of forms; (2) any statement, document, or pleading submitted by a party to the claim; (3) a copy of the notification to an operator of its possible liability for the claim; (4) all evidence submitted to the deputy commissioner under this part; (5) any written stipulation of law or fact or stipulation of contested and uncontested issues entered into by the parties; (6) any pertinent forms submitted to the deputy commissioner; (7) the statement by the deputy commissioner of contested and uncontested issues in the claim; and (8) the deputy commissioner's initial determination of eligibility or other documents necessary to establish the right of the fund to reimbursement, if appropriate. Copies of the transmittal notice shall also be sent to all parties to the claim.

(c) A party may at any time request and obtain from the deputy commissioner copies of documents transmitted to the Office of Administrative Law Judges under paragraph (b) of this section. If the party has previously been provided with such documents, additional copies may be sent to the party upon the payment of a copying fee to be determined by the deputy commissioner.

Comments received: (a) A number of comments oppose the automatic inclusion in the hearing record of documents previously submitted to the deputy commissioner. (b) In particular, there is one objection to the transmittal of the initial determination.

Discussion and changes: (a) It is the opinion of the Department that the transmittal of evidentiary material already submitted to the deputy commissioner to the administrative law judge for inclusion in the record will both expedite the hearing and eliminate the need for additional unnecessary preparation by the parties. It will also reduce the possibility that relevant evidence will be omitted from the record or overlooked, and should be of significant assistance to unrepresented claimants and all other parties alike.

Hearsay rules and similar rules which might be used to exclude evidence in a court proceeding are not applicable to the adjudication of a black lung claim (see § 725.455(b)), and are clearly inconsistent with the intent of the Act. It would be virtually impossible for a claimant to afford the cost of compliance with formal rules of evidence and the Department will not impose any such rules. If an operator or other party desires to challenge any other party's evidence, the rules provide ample opportunity to do so, and similarly, any objection to evidence transmitted shall be considered in the course of the proceedings (§ 725.455(b)).

(b) See paragraph (b) of the discussion and changes, following § 725.420. Conforming changes are made in this section. The automatic transmittal of the memorandum of conference is also omitted. This should not be construed to preclude the introduction into evidence of the memorandum of conference in appropriate cases.

§ 725.422 Legal assistance.

The Secretary or his or her designee may, upon request, provide a claimant with legal assistance in processing a claim under the Act. Such assistance may be made available to a claimant in the discretion of the Solicitor of Labor or his or her designee at any time prior to or during the time in which the claim is being adjudicated and shall be furnished without charge to the claimant. Representation of a claimant in adjudicatory proceedings shall not be provided by the Department of Labor unless it is determined by the Solicitor of Labor that such representation is in the best interests of the black lung benefits program. In no event shall representation be provided to a claimant in a claim with respect to which the claimant's interests are adverse to those of the Secretary of Labor or the fund.

Comments received: (a) One comment objects to the use of fund resources for the purpose of providing legal assistance to claimants, and challenges the legal authority for such representation. (b) One comment disagrees that the Solicitor should be allowed to determine when legal assistance will be provided, and urges the use of the legal assistance provision appearing in the 1973 rules.

Discussion and changes: (a) Section 39(c)(1) of the Longshoremen's Act authorizes the Secretary to provide legal assistance to claimants. This provision is unaffected by the obligation of the fund to pay for all administrative services provided by the Department in connection with the Black Lung Benefits program.

(b) This section is not more restrictive than the former legal assistance provision (20 CFR § 725.416 (1973)). Under both the old rule and this rule, legal information and assistance, but not representation, were routinely made available to claimants. Although not specified in the prior rule, the decision to commit resources to a claimant's case was always within the discretion of the

Solicitor, as the Solicitor is in the best position to authorize the allocation of Department of Labor legal staff resources. The language of the section is changed to conform the Department's legal assistance policy in the black lung area with that in the Longshoremen's Act area.

Subpart E—Hearings

§ 725.450 Right to a hearing.

Any party to a claim (see § 725.360) shall have a right to a hearing concerning any contested issue of fact or law unresolved by the deputy commissioner. There shall be no right to a hearing until the processing and adjudication of the claim by the deputy commissioner has been completed. There shall be no right to a hearing in a claim with respect to which a determination of the claim made by the deputy commissioner has become final and effective in accordance with this part.

Comments received: None for which a response is required.

§ 725.451 Request for hearing.

After the completion of proceedings before the deputy commissioner, or as is otherwise indicated in this part, any party may in writing request a hearing on any contested issue of fact or law. A deputy commissioner may on his or her own initiative refer a case for hearing. If a hearing is requested, or if a deputy commissioner determines that a hearing is necessary to the resolution of any issue, the claim shall be referred to the Chief Administrative Law Judge for a hearing under § 725.421.

Comments received: (a) One comment recommends that a claimant should be allowed to request a hearing by telephone. (b) One comment recommends that the deputy commissioner should be required to terminate the processing of a claim as soon as a hearing is requested, and immediately forward the claim for a hearing.

Discussion and changes: (a) In order to preserve the rights of all parties, a written request for a hearing is necessary.

(b) A party should not be allowed to proceed to a hearing before informal procedures are completed. It is not appropriate for a hearing to go forward until the issues are fully identified and most evidentiary development completed. These preliminary activities are within the purview of the deputy commissioner, and not the administrative law judge.

§ 725.452 Type of hearing; parties.

(a) A hearing held under this part shall be conducted by an administrative law judge designated by the Chief Administrative Law Judge. Except as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. 554 et seq.

(b) All parties to a claim shall be permitted to participate fully at a hearing held in connection with such claim.

(c) A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

Comments received: A number of comments recommend that summary judgment procedures should not be available in the case of an unrepresented claimant.

Discussion and changes: Summary judgment without an oral proceeding is appropriate only where there is no genuine issue of material fact to be resolved. In such a case, the oral proceeding can serve no useful purpose to either the represented or unrepresented claimant. A similar procedure was included in the prior rules and proved effective.

§ 725.453 Notice of hearing.

All parties shall be given at least 30 days written notice of the date and place of a hearing and the issues to be resolved at the hearing. Such notice shall be sent to each party or representative by certified mail.

Comments received: A number of comments argue that 10 days notice of hearing is too short a period to permit adequate preparation.

Discussion and changes: The Department agrees and the period is extended to 30 days.

§ 725.453A Time and place of hearing.

(a) The Chief Administrative Law Judge shall assign a definite time and place for a formal hearing, and shall, where possible, schedule the hearing to be held at a place within 75 miles of the claimant's residence unless an alternate location is requested by the claimant.

(b) If the claimant's residence is not in any State, the Chief Administrative Law Judge may, in his or her discretion, schedule the hearing in the country of the claimant's residence.

(c) The Chief Administrative Law Judge or the administrative law judge assigned the case may in his or her discretion direct that a hearing with respect to a claim shall begin at one location and then later be reconvened at another date and place.

Comments received: (a) A few comments recommend that the hearing should be held within 25 or 50 miles of the claimant's residence rather than 75, or that a claimant should be allowed to request a specific location for a hearing. (b) One comment recommends that a hearing should be conducted within a limited time after the claim is forwarded to the Office of Administrative Law Judges.

Discussion and changes: (a) Under most circumstances, hearings will be held much closer than 75 miles from the claimant's residence. In extraordinary circumstances, an administrative law judge will hold a hearing in a claimant's home, and this has been done in the past. However, in order to preserve flexibility in scheduling and to maximize the use of limited resources, an outside limit of 75 miles is considered necessary by the Department. Any claimant may request a specific location for a hearing, and that request will be honored if possible.

(b) In view of limited resources, the Department cannot require that a hearing be conducted within a specified time from the date the claim is forwarded for a hearing. Every effort will be made to conduct a hearing as soon as possible after the request for hearing is transmitted to the Office of Administrative Law Judges.

§ 725.454 Change of time and place for hearing; transfer of cases.

(a) The Chief Administrative Law Judge or administrative law judge assigned the case may change the time and place for a hearing, either on his or her own motion or for good cause shown by a party. The administrative law judge may adjourn or postpone the hearing, or reopen the hearing for the receipt of additional evidence, for good cause shown, at any time prior to the mailing to the parties of the decision in the case. Unless otherwise agreed, at least 10 days notice shall be given to the parties of any change in the time or place of hearing.

(b) The Chief Administrative Law Judge may for good cause shown transfer a case from one administrative law judge to another.

Comments received: None.

§ 725.455 Hearing procedures; generally.

(a) *General.* The purpose of any hearing conducted under this subpart shall be to resolve contested issues of fact or law. Except as provided in § 725.421(b)(8), any findings or determinations made with respect to a claim by a deputy commissioner shall not be considered by the administrative law judge.

(b) *Evidence.* The administrative law judge shall at the hearing inquire fully into all matters at issue, and shall not be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart. The administrative law judge shall receive into evidence the testimony of the witnesses and parties, the evidence submitted to the Office of Administrative Law Judges by the deputy commissioner under § 725.421, and such additional evidence as may be submitted in accordance with the provisions of this subpart. The administrative law judge may entertain the objections of any party to the evidence submitted under this section.

(c) *Procedure.* The conduct of the hearing and the order in which allegations and evidence shall be presented

shall be within the discretion of the administrative law judge and shall afford the parties an opportunity for a fair hearing.

Comments received: (a) A few comments suggest the development of separate rules to be applied in the case of an unrepresented claimant. (b) One comment recommends that hearings should not be de novo.

Discussion and changes: (a) Separate rules for an unrepresented claimant are neither necessary nor justified. The administrative law judge has ample authority to protect the rights of the unrepresented claimant and is required to do so.

(b) The Administrative Procedure Act, as incorporated, requires de novo hearings.

§ 725.456 Introduction of documentary evidence.

(a) All documents transmitted to the Office of Administrative Law Judges under § 725.421 shall be placed into evidence by the administrative law judge as exhibits of the Director, subject to objection by any party.

(b)(1) Any other documentary material, including medical reports, which was not submitted to the deputy commissioner, may be received in evidence subject to the objection of any party, if such evidence is sent to all other parties within 20 days before a hearing is held in connection with the claim.

(2) Documentary evidence, which is not exchanged with the parties in accordance with this paragraph, may be admitted at the hearing with the written consent of the parties or on the record at the hearing, or upon a showing of good cause why such evidence was not exchanged in accordance with this paragraph. If documentary evidence is not exchanged in accordance with paragraph (b)(1) of this section and the parties do not waive the 20-day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the deputy commissioner for consideration of such evidence.

(3) A medical report which is not made available to the parties in accordance with paragraph (b)(1) of this section shall not be admitted into evidence in any case unless the hearing record is kept open for at least 30 days after the hearing to permit the parties to take such action as each considers appropriate in response to such evidence. If, in the opinion of the administrative law judge, evidence is withheld from the parties for the purpose of delaying the adjudication of the claim, the administrative law judge may exclude such evidence from the hearing record and close the record at the conclusion of the hearing.

(4) Notwithstanding any other provision of this paragraph, documentary evidence other than medical reports which is presented or discovered in connection with the testimony of a witness at the hearing may be admitted into the hearing record, subject to the objection of any party.

(c) All medical records and reports submitted by any party shall be considered by the administrative law judge in accordance with the quality standards contained in part 718 of this subchapter as amended from time to time.

(d) Documentary evidence which is obtained by any party during the time a claim is pending before the deputy commissioner, and which is withheld by such party until the claim is forwarded to the Office of Administrative Law Judges shall, notwithstanding paragraph (b) of this section, not be admitted into the hearing record in the absence of extraordinary circumstances, unless such admission is requested by any other party to the claim (see § 725.414(e)).

(e) If, during the course of a hearing, it is determined by the administrative law judge that the documentary evidence submitted in accordance with this section is incomplete as to any issue which must be adjudicated, the administrative law judge may, in his or her discretion, remand the claim to the deputy commissioner with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

Comments received: (a) Many objections to this section have been received. In sum, the commentors did not think it fair or appropriate to limit the right of any party to submit evidence to the administrative law judge if it was not previously submitted to the deputy commissioner. A few comments recommend various alternatives, including a requirement that evidence be exchanged 20 days or more prior to a hearing. (b) Some comments object to the requirement limiting the admissibility of medical reports without first submitting them for quality review. (c) Some comments object to the privilege which protects the deputy commissioner's work product.

Discussion and changes: (a) As indicated in paragraph (b) of the *Discussion and changes* following § 725.420, in designing the proposed procedures, the Department intended to expedite the claims process, eliminate surprise, and require the parties to undertake a timely development of their positions. The Department has been much criticized for delays in the claims process, and it was hoped that the proposed procedures would help to eliminate some of this delay. The proposed procedures were not intended to exclude any evidence, but were designed to impose severe consequences for a party who simply did nothing until the claim was set for a hearing. However, the Department recognizes that many claimants do not obtain representation until shortly before a hearing. Once representation is secured, new evidence is often obtained. The Department does not think it appropriate to place a previously unrepresented claimant at a disadvantage, and accordingly, this section has been significantly revised.

The revision requires each party to obtain and exchange evidence within 20 days before the hearing. Evidence which was withheld may still be excluded.

(b) The Department is required by the Act to issue and enforce quality standards to be applied to all medical evidence collected in connection with a claim. This responsibility does not diminish when a claim comes before an administrative law judge. Some changes are made, however, to make the quality control function consistent with revised procedures.

(c) Upon consideration of the comments, the Department has removed the privilege exempting the deputy commissioner's work product from discovery. This revision should not be construed as a general waiver of the Director's right to oppose the discovery of any document in his or her custody which is either privileged, irrelevant, or otherwise inappropriate for admission into evidence in any claim.

§ 725.457 Witnesses.

(a) Witnesses at the hearing shall testify under oath or affirmation. The administrative law judge and the parties may question witnesses with respect to any matters relevant and material to any contested issue. Any party who intends to present the testimony of an expert witness at a hearing shall so notify all other parties to the claim at least 10 days before the hearing. The failure to give notice of the appearance of an expert witness in accordance with this paragraph, unless notice is waived by all parties, shall preclude the presentation of testimony by such expert witness.

(b) No person shall be required to appear as a witness in any proceeding before an administrative law judge at a place more than 100 miles from his or her place of residence, unless the lawful mileage and witness fee for 1 day's attendance is paid in advance of the hearing date.

Comments received: Comments object to the prohibition against the appearance of Department of Labor personnel as witnesses.

Discussion and changes: (a) The Department agrees that the blanket prohibition against the appearance of Department of Labor personnel as witnesses is inappropriate, and it has been deleted from the rule. The change should not be construed as a waiver of the Department's right to oppose a request for Department of Labor personnel to appear as witnesses, on a case-by-case basis.

(b) A change is made to require prior notice of an appearance by an expert witness, consistent with the revision of § 725.456.

§ 725.458 Deposition; interrogatories.

The testimony of any witness or party may be taken by deposition or interrogatory according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the U.S. District Court for the District of Columbia if the case is pending in the District or

outside the United States), except that at least 30 days prior notice of any deposition shall be given to all parties unless such notice is waived. No post-hearing deposition or interrogatory shall be permitted unless authorized by the administrative law judge upon the motion of a party to the claim.

Comments received: (a) Comments recommend that the 30-day notice requirement should be subject to waiver. (b) One comment urges that the Department pay for depositions or interrogatories obtained by a claimant. (c) One comment recommends clarification of the post-hearing procedures for obtaining evidence by deposition or interrogatory.

Discussion and changes: (a) The Department agrees that the notice requirement should be subject to waiver and this change is made.

(b) The Department is not authorized, nor are any funds available, to pay for a deposition or interrogatory obtained by any party.

(c) The Department agrees that the post-hearing procedures for obtaining evidence by deposition or interrogatory need clarification and this clarification is reflected in this rule.

§ 725.459 Witness fees.

(a) A witness summoned to hearing before an administrative law judge, or whose deposition is taken, shall receive the same fees and mileage as witnesses in courts of the United States. Except as provided in paragraph (c) of this section, such fees shall be paid by the party summoning the witness.

(b) No claimant shall be required to bear the financial responsibility for producing an expert witness for cross-examination if such expert witness, regardless of his or her availability to attend the hearing, has previously submitted depositions, interrogatories, or medical reports. Such expert witness, if he or she is required to attend the hearing, respond to interrogatories or give a deposition, shall be summoned and shall have his or her expert witness fee paid by the party who summons such witness.

(c) If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, fees and mileage for necessary witnesses attending the hearing at the request of the claimant. Both the necessity for the witness and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator as attorney's fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

Comments received: One comment argues that this section denies an operator the right to cross-examine a claimant's expert witness and recommends that the section specify an operator's right to obtain the testimony of a claimant's expert witness by deposition or interrogatory.

Discussion and changes: This section does not deny an operator the right to cross-examine a claimant's expert witness either by deposition, interrogatory, or at the hearing. It provides only that the operator must pay for such evidence if it is sought. Few claimants will have the financial resources to pay the high cost of cross-examination of an expert witness. The operator may, of course, have the claimant examined by a physician which it selects, and have the claimant's evidence reviewed by a physician which it selects.

§ 725.459A Oral argument and written allegations.

The parties, upon request, may be allowed a reasonable time for the presentation of oral argument at the hearing. Briefs or other written statements or allegations as to facts or law may be filed by any party with the permission of the administrative law judge. Copies of any brief or other written statement shall be filed with the administrative law judge and served on all parties by the submitting party.

Comments received: None for which a response is required.

§ 725.460 Consolidated hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

Comments received: None for which a response is required.

§ 725.461 Waiver of right to appear and present evidence.

(a) If all parties waive their right to appear before the administrative law judge, it shall not be necessary for the administrative law judge to give notice of, or conduct, an oral hearing. A waiver of the right to appear shall be made in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. Such waiver may be withdrawn by a party for good cause shown at any time prior to the mailing of the decision in the claim. Even though all of the parties have filed a waiver of the right to appear, the administrative law judge may, nevertheless, after giving notice of the time and place, conduct a hearing if he or she believes that the personal appearance and testimony of the party or parties would assist in ascertaining the facts in issue in the claim. Where a waiver has been filed by all parties, and they do not appear before the administrative law judge personally or by representative, the administrative law judge shall make a record of the relevant documentary evidence submitted in accordance with this part and any further written stipulations of the parties. Such documents and stipulations shall be considered the evidence of record in the case and the decision shall be based upon such evidence.

(b) Except as provided in § 725.456(a), the unexcused failure of any party to attend a hearing shall constitute a waiver of such party's right to present evidence at the hearing, and may result in a dismissal of the claim (see § 725.465).

Comments received: One comment recommends that the Department explain the consequences of a waiver of appearance to claimants.

Discussion and changes: A claimant who fails to appear at a hearing is always given the opportunity to explain why he or she did not appear before the record is closed or the claim is dismissed (§ 725.465). The consequences of a claimant's failure to attend a hearing are generally described in the administrative law judge's order to show cause requesting an explanation why the claimant failed to appear at a hearing.

§ 725.462 Withdrawal of controversion of issues set for formal hearing; effect.

A party may, on the record, withdraw his or her controversion of any or all issues set for hearing. If a party withdraws his or her controversion of all issues, the administrative law judge shall remand the case to the deputy commissioner for the issuance of an appropriate order.

Comments received: None.

§ 725.463 Issues to be resolved at hearing; new issues.

(a) Except as otherwise provided in this section, the hearing shall be confined to those contested issues which have been identified by the deputy commissioner (see § 725.421) or any other issue raised in writing before the deputy commissioner.

(b) An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the deputy commissioner. Such new issue may be raised upon application of any party, or upon an administrative law judge's own motion, with notice to all parties, at any time after a claim has been transmitted by the deputy commissioner to the Office of Administrative Law Judges and prior to decision by an administrative law judge. If a new issue is raised, the administrative law judge may, in his or her discretion, either remand the case to the deputy commissioner with instructions for further proceedings,

hear and resolve the new issue, or refuse to consider such new issue.

(c) If a new issue is to be considered by the administrative law judge, a party may, upon request, be granted an appropriate continuance.

Comments received: A few comments recommend that the consideration of new issues should be allowed, especially in the case of an unrepresented claimant.

Discussion and changes: The Department does not agree that a party should be allowed to raise at a hearing, new issues which could have and should have been raised before the deputy commissioner. The right to raise new issues when a claim is forwarded for a hearing has been a cause of needless delay in the adjudication of some claims, and is inappropriate in light of the claims procedure established by these rules.

This section is not intended to prevent a new issue from being raised if new evidence brings the issue to light, nor should this section be construed to, in any way, impair any party's right or ability to address a previously raised issue or properly submitted evidence.

The deputy commissioner is responsible for ensuring that all issues in a claim are properly formulated, regardless of whether the claimant is represented. This approach has worked well in the past and there is no reason to believe that a special rule for unrepresented claimants is appropriate.

§ 725.464 Record of hearing.

All hearings shall be open to the public and shall be mechanically or stenographically reported. All evidence upon which the administrative law judge relies for decision shall be contained in the transcript of testimony, either directly or by appropriate reference. All medical reports, exhibits, and any other pertinent document or record, either in whole or in material part, introduced as evidence, shall be marked for identification and incorporated into the record.

Comments received: None for which a response is required.

§ 725.465 Dismissals for cause.

(a) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim:

(1) Upon the failure of the claimant or his or her representative to attend a hearing without good cause;

(2) Upon the failure of the claimant to comply with a lawful order of the administrative law judge; or

(3) Where there has been a prior final adjudication of the claim or defense to the claim under the provisions of this subchapter and no new evidence is submitted (except as provided in part 727 of this subchapter).

(b) A party who is not a proper party to the claim (see § 725.360) shall be dismissed by the administrative law judge.

(c) In any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

(d) No claim shall be dismissed in a case with respect to which payments prior to final adjudication have been made to the claimant in accordance with § 725.522, except upon the motion or written agreement of the Director.

Comments received: None.

Discussion and changes: A change is made to reflect the right of a previously denied claimant to file a new claim on the basis of new evidence. (*See Discussion and Changes* following § 725.310.)

§ 725.466 Order of dismissal.

(a) An order dismissing a claim shall be served on the parties in accordance with § 725.477. The dismissal of a claim shall have the same effect as a decision and order disposing of the claim on its merits, except as provided in paragraph (b) of this section. Such order shall advise the parties of their right to request review by the Benefits Review Board.

(b) Where the Chief Administrative Law Judge or the presiding administrative law judge issues a decision and order dismissing the claim after a show cause proceeding, the deputy commissioner shall terminate any payments being made to the claimant under § 725.522, and the order of dismissal shall, if appropriate, order the claimant to reimburse the Fund for all benefits paid to the claimant.

Comments received: One comment argues that a claimant should not be required to reimburse the Fund unless there is fault or fraud.

Discussion and changes: The Act in certain specified situations requires the payment of benefits to an eligible claimant prior to the final adjudication of the claim (Act, section 424(a)(1)). If an earlier determination of entitlement is reversed, payments made by the Fund prior to final adjudication were invalid and it is the responsibility of the Secretary as trustee of the Fund to recoup whatever has been paid.

§ 725.475 Termination of hearings.

Hearings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge.

Comments received: None.

§ 725.476 Issuance of decision and order.

Within 20 days after the official termination of the hearing (see § 725.475), the administrative law judge shall issue a decision and order with respect to the claim making an award to the claimant, rejecting the claim, or taking such other action as is appropriate.

Comments received: None.

§ 725.477 Form and contents of decision and order.

(a) Orders adjudicating claims for benefits shall be designated by the term "decision and order" or "supplemental decision and order" as appropriate, followed by a descriptive phrase designating the particular type of order, such as "award of benefits," "rejection of claim," "suspension of benefits," "modification of award."

(b) A decision and order shall contain a statement of the basis of the order, the names of the parties, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance. A decision and order shall be based upon the record made before the administrative law judge.

Comments received: None.

§ 725.478 Filing and service of decision and order.

On the date of issuance of a decision and order under § 725.477, the administrative law judge shall serve the decision and order on all parties to the claim by certified mail. On the same date, the original record of the claim shall be returned to the DCMWC in Washington, D.C., and the decision and order shall be considered to be filed in the office of the deputy commissioner. Immediately upon receipt of a decision and order awarding benefits, the deputy commissioner shall compute the amount of benefits due, including any interest or penalties, and the amount of reimbursement owed the Fund, if any, and so notify the parties. Any computation made by the deputy commissioner under this paragraph shall strictly observe the terms of the award made by the administrative judge.

Comments received: Comments support this procedure. One comment recommends clarification of the manner in which benefits due are computed.

Discussion and changes: The Department agrees that there should be a clarification of the manner in which benefits due are computed. The deputy commissioner is resonsible for computing the amount of benefits or reimbursement due in accordance with the administrative law judge's order. It would not be possible for the administrative law judge to compute exact amounts, especially in view of the complex computations which may be involved and the passage of time between the hearing and an award of benefits. This responsibility is properly placed with the deputy commissioner, who will utilize the resources of the Department

to see that the computation is properly made, and immediately notify the parties. A change is made to reflect this procedure.

§ 725.479 Finality of decisions and orders.

(a) A decision and order shall become effective when filed in the office of the deputy commissioner (see § 725.478), and unless proceedings for suspension or setting aside of such order are instituted within 30 days of such filing, the order shall become final at the expiration of the 30th day after such filing (see § 725.481).

(b) Any party may, within 30 days after the filing of a decision and order under § 725.478, request a reconsideration of such decision and order by the administrative law judge. The procedures to be followed in the reconsideration of a decision and order shall be determined by the administrative law judge.

(c) The time for appeal to the Benefits Review Board shall be suspended during the consideration of a request for reconsideration. After the administrative law judge has issued and filed a denial of the request for reconsideration, or a revised decision and order in accordance with this part, any dissatisfied party shall have 30 days within which to institute proceedings to set aside the new decision and order or affirmance of the original decision and order.

Comments received: None.

§ 725.480 Modification of decisions and orders.

(a) A party who is dissatisfied with a decision and order which has become final in accordance with § 725.479 may request a modification of the decision and order if the conditions set forth in § 725.310 are met.

Comments received: One comment requests clarification of the official authorized to modify a decision and order of an administrative law judge.

Discussion and changes: This section provides, in accordance with Section 22 of the Longshoremen's Act, that a modification of a decision and order may be sought as provided in § 725.310. Section 725.310 requires that a request for modification be first addressed to the deputy commissioner who is properly responsible for the investigation of the basis on which a modification is requested. Contested issues unresolved by the deputy commissioner may be referred to the Office of Administrative Law Judges for a hearing.

§ 725.481 Right to appeal to the Benefits Review Board.

Any party dissatisfied with a decision and order issued by an administrative law judge may, before the decision and order becomes final (see § 725.479), appeal the decision and order to the Benefits Review Board. A notice of appeal shall be filed with the Board. Proceedings before the Board shall be conducted in accordance with Part 802 of this title.

Comments received: One comment points out that appeals to the Board are, according to the Board rules, filed with the deputy commissioner.

Discussion and changes: The change contained in these rules reflects a change in Board procedures which will be set out in the forthcoming revision of the Board's rules. Until revised rules are published by the Board, appeals may be filed either with the Board or the deputy commissioner.

§ 725.482 Judicial review.

(a) Any person adversely affected or aggrieved by a final order of the Benefits Review Board may obtain a review of that order in the U.S. court of appeals for the circuit in which the injury occurred by filing in such court within 60 days following the issuance of such Board order a written petition praying that the order be modified or set aside. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless the court finds that irreparable injury would otherwise ensue to an operator or carrier.

(b) The Director, Office of Workers' Compensation Program, as designee of the Secretary of Labor responsible for the administration and enforcement of the Act, shall be considered the proper party to appear and present argument on behalf of the Secretary of Labor in all review proceedings conducted pursuant to this part and the Act, either as petitioner or respondent.

Comments received: None for which a response is required.

§ 725.483 Costs in proceedings brought without reasonable grounds.

If a United States court having jurisdiction of proceedings regarding any claim or final decision and order, determines that the proceedings have been instituted or continued before such court without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

Comments received: None.

Subpart F—Responsible Coal Mine Operators

General Provisions

§ 725.490 Statutory provisions and scope.

(a) One of the major purposes of the black lung benefits amendments of 1977 is to provide a more effective means of transferring the responsibility for the payment of benefits from the Federal government to the coal industry with respect to claims filed under this part. In furtherance of this goal, a Black Lung Disability Trust Fund financed by the coal industry was established by the Black Lung Benefits Revenue Act of 1977. The primary purpose of the Fund is to pay benefits with respect to all claims in which the last coal mine employment of the miner on whose account the claim was filed occurred before January 1, 1970. With respect to claims in which the miner's last coal mine employment occurred after January 1, 1970, individual coal mine operators will be liable for the payment of benefits. Where no such operator exists or the operator determined to be liable is in default in any case, the Fund shall pay the benefits due and seek reimbursement as is appropriate. In addition, the Black Lung Benefits Reform Act of 1977 amended certain provisions affecting the scope of coverage under the Act and describing the effects of particular corporate transactions on the liability of operators.

(b) The provisions of this subpart define the term "operator," prescribe the manner in which the identity of an operator which may be liable for the payment of benefits—referred to herein as a "responsible operator"—will be determined, and briefly describe the obligations of operators to secure the payment of benefits. (See also Part 726 of this subchapter.)

Comments received: See *Discussion and Changes* following §§ 725.491-725.493.

Discussion and changes: None.

§ 725.491 Operator defined.

(a) In accordance with Section 3(d) of the Act, an operator for purposes of this part is "any owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine." In accordance with Sections 402(d) and 422(b) of the Act, certain other employers, including those engaged in coal mine construction, maintenance, and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator for purpose of this part. It is Congress' intent that any employer of a miner as defined in § 725.202(a) shall, to the extent appropriate, be considered an operator for for the purposes of this part, and the provisions of this part shall be construed in accordance with this intent.

(b)(1) In determining which operator or other employer is the employer of a particular miner, primary consideration shall be given to the identity of the employer which is directly responsible for the supervision, operation and control of the mine or mines or other facilities where the miner was

employed. However, Congress has made it clear that such supervision or control may be directly or indirectly exercised. Therefore, in appropriate cases where, for example, the individual or business entity most directly connected with the mine site is not capable of assuming liability for the payment of benefits (§ 725.492(d)) or is no longer in business and such individual or business entity is a subsidiary of a parent company, a member of a joint venture, a partner in a partnership, or is substantially owned or controlled by another business entity, such parent entity or other member of a joint venture or partner or controlling business entity may be considered an operator for purposes of this part, regardless of the nature of its business activities.

(2) Where a coal mine is leased, and the lease empowers the lessor to make decisions with respect to the terms and conditions under which coal is to be extracted or prepared, such as, but not limited to, the manner of extraction or preparation or the amount of coal to be produced, the lessor may be considered an operator with respect to employees of the lessee. An individual land owner or others who lease coal lands or mineral rights, who have never been coal mine operators or are not in the regular business of leasing coal mines, shall not be considered a coal mine operator in accordance with the terms of this section. Where a lessor previously operated a coal mine, it may be considered an operator with respect to employees of any lessee of such mine, particularly where the leasing arrangement was executed or renewed after the effective date of this part and does not require the lessee to secure benefits provided by the Act.

(3) In any claim in which the liability of a lessor for claims arising out of employment with a lessee is brought into question, the lessee shall be considered primarily liable for the claim, and the liability of the lessor may be established only after it has been determined that the lessee is unable to provide for the payment of benefits to a successful claimant. In any case involving the liability of a lessor for a claim arising out of employment with a lessee, any determination of lessor liability shall be made on the basis of the facts present in the case in consideration of the terms and intent of the act and this part.

(4) A former coal mine operator which has become a lessor of coal miner shall be liable for approved claims arising out of coal mine employment with such lessor during the time the lessor was a coal mine operator, if such employment terminated on or after January 1, 1970, and the conditions for liability contained in § 725.492 are met.

(c) (1) An independent contractor which performs or performed services or engages or engaged in construction at a mine or preparation or transportation facility may be held liable for the payment of benefits under this part as a coal mine operator with respect to its employees who work or have worked in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction in any period during which such employees were exposed to coal dust during their employment with such contractor. Such contractor's status as an operator shall not be contingent upon the amount or percentage of its work or business related to activities in or around a mine, nor upon the number or percentage of its employees engaged in such activities.

(2) (i) Any individual who works or has worked as a sole proprietor, a partner in a partnership, a member of a family business or who is otherwise self-employed in or around a coal mine or coal preparation or transportation facility in the extraction, preparation, or transportation of coal or in coal mine construction during any period such individual was exposed to coal dust may be considered an operator under this part.

(ii) A self-employed operator, depending upon the facts of the case, may be considered an employee of any other operator, person, or business entity which substantially controls, supervises, or is financially responsible for the activities of the self-employed operator.

(iii) For the purposes of this part, a lessor of a coal mine which leases such mine to a self-employed operator shall be considered the employer of such self-employed operator and its employees if the lease or agreement is executed or renewed after the effective date of this part and such lease or agreement does not require the lessee to guarantee the payment of benefits which may be required under this part.

Comments received: (a) Coal mine construction employer comments: (1) Many comments were received from coal mine construction employers urging the Department to exempt such employers from the provisions of the Act, on the ground that coal mine construction workers are not exposed to coal dust in the course of their employment; (2) a number of construction employers argue that their employees should be required to provide "documented evidence" of exposure to coal dust in their construction employment as a precondition to holding a construction employer liable for benefits; (3) some comments recommend that a showing of conditions "substantially similar to those in an underground mine" should be required before a construction employer may be found liable for the payment of benefits.

(b) Coal mine lessor comments: Comments received from the lessors of coal mines express vigorous opposition to the provisions by which a lessor of coal mines may be considered a coal mine operator, or liable for the employees of a lessee operator. Some comments urge the absolute exclusion of owners of coal lands or mineral rights or any other person or entity that is not involved in the actual day-to-day supervision and control of mining or leased property. Comments also urge that the rules make clear that any liability which might be imposed on a lessor should be secondary to that of a lessee.

Discussion and changes: (a) Construction employer comments; (1) Section 2(d) of the amendments to the Act defines the term "miner" to include "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." Section 7(b) of amendments to the Act exempts construction employers from the insurance purchase requirements of the Act and penalties for noncompliance, but clearly sets forth the proposition that coal mine construction employers are otherwise liable for benefits awarded on account of pneumoconiosis arising out of coal mine construction employment (Act, section 422(b)). Moreover, section 3(d) of the Act (the Federal Mine Safety and Health Act of 1977) was amended to include in the definition of "operator," "any independent contractor performing services or construction at [a] mine."

During consideration of these amendments, Congress heard testimony from coal mine construction business representatives and others, who urged that coal mine construction employers should be required to both observe safety and health standards when working on jobs in or around coal mines and to provide adequate compensation benefits to employees who were affected by pneumoconiosis as a result of such work. In order to avoid the imposition of an unnecessary financial hardship on construction employers, Congress exempted them from the coal tax, as well as the black lung insurance requirements of the Act.

Upon consideration of information received, Congress determined to settle the previously litigated coverage question, and unequivocally did so in favor of coal mine construction employees by explicitly covering coal mine construction employers. The Department cannot, by regulation, reconsider Congress determination.

(2) One comment addressed the presumption of exposure to coal dust contained in § 725.492(c). The presumption is established on the basis of authority contained in section 422(h) of the Act and is intended to reallocate the burden of proving exposure by placing this burden on the employer. Exposure to coal dust is, of course, an important element in a claim involving an operator since, with only a few exceptions, an operator's liability is contingent upon proof that the miner's pneumoconiosis arose at least in part out of employment with such operator (Act, section 422 (c)). It is the Department of Labor's responsibility to establish that the liability for a particular claim lies with an operator rather than the trust fund. The Department has no independent knowledge of the specific conditions of a miner's employment. Only the employer has the information which might serve to ab-

solve it of liability under section 422(c) of the Act. The exposure presumption is authorized by section 422(h) of the Act. It is a rebuttable presumption and may be overcome by testimony of supervisory personnel and work records kept by the operator, demonstrating little or no exposure to coal dust.

The contractors object to the presumption primarily on the ground that there is no exposure to coal dust in coal mine construction, and suggest that the claimant bear the burden of proving continuous exposure with "documented evidence." The Department is not aware of any documented evidence a claimant is likely to have relating to his or her coal dust exposure. On the other hand, a construction employer is now required by the safety and health provisions of the Act to monitor construction employees' working conditions where work is done in or around a coal mine. Moreover, a construction employer is required by various other laws to keep work records, and has supervisory personnel within its control who would most likely be able to testify to the conditions under which an employee worked.

(3) The Department received a recommendation that the proposed rules be revised to require a showing of "conditions substantially similar to conditions in underground coal mines" in the miner's employment before a contractor can be found liable for benefits. The Department does not believe that use of the term "substantially similar to conditions in underground employment," which appears in the Senate report, but which does not appear in the Act, evidences an intent to establish a special test of liability to be applied in the claims involving coal mine construction employers and employees. There is no common or industry usage for this term and it is nowhere defined. In view of each of these considerations, the presumption of dust exposure may be rebutted on a case-by-case basis.

(b) Lessor comments: Section 3(d) of the Act defines an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal mine * * *." The legislative history of both the 1969 and 1972 Acts instructed the Secretary of Labor to apply this definition in a manner which would maximize the occasions on which greater operator liability, rather than Federal liability, could be established.

The 1977 amendments to the black lung provisions of the Act were motivated in significant part by the inability of the Secretary of Labor to assess coal operator liability in the vast majority of part C claims under the then existing law. This difficulty was caused primarily by the many and intricate corporate changes which characterized business in the coal industry during the late 1950's and 1960's. During this time, many large and medium size coal operators terminated their own mining operations, diversified their interests and began leasing their coal land to other operators both large and small. Many claims were received from the former employees of coal operators turned lessors, and the Department experienced considerable difficulty in assessing liability against these businesses.

In response to the difficulties encountered by the Department in assessing operator liability in lessor cases, as well as many other cases involving corporate changes, Congress established the coal tax and Black Lung Disability Benefits Trust Fund, terminating Federal liability for black lung claims, and significantly amended section 422(i) of the Act to clearly require the payment of benefits by an operator which had undergone substantial corporate changes. In order to decrease the burden on operators and former operators, the Act established that liability would not be imposed on an operator if the miner's last employment with the operator occurred before January 1, 1970.

While the cutoff date would absolve most coal lessors of liability for their former miners, the lessor problem remained. Accordingly, in the development of the revised section 422(i), the Senate report contained the following language: "In addition, a number of business entities which previously engaged in extensive coal mining operations, although no longer directly involved in the extraction of coal, still derive substantial revenues from the leasing of coal properties * * *. It was originally the intent of Congress that such entities should bear the liability for each lung disease arising out of employment in their mines." The explanation of section 422(i)(2) provides, "It is the intention of this section to require the payment of benefits by the prior operator where, for example, such operator now derives revenues from the leasing of coal mines * * *." (S. Rept. 95-209, 95th Cong., 1st sess., 8-10 (1977)). The Senate amendments to section 422(i) were adopted by the Conference Committee unchanged. There can be little doubt that Congress confirmed the view held by the Department concerning the potential liability of certain lessors.

Coal mine lessors are most likely to be former operators with extensive land or mineral rights holdings or other large commercial enterprises, and some of them have the capability to mine their own coal when conditions are favorable. While few lessors exercise day-to-day control over their leased properties, standard coal leases frequently demand a specified level of production and royalties, and retain numerous rights for the lessor. Many newer leases require the lessee to obtain worker's compensation and other similar coverage for miners employed by the lessee. Many lessees are themselves substantial coal operators, and in these cases the coverage of miners under the Federal black lung program is provided by the immediate employer. Some other lessees simply ignored Federal black lung coverage requirements. Department of Labor estimates indicate that in excess of 30 percent of all active coal mine operators failed to obtain insurance coverage under the prior act.

The rules were designed in consideration of these factors, with a view towards informing coal mine lessors of the circumstances under which they might be found liable to pay benefits to either a miner formerly employed as such by the lessor or a miner employed by a lessee of the lessor.

The comments received argue that the use of the term "lessee" in section 3(d) of the act precludes the assessment of liability against a lessor. The Department does not agree. The definition extends to any owner or other person who "operates, controls or supervises a coal mine." The history of the act specifies that indicia of ownership, supervision and control may be established either "directly or indirectly." Moreover, the revised section 422(i) of the act and the explanations of that section further clarify the potential liability of a lessor in the black lung benefits context of the act. It is the opinion of the Department that a lessor of coal mines is an owner of a coal mine and, depending upon the facts of each case, may, either directly or indirectly, supervise and control the lessee's mining of coal. Actual day-to-day supervision and control is not required by the Act.

The Department agrees that not all owners of coal lands or mineral rights could be found to be liable coal mine operators. Each case must be determined on the basis of its own facts measured against the requirements of the act.

The Department also agrees that the liability of the lessor should be secondary to that of the lessee. In order to effectuate this intent, the rules encourage lessors to require lessees to obtain Federal black lung insurance or to self insure, as a condition of any lease entered into or renewed after the effective date of this part. This type of lease provision is not now uncommon and can serve to fully relieve the lessor of any liability for a claim arising out of employment with the lessee.

§ 725.492 Responsible operator defined.

(a) A "responsible operator" is the operator which is determined liable for the payment of benefits under this part for any period after December 31, 1973. In order for an employer to be considered a responsible operator in any case, the following shall be established:

(1) The miner's disability or death shall have arisen at least in part out of employment in or around a mine or other facility during a period when the mine or facility was operated by such operator, except as provided in § 725.493(a)(2);

(2) The operator shall have been an operator of a coal mine or other facility for any period after June 30, 1973;

(3) The miner's employment with the operator or other employer shall have included at least 1 working day (§ 725.493(b)) after December 31, 1969; and

(4) The operator or the employer shall be capable of assuming its liability for the payment of continuing benefits under this part, through any of the following means:

(i) By obtaining a policy or contract of insurance under section 423 of the act and part 726 of this subchapter; or

(ii) By qualifying as a self-insurer under section 423 of the act and part 726 of this subchapter; or

(iii) By possessing any assets that may be available for the payment of benefits under this part or through an action under subpart H of this part.

(b) In the absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part.

(c) For the purposes of determining whether an employer is or was an operator or other employer covered by the Act which may be found liable for the payment of benefits to an employee of such employer under this part, there shall be a rebuttable presump-

tion that during the course of an individual's employment such individual was regularly and continuously exposed to coal dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment.

For purposes of § 725.493(a), a year of coal mine employment may be established by accumulating intermittent periods of coal mine employment.

Comments received: A number of comments object to the presumption of exposure as it applies in the claim of a coal mine construction employee.

Discussion and changes: See paragraph (a)(2) of *Discussion and changes* following § 725.491. No change is necessary in view of that discussion.

§ 725.493 Criteria for identifying a responsible operator.

(a)(1) Subject to the provisions of subparagraphs (2) and (3) of this section, and provided that the conditions of § 725.492(a)(2)–(a)(4) are met, the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year, as determined in accordance with paragraph (b) of this section, shall be the responsible operator.

(2)(i) Except as otherwise provided in this paragraph, if the operator described in paragraph (a)(1) of this section was an operator of a mine or mines or the owner of the assets thereof on or after January 1, 1970, (a "prior operator") and on or after January 1, 1970, transferred such mine or mines or substantially all of the assets thereof to another operator (a "successor operator"), such successor operator shall be liable for and shall secure the payment of all benefits which would have been payable by the prior operator with respect to miners previously employed by such prior operator as if the acquisition had not occurred and the prior operator had continued to be a coal mine operator. A lessor of a coal mine may be considered a prior or successor operator in accordance with this subpart.

(ii) The stated congressional objective supporting section 422(i) of the Act is to prevent a coal operator from circumventing liability under this part by entering into corporate or other business transactions which make the assessment of liability against that operator a financial or legal impossibility. Accordingly, a prior operator under paragraph (a)(2)(i) of this section, which transfers a mine or mines or substantially all the assets thereof, shall remain primarily liable for the payment of benefits under this part predicated on employment with the prior operator if such prior operator meets the conditions of § 725.492(a)(2) and (a)(4). If the conditions in § 725.492(a)(2) and (a)(4) are not met, the successor operator shall, if appropriate, be liable for the payment of such benefits.

(iii) Except as is provided in paragraph (a)(2)(ii) of this section, if the operator described in paragraph (a)(1) of this section is a prior operator which, on or after January 1, 1970, transferred its coal mining business or substantially all the assets thereof to a successor operator, or if such business or assets was subsequently transferred to a successsor of such successor operator, such successor operator which has most recently acquired the coal mining operations in question or substantially all of the assets thereof shall be deemed the responsible operator if it meets the conditions of § 725.492(a)(2) and (a)(4). If such successor operator fails to meet such conditions, any prior operator or any operator in the chain of succession, beginning with the most recent operator, which acquired the coal mining business in question or substantially all of the assets thereof on or after January 1, 1970, and which meets the conditions of § 725.492(a)(2) and (a)(4), may be determined to be the responsible operator. Wherever possible the employer of the miner shall be considered the responsible operator. However, any successor operator may be determined to be the responsible operator with respect to a claim whether or not the miner on whose total disability or death the claim is predicated was employed by such successor operator for any period of time.

(3) For purposes of paragraph (a)(2) of this section, the following shall apply to corporate reorganizations, liquidations, and such other transactions as are enumerated in this section, occurring on or after January 1, 1970:

(i) If an operator ceases to exist by reason of a reorganization which involves a change in identity, form, or place of business or organization, however effected, the resulting entity shall be treated as the operator to which this section applies;

(ii) If an operator ceases to exist by reason of a liquidation into a parent or successor corporation, the parent or successor corporation shall be treated as the operator to which this section applies;

(iii) If an operator ceases to exist by reason of a sale of substantially all its assets, merger, consolidation, or division, the successor operator or corporation, or business entity shall be treated as the operator to which this section applies.

(4) If there is no operator which meets the conditions of paragraphs (a)(1) or (2) of this section, the responsible operator shall be considered to be the operator with which the miner had the latest periods of cumulative employment of not less than 1 year, subject to the provisions of paragraph (a)(2) of this section and provided that the conditions of § 725.492(a)(2)–(a)(4) are met.

(5) No determination of responsibility made under paragraphs (a)(1)–(b)(4) of this section shall be construed to limit the authority of the Secretary to determine that any individual or business entity is an operator under the Act.

(6) In the event an operator or other employer is determined to be a responsible operator under the provisions of paragraph (a)(1)–(b)(4) of this section, there shall be a rebuttable presumption that the miner's pneumoconiosis arose in whole or in part out of his or her employment with such operator. Unless this presumption is rebutted, the responsible operator shall be liable to pay benefits to the claimant on account of the disability or death of the miner in accordance with this part. A miner's pneumoconiosis, or disability therefrom, shall be considered to have arisen in whole or in part out of work in or around a mine if such work contributed to or aggravated the progression or advancement of a miner's loss of ability to perform his or her regular coal mine employment or comparable employment.

(b) From the evidence presented, the identity of the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than 1 year and, to the extent the evidence permits, the beginning and ending dates of such periods, shall be ascertained. For purposes of this section, a year of employment means a period of 1 year, or partial periods totalling 1 year, during which the miner was regularly employed in or around a coal mine by the operator or other employer. Regular employment may be established on the basis of any evidence presented, including the testimony of a claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. However, if an operator or other employer proves that the miner was not employed by it for a period of at least 125 working days, such operator or other employer shall be determined to have established that the miner was not regularly employed for a cumulative year by such operator or employer for the purposes of paragraph (a) of this section. A "working day" means any day or part of a day for which a miner received pay for work as a miner (see § 725.202(a)).

Comments received: (a) A few comments reiterate concerns expressed by coal mine construction employers and coal mine lessors in connection with §§ 725.491–725.492. (b) A great many comments object to the

Department's definition of a "year." Coal mine construction employers object in particular to the applicability of the definition to them. Many other comments argue that the 150 day provision is either too long or too short or that it is simply arbitrary. *Discussion and changes;* (a) See *discussion and changes* following § 725.491. No change is necessary in consideration of that discussion.

(b) One of the most difficult questions which has arisen in connection with the Department's effort to establish workable rules to be applied in the adjudication of claims centers around the meaning of the term "one year". The term "one year" is significant in claims determinations for two reasons. First, it is necessary to establish length of employment for purposes of the presumptions contained in section 411(c) of the Act. That section sets forth various presumptions available in the case of a miner who was employed for 10, 15 or 25 years as a miner. Neither the Act nor the legislative history gives any indication of how one year of employment is to be defined.

In addition, in developing the criteria for determining the liability of a coal mine operator under the 1972 Act, the Department selected 1 year as the length of employment which would be required in order to trigger an operator's liability. There was no definition of a year in the rule issued under the 1972 Act (20 CFR § 725.311 (1976)).

Section 7(j) of S. 1538, the Senate-passed version of the 1977 amendments, contained a definition of a year which relied primarily upon four calendar quarters of coverage under Section 213 of the Social Security Act or continuous employment as a miner on the payroll of a coal company. The provision was dropped in conference.

In its effort to give some certainty to the meaning of the term "one year," the Department explored all available information. In the workers' compensation area a year has been variously defined by statute to consist of a specified number of hours or shifts worked during a calendar period. Where a year is not defined by statute, courts have considered regular, continuous, or full-time employment over a given calendar period to constitute a year. A few courts have found a year of employment even though the employment was not regular over the calendar period, so long as it was the only employment undertaken by the claimant.

The 1975 *Bureau of Mines Minerals Yearbook* (table 15) indicates that during 1975 the average number of days worked by coal miners ranged by State from 138-324 days, the national average being 228 days for underground miners and 241 for surface miners. Other sources, including Bureau of Mines data, the Keystone Coal Industry Manual, and coal industry figures indicate that the average number of days worked by miners in any given year from 1890-1977 ranges from 146 in 1932 to 278 in 1944. During the last 10 years the average ranges from 206 days in 1974 to 233 days in 1975 (Prepared by Bureau of Mines, Mineral Supply—Division of Fossil Fuels, Branch of Coal).

The National Bituminous Coal Wage Agreement of 1978, upon which the Department relies in defining "one year", credits a miner with a full year of service for welfare and pension fund purposes if the miner has worked 1000 or more hours (125 working days) in a calendar year. The agreement was a product of collective bargaining between labor and industry and therefore represents a reasonable basis for the definition in these rules.

Some changes are made in the section to more clearly reflect the placement of the burden of proving the actual days worked on the operator, which is in a much better position to have the records necessary to establish proof of days worked.

The coal mine contractors have strongly objected to the application of the one-year rule to them, on the ground that their employees are not exposed to coal dust and that they will not be able to prove non-exposure during periods of coal mine construction employment. In order to avoid liability, a contractor need only prove that its employee was not exposed to coal dust for one-year period during his or her employment with the contractor. There is no limitation on the evidence which can be presented to prove non-exposure, and if the contractor's claims of non-exposure of its employees is correct, the contractor could never be found liable for any claim. If the contractor does not keep records, it may rely on the testimony of current and former employees or the testimony of the miner. While a contractor's failure to keep records of where its employees work might lead to liability in such a case, this failure is not, in the Department's opinion, a reason to invoke trust fund liability or otherwise absolve the contractor.

The contractors also point out that they will be unable to establish proof of a miner's prior employment. This problem is considered particularly acute by the contractors in view of the transient nature of coal mine construction employment. However, this issue is not relevant to this section.

§ 725.494 Insurance coverage.

(a) Any operator which may be liable for the payment of benefits under this part shall secure such liability pursuant to section 423 of the act by:

(1) Qualifying as a self-insurer or establishing a qualified self-insurance trust as provided in part 726 of this chapter; or

(2) Insuring and keeping insured the payment of such benefits with an authorized insurance carrier or fund in accordance with the provisions of part 726 of this subchapter.

(b) A coal mine construction or transportation employer which is not also a coal mine operator shall not be required to purchase insurance or qualify as a self-insurer in accordance with this part and part 726 of this subchapter. However, such employer shall be liable for the payment of benefits to any of its employees who are exposed to coal dust in the course of their employment, if eligibility is established under this part or part 727 of this subchapter and it is determined that such employer is a responsible operator within the meaning of this part. An employer other than a coal mine operator which may be liable for the payment of benefits under this part or part 727 of this subchapter shall take such action as may be appropriate to guarantee the discharge of such liability. In connection with the liability of an employer described in this paragraph, the deputy commissioner or other adjudication officer may require a deposit of security in accordance with § 725.606. A coal mine construction or transportation employer which also operates a coal mine or coal preparation facility shall not be excused from its obligation to purchase insurance or self-insure its potential liability under the act with respect to all covered employees, as described in paragraph (a) of this section. Any attempt by a coal mine operator to alter its corporate structure or reassign employees within such structure for the purpose of avoiding the insurance obligations of the act shall be considered void for the purpose of determining whether such operator is in compliance with the insurance requirements of the act, or is the employer of such employees.

Comments received: None for which a response is required.

§ 725.495 Penalty for failure to insure.

(a) Any employer required to secure the payment of benefits under the act and § 725.494 which fails to secure such benefits shall be subject to a civil penalty to be assessed by the Secretary of Labor of not more than $1,000 for each day during which such failure occurs; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such civil penalty as herein provided for the failure of such corporation to secure the payment of benefits; and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any payments or other benefit which may accrue under the act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of benefits as required by the act.

(b) If the Director determines that an operator has not fully discharged its insurance obligations imposed by the act, the Director shall notify the operator of its violation, and if corrective action is not taken within a reasonable time specified by the Director, the Director shall forward the case to the Chief Administrative Law Judge for appropriate proceedings. The administrative law judge assigned the case shall schedule and conduct a hearing with respect to the liability of the operator for the penalty described in this section. A penalty hearing conducted in accordance with this paragraph shall be subject to the provisions of 5 U.S.C. 554 and proceedings shall be determined in the discretion of the administrative law judge.

(c) An action may be commenced under this section at any time after information supporting such action becomes known to the Director.

(d) In determining the amount of any penalty assessed under this section, the administrative law judge shall consider the circumstances of the failure of an operator to comply with paragraph (a) of this section and shall, in the absence of mitigating circumstances, assess the maximum penalty allowed.

(e) Any penalty owed under this section shall be paid to the fund and may be enforced by the Secretary on behalf of the fund as appropriate.

(f) An appeal from a decision issued by an administrative law judge under this section shall be taken in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. 553 *et seq.* The Board shall not have jurisdiction to consider an appeal of a case adjudicated under this part.

Comments received: None.

Subpart G—Payment of Benefits

§ 725.501 Payment provisions generally.

The provisions of this subpart govern the payment of benefits to claimants whose claims are approved for payment under section 415 and part C of title IV of the act or approved after review under section 435 of the act and part 727 of this subchapter.

Comments received: One comment recommends that a part B (Social Security Administration) beneficiary should be presumed entitled to medical benefits provided under section 11 of the act.

Discussion and changes: See *Discussion and changes* following § 725.701.

725.502 Manner of payment, payment periods.

(a) Benefits under the act shall be paid periodically, promptly, and directly to the person entitled thereto or his or her representative payee (see § 725.510).

(b) Benefits are payable for monthly periods and shall be paid to an eligible claimant beginning with the month during which eligibility begins and shall terminate with the month before the month during which eligibility terminates. If a claimant dies in the first month during which all requirments for eligibility are met, benefits shall be paid for that month.

(c) Except as is otherwise provided in this part, all past due benefits shall be paid during the month in which the first benefit payment is made.

Comments received: None.

§ 725.503 Date from which benefits are payable.

(a) In accordance with the provisions of section 6(a) of the Longshoremen's Act as incorporated by section 422(a) of the act, and except as provided in § 725.503A, the provisions of this section shall be applicable in determining the date from which benefits are payable to an eligible claimant.

(b) In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed, or the month during which the claimant elected review under part 727 of this subchapter.

(c) Except as is provided in part 727 of this subchapter, in the case of a survivor of a miner who died due to or while totally disabled by pneumoconiosis, benefits shall be payable beginning with the month of the miner's death, or January 1, 1974, whichever is later.

(d) No benefits shall be payable with respect to a claim filed between July 1 and December 31, 1973 (a section 415 claim), for any period of eligibility prior to July 1, 1973 (or January 1, 1974 if the claim is approved under part 727 of this subpart), nor shall any benefits be payable with respect to such claim pursuant to the provisions of section 415 of part B of title IV of the act for any period of eligibility after December 31, 1973. Where in the case of a section 415 claim, eligibility continues beyond December 31, 1973, benefits for periods of eligibility occurring after such date shall be payable under part C of title IV of the act.

(e) No benefits shall be payable with respect to a claim filed after December 31, 1973 (a part C claim), for any period of eligibility occurring before January 1, 1974.

(f) Each decision and order awarding benefits shall indicate the month from which benefits are payable to the eligible claimant.

Comments received: One comment urges the Department to determine the actual month of onset in every case.

Discussion and changes: See *Discussion and changes* following § 727.302 of this subchapter. No change is made in this section on the basis of that discussion, although it should be noted once again, that a reasonable effort will always be made to establish the month of onset.

§ 725.503A Payments to a claimant employed as a miner.

(a) In the case of a claimant who is employed as a miner (see § 725.202(a)) at the time of a final determination of such miner's eligibility for benefits, no benefits shall be payable unless: (1) the miner's eligibility is established under section 411(c)(3) of the act; or (2) the miner terminates his or her coal mine employment within 1 year from the date of the final determination of the claim.

(b) If the eligibility of a working miner is established under section 411(c)(3) of the act, benefits shall be payable as is otherwise provided in this part. If eligibility cannot be established under section 411(c)(3), and the miner continues to be employed as a miner in any capacity for a period of less than 1 year after a final determination of the claim, benefits shall be payable beginning with the month during which the miner ends his or her coal mine employment. If the miner's employment continues for more than 1 year after a final determination of eligibility, such determination shall be considered a denial of benefits on the basis of the miner's continued employment, and the miner may seek benefits only as provided in § 725.310, if applicable, or by filing a new claim under this part. The provisions of subparts D and E of this part shall be applicable to claims considered under this section as is appropriate.

(c) In any case where the miner returns to coal mine or comparable and gainful work, the payments to such miner shall be suspended and no benefits shall be payable (except as provided in section 411(c)(3) of the act) for the period during which the miner continues to work. If the miner again terminates employment, the deputy commissioner may require the miner to submit to further medical examination before authorizing the payment of benefits.

Comments received: One comment argues that a miner who stops work within 1 year from an eligibility determination should not be required to undergo additional medical examination.

Discussion and changes: This section permits further medical examination only if the miner stops work within 1 year from an eligibility determination, is awarded benefits and later returns to coal mine or comparable and gainful work and then again terminates his or her employment. A further medical examination may be warranted in such a case.

§ 725.504 Payees.

Benefits may be paid, as appropriate, to a beneficiary, to a qualified dependent, or to a representative authorized under this subpart to receive payments on behalf of such beneficiary or dependent.

Comments received: None.

§ 725.505 Payment on behalf of another; "legal guardian" defined.

Benefits are paid only to the beneficiary, his or her representative payee (see § 725.510) or his or her legal guardian. As used in this section, "legal guardian" means an individual who has been appointed by a court of competent jurisdiction or otherwise

appointed pursuant to law to assume control of and responsibility for the care of the beneficiary, the management of his or her estate, or both.

Comments received: None.

§ 725.506 Guardian for minor or incompetent.

An adjudication officer may require that a legal guardian or representative be appointed to receive benefit payments payable to any person who is mentally incompetent or a minor and to exercise the powers granted to, or to perform the duties otherwise required of such person under the act.

Comments received: None.

§ 725.510 Representative payee.

(a) If the deputy commissioner determines that the best interests of a beneficiary are served thereby, the deputy commissioner may certify the payment of such beneficiary's benefits to a representative payee.

(b) Before any amount shall be certified for payment to any representative payee for or on behalf of a beneficiary, such representative payee shall submit to the deputy commissioner such evidence as may be required of his or her relationship to, or his or her responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his or her authority to receive such a payment. The deputy commissioner may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility, or authority. If a person requesting representative payee status fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him or her on behalf of the beneficiary unless the required evidence is thereafter submitted.

(c) All benefit payments made to a representative payee shall be available only for the use and benefit of the beneficiary, as defined in § 725.511.

Comments received: None.

§ 725.511 Use and benefit defined.

(a) Payments certified to a representative payee shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability of the beneficiary. Where a beneficiary is receiving care in an institution, current maintenance shall include the customary charges made by the institution and charges made for the current and foreseeable needs of the beneficiary which are not met by the institution.

(b) Payments certified to a representative payee which are not needed for the current maintenance of the beneficiary, except as they may be used under § 725.512, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. savings bonds which shall be purchased in accordance with applicable regulations of the U.S. Treasury Department (31 CFR Part 315). Surplus funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

Name of beneficiary——————————
by (Name of representative payee) representative payee,
or (Name of beneficiary)
by (Name of representative payee) trustee.

U.S. savings bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows: (Name of beneficiary) (Social Security No.), for whom (Name of payee) is representative payee for black lung benefits.

Comments received: None.

§ 725.512 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child, or a legally dependent parent of the beneficiary.

Comments received: None.

§ 725.513 Accountability; transfer.

(a) The deputy commissioner may require a representative payee to submit periodic reports including a full accounting of the use of all benefit payments certified to a representative payee. If a requested report or accounting is not submitted within the time allowed, the deputy commissioner shall terminate the certification of the representative payee and thereafter payments shall be made directly to the beneficiary. A certification which is terminated under this section may be reinstated for good cause, provided that all required reports are supplied to the deputy commissioner.

(b) A representative payee who has conserved or invested funds from payments under this part shall, upon the direction of the deputy commissioner, transfer any such funds (including interest) to a successor payee appointed by the deputy commissioner or, at the option of the deputy commissioner, shall transfer such funds to the Office for recertification to a successor payee or the beneficiary.

Comments received: None.

§ 725.514 Certification to dependent of augmentation portion of benefit.

(a) If the basic benefit of a miner or of a surviving spouse is augmented because of one or more dependents, and it appears to the deputy commissioner that the best interests of such dependent would be served thereby, or that the augmented benefit is not being used for the use and benefit (as defined in this subpart) of the augmentee, the deputy commissioner may certify payment of the amount of such augmentation (to the extent attributable to such dependent) to such dependent directly, or to a legal guardian or a representative payee for the use and benefit of such dependent.

(b) Any request to the deputy commissioner to certify separate payment of the amount of an augmentation in accordance with paragraph (a) of this section shall be in writing on such form and in accordance with such instructions as are prescribed by the Office.

(c) The deputy commissioner shall specify the terms and conditions of any certification authorized under this section and may terminate any such certification where appropriate.

(d) Any payment made under this section, if otherwise valid under the Act, is a complete settlement and satisfaction of all claims, rights, and interests in and to such payment, except that such payment shall not be construed to abridge the rights of any party to recoup any overpayment made.

Comments received: None.

§ 725.515 Assignment and exemption from claims of creditors.

Except as provided by the act and this part, no assignment, release, or commutation of benefits due or payable under this part shall be valid, and all benefits shall be exempt from claims of creditors and from levy, execution, and attachment or other remedy or recovery or collection of a debt, which exemption may not be waived.

Comments received: None.

BENEFIT RATES

§ 725.520 Computation of benefits.

(a) *Basic rate.* The amount of benefits payable to a beneficiary for a month is determined, in the first instance, by computing the "basic rate." The basic rate is equal to 50 percent of the minimum monthly payment to which a totally disabled Federal employee in Grade GS-2 would be entitled for such month under the Federal Employees' Compensation Act, Chapter 81, Title 5, United States Code. That rate for a month is determined by:

(1) Ascertaining the lowest annual rate of pay (step 1) for Grade GS-2 of the General Schedule applicable to such month (see 5 U.S.C. 5332);

(2) Ascertaining the monthly rate thereof by dividing the amount determined in paragraph (a)(1) of this section by 12;

(3) Ascertaining the minimum monthly payment under the Federal Employees' Compensation Act by multiplying the amount determined in paragraph (a)(2) of this section by 0.75 (that is, by 75 percent) (see 5 U.S.C. 8112); and

(4) Ascertaining the basic rate under the act by multiplying the amount determined in paragraph (a)(3) of this section by 0.50 (that is, by 50 percent).

(b) *Basic benefit.* When a miner or surviving spouse is entitled to benefits for a month for which he or she has no dependents who qualify under this part and when a surviving child of a miner or spouse, or a parent, brother, or sister of a miner, is entitled to benefits for a month for which he or she is the only beneficiary entitled to benefits, the amount of benefits to which such beneficiary is entitled is equal to the basic rate as computed in accordance with this section (raised, if not a multiple of 10 cents, to the next high multiple of 10 cents). This amount is referred to as the "basic benefit."

(c) *Augmented benefit.* (1) When a miner or surviving spouse is entitled to benefits for a month for which he or she has one or more dependents who qualify under this part, the amount of benefits to which such miner or surviving spouse is entitled is increased. This increase is referred to as an "augmentation."

(2) The benefits of a miner or surviving spouse are augmented to take account of a particular dependent beginning with the first month in which such dependent satisfies the conditions set forth in this part, and continues to be augmented through the month before the month in which such dependent ceases to satisfy the conditions set forth in this part, except in the case of a child who qualifies as a dependent because he or she is a student. In the latter case, such benefits continue to be augmented through the month before the first month during no part of which he or she qualifies as a student.

(3) The basic rate is augmented by 50 percent for one such dependent, 75 percent for two such dependents, and 100 percent for three or more such dependents.

(d) *Survivor benefits.* As used in this section, "survivor" means a surviving child of a miner or surviving spouse, or a surviving parent, brother, or sister of a miner, who establishes entitlement to benefits under this part.

(e) *Computation and rounding.* (1) Any computation prescribed by this section is made to the third decimal place.

(2) Monthly benefits are payable in multiples of 10 cents. Therefore, a monthly payment of amounts derived under paragraph (c)(3) of this section which is not a multiple of 10 cents is increased to the next higher multiple of 10 cents.

(3) Since a fraction of a cent is not a multiple of 10 cents, such an amount which contains a fraction in the third decimal place is raised to the next higher multiple of 10 cents.

(f) *Eligibility based on the coal mine employment of more than one miner.* Where an individual, for any month, is entitled (and/or qualifies as a dependent for purposes of augmentation of benefits) based on the disability or death due to pneumoconiosis arising out of the coal mine employment of more than one miner, the benefit payable to or on behalf of such individual shall be at a rate equal to the highest rate of benefits for which entitlement is established by reason of eligibility as a beneficiary, or by reason of his or her qualification as a dependent for augmentation of benefit purposes.

Comments received: None.

§ 725.521 Commutation of payments; lump sum awards.

(a) Whenever the deputy commissioner determines that it is in the interest of justice, the liability for benefits or any part thereof as determined by a final adjudication, may, with the approval of the Director, be discharged by the payment of a lump sum equal to the present value of future benefit payments commuted, computed at 4 percent true discount compounded annually.

(b) Applications for commutation of future payments of benefits shall be made to the deputy commissioner in the manner prescribed by the deputy commissioner. If the deputy commissioner determines that an award of a lump sum payment of such benefits would be in the interest of justice, he or she shall refer such application, together with the reasons in support of such determination, to the Director for consideration.

(c) The Director shall, in his or her discretion, grant or deny the application for commutation of payments. Such decision may be appealed to the Benefits Review Board.

(d) The computation of all commutations of such benefits shall be made by the OWCP. For this purpose the file shall contain the date of birth of the person on whose behalf commutation is sought, as well as the date upon which such commutation shall be effective.

(e) For purposes of determining the amount of any lump sum award, the probability of the death of the disabled miner and/or other persons entitled to benefits before the expiration of the period during which he or she is entitled to benefits, shall be determined in accordance with the most current United States Life Tables, as developed by the Department of Health, Education, and Welfare, and the probability of the remarriage of a surviving spouse shall be determined in accordance with the remarriage tables of the Dutch Royal Insurance Institution. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(f) In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall be notified of and given an opportunity to participate in the proceedings to determine whether a lump sum award shall be made. Such operator or carrier shall, in the event a lump sum award is made, tender full and prompt payment of such award to the claimant as though such award were a final payment of monthly benefits. Except as provided in paragraph (g) of this section, such lump sum award shall forever discharge such operator or carrier from its responsibility to make monthly benefit payments under the act to the person who has requested such lump-sum award. In the event that an operator or carrier is adjudicated liable for the payment of benefits, such operator or carrier shall not be liable for any portion of a commuted or lump sum award predicated upon benefits due any claimant prior to January 1, 1974.

(g) In the event a lump-sum award is approved under this section, such award shall not operate to discharge an operator carrier, or the Fund from any responsibility imposed by the act for the payment of medical benefits to an eligible miner.

Comments received: (a) A number of comments urge deletion of this section on the grounds that lump sum awards are not appropriate in black lung claims. (b) A few comments urge the Department to adopt Section 8 of the Longshoremen's Act which allows the parties to settle the claim for less

than the full discounted value of future benefits.

Discussion and changes: (a) Section 14(j) of the Longshoremen's Act, which is incorporated by the Black Lung Act, authorizes the deputy commissioner to approve lump-sum awards. While no lump-sum award has ever been approved in connection with a black lung claim, the Department does not agree that the statutorily authorized possibility of obtaining a lump-sum award should be absolutely foreclosed.

(b) The authority to approve a settlement of a claim for less than its full discounted future value is contained in section 8 of the Longshoremen's Act. That section is not incorporated for use in the black lung program, and the Department is not convinced by the comments that any settlement procedure is otherwise appropriate for these rules.

§ 725.522 Payments prior to final adjudication.

(a) Unless a stay of payments is ordered by the Board or appropriate court under section 21 of the LHWCA, the payment of benefits to a claimant who has been determined eligible therefor by a deputy commissioner, administrative law judge, the Board, or a court shall commence within no more than 30 days following an initial determination of eligibility by such deputy commissioner, or the filing of an award of benefits by such administrative law judge, Board, or court, notwithstanding the pendency of further proceedings before an admininstrative law judge or an appeal to the Board or court.

(b) If an operator or carrier has been initially determined liable for the payment of benefits to an eligible claimant by the deputy commissioner (see § 725.420), or ordered to pay benefits by an administrative law judge, the Board, or an appropriate court, and such operator or carrier fails or refuses to commence the payment of benefits (including all past due benefits and medical expenses) within the 30-day period specified in paragraph (a) of this section, the fund shall commence the payments due and owing and shall continue such payments as appropriate. In the event that the fund undertakes the payment of benefits on behalf of an operator or carrier, the provisions of §§ 725.601–725.608 shall be applicable to such operator or carrier.

(c) If benefit payments are commenced prior to the final adjudication of the claim and it is later determined by an administrative law judge, the Board, or court that the claimant was ineligible to receive such payments, such payments shall be considered overpayments pursuant to § 725.540 of this subpart which may be recovered in accordance with the provisions of this subpart.

Comments received: (a) A few comments argue that no cause for a stay of payments is appropriate. (b) One comment recommends that an operator should be allowed to recoup payments made prior to final adjudication from the fund, if an earlier determination of eligibility is reversed.

Discussion and changes: (a) A stay of payments may be authorized by the Board in accordance with the provisions of section 21 of the Longshoremen's Act. While stays are rarely, if ever, granted, the Department does not think it appropriate to foreclose the possibility that an operator might obtain a stay if proper grounds for a stay are present. It should be noted that courts have refused to find that difficulty or even impossibility of obtaining reimbursement from a claimant constitutes irreparable harm sufficient to support a stay of payments.

(b) If an operator is determined liable for the payment of benefits to a claimant prior to final adjudication, the Act and the rules require the operator to begin the payment of benefits prior to final adjudication, notwithstanding the possibility that the operator may ultimately prevail on the merits. Any operator which refuses to undertake these payments shall, in addition to the payments due and past due, be liable for the payment of penalties, interest, and the claimant's attorney's fees and costs, in most instances. It is the policy of the Act that operators must bear the risk of overpayments. The trust fund is not, and can in no way be construed as, the insuror of the risks involved in an operator's legal obligation to make payments in a timely fashion. The fund is not intended to be used, nor is it funded, for this purpose. If an operator makes an overpayment to a claimant it, like the fund, must seek reimbursement from the claimant.

Special Provisions for Operator Payments

§ 725.530 Operator payments; generally.

(a) An operator or carrier which has been determined liable for the payment of benefits to a claimant by the deputy commissioner, or ordered to pay such benefits by an administrative law judge, the Board, or a court, or an operator who has agreed that it is liable for the payment of benefits to a claimant, shall commence the payment of benefits (including past due benefits, medical costs, penalties and interest, if any) within 30 days of such determination, order, or agreement. Thereafter, monthly benefit payments shall be made for the duration of the claimant's eligibility. Arrangements for the payment of medical costs shall be made by such operator or carrier in accordance with the provisions of subpart I of this part.

(b) Benefit payments made by an operator or carrier shall be made directly to the person entitled thereto or a representative payee if authorized by the deputy commissioner. The payment of a claimant's attorney's fee, if any is awarded, shall be made directly to such attorney. Reimbursement of the fund, including interest, shall be paid directly to the Secretary on behalf of the fund.

Comments received: A few comments express concern that no sanction is set forth for the failure of an operator to make payments in accordance with this section.

Discussion and changes: Other sections of these rules specify the sanctions imposed if an operator refuses to make timely payments and the obligation of the fund to make payments on behalf of an operator under certain circumstances.

§ 725.531 Receipt for payment.

Any individual receiving benefits under the act in his or her own right, or as a representative payee, or as the duly appointed agent for the estate of a deceased beneficiary, shall execute receipts for benefits paid by any operator which shall be produced by such operator for inspection whenever the deputy commissioner requires. A canceled check shall be considered adequate receipt of payment for purposes of this section. No operator or carrier shall be required to retain receipts for payments made for more than 5 years after the date on which such receipt was executed.

Comments received: (a) Comments recommend that a canceled check should constitute adequate receipt for payment. (b) One comment notes that there is no time limitation on the retention of receipts and suggests that an operator should be allowed to dispose of receipts after 5 years.

Discussion and changes: (a) The Department agrees that canceled checks constitute adequate receipt of payment and a clarifying change is made.

(b) The Department agrees that operators should not be required to retain receipts of payment for an indefinite time. The 5-year recommendation is adopted.

§ 725.532 Suspension, reduction, or termination of payments.

(a) No suspension, reduction, or termination in the payment of benefits is permitted unless authorized by the deputy commissioner, administrative law judge, Board, or court. No suspension, reduction, or termination shall be authorized except upon the occurrence of an event which terminates a claimant's eligibility for benefits (see subpart B of this part) or as is otherwise provided in this subpart (see also §§ 725.533–725.546).

(b) Any unauthorized suspension in the payment of benefits by an operator or carrier shall be treated as provided in subpart H.

(c) Unless suspension, reduction, or termination of benefits payments is required by an administrative law judge, the Benefits Review Board or a court, the deputy commissioner, after receiving notification of the occurrence of an event that would require the suspension, reduction, or termination of benefits, shall follow the procedures for the determination of claims set forth in subparts D and E.

Comments received: One comment recommends that there should be no suspension

of benefits allowed without prior notice and hearing.

Discussion and changes: No ex parte suspension of benefits is authorized by this section.

INCREASES AND REDUCTIONS OF BENEFITS

§ 725.533 Modification of benefits amounts; general.

(a) Under certain circumstances the amount of monthly benefits as computed in § 725.520 or lump-sum award (§ 725.521) shall be modified to determine the amount actually to be paid to a beneficiary. With respect to any benefits payable for all periods of eligibility after January 1, 1974, a reduction of the amount of benefits payable shall be required on account of:

(1) Any compensation or benefits received under any State workers' compensation law because of death or partial or total disability due to pneumoconiosis; or

(2) Any compensation or benefits received under or pursuant to any Federal law including part B of title IV of the act because of death or partial or total disability due to pneumoconiosis; or

(3) In the case of benefits payable to a parent, brother, or sister, the excess earnings from wages and from net earnings from self-employment (see § 410.530 of this title) of such parent, brother, or sister, respectively; or

(4) The fact that a claim for benefits from an additional beneficiary is filed, or that such claim is effective for a payment during the month of filing, or a dependent qualifies under this part for an augmentation portion of a benefit of a miner or widow for a period in which another dependent has previously qualified for an augmentation.

(b) With respect to periods of eligibility occurring after June 30, 1973, but before January 1, 1974, benefits shall be reduced in months of eligibility occurring during such period only:

(1) By an amount equal to any payment received under the workers' compensation, unemployment compensation, or disability insurance laws of any State on account of the disability or death of the miner due to pneumoconiosis; and

(2) On account of excess earnings under section 203 (b) through (l) of the Social Security Act; and

(3) For failure to report earnings from work in employment and self-employment within the prescribed period of time; and

(4) By reason of the fact that a claim for benefits from an additional beneficiary is filed, or that such a claim is effective for a month prior to the month of filing, or a dependent qualifies under this part or this chapter for an augmentation portion of a benefit of a miner or surviving spouse for a month for which another dependent has previously qualified for an augmentation.

(c) With respect to claims filed between July 1 and December 31, 1973, and paid for periods of eligibility occurring during such period, there shall be no retroactive adjustment of benefits paid in light of the amendments enacted by the Black Lung Benefits Reform Act of 1977 insofar as such amendments affect events which cause a reduction in benefits.

(d) An adjustment in a beneficiary's monthly benefit may be required because an overpayment or underpayment has been made to such beneficiary (see §§ 725.540–725.546).

(e) A suspension of a beneficiary's monthly benefits may be required when the Office has information indicating that reductions on account of excess earnings may reasonably be expected.

(f) Monthly benefit rates are payable in multiples of 10 cents. Any monthly benefit rate which, after the applicable computations, augmentations, and reductions is not a multiple of 10 cents, is increased to the next higher multiple of 10 cents. Since a fraction of a cent is not a multiple of 10 cents, a benefit rate which contains such a fraction in the third decimal is raised to the next higher multiple of 10 cents.

(g) Any individual entitled to a benefit, who is aware of any circumstances which could affect entitlement to benefits, eligibility for payment, or the amount of benefits, or result in the termination, suspension, or reduction of benefits, shall promptly report these circumstances to the Office. The Office may at any time require an individual receiving, or claiming entitlement to, benefits, either on his or her own behalf or on behalf of another, to submit a written statement giving pertinent information bearing upon the issue of whether or not an event has occurred which would cause such benefit to be terminated, or which would subject such benefit to reductions or suspension under the provisions of the Act. The failure of an individual to submit any such report or statement, properly executed, to the Office shall subject such benefit to reductions, suspension, or termination as the case may be.

Comments received: (a) One comment requests clarification of the applicability of the modification provisions to lump sum awards. (b) One comment requests clarification of a claimant's right to a hearing before suspension or termination of benefits.

Discussion and changes: (a) The Department agrees that lump sum awards are subject to the act's offsets and a clarifying change is made.

(b) See § 725.532(c) and the *Discussion and changes* following that section.

§ 725.534 Reduction of State benefits.

No benefits under section 415 of part B of title IV of the Act shall be payable to the residents of a State which, after December 31, 1969, reduces the benefits payable to persons eligible to receive benefits under section 415 of the Act under State laws applicable to its general work force with regard to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance benefits which are funded in whole or in part out of employer contributions.

Comments received: None.

§ 725.535 Reduction; receipt of State or Federal benefit.

(a) As used in this section the term "State or Federal benefit" means a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation. With respect to a claim for which benefits are payable for any month between July 1 and December 31, 1973, "State benefit" means a payment to a beneficiary made on account of disability or death due to pneumoconiosis under State laws relating to workers' compensation (including compensation for occupational disease), unemployment compensation, or disability insurance.

(b) Benefit payments to a beneficiary for any month are reduced (but not below zero) by an amount equal to any payments of State or Federal benefits received by such beneficiary for such month.

(c) Where a State or Federal benefit is paid periodically but not monthly, or in a lump sum as a commutation of or a substitution for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Office determines will approximate as nearly as practicable the reduction required under paragraph (b) of this section. In making such a determination, a weekly State or Federal benefit is multiplied by 4⅓ and a biweekly benefit is multiplied by 2⅙ to ascertain the monthly equivalent for reduction purposes.

(d) Amounts paid or incurred or to be incurred by the individual for medical, legal, or related expenses in connection with this claim for State or Federal benefits (defined in paragraph (a) of this section) are excluded in computing the reduction under paragraph (b) of this section, to the extent that they are consistent with State or Federal Law. Such medical, legal, or related expenses may be evidenced by the State or Federal benefit awards, compromise agreement, or court order in the State or Federal benefit pro-

ceedings, or by such other evidence as the Office may require. Such other evidence may consist of:

(1) A detailed statement by the individual's attorney, physician, or the employer's insurance carrier; or:

(2) Bills, receipts, or canceled checks; or

(3) Other evidence indicating the amount of such expenses; or

(4) Any combination of the foregoing evidence from which the amount of such expenses may be determinable. Such expenses shall not be excluded unless established by evidence as required by the Office.

Comments received: One comment argues that if an offset exceeds the amount of benefits payable under the Act in a given month, these should be a carryover of the excess to offset amounts applied in future months.

Discussion and changes: The purpose of the Act is to guarantee minimum monthly benefits to eligible persons who, because of the effects of black lung disease, are in need of financial assistance in meeting ordinary living expenses. The Act is not intended to, and does not set monthly or lifetime maximum benefit levels to which a claimant might be entitled from all sources. The primary concern of Congress, that eligible persons be provided with assistance in meeting monthly living costs, would be subverted if the comment were accepted.

§ 725.536 Reductions; excess earnings.

In the case of a surviving parent, brother, or sister, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203 (b), (f), (g), (h), (j), and (l) of the Social Security Act (42 U.S.C. 403 (b), (f), (g), (h), (j), and (l)), as if such benefit payments were benefits payable under section 202 of the Social Security Act (42 U.S.C. 402) (see §§ 404.428–404.456 of this title).

Comments received: None.

§ 725.537 Reductions; retroactive effect of an additional claim for benefits.

Beginning with the month in which a person other than a miner files a claim and becomes entitled to benefits, the benefits of other persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid.

Comments received: None.

§ 725.538 Reductions; effect of augmentation of benefits based on subsequent qualification of individual.

(a) Ordinarily, a written request that the benefits of a miner or surviving spouse be augmented on account of a qualified dependent is made as part of the claim for benefits. However, it may also be made thereafter.

(b) In the latter case, beginning with the month in which such a request is filed on account of a particular dependent and in which such dependent qualifies for augmentation purposes under this part, the augmented benefits attributable to other qualified dependents (with respect to the same miner or surviving spouse), if any, are adjusted downward, if necessary, so that the permissible amount of augmented benefits (the maximum amount for the number of dependents involved) will not be exceeded.

(c) Where, based on the entitlement to benefits of a miner or surviving spouse, a dependent would have qualified for augmentation purposes for a prior month of such miner's or surviving spouse's entitlement had such request been filed in such prior month, such request is effective for such prior month. For any month before the month of filing such request, however, otherwise correct benefits previously certified by the Office may not be changed. Rather the amount of the augmented benefit attributable to the dependent filing such request in the later month is reduced for each month of the retroactive period to the extent that may be necessary. This means that for each month of the retroactive period, the amount payable to the dependent filing the later augmentation request is the difference, if any, between:

(1) The total amount of augmented benefits certified for payment for other dependents for that month, and

(2) The permissible amount of augmented benefits (the maximum amount for the number of dependents involved) payable for the month for all dependents, including the dependent filing later.

Comments received: None.

§ 725.539 More than one reduction event.

If a reduction for receipt of State or Federal benefits and a reduction on account of excess earnings are chargeable to the same month, the benefit for such month is first reduced (but not below zero) by the amount of the State or Federal benefits, and the remainder of the benefit for such month, if any, is then reduced (but not below zero) by the amount of excess earnings chargeable to such month.

Comments received: None.

OVERPAYMENTS; UNDERPAYMENTS

§ 725.540 Overpayments.

(a) *General.* As used in this subpart, the term "overpayment" includes:

(1) Payment where no amount is payable under this part;

(2) Payment in excess of the amount payable under this part;

(3) A payment under this part which has not been reduced by the amounts required by the Act (see § 725.533);

(4) A payment under this part made to a resident of a State whose residents are not entitled to benefits (see §§ 725.402 and 725.403);

(5) Payment resulting from failure to terminate benefits to an individual no longer entitled thereto;

(6) Duplicate benefits paid to a claimant on account of concurrent eligibility under this part and parts 410 or 727 of this title or as provided in § 725.309.

(b) *Overpaid beneficiary is living.* If the beneficiary to whom an overpayment was made is living at the time of a determination of such overpayment, is entitled to benefits at the time of the overpayment, or at any time thereafter becomes so entitled, no benefit for any month is payable to such individual, except as provided in paragraph (c) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded.

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (b) of this section may be effected by withholding a part of the monthly benefit payable to a beneficiary where it is determined that:

(1) Withholding the full amount each month would deprive the beneficiary of income required for ordinary and necessary living expenses;

(2) The overpayment was not caused by the beneficiary's intentionally false statement or representation, or willful concealment of, or deliberate failure to furnish, material information; and

(3) Recoupment can be effected in an amount of not less than $10 a month and at a rate which would not unreasonably extend the period of adjustment.

(d) *Overpaid beneficiary dies before adjustment.* If an overpaid beneficiary dies before adjustment is completed under the provisions of paragraph (b) of this section, recovery of the overpayment shall be effected through repayment by the estate of the deceased overpaid beneficiary, or by withholding of amounts due the estate of such deceased beneficiary, or both.

Comments received: One comment recommends that there should be a hearing before an overpayment is declared.

Discussion and changes: See § 725.532(c) and *Discussion and changes* following that section.

§ 725.541 Notice of waiver of adjustment or recovery of overpayment.

Whenever a determination is made that more than the correct amount of payment has been made, notice of the provisions of section 204(b) of the Social Security Act regarding waiver

of adjustment or recovery shall be sent to the overpaid individual, to any other individual against whom adjustment or recovery of the overpayment is to be effected, and to any operator or carrier which may be liable to such overpaid individual.

Comments received: None.

§ 725.542 When waiver of adjustment or recovery may be applied.

There shall be no adjustment or recovery of an overpayment in any case where an incorrect payment has been made with respect to an individual:

(a) Who is without fault, and where

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title IV of the Act, or

(2) Be against equity and good conscience.

Comments received: One comment suggests that a hearing should be conducted to determine the applicability of this section in any case.

Discussion and changes: See *Discussion and changes* following § 725.532.

§ 725.543 Standards for waiver of adjustment or recovery.

The standards for determining the applicability of the criteria listed in § 725.542 shall be the same as those applied by the Social Security Administration under §§ 410.561–410.561h of this title.

Comments received: None.

§ 725.544 Collection and compromise of claims for overpayment.

(a) *General effect of the Federal Claims Collection Act of 1966.* In accordance with the Federal Claims Collection Act of 1966 and applicable regulations, claims by the Office against an individual for recovery of an overpayment under this part not exceeding the sum of $20,000, exclusive of interest, may be compromised, or collection suspended or terminated, where such individual or his or her estate does not have the present or prospective ability to pay the full amount of the claim within a reasonable time (see paragraph (c) of this section), or the cost of collection is likely to exceed the amount of recovery (see paragraph (d) of this section), except as provided under paragraph (b) of this section.

(b) *When there will be no compromise, suspension, or termination of collection of a claim for overpayment.* (1) In any case where the overpaid individual is alive, a claim for overpayment will not be compromised, nor will there be suspension or termination of collection of the claim by the Office, if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such individual or on the part of any other party having any interest in the claim.

(2) In any case where the overpaid individual is deceased:

(i) A claim for overpayment in excess of $5,000 will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication of fraud, the filing of a false claim, or misrepresentation on the part of such deceased individual; and

(ii) A claim for overpayment, regardless of the amount, will not be compromised, nor will there be suspension or termination of collection of the claim by the Office if there is an indication that any person other than the deceased overpaid individual had a part in the fraudulent action which resulted in the overpayment.

(c) *Inability to pay claim for recovery of overpayment.* In determining whether the overpaid individual is unable to pay a claim for recovery of an overpayment under this part, the Office shall consider the individual's age, health, present and potential income (including inheritance prospects), assets (e.g., real property, savings account), possible concealment or improper transfer of assets, and assets or income of such individual which may be available in enforced collection proceedings. The Office will also consider exemptions available to such individual under the pertinent State or Federal law in such proceedings. In the event the overpaid individual is deceased, the Office shall consider the available assets of the estate, taking into account any liens or superior claims against the estate.

(d) *Cost of collection or litigative probabilities.* Where the probable costs of recovering an overpayment under this part would not justify enforced collection proceedings for the full amount of the claim, or where there is doubt concerning the Office's ability to establish its claim as well as the time which it will take to effect such collection, a compromise or settlement for less than the full amount may be considered.

(e) *Amount of compromise.* The amount to be accepted in compromise of a claim for overpayment under this part shall bear a reasonable relationship to the amount which can be recovered by enforced collection proceedings, giving due consideration to the exemption available to the overpaid individual under State or Federal law and the time which collection will take.

(f) *Payment.* Payment of the amount the Office has agreed to accept as a compromise in full settlement of a claim for recovery of an overpayment under this part shall be made within the time and in the manner set by the Office. A claim for the overpayment shall not be considered compromised or settled until the full payment of the compromised amount has been made within the time and manner set by the Office. Failure of the overpaid individual or his or her estate to make such payment as provided shall result in reinstatement of the full amount of the overpayment less any amounts paid prior to such default.

Comments received: None.

§ 725.545 Underpayments.

(a) *General.* As used in this subpart, the term "underpayment" includes a payment in an amount less than the amount of the benefit due for such month, and nonpayment where some amount of such benefits is payable.

(b) *Underpaid individual is living.* If an individual to whom an underpayment was made is living, the deficit represented by such underpayment shall be paid to such individual either in a single payment (if he or she is not entitled to a monthly benefit or if a single payment is requested by the claimant in writing) or by increasing one or more monthly benefit payments to which such individual becomes entitled.

(c) *Underpaid individual dies before adjustment of underpayment.* If an individual to whom an underpayment was made dies before receiving payment of the deficit or negotiating the check or checks representing payment of the deficit, such payment shall be distributed to the living person (or persons) in the highest order of priority as follows:

(1) The deceased individual's surviving spouse who was either:

(i) Living in the same household with the deceased individual at the time of such individual's death; or

(ii) In the case of a deceased miner, entitled for the month of death to black lung benefits as his or her surviving spouse or surviving divorced spouse.

(2) In the case of a deceased miner or spouse his or her child entitled to benefits as the surviving child of such miner or surviving spouse for the month in which such miner or spouse died (if more than one such child, in equal shares to each such child).

(3) In the case of a deceased miner, his parent entitled to benefits as the surviving parent of such miner for the month in which such miner died (if more than one such parent, in equal shares to each such parent).

(4) The surviving spouse of the deceased individual who does not qualify under paragraph (c)(1) of this section.

(5) The child or children of the deceased individual who do not qualify under paragraph (c)(2) of this section (if more than one such child, in equal shares to each such child).

(6) The parent or parents of the deceased individual who do not qualify under paragraph (c)(3) of this section (if more than one such parent, in equal shares to each such parent).

(7) The legal representative of the estate of the deceased individual as defined in paragraph (e) of this section.

(d) *Deceased beneficiary.* In the event that a person, who is otherwise qualified to receive payments as the result of a deficit caused by an underpayment under the provisions of paragraph (c) of this section, dies before receiving payment or before negotiating the check or checks representing such payment, his or her share of the underpayment shall be divided among the remaining living person(s) in the same order or priority. In the event that there is (are) no other such person(s), the underpayment shall be paid to the living person(s) in the next lower order of priority under paragraph (c) of this section.

(e) *Definition of legal representative.* The term "legal representative," for the purpose of qualifying for receipt of an underpayment, generally means the executor or the administrator of the estate of the deceased beneficiary. However, it may also include an individual, institution or organization acting on behalf of an unadministered estate, provided the person can give the Office good acquittance (as defined in paragraph (f) of this section). The following persons may qualify as legal representative for purposes of this section, provided they can give the Office good acquittance:

(1) A person who qualifies under a State's "small estate" statute; or

(2) A person resident in a foreign country who under the laws and customs of that country, has the right to receive assets of the estate; or

(3) A public administrator; or

(4) A person who has the authority under applicable law to collect the assets of the estate of the deceased beneficiary.

(f) *Definition of "good acquittance."* A person is considered to give the Office "good acquittance" when payment to that person will release the Office from further liability for such payment.

Comments received: One comment suggests that any underpaid claimant should be allowed to elect payment of the deficiency in a lump sum.

Discussion and changes: The Department agrees and a change is made.

§725.546 Relation to provisions for reductions or increases.

The amount of an overpayment or an underpayment is the difference between the amount to which the beneficiary was actually entitled and the amount paid. Overpayment and underpayment simultaneously outstanding against the same beneficiary shall first be adjusted against one another before adjustment pursuant to the other provisions of this subpart.

Comments received: None.

§ 725.547 Applicability of overpayment and underpayment provisions to operator or carrier.

(a) The provisions of this subpart relating to overpayments and underpayments shall be applicable to overpayments and underpayments made by responsible operators or their insurance carriers, as appropriate. However, if an overpayment has been made by an operator, the provisions of §§ 725.541–725.544 shall not be applicable.

(b) No operator or carrier may make an adjustment of an overpayment without prior application to, and approval by, the Office which shall exercise full supervisory authority over the adjustment of all overpayments.

(c) In any case involving either overpayments or underpayments, the Office may take any necessary action, and deputy commissioners may issue appropriate orders to protect the rights of the parties.

(d) Disputes arising out of orders so issued shall be resolved by the procedures set out in subpart E of this part.

Comments received: None.

SUBPART H—ENFORCEMENT OF LIABILITY; REPORTS

§ 725.601 Enforcement generally.

(a) The Act, together with certain incorporated provisions from the Longshoremen's and Harbor Workers' Compensation Act, contains a number of provisions which subject an operator or other employer, claimants and others to penalties for failure to comply with certain provisions of the Act, or failure to commence and continue prompt periodic payments to a beneficiary.

(b) It is the policy and intent of the Department to vigorously enforce the provisions of this part through the use of the remedies provided by the Act. Accordingly, if an operator refuses to pay benefits with respect to a claim for which the operator has been adjudicated liable, the Director shall invoke and execute the lien on the property of the operator as described in § 725.603. Enforcement of this lien shall be pursued in an appropriate U.S. district court. If the Director determines that the remedy provided by § 725.603 may not be sufficient to guarantee the continued compliance with the terms of an award or awards against the operator, the Director shall in addition seek an injunction in the U.S. district court to prohibit future noncompliance by the operator and such other relief as the court considers appropriate (see § 725.604). If an operator unlawfully suspends or terminates the payment of benefits to a claimant, the deputy commissioner shall declare the award in default and proceed in accordance with § 725.605. In all cases payments in addition to compensation (see § 725.607) and interest (see § 725.608) shall be sought by the Director or awarded by the deputy commissioner.

(c) In certain instances the remedies provided by the Act are concurrent; that is, more than one remedy might be appropriate in any given case. In such a case, the Director shall select the remedy or remedies appropriate for the enforcement action. In making this selection, the Director shall consider the best interests of the claimant as well as those of the Fund.

Comments received: (a) One comment suggests that this subpart should make clear what a claimant or attorney should do in the case of a suspension or termination by an operator. (b) A few comments support the Department's approach.

Discussion and changes: If an operator defaults, the claimant may request the deputy commissioner to declare a default which can be pursued in a U.S. district court, or in a case where the award is final, seek relief in court in accordance with § 725.604. The deputy commissioner should be notified in any case. The steps to be taken in the pursuit of court enforcement of an award are prescribed by the Federal Rules of Civil Procedure and the local rules of the court. Those rules are extensive and varied and cannot be set forth in this part.

§ 725.602 Reimbursement of the fund.

(a) In any case in which the fund has paid benefits, including medical benefits, on behalf of an operator or other employer which is determined liable therefore, or liable for a part thereof, such operator or other employer shall simultaneously with the first payment of benefits made to the beneficiary, reimburse the fund (with interest) for the full amount of all benefit payments made by the fund with respect to the claim.

(b) In any case where benefit payments have been made by the fund, the fund shall be subrogated to the rights of the beneficiary. The Secretary of Labor may, as appropriate, exercise such subrogation rights.

Comments received: None.

§ 725.603 Payments by the fund on behalf of an operator; liens.

(a) If an amount is paid out of the fund to an individual entitled to benefits under this part or part 727 of this subchapter on behalf of an operator or other employer which is or was required to pay or secure the payment of all or a portion of such amount (see § 725.522), the operator or other employer shall be liable to the United States for repayment to the fund of the amount of benefits properly at-

tributable to such operator or other employer.

(b) If an operator or other employer liable to the fund refuses to pay, after demand, the amount of such liability, there shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such operator or other employer. The lien arises on the date on which such liability is finally determined, and continues until it is satisfied or becomes unenforceable by reason of lapse of time.

(c) (1) Except as otherwise provided under this section, the priority of the lien shall be determined in the same manner as under section 6323 of the Internal Revenue Code of 1954.

(2) In the case of a bankruptcy or insolvency proceeding, the lien imposed under this section shall be treated in the same manner as a lien for taxes due and owing to the United States for purposes of the Bankruptcy Act or section 3466 of the Revised Statutes (31 U.S.C. 191).

(3) For purposes of applying section 6323(a) of the Internal Revenue Code of 1954 to determine the priority between the lien imposed under this section and the Federal tax lien, each lien shall be treated as a judgment lien arising as of the time notice of such lien is filed.

(4) For purposes of the section, notice of the lien imposed hereunder shall be filed in the same manner as under section 6323(f) (disregarding paragraph (4) thereof) and (g) of the Internal Revenue Code of 1954.

(5) In any case where there has been a refusal or neglect to pay the liability imposed under this section, the Secretary of Labor may bring a civil action in a district court of the United States to enforce the lien of the United States under this section with respect to such liability or to subject any property, of whatever nature, of the operator, or in which it has any right, title, or interest, to the payment of such liability.

(b) The liability imposed by this paragraph may be collected at a proceeding in court if the proceeding is commenced within 6 years after the date upon which the liability was finally determined, or prior to the expiration of any period for collection agreed upon in writing by the operator and the United States before the expiration of such 6-year period. This period of limitation shall be suspended for any period during which the assets of the operator are in the custody or control of any court of the United States, or of any State, or the District of Columbia, and for 6 months thereafter, and for any period during which the operator is outside the United States if such period of absence is for a continuous period of at least 6 months.

Comments received: None.

§ 725.604 Enforcement of final awards.

Notwithstanding the provisions of § 725.603, if an operator or other employer or its officers or agents fails to comply with an order awarding benefits that has become final, any beneficiary of such award or the deputy commissioner may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the U.S. District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such operator or other employer or its officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such operator or other employer and its officers or agents compliance with the order.

Comments received: None.

§ 725.605 Defaults.

(a) Except as is otherwise provided in this part, no suspension, termination or other failure to pay benefits awarded to a claimant is permitted. If an employer found liable for the payment of such benefits fails to make such payments within 30 days after any date on which such benefits are due and payable, the person to whom such benefits are payable may, within one year after such default, make application to the deputy commissioner for a supplementary order declaring the amount of the default.

(b) If after investigation, notice and hearing as provided in subparts D and E of this part, a default is found, the deputy commissioner or the administrative law judge, if a hearing is requested, shall issue a supplementary order declaring the amount of the default, if any. In cases where a lumpsum award has been made, if the payment in default is an installment, the deputy commissioner or administrative law judge, may, in his or her discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the operator has its principal place of business or maintains an office or for the judicial district in which the injury occurred. In case such principal place of business or office is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the U.S. District Court for the District of Columbia. Such supplementary order shall be final and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later benefits order upon presentation of a certified copy thereof to the court.

(c) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the deputy commissioner shall make payment from the fund, and in addition, provide any necessary medical, surgical, and other treatment required by subpart I of this part. A defaulting employer shall be liable to the Fund for payment of the amounts paid by the fund under this section; and for the purpose of enforcing this liability, the fund shall be subrogated to all the rights of the person receiving such payments or benefits.

Comments received: None.

§ 725.606 Security for the payment of benefits.

Whenever an adjudication officer deems it advisable, he or she may require any operator or other employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of benefits to eligible claimants. Payments may be made from such deposit, or such deposit may be returned to an operator or other employer, only upon the order of such adjudication officer. The adjudication officer shall require the deposit of security pursuant to this section in any case where an operator or other liable employer is uninsured or has failed to secure the payment of benefits.

Comments received: None.

§ 725.607 Payments in addition to compensation.

(a) If any benefits payable under the terms of (1) an award by a deputy commissioner (§ 725.419(d)), (2) a decision and order filed and served by an administrative law judge (§ 725.478), or (3) a decision filed by the Board or a U.S. court of appeals, are not paid by an operator or other employer ordered to make such payments within 10 days

after such payments become due, there shall be added to such unpaid benefits an amount equal to 20 percent thereof, which shall be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the LHWCA and an order staying payments has been issued.

(b) If, on account of an operator's or other employer's failure to pay benefits as provided in paragraph (a) of this section, benefit payments are made by the fund, the eligible claimant shall nevertheless be entitled to receive such additional compensation to which he or she may be eligible under paragraph (a) of this section, with respect to all amounts paid by the fund on behalf of such operator or other employer.

(c) The fund shall not be liable for payments in addition to compensation under any circumstances.

Comments received: (a) Some comments request clarification of the relationship between interest payments and the 20 percent penalty. (b) One comment suggests that the Fund should not be exempt from the 20 percent penalty.

Discussion and changes: (a) The 20 percent penalty is required in appropriate cases where the employer does not begin the payment of benefits after the issuance of an award by the deputy commissioner, or after being ordered to pay benefits by an administrative law judge, the Board, or a court. The penalty is intended to encourage the prompt payment of benefits by operators whether or not additional proceedings are pursued. Because by the terms of section 14(f) of the Longshoremen's Act, as incorporated, the 20 percent penalty is added to compensation benefits due and owing, those additional benefits should be considered in computing the amount of interest due. A change is made in § 725.608 to clarify this result.

(b) Section 424 of the act, which sets out the obligations of the fund, explicitly exempts the fund from payment of penalties, and such obligation cannot be assumed by these rules.

§ 725.608 Interest.

(a) If an operator or other employer fails or refuses to pay any or all benefits due under the terms of an initial determination by a deputy commissioner (§ 725.420), a decision and order filed and served by an administrative law judge (§ 725.478) or a decision filed by the Board or a United States court of appeals, including any penalty awarded in addition to benefits in accordance with § 725.607, such operator shall be liable for 6 percent simple annual interest on all past due benefits computed from the date on which such benefits were due and payable, in addition to such operator's or other employer's liability as is otherwise provided in this part. Except as provided in paragraph (b) of this section, interest payments owed under this paragraph shall be made directly to the beneficiary.

(b) If an operator or other employer fails or refuses to pay any or all benefits due pursuant to an award of benefits or an initial determination of eligibility made by the deputy commissioner, and the Fund undertakes such payments, such operator or other employer shall be liable to the fund in an amount equal to six percent simple annual interest on all payments made by the Fund for which such operator is determined liable, computed from the first date on which such benefits are paid by the fund, in addition to such operator's liability to the fund, as is otherwise provided in this part. Interest payments owed pursuant to this paragraph shall be paid directly to the fund.

(c) The fund shall not be liable for the payment of interest under any circumstances.

Comments received: (a) Some comments request clarification of the relationship between interest payments and the 20 percent penalty described in § 725.607. (b) A few comments argue that the Fund should be liable for the payment of interest.

Discussion and changes: (a) See paragraph (a) of *Discussion and changes* following § 725.607. A change is made to reflect that discussion.

(b) It has long been the law that an award of interest against an instrumentality of the United States, such as the fund, is not allowed unless specifically authorized by statute. There being no such authorization in the Act, despite other specific language which indicates when interest is owed to the fund (section 424(a)(6), (b)(2)), no payment of interest can be made by the Fund. *See also* paragraph (a) of the *Discussion and changes* following § 725.607, which contains other discussions pertinent to this matter. Conforming language changes are made in accordance with such discussion.

§ 725.620 Failure to secure benefits; other penalties.

(a) If an operator fails to discharge its insurance obligations under the Act, the provisions of § 725.495 shall apply.

(b) Any employer who knowingly transfers, sells, encumbers, assigns, or in any manner disposes of, conceals, secrets, or destroys any property belonging to such employer, after one of its employees has been injured within the purview of the Act, and with intent to avoid the payment of benefits under the Act to such miner or his or her dependents, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both. In any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable for such penalty or imprisonment as well as jointly liable with such corporation for such fine.

(c) No agreement by a miner to pay any portion of a premium paid to a carrier by such miner's employer or to contribute to a benefit fund or department maintained by such employer for the purpose of providing benefits or medical services and supplies as required by this part shall be valid; and any employer who makes a deduction for such purpose from the pay of a miner entitled to benefits under the Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(d) No agreement by a miner to waive his or her right to benefits under the Act and the provisions of this part shall be valid.

(e) This section shall not affect any other liability of the employer under this part.

Comments received: None.

§ 725.621 Reports.

(a) Upon making the first payment of benefits and upon suspension, reduction, or increase of payments, the operator or other employer responsible for making payments shall immediately notify the deputy commissioner of the action taken, in accordance with a form prescribed by the Office.

(b) Within 16 days after final payment of benefits has been made by an employer, such employer shall so notify the deputy commissioner, in accordance with a form prescribed by the Office, stating that such final payment, has been made, the total amount of benefits paid, the name of the beneficiary, and such other information as the Office deems pertinent.

(c) The Director may from time to time prescribe such additional reports to be made by operators, other employers, or carriers as the Director may consider necessary for the efficient administration of the Act.

(d) Any employer who fails or refuses to file any report required of such employer under this section shall be subject to a civil penalty not to exceed $500 for each failure or refusal, which penalty shall be determined in accordance with the procedures set forth in § 725.495, as appropriate.

(e) No request for information or response to such request shall be considered a report for purposes of this section or the Act, unless it is so designated by the Director or by this section.

Comments received: None.

Subpart I—Medical Benefits and Vocational Rehabilitation

§ 725.701 Availability of medical benefits.

(a) A miner who is determined to be eligible for benefits under this part or part 727 of this subchapter is entitled

to medical benefits as set forth in this subpart as of the date of his or her claim, but in no event before Jaunuary 1, 1974. No medical benefits shall be provided to the survivor or dependent of a miner under this part.

(b) A responsible operator, other employer, or where there is neither, the Fund, shall furnish a miner entitled to benefits under this part with such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis and ancillary pulmonary conditions and disability require.

(c) The medical benefits referred to in paragraphs (a) and (b) of this section shall include palliative measures useful only to prevent pain or discomfort associated with the miner's pneumoconiosis or attendant disability.

(d) The costs recoverable under this subpart shall include the reasonable cost of travel necessary for medical treatment (to be determined in accordance with prevailing United States government mileage rates) and the reasonable documented cost to the miner or medical provider incurred in communicating with the employer, carrier, or deputy commissioner on matters connected with medical benefits.

Comments received: (a) A few comments urge that the rate of reimbursement for travel by automobile should be specified. (b) One comment recommends that fees should be awarded if a miner needs to retain representation in pursuit of medical benefits. (c) A few comments note that the proposed rules do not contain provisions implementing Section 11 of the Reform Act relating to the availability of medical benefits for Part B beneficiaries. Some of these comments urge that Part B beneficiaries should be automatically awarded medical benefits or presumed entitled thereto.

Discussion and changes: (a) The Department agrees that the rate of reimbursement for travel by private automobile should be specified, and this is done.

(b) A representative's fee may be awarded for services rendered in connection with a dispute over a miner's entitlement to a medical treatment benefit. If the representative is an attorney and the conditions set forth in section 28 of the Longshoremen's Act are present, the fee may be assessed against a coal mine operator. No change is necessary to clarify this result.

(c) The Department agrees that the proposed rules do not adequately treat claims for medical benefits filed under section 11 of the Reform Act. A new § 725.701A is added to correct this deficiency.

In connection with this new section some explanation is appropriate:

1. A Part B beneficiary who files for section 11 benefits does not jeopardize the prior part B award, regardless of the outcome of the section 11 claim, unless fraud or concealment in the earlier claim is revealed.

2. The interim presumption contained in 20 CFR § 727.203 is applicable to all section 11 claims.

3. All filing and adjudication rules and proceedings prescribed in this part are applicable to section 11 claims.

4. A difficult question arises in connection with the retroactive application of section 11.

Unlike the provisions relating to the review of pending and denied part B and part C claims, Congress did not specifically make section 11 benefits retroactive. It could have done so, or it could have automatically extended benefits under the part B program to include medical benefits in all previously approved claims, and authorized payments from general revenues. In such a case there would ordinarily be a presumption in law that the section was prospective only. However, section 7(a) of the Longshoremen's Act (which is incorporated by the Act) provides that in an approved claim medical benefits are to be paid "for such period as the nature of the injury * * * may require." No benefits of any kind are payable under part C (all section 11 claims are part C claims) for any period prior to January 1, 1974. These conflicts in the law cannot easily be resolved in keeping with the spirit and intent of the Act. Medical benefits, unlike monthly dollar benefits, are not provided to assist a beneficiary in meeting ordinary expenses of life by replacing wages lost as a result of black lung disease. They are provided in recognition of the principle that an injured worker is likely to require medical attention as the result of the injury and that payment for the cost of this medical attention is properly a part of whatever compensation is provided on account of the injury.

The approved part B miner/beneficiary was found to be totally disabled due to pneumoconiosis as of some date between December 31, 1969, and June 30, 1973, although this individual may well have been totally disabled due to the disease for some period of time before December 31, 1969. If medical treatment is sought or required on any occasion either before or during the term of a part B award, it is almost certain that the cost of that treatment has already been paid, either by some governmental source, private or group insurance, or out of pocket by the miner. Moreover, if there is a dispute over a claimant's entitlement to reimbursement for a medical service already rendered, it would be very difficult to resolve.

If the cost was borne out of pocket by the miner, the language and intent of the Act should be construed to allow a reimbursement of the miner on the basis of an approved section 11 claim, if the liability for the cost in question accrued on or after January 1, 1974. If the cost was borne by a public or private source, some part of the benefits provided may be attributable to premiums, taxes, or deductions paid by the miner and some other part is probably attributable to government or employer subsidies. In some instances, the public or private insurance liability would not have provided first dollar payments if the miner was the beneficiary of a workers' compensation award which required the payment of the medical treatment costs. If the Department were to adopt the view that section 11 provides full retroactive benefits for all medical treatment costs incurred on account of pneumoconiosis back to January 1, 1974 (that cut-off date for the retroactive payment of part C benefits is absolute) a number of serious difficulties would be present. The accounting, paperwork and diversion of limited resources which such an undertaking would require would be prohibitive. Approximately 200,000 miners' claims were approved under part B. In many instances, all this effort would be of no benefit to the miner, since the money paid would have to be reimbursed to the original source which paid the cost when it was incurred. The Department does not believe that Congress intended the Department to devote the considerable resources necessary to effect such a result which would be of no benefit to the individual miner and which would be significantly detrimental to the Department's efforts to promptly process and determine other claims. Moreover the cost of such an effort was not considered in the evolution of the coal tax.

If the Department adopted the view that reimbursement should be provided to the extent that the miner contributed to a public or private health insurance fund, the accounting and paperwork job to be done would be even more difficult, if not impossible. Once again, if any part of the miner's payments were made before January 1, 1974, this would not be reimbursable. It is unlikely that a miner who was totally disabled before July 1, 1973 (the relevant date in a part B approval), would have been making payments to a health insurance fund after January 1, 1974. These payments in the case of a salaried employee are almost always deducted or paid directly from wages earned. There would, therefore, be little or no benefit gained by the adoption of the more limited approach.

Accordingly, the Department has determined that section 11 benefits should be paid on a prospective basis from the date of filing with the exception that a miner may be reimbursed for out-of-pocket medical treatment expenses incurred after January 1, 1974, if documented proof of any such expense is provided.

§ 725.701A Claims for medical benefits only under section 11 of the Reform Act.

(a) Section 11 of the Reform Act directs the Secretary of Health, Education, and Welfare to notify each miner receiving benefits under part B of title IV of the Act that he or she may file a claim for medical treatment benefits described in this subpart. Section 11 and § 725.308(b) provide that a claim for medical treatment benefits shall be filed within 6 months from the date notice was mailed, unless the period is enlarged for good cause shown. This section sets forth the rules governing the processing, adjudication, and payment of claims filed under section 11.

(b)(1) A claim filed pursuant to the notice described in paragraph (a) of this section shall be considered a claim for medical benefits only, and shall be filed, processed, and adjudicated in accordance with the provisions of this part, except as provided in this section. While a claim for medical benefits must be treated as any other claim filed under part C of title IV of the

Act, the Department shall accept the Social Security Administration's finding of entitlement as its initial determination.

(2) In the case of a part B beneficiary whose coal mine employment terminated before January 1, 1970, the Secretary shall make an immediate award of medical benefits. Where the part B beneficiary's coal mine employment terminated on or after January 1, 1970, the Secretary shall immediately authorize the payment of medical benefits and thereafter inform the responsible operator, if any, of the operator's right to contest the claimant's entitlement for medical benefits.

(c) A miner on whose behalf a claim is filed under this section (see § 725.301) must have been alive on March 1, 1978, in order for the claim to be considered.

(d) The criteria contained in subpart C of part 727 of this subchapter are applicable to claims for medical benefits filed under this section.

(e) No determination made with respect to a claim filed under this section shall affect any determination previously made by the Social Security Administration. The Social Security Administration may, however, reopen a previously approved claim if the conditions set forth in § 410.672(c) of this chapter are present. These conditions are generally limited to fraud or concealment.

(f) If medical benefits are awarded under this section, such benefits shall be payable by a responsible coal mine operator (see §§ 725.491–725.493), if the miner's last employment occurred on or after January 1, 1970, and in all other cases by the fund. An operator which may be required to provide medical treatment benefits to a miner under this section shall have the right to participate in the adjudication of the claim as is otherwise provided in this part.

(g) Any miner whose coal mine employment terminated after January 1, 1970, may be required to submit to a medical examination requested by an identified operator. The unreasonable refusal to submit to such an examination shall have the same consequences as are provided under § 725.408.

(h) If a miner is determined eligible for medical benefits in accordance with this section, such benefits shall be provided from the date of filing, except that such benefits may also include payments for any unreimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974, to the date of filing which are attributable to medical care required as a result of the miner's total disability due to pneumoconiosis. No reimbursement for health insurance premiums, taxes attributable to any public health insurance coverage, or other deduction or payments made for the purpose of securing third party liability for medical care costs is authorized by this section. If a miner seeks reimbursement for medical care costs personally incurred before the filing of a claim under this section, the deputy commissioner shall require documented proof of the nature of the medical service provided, the identity of the medical provider, the cost of the service, and the fact that the cost was paid by the miner, before reimbursement before such cost may be awarded.

Comments received: This is a new section adopted in response to comments received concerning § 725.701.

§ 725.702 Physician defined.

The term "physician" includes only doctors of medicine (MD) and osteopathic practitioners within the scope of their practices as defined by State law. No treatment or medical services performed by any other practitioner of the healing arts is authorized by this part, unless such treatment or service is authorized and supervised both by a physician as defined in this section and the deputy commissioner.

Comments received: None.

§ 725.703 Notification of right to medical benefits; authorization of treatment.

(a) Upon notification to a miner of such miner's entitlement to benefits, the Office shall provide the miner with a list of authorized treating physicians and medical facilities in the area of the miner's residence. The miner may select a physician from this list or may select another physician with approval of the Office. Where emergency services are necessary and appropriate, authorization by the Office shall not be required.

(b) The Office may, on its own initiative, or at the request of a responsible operator, order a change of physicians or facilities, but only where it has been determined that the change is desirable or necessary in the best interest of the miner. The miner may change physicians or facilities subject to the approval of the Office.

(c) If adequate treatment cannot be obtained in the area of the claimant's residence, the Office may authorize the use of physicians or medical facilities outside such area as well as reimbursement for travel expenses and overnight accommodations.

Comments received: One comment recommends that this section specify that payment will be made for travel and overnight accommodations.

Discussion and changes: The Department agrees, if adequate medical care is not available in the area of the miner's residence.

§ 725.704 Arrangements for medical care.

(a) *Operator liability.* If an operator has been determined liable for the payment of benefits to a miner, the Office shall notify such operator or insurer of the names, addresses, and telephone numbers of the authorized providers of medical benefits chosen by an entitled miner, and shall require the operator or insurer to:

(1) Notify the miner and the providers chosen that such operator will be responsible for the cost of medical services provided to the miner on account of the miner's total disability due to pneumoconiosis;

(2) Designate a person or persons with decisionmaking authority with whom the Office, the miner and authorized providers may communicate on matters involving medical benefits provided under this subpart and notify the Office, miner and providers of such designation;

(3) Make arrangements for the direct reimbursement of providers for their services.

(b) *Fund liability.* If there is no operator found liable for the payment of benefits, the Office shall make necessary arrangements to provide medical care to the miner, notify the miner and medical care facility selected of the liability of the fund, designate a person or persons with whom the miner or provider may communicate on matters relating to medical care, and make arrangements for the direct reimbursement of the medical provider.

Comments received: One comment urges that a similar section be developed in those cases where medical treatment is paid by the fund.

Discussion and changes: This section has been revised in accordance with the comment received.

§ 725.705 Authorization to provide medical services.

(a) Except as provided in paragraph (b) of this section, medical services from an authorized provider which are payable under § 725.701 shall not require prior approval of the Office or the responsible operator.

(b) Except where emergency treatment is required, prior approval of the Office or the responsible operator shall be obtained before any hospitalization or surgery, or before ordering an apparatus for treatment where the purchase price exceeds $100. A request for approval of non-emergency hospitalization or surgery shall be acted upon expeditiously, and approval or disapproval will be given by telephone if a written response cannot be given within 7 days following the request. No employee of the Department of Labor, other than a deputy commissioner or the Chief, Branch of Medical Analysis and Services, DCMWC, is au-

thorized to approve a request for hospitalization or surgery by telephone.

(c) Payment for medical services, treatment, or an apparatus shall be made at no more than the rate prevailing in the community in which the providing physician, medical facility or supplier is located.

Comments received: A number of comments object to the requirement of prior approval in the case of nonemergency hospitalization or surgery or ordering an apparatus for treatment costing in excess of $100, and some suggest in the alternative that an expedited approval procedures be instituted.

Discussion and changes: Prior approval for nonemergency services is an essential part of the Department's responsibility to administer the program. It is agreed, however, that an expedited procedure is appropriate and such a procedure is added to this section. The procedure shall not be applicable to request for permission to purchase an apparatus which costs more than $100. Past abuses, considerable doubt concerning the usefulness of certain expensive equipment, and in some instances a potential hazard to the claimant's health, require closer review of a request to purchase an apparatus costing more than $100.

§ 725.706 Reports of physicians and supervison of medical care.

(a) Within 30 days following the first medical or surgical treatment provided under § 725.701, the treating physician or facility shall furnish to the Office and the responsible operator, if any, a report of such treatment.

(b) In order to permit continuing supervision of the medical care provided to the miner with respect to the necessity, character and sufficiency of any medical care furnished or to be furnished, the treating physician, facility, employer or carrier shall provide such reports in addition to those required by paragraph (a) of this section as the Office may from time to time require. Within the discretion of the deputy commissioner, payment may be refused to any medical provider who fails to submit any report required by this section.

Comments received: A few comments object to any provision requiring a treating physician to submit reports of treatment.

Discussion and changes: Supervision of medical care provided for a miner by the Act is an important part of the Department's responsibility to properly administer the Act. These reports are necessary to ensure that medical treatment benefits are provided in accordance with law. Moreover, the Department does not agree that these reporting requirements will significantly discourage qualified physicians from treating disabled miners or that filing the required reports will be particularly burdensome.

§ 725.707 Disputes concerning medical benefits.

(a) Whenever a dispute develops concerning medical services under this part, the deputy commissioner shall attempt to informally resolve such dispute. In this regard the deputy commissioner may, on his or her own initiative or at the request of the responsible operator order the claimant to submit to an examination by a physician selected by the deputy commissioner.

(b) If no informal resolution is accomplished, the deputy commissioner shall refer the case to the Office of Administrative Law Judges for hearing in accordance with this part. Any such hearing shall be scheduled at the earliest possible time and shall take precedence over all other requests for hearing except for prior requests for hearing arising under this section and as provided by § 727.405 of this subchapter. During the pendency of such adjudication, the Director may order the payment of medical benefits prior to final adjudication under the same conditions applicable to benefits awarded under § 725.522.

(c) In the development or adjudication of a dispute over medical benefits, the adjudication officer is authorized to take whatever action may be necessary to protect the health of a totally disabled miner.

(d) Any interested medical provider may, if appropriate, be made a party to a dispute over medical benefits.

Comments received: None.

§ 725.710 Objective of vocational rehabilitation

The objective of vocational rehabilitation is the return of a miner who is totally disabled for work in or around a coal mine and who is unable to utilize those skills which were employed in the miner's coal mine employment to gainful employment commensurate with such miner's physical impairment. This objective may be achieved through a program of re-evaluation and redirection of the miner's abilities, or retraining in another occupation, and selective job placement assistance.

Comments received: None.

§ 725.711 Requests for referral to vocational rehabilitation assistance.

Each miner who has been determined entitled to receive benefits under part C of title IV of the Act shall be informed by the OWCP of the availability and advisability of vocational rehabilitation services. If such miner chooses to avail himself or herself of vocational rehabilitation, his or her request shall be processed and referred by OWCP vocational rehabilitation advisors pursuant to the provisions of §§ 702.501-702.508 of this chapter as is appropriate.

Signed this 11th day of August at Washington, D.C.

RAY MARSHALL,
Secretary of Labor.

[FR Doc. 78-23004 Filed 8-17-78; 8:45 am]

[4510-27]

PART 727—REVIEW OF PENDING AND DENIED CLAIMS UNDER THE BLACK LUNG BENEFITS REFORM ACT OF 1977

AGENCY: Employment Standards Administration, Department of Labor.

ACTION: Final rulemaking.

SUMMARY: On April 25, 1978, the Department of Labor published a notice of proposed rulemaking in the FEDERAL REGISTER (43 FR 17765-17773) which contained detailed procedures to be applied in the prompt processing and adjudication of all previously denied and pending claims for which review by the Department of Labor is required. The notice also set forth the criteria and standards to be applied to review claims for the purpose of determining total disability or death due to black lung disease. This new part 727 establishes procedures for the processing of pending and denied claims under part C of title IV of the Federal Mine Safety and Health Act of 1977, as amended by the Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977.

EFFECTIVE DATE: August 18, 1978.

FOR FURTHER INFORMATION CONTACT:

Robert B. Dorsey, Chief, Branch of Claims Determination, Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor, Room C-3526, NDOL Building, 200 Constitution Avenue NW., Washington, D.C. 20210, telephone 202-523-6727.

SUPPLEMENTARY INFORMATION: On March 1, 1978, title IV of the Federal Mine Safety and Health Act of 1977, formerly the Federal Coal Mine Health and Safety Act of 1969, which provides benefits to coal miners who are totally disabled by black lung disease and to the survivors of coal miners who died due to or while totally disabled by that disease, was significantly amended by the enactment of the Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977. Among other things, the new Acts require a review of claims which were previously denied or are still pending, by either the Department of Health, Education,

and Welfare or the Department of Labor.

The new act also requires that less stringent standards are to be applied in the review of pending and denied claims, as well as in the consideration of new claims. It is expected that the application of these new standards will allow a greater number of victims of black lung disease to obtain benefits under the law.

Many comments were received on the proposed part 727 from black lung claimants, groups which assist claimants in obtaining benefits, claimant representatives, Members of Congress, attorneys, coal mine operators and their representatives, and coal mine construction companies and their representatives. The vast majority of comments received were substantive, detailed, and very useful to the Department.

The Department has responded to all relevant and substantive comments and has made changes in the rules where necessary. Following each final rule set forth, the Department has responded, in discussion form, to the comments received and changes made in the rules. These discussions are entitled "Comments Received" and "Discussion and Changes." Our purpose is to respond to all relevant and substantive comments and to specify those changes made in the rules. Wherever possible, comments which are essentially similar are considered together.

The discussion following each rule contained in this document shall not be considered a part of the rule and will not be published in the Code of Federal Regulations.

A few of the revisions made reflect technical, clarifying and correcting changes felt to be necessary by Department of Labor personnel.

Since these rules implement the recent amendments to title IV of the act and because of the need to immediately commence the processing and adjudication of claims for benefits, I find that good cause exists for making these rules effective immediately.

Accordingly, 20 CFR Part 727 is adopted as follows:

Subpart A—General

Sec.

727.1 Statutory provisions, purpose of this part.
727.2 Applicability and content of this part.
727.3 Definitions, use of terms.
727.4 Applicability of other parts in this subchapter.

Subpart B—Initial Review of Pending and Denied Claims

727.101 Who is entitled to review.
727.102 "Pending" and "denied" claim defined.
727.103 Duplicate claims.
727.104 Review by the Social Security Administration.
727.105 Action by the Office, Social Security approval.
727.106 Action by the Office, insufficient evidence for Social Security approval.
727.107 Action by the Office, Social Security referral without prior review.
727.108 Action by the Office, Department of Labor pending or denied claim.
727.109 Hearings and appeals, parties.

Subpart C—Criteria for Determining Eligibility for Benefits

727.200 Basis for criteria.
727.201 Persons entitled to benefits, dependents.
727.202 Definition of pneumoconiosis.
727.203 Interim presumption.
727.204 Presumption of entitlement applicable to certain death claims.
727.205 Effect of current coal mine employment or coal mine employment at the time of death.
727.206 Quality standards applicable to evidence.

Subpart D—Payment of Benefits/Liability

727.300 Conditions and duration of eligibility.
727.301 Amounts payable, other payment provisions.
727.302 Date from which benefits are payable after review and approval.
727.303 Claims filed under section 415 of the act.
727.304 Liability for benefit payments.

Subpart E—Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board

727.401 General.
727.402 Claims pending in the Office of Administrative Law Judges.
727.403 Claims pending before the Benefits Review Board.
727.404 Claims pending in a U.S. Court of Appeals.
727.405 Expedited review of claims.

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 6 of 1950, 15 FR 3174; 30 U.S.C. 901 et seq., 902(f), 925, 932, 934, 936, 945; 33 U.S.C. 901 et seq.

Subpart A—General

§ 727.1 Statutory provisions, purpose of this part.

(a) Under title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, benefits were provided to coal miners and certain survivors of coal miners on account of the miners' total disability or death due to pneumoconiosis. Part B of title IV of the act as amended provided that all claims for benefits filed between December 30, 1969, and June 30, 1973, would be filed with, processed by, and paid from Federal funds by the Secretary of Health, Education, and Welfare, through the Social Security Administration. The survivor of a miner was permitted to file a claim with the Secretary of Health, Education, and Welfare under part B until January 1, 1974, or within 6 months of the miner's death, if death occurred before January 1, 1974, or in the case of a part B beneficiary, within 6 months of the beneficiary's death. Section 415 of part B of title IV of the act provides that a claim filed by a miner between July 1 and December 31, 1973, would be filed with and processed by the Secretary of Labor and paid, if appropriate, by the Secretary of Labor from Federal funds for all periods of eligibility between July 1 and December 31, 1973. For periods of eligibility after December 31, 1973, an approved section 415 claim was to be paid by a coal mine operator found liable pursuant to the act or the Secretary of Labor as appropriate. A claim filed after December 31, 1973, was to be filed under an approved State workers' compensation law or, if no such law was available in an appropriate State, the claim was to be filed with the Secretary of Labor under part C of title IV of the act. Claims were to be adjudicated under certain provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq., and paid by a coal mine operator found liable pursuant to the act. If no such operator could be identified benefits were to be paid by the Secretary of Labor from Federal funds.

(b) The Black Lung Benefits Revenue Act of 1977 and the Black Lung Benefits Reform Act of 1977 significantly amend the provisions of title IV of the act to, among other things, establish the black lung disability trust fund (the fund) for the payment of all claims predicated upon coal mine employment which terminate prior to January 1, 1970, and for other claims for which no operator liability can be established. The fund is financed by individual coal mine operators. Other provisions of the act as amended modify the evidentiary requirements necessary to establish entitlement to benefits, eliminate certain restrictions on the filing of claims, establish penalties to be applied if a coal operator fails to meet its obligations under the act, and make technical, correcting, and other administrative or procedural and substantive changes.

(c) Section 435 of the act as amended directs the Secretary of Health, Education, and Welfare and the Secretary of Labor to undertake a review of all previously denied and pending claims in light of the amendments made by such act. The Secretary of Health, Education, and Welfare is directed to perform this review at the request of the claimant on all denied and pending claims filed under part B of title IV of the act, exclusive of those claims filed under section 415. The Secretary of Labor is directed to perform this review automatically on

all claims filed under section 415 and part C of title IV of the act, which were denied or pending as of the effective date of the Black Lung Benefits Reform Act of 1977, and in addition is required to review certain claims originally filed with the Secretary of Health, Education, and Welfare.

(d) The new section 435 contains provisions setting forth the scope of the claims review, the procedures to be followed and the consequences which accrue depending upon the results of any particular review. It is the purpose of this part to set forth and implement the provisions of section 435 as those provisions apply to the Secretary of Labor, and inform all interested parties of the manner in which a right to review will be extended with respect to all denied and pending claims for black lung benefits under the act by the Secretary of Labor.

Comments received: None.

§ 727.2 Applicability and content of this part.

(a) This part is designed to apply to, and set forth the role of, the Secretary of Labor in carrying out the provisions of section 435 of the act. The action to be taken and the procedure to be followed by the Secretary of Health, Education, and Welfare and the Social Security Administration under section 435 is detailed elsewhere. This part will, however, describe what will be done by the Secretary of Health, Education, and Welfare and the Social Security Administration in general terms and will detail the responsibilities assigned to the Secretary of Labor with respect to a claim reviewed by the Secretary of Health, Education, and Welfare.

(b) This subpart A describes generally the statutory framework established to facilitate the review of all pending and denied black lung claims, the applicability and content of this part and other relevant parts contained in this Title 20 of the Code of Federal Regulations, and sets forth applicable definitions and usages.

(c) Subpart B of this part sets forth the procedures to be followed in the review of various types of claims subject to review under this part.

(d) Subpart C of this part contains the criteria to be applied in determining a claimant's eligibility for benefits under this part. Such criteria shall also be applicable to all claims for medical services filed under section 11 of the Black Lung Benefits Reform Act of 1977 (see § 725.308(b) of this subchapter), and shall also be applicable to all other claims filed under part 725 of this subpart until such time as the Secretary promulgates new criteria for determining total disability or death due to pneumoconiosis in accordance with section 402(f)(1) of the act.

(e) Subpart D of this part contains provisions relating to the liability for, and conditions governing, the payment of benefits under this part.

(f) Subpart E of this part sets forth special provisions relating to the processing of claims subject to review under this part which are within the jurisdiction of an admininstrative law judge or the Benefits Review Board.

Comments received: (1) Commentators support the requirement of paragraph (d) that the interim presumption be applied to claims for medical benefits filed by miners receiving benefits under part B of the act and to claims filed before the Department of Labor establishes new medical standards. (2) One person expressed the view that the Department should clarify what is meant by the term "the filing of a claim."

Discussion and changes: It is and has always been the view of the Department of Labor that a claim is "filed" when a completed claim form is submitted to the appropriate office, and this view we believe is reflected in this part and part 725 of this subchapter (see §§ 725.301-725.305 of this subchapter). No change is, therefore, necessary.

§ 727.3 Definitions, use of terms.

Except as is otherwise provided by this part, the definitions and usages of terms contained in subpart A of part 725 of this title, as amended from time to time, shall be applicable to this part.

Comments received: None.

§ 727.4 Applicability of other parts in this subchapter.

(a) *Part 725.* Part 725 of this subchapter, which sets forth: (1) The procedure for filing a claim for black lung benefits under part C of title IV of the act, (2) the procedure to be followed in the adjudication of claims so filed, (3) standards for determining whether a particular individual is a miner, or a qualified dependent or survivor of a miner, (4) the criteria to be applied in determining the liability of a coal operator or the fund for the payment of approved claims so filed, and (5) the manner in which the payment of benefits shall be made with respect to part C claims, shall not be applicable to the processing, adjudication, or payment of claims under this part unless applicability is specifically provided by part 725 or this part.

(b) *Part 718.* Part 718 of this subchapter, which contains the criteria and standards to be applied in determining whether a miner is totally disabled due to pneumoconiosis or whether a miner died due to or while totally or partially disabled by pneumoconiosis, shall not be applicable to the determination of claims under this part unless applicability is provided by part 718 or this part. Until such time as part 718 of this subchapter is revised in accordance with the 1977 amendments to the act, the provisions of subpart D of part 410 of this title which are not inconsistent with the 1977 amendments to the act, shall be applicable to the adjudication of claims under this part, unless otherwise provided by this part (see subpart C of this part).

(c) *Parts 715, 717, and 720.* Parts 715, 717, and 720 of this subchapter, which parts established the procedures for the filing, processing, and payment of claims filed under section 415 of the act, are repealed and pertinent provisions of those parts which retain vitality are incorporated within part 725 of this subchapter as amended.

(d) *Part 726.* Part 726 of this subchapter, which contains provisions setting forth a coal operator's obligations to insure or self-insure its liability for the payment of benefits to certain eligible claimants, is applicable to this part insofar as it bears upon the responsibility of a coal operator to secure the payment of benefits to certain claimants who may be determined eligible for benefits under this part.

Comments received: None.

Subpart B—Initial Review of Pending and Denied Claims

§ 727.101 Who is entitled to review.

(a) *By the Secretary of HEW.* Any person who filed a claim for benefits under part B of title IV of the act, excluding miners who filed under section 415 of the act between July 1 and December 31, 1973, and whose claim was either pending or had been denied as of March 1, 1978 (see § 727.102), may upon notification by the Secretary of Health, Education, and Welfare, elect to have the claim reviewed by the Secretary of Health, Education, and Welfare.

(b) *By the Secretary of Labor.* (1) Any person who elects review by the Social Security Administration under paragraph (a) of this section and whose claim cannot be approved after such review shall have the claim reviewed by the Secretary of Labor.

(2) Any person who is eligible to have his or her claim reviewed under paragraph (a) of this section may elect to have the claim referred directly to the Secretary of Labor for review.

(3) Any person who has filed a claim for benefits under section 415 or part C of title IV of the act and whose claim was pending or had been denied (see § 727.102) on or before March 1, 1978, shall have the claim automatically reviewed by the Secretary of Labor. (But see § 727.103.)

(4) Any claimant whose claim is subject to review by the Secretary of Labor under this paragraph shall have the right to submit additional evi-

dence to the Secretary of Labor in support of such claim.

Comments received: One comment considered the description of the types of claims which are to be reviewed by the Secretary of HEW to be unclear.

Discussion and changes: The Department does not agree that the description of claims subject to HEW review is unclear. A further explanation of the procedures to be followed by the Department of HEW can be found in that Department's own regulations, 20 CFR Part 410, as amended. No change is necessary.

§ 727.102 "Pending" and "denied" claim defined.

(a) *Applicability.* This section defines the terms "pending" and "denied" claims for purposes of this part only, and the following definitions shall be applicable only to claims filed with the Secretary of Labor under section 415 and part C of title IV of the act.

(b) *Denied claim defined.* For the purposes of this part, a claim filed with the Secretary of Labor shall be considered a denied claim if:

(1) The claim was filed before March 1, 1978; and

(2) The claimant's entitlement to benefits has been denied for any reason by a deputy commissioner in the Office of Workers' Compensation Programs, U.S. Department of Labor, an administrative law judge assigned to determine black lung claims by the Secretary of Labor, the Benefits Review Board in the U.S. Department of Labor, or an appropriate U.S. court of appeals; and

(3) No further proceedings before a deputy commissioner, administrative law judge, the Benefits Review Board, or a U.S. court of appeals are pending; and

(4) The time has expired to seek further consideration of such denial; or

(5) The claim has been declared abandoned by a deputy commissioner or administrative law judge (see § 725.409 of this subchapter which replaces 38 FR 26059).

(c) *Pending claim defined.* For the purposes of this part and except as provided in §§ 727.402 and 727.403, a claim filed with the Secretary of Labor shall be considered a pending claim if:

(1) The claim was filed before March 1, 1978; and

(2) The claim is before a deputy commissioner, administrative law judge, the Board, or a U.S. court of appeals for consideration; or

(3) The time permitted to seek further consideration of the claim has not expired.

(d) *Withdrawn claims.* A claim for benefits which has been previously withdrawn at the request of the claimant (see § 725.306 of this subchapter) shall not be considered a pending or denied claim for purposes of this part. Any person who has voluntarily withdrawn his or her claim from consideration may file a new claim for benefits under part 725 of this subchapter.

Comments received: (a) It is argued by some commentators that claims which have been considered by the Benefits Review Board or a U.S. court of appeals and which have been denied by either, and claims which have been declared abandoned, should not be subject to review under the new law. (b) Another comment urges that coal operators be allowed to submit additional evidence in connection with a reviewed claim.

Discussion and changes: (a) It is the opinion of the Department that all claims which are pending or have been denied (except voluntarily withdrawn claims) are automatically subject to review under the new law, regardless of the level of adjudication at which the denial took place. Moreover, an abandonment is in reality a denial in which no hearing was requested and is clearly subject to the review provisions relating to denied claims. The comments relating to these matters are, therefore, rejected. (b) An operator is allowed to submit evidence in connection with any claim first reviewed by the Secretary of HEW, with respect to which an operator has been notified of its potential liability. (§ 727.105(b)(5)). In connection with a claim reviewed by the Secretary of Labor, an operator is also allowed to submit evidence (see §§ 727.106(c), 727.107(c), 727.108(d), cross-referencing 20 CFR §§ 725.409-725.421). No changes are, therefore, necessary.

§ 727.103 Duplicate claims.

(a) A person who filed a claim for benefits with the Social Security Administration and whose claim has been approved by that agency and who has also filed a claim with the Secretary of Labor which was pending or had been denied as of March 1, 1978, shall be entitled to a review of such claim under this part.

(b) A person who has filed a claim with the Social Security Administration which was pending or had been denied by that agency as of March 1, 1978, and who has also filed a claim with the Secretary of Labor that has been approved, shall be entitled to elect review of the pending or denied claim by the Social Security Administration or by the Department of Labor subject to the limitation contained in paragraph (e) of this section.

(c) A person who has filed a claim both with the Social Security Administration and the Department of Labor and whose claims were either pending with or denied by both agencies as of March 1, 1978, shall have the claim reviewed by the Social Security Administration if such review is requested by the claimant. If the claim is not approved by the Social Security Administration it shall be forwarded to the Secretary of Labor for further review as provided in § 727.106. During the pendency of review proceedings by the Social Security Administration, if any, no action shall be taken by the Secretary of Labor with respect to the claim which is pending or had been denied by the Secretary of Labor. If the claimant does not respond to notification of his or her right to review by the Social Security Administration within 6 months of such notice (see § 727.104), unless the period is enlarged for good cause shown, the Secretary of Labor shall proceed under this part to complete processing of the claim originally filed with the Secretary of Labor. If the claimant, upon notification of his or her right to review by the Social Security Administration (see § 727.104) requests that the claim originally filed with the Administration be forwarded to the Department of Labor for review, or if more than one claim has been filed with the Secretary of Labor by the same claimant, such claims shall be merged and processed with the first claim filed with the Department of Labor.

(d) A person may exercise the right of review provided in paragraph (c) of this section at the same time such person is pursuing an appeal of a previously denied part B claim under the law as it existed prior to March 1, 1978. If the part B claim is ultimately approved as a result of the appeal, the claimant must immediately notify the Secretary of Labor and, where appropriate, the coal mine operator, and all duplicate payments made under part C shall be considered an overpayment and arrangements shall be made to insure the repayment of such overpayments to the fund or an operator as appropriate.

(e) In the case of a claimant who has filed one or more claims with both the Social Security Administration and the Department of Labor, under no circumstances are duplicate benefits payable for concurrent periods of eligibility.

Comments received: A number of comments urge the Secretary of Labor to simultaneously review certain claims for which review by the Secretary of HEW has also been elected, particularly if special circumstances exist.

Discussion and changes: It is the view of the Department of Labor that the Act does not authorize the Social Security Administration and the Department of Labor to simultaneously review duplicate claims which were pending with or denied by both agencies as of March 1, 1978. The Conference Committee statement provides: The conferees also expect the Secretaries of HEW and Labor to establish a satisfactory mechanism to coordinate their responsibilities and to avoid both agencies simultaneously reviewing the claim of any claimant previously denied under part B and later denied, pending, or entitled under part C. (H. Rept. 95-864, 95th Cong., 2d sess., pp. 21-22 (1978).)

The procedures for the handling of duplicate claims set forth in this section of the

regulations are fully consistent with the intent of Congress.

Where, however, a part B claim is pending on appeal under the old law, and the claimant also elects to have the claim reviewed under section 435 of the Act, the statute does not prohibit the processing of the request for review. Nor does the statute prohibit the Department of Labor from reviewing a pending or denied part C claim at the same time the claimant is pursuing an appeal of a part B denial under the old law. A new paragraph (d) has been added to this section to reflect this view. If as a result of the review conducted pursuant to section 435 of the Act the claimant is found entitled to benefits, appropriate payments will be made either by the Black Lung Disability Trust Fund or the coal mine operator liable for the claim. The Act does not, however, permit a claimant to receive duplicate payments under both part B and part C. Therefore, if a part C beneficiary is ultimately successful in the appeal of the part B denial, the fund or the operator will cease making payments and will be entitled to reimbursement for payments made.

§ 727.104 Review by the Social Security Administration.

(a) *Notification.* The Social Security Administration will notify each claimant who has filed a claim for benefits under part B of title IV of the Act, excluding miners who filed under section 415 of the Act, and whose claim was either pending or had been denied on or before March 1, 1978, that upon the request of the claimant such claim shall be either:

(1) Reviewed by the Social Security Administration on the basis of the evidence contained in the claimant's file, in accordance with the amendments made by the Black Lung Benefits Reform Act of 1977; or,

(2) Referred by the Social Security Administration to the Office of Workers' Compensation Programs in the Department of Labor for review based on the evidence contained in the claimant's file and any additional evidence the claimant seeks to submit, in accordance with the amendments made by the Black Lung Benefits Reform Act of 1977.

(b) *Response to notification.* Upon receipt of a claimant's response or a response on behalf of a claimant to the notice required by paragraph (a) of this section the Social Security Administration will undertake to review the claim or refer the claimant's file to the Office for processing under § 727.107. If there is no response to notification sent in accordance with paragraph (a) of this section within 6 months from the date on which notice is sent, unless the period is enlarged for good cause shown, the claimant shall be considered to have waived the right to review by the Social Security Administration. The date on which notice is sent and the date on which a claimant's response is received shall be noted on an appropriate form by the Social Security Administration.

(c) *Change of election.* A part B claimant who has elected review by the Secretary of Labor may in writing revoke such election and elect review by the Social Security Administration at any time before being notified of the deputy commissioner's initial findings on the claim (§ 725.410 of this subchapter). If such a revocation is made, the deputy commissioner shall return the claimant's file to the Social Security Administration for appropriate processing. All documents received by the deputy commissioner, except the documents changing the claimant's election, shall be deleted from the claimant's file before it is returned to the Social Security Administration.

(d) *Social Security Administration review procedures.* Where the Social Security Administration determines that the claimant is eligible, the Administration will forward the claim file together with a copy of such determination to the Office for processing and payment in accordance with § 727.105 and shall so notify the claimant. Where it is determined that the claim cannot be approved, the Social Security Administration will transfer the claimant's file to the Office for further review in accordance with § 727.106, and shall so notify the claimant.

Comments received: (a) One comment recommends that the period allowed a claimant to elect HEW or Labor review should be enlarged to 1 year. (b) It has also been pointed out that there is no provision which allows or prohibits a change of that election.

Discussion and changes: (a) The existing provision, following the statutory language, permits a claimant 6 months to elect review of his or her claim, but also allows that period to be extended for an indefinite period for good cause shown. We think this is more favorable to the claimant than an inflexible 1 year period and accordingly, no change is necessary. (b) In view of the fact that a claimant for various reasons, including the possibility of recovering additional retroactive benefits, may upon being informed of his or her rights wish to change an earlier election to forego review of the claim by HEW, it has been determined to permit a change of election up until the time when the deputy commissioner makes initial findings with respect to the claim.

§ 727.105 Action by the Office, Social Security approval.

(a)(1) Where the Social Security Administration determines that the claimant is eligible for benefits upon review under § 727.104(c), the claimant's file and certification of approval for payment of benefits will be forwarded to the Department of Labor. Upon receipt of the file and certification, the Office shall immediately authorize the payment of all benefits due to the claimant from the fund, in accordance with § 725.522 of this subchapter. Such payments shall commence within not more than 30 days. Payments shall include all past due benefits, augmentation for dependents and medical expenses to the extent supported by information in the file.

(2) After authorizing payment, the deputy commissioner shall commence verification of the information in the file on which authorization of benefit payments was based. The deputy commissioner shall request current information from the claimant pertaining to any matter affecting the amount of benefits payable or any additional information which may be necessary to establish a more detailed and complete history of the miner's employment. After receipt of such information, the deputy commissioner shall determine the amount of benefits actually payable to the claimant and shall, if necessary, increase, decrease or terminate benefit payments as appropriate in accordance with subpart G of part 725 of this subchapter. The deputy commissioner shall then issue a proposed decision and order in accordance with the procedure set forth in §§ 725.418 and 725.419 of this subchapter, except as provided in paragraph (b)(1) of this section. If the information received establishes that there has been an underpayment or overpayment, benefit payments shall be corrected retroactive to January 1, 1974.

(3) If the information requested is not supplied to the deputy commissioner within 60 days following such request, unless the period is enlarged for good cause shown, the deputy commissioner shall issue an order to show cause why benefit payments should not be suspended and all benefits previously paid should not be declared an overpayment (see § 725.540 of this subchapter). If the claimant submits a satisfactory response to such order, and within a reasonable time submits sufficient evidence to allow the deputy commissioner to determine the actual amount of benefits payable, the deputy commissioner shall issue a proposed decision and order awarding benefits in accordance with §§ 725.418 and 725.419 of this subchapter except as provided in paragraph (b)(1) of this section. If there is no satisfactory response to the deputy commissioner's order to show cause in the time allotted, the deputy commissioner may issue a proposed decision and order in accordance with §§ 725.418 and 725.419 of this subchapter or proceed in accordance with § 725.409 of this subchapter. Benefit payments shall not be terminated and no overpayment shall be declared on account of an unrepresented claimant's failure to respond to a show cause order until the deputy commissioner has attempted to contact the claimant personally or by

telephone. In the case of an unrepresented claimant, a response to a show cause order may be given orally, in person or by telephone, except that such a response shall not excuse the claimant from submitting necessary information in writing.

(b)(1) If the deputy commissioner determines that there is a coal mine employer which may be liable for the payment of benefits to the claimant, the deputy commissioner shall identify and notify such operator of its possible liability as provided in § 725.412 of this subchapter, and shall proceed to adjudicate the claim in accordance with the appropriate provisions of subparts D and E of part 725 of this subchapter. The identification and notification of an operator shall be made as soon as possible after receipt of the claimant's file

(2) An employer notified under this section shall have the right to have the claimant examined by a physician selected by such operator (see § 725.414 of this subchapter). If an employer contests the claim, the claimant may obtain and submit additional medical evidence to the deputy commissioner within the time permitted by § 725.414 of this subchapter for the submission of the employer's evidence. Evidence submitted by a claimant under this paragraph shall be paid for by the fund, if authorized by the deputy commissioner, and shall be reimbursable to the fund by the employer, if the employer is found liable for the claim (see § 725.407 of this subchapter).

(c) Except as is otherwise provided in this section, a determination of entitlement made by the Social Security Administration under this section is binding on the deputy commissioner.

(d) If it is determined by an administrative law judge, the Benefits Review Board, or a U.S. court that the determination of entitlement made by the Social Security Administration was incorrect, the payment of benefits shall terminate and any benefits paid shall be considered an overpayment subject to collection in accordance with § 725.540 of this subchapter.

Comments received: (a) Vigorous opposition was expressed to the Department's intention of notifying a potentially liable coal mine operator and obtaining additional payment information from claimants before beginning payments to a claimant whose claim is approved upon review by the Social Security Administration. Other comments urge quick identification of an operator. (b) Opposition was also expressed to the formality of the procedures for terminating payments to an unrepresented claimant who fails to supply requested information, and a telephone contact procedure was recommended. More specific time limits for a claimant's reply to show cause orders are also recommended.

Discussion and changes: (a) In developing the proposed rule, the Department was concerned that because the files of claims approved by the Social Security Administration would contain only information dating prior to 1973 and would probably not contain current or adequate information on matters relating to dependency, survivorship and offsets, the actual amount of benefits payable to a claimant could not be determined without further inquiry. Moreover, the Department was concerned that the files would not contain sufficient information to permit the identification of a potentially liable coal operator. There was also reluctance to begin payment of benefits from the fund in claims where liability should properly belong to an operator, without at least notifying that operator of its potential liability for payment of benefits.

The comments received, however, persuasively argue that the law gives the Department no choice in this matter. The law mandates that benefit payments commence within 30 days of the date a claimant is found eligible for benefits by the Social Security Administration. The Department will authorize the payment of all benefits due the claimant immediately upon receipt of certification of approval from the Social Security Administration. After authorizing payment of benefits from the fund, the Department will commence verification of the information in a claimant's file upon which the amount of payments due was based. As soon as possible after receipt of a claimant's file, an attempt will be made to identify and notify a responsible operator, if any. Verification of the information upon which payment of benefits was based will be accomplished by requesting current information from the claimant, initially by telephone or personal contact where possible. In any event, written confirmation of information upon which the benefit payments amount is based will be required.

The operator is not prejudiced by this procedure since the deputy commissioner is bound by law to accept the determination of approval by the Social Security Administration (Act, section 435(a)(2)(A)), and the operator is entitled to a de novo hearing before an administrative law judge, who is not bound by that determination, and who may consider all evidence and objections. The operator will be required to reimburse the fund if found liable for the payment of benefits. Any overpayments made as a result of this procedure will be owed by the claimant to the fund. All necessary changes are reflected in the text.

(b) The Department recognizes the difficulties encountered by the unrepresented claimant and has made necessary changes to insure that personal contact will be attempted before a claimant's benefits are terminated as a result of the claimant's failure to supply requested information. The termination procedure and repayment requirements will remain in the rules to deal with the claimant who simply refuses to supply requested information. A time limit of 60 days, which may be extended for good cause, has been included with these changes.

§727.106 Action by the Office, insufficient evidence for Social Security approval.

(a) In the case of a claim which has not been approved for benefits by the Social Security Administration under § 727.105, the claim shall be transferred by the Administration to the Office and the Office shall follow the procedures set forth in this section. There shall be no further consideration of a claim described in this paragraph except as provided in this part.

(b) Upon receipt of the claimant's file from the Social Security Administration, the Office shall assign the claim to a deputy commissioner who may:

(1) Assist the claimant in obtaining additional medical evidence or request that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or

(2) Request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment.

(c) Based upon the evidence developed under this section, if any, and the information contained in the claimant's original file, the deputy commissioner may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter, which action may include the notification and participation of a coal mine employer and the submission of additional evidence as is appropriate.

Comments received: (a) One comment suggests deletion of the phrase "as appropriate" wherever it appears in this section and §§ 727.107 and 727.108. (b) One comment urges that immediate payment be made in cases for which an operator may be found liable, before the operator is allowed to participate in the determination of the claim in connection with this section and §§ 727.107 and 727.108.

Discussion and changes: (a) The Department disagrees. The deputy commissioners must have sufficient flexibility to take such action as is necessary to complete the adjudication of the claim. (b) The Department does not consider it proper to adjudicate a claim and award and pay benefits from the fund, absent statutory authority, such as exists in connection with a Social Security Administration approval, without permitting a coal operator, if any, to submit evidence and participate in the adjudication of the claim. In many instances the operator will be involved in the claim before sufficient evidence is present to establish a claimant's entitlement. Full and fair consideration of an operator's evidence and views is an essential element of claims proceedings, and the authorization of payments to a claimant from the fund without considering that evidence and those views would not be in keeping with the adjudicatory scheme established by Congress or the Secretary's fiduciary duties as a trustee of the fund.

§ 725.107 Action by the Office, Social Security referral without prior review.

(a) In the case of a claim which is referred at the claimant's request by the Social Security Administration to the Office under § 727.104(a)(2) without

prior review by the Social Security Administration, the Office shall follow the procedures set forth in this section.

(b) Upon receipt of a claimant's file the claim shall be assigned to a deputy commissioner who shall examine the evidence contained in the file to determine whether the claim may be approved in light of the amendments made by the Black Lung Benefits Reform Act of 1977.

(c) If it is determined by the deputy commissioner that the evidence in the file supports a finding of entitlement to benefits the deputy commissioner may: (1) Request up-to-date information from the claimant pertaining to any matter affecting the amount of benefits payable (see subpart G of part 725 of this subchapter); and (2) request any additional information or verification which may be necessary to establish a more detailed and complete history of the miner's employment, for the purpose of determining the identity of any coal mine employer which may be liable for the payment of the claim, and for such other purposes as may be appropriate. Upon receipt of any additional information requested under this paragraph, or if the claimant fails to supply such information, the deputy commissioner may make an initial finding with respect to the eligibility of the claimant, notify a coal mine employer, if any, of its possible liability for the claim and proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(d) If it is determined by the deputy commissioner that the evidence on file is insufficient to support a finding of entitlement with respect to a claim reviewed under this section, the deputy commissioner may: (1) Assist the claimant in obtaining additonal medical evidence or request that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or (2) request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment. Based upon evidence developed under this paragraph, if any, and the information contained in the claimant's original file, the deputy commissioner may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

Comments received: See § 727.106.

§ 727.108 Action by the Office, Department of Labor pending or denied claim.

(a) In the case of a claim filed with the Office under section 415 or Part C of Title IV of the act which is pending or has been denied as of March 1, 1978, the Office shall follow the procedures set forth in this section.

(b) The deputy commissioner shall examine the evidence contained in the file to determine whether the claim may be approved in light of the amendments made by the Black Lung Benefits Reform Act of 1977.

(c) The deputy commissioner may: (1) request up-to-date information from the claimant pertaining to any matter affecting the amount of benefits payable (see subpart G of Part 725 of this subchapter); and (2) request any additional information or verification which may be necessary to establish a more detailed and complete history of the miner's employment, for the purpose of determining the identity of any coal mine employer which may be liable for the payment of the claim, and for such other purposes as may be appropriate. Upon receipt of any additional information requested under this paragraph, or if the claimant fails to supply such information, the deputy commissioner may notify a coal mine employer, if any, of its possible liability for the claim and proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(d) If it is determined by the deputy commissioner that the evidence on file is insufficient to support a finding of entitlement with respect to a claim reviewed under this section, the deputy commissioner may: (1) assist the claimant in obtaining additional medical evidence or request that such evidence be submitted (see §§ 725.405–725.408 of this subchapter); or (2) request such additional documents or information as may be necessary to establish the amount of benefits which may be payable, or to establish a more detailed and complete history of the nature and duration of the miner's employment. Based upon the evidence developed under this paragraph, if any, and the information contained in the claimant's original file, the deputy commissioner may make an initial finding with respect to the eligibility of the claimant and shall proceed to adjudicate the claim under §§ 725.409–725.421 of this subchapter.

(e) Notwithstanding the provisions of paragraphs (a)–(d) of this section, in the case of a claim filed by a Part B beneficiary under Part C of the act prior to March 1, 1978, for such additional benefits as may be available, the Department shall accept the Social Security Administration's documented finding of entitlement as its initial determination of eligibility.

Comments received: See § 727.106.

§ 727.109 Hearings and appeals, parties.

(a) If a hearing before an administrative law judge is necessary in connection with a claim reviewed under this part, the hearing shall be conducted in accordance with the procedures set forth in subpart E of Part 725 of this subchapter. An appeal from a decision of an administrative law judge shall be considered by the Benefits Review Board in accordance with the procedures set forth in Parts 801 and 802 of this title.

(b) parties to proceedings conducted in connection with a claim reviewed under this section, matters relating to the representation of parties and the right of such representative to obtain a fee for services rendered, the powers of adjudication officers and the service of papers or documents shall be governed by the appropriate provisions contained in subparts C, D, and E of Part 725 of this subchapter.

Comments received: No comments for which a response is required.

Subpart C—Criteria for Determining Eligibility for Benefits

§ 727.200 Basis for criteria.

In enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis shall be no more restrictive than the criteria applicable to a claim filed with the Social Security Administration on or before June 30, 1973, under Part B of Title IV of the Act (the interim adjudicatory rules). These criteria are to be applied to claims reviewed under section 435 of the Act, to all filed reviewed under section 11 of the Black Lung Benefits Reform Act of 1977 and to new claims filed prior to the effective date of regulations to be promulgated in Part 718 of this subchapter which will establish permament criteria, regardless of the date on which the claim is finally adjudicated. The rules promulgated in this section take into account the amendments made by the Black Lung Benefits Reform Act of 1977 and the expectations of the Congress. Accordingly, these rules provide additional standards, not available in the interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment.

Comment received: (a) Many comments were received in connection with the provisions of this subpart, especially with regard to the Department's formulation of the interim presumption contained in § 727.203. A few comments addressed to this section related to the specific provisions of § 727.203 and those will be considered in connection with that section. (b) A few comments directed specifically to this section approve the application of the interim presumption to claims for medical benefits filed under section 11 of the Reform Act and all claims filed between March 1, 1978, and the effec-

tive date of the Secretary of Labor's revised medical criteria.

Discussion and changes: In connection with section 11 claims and claims filed before the effective date of the Secretary's revised criteria, it should be noted that the procedures contained in Part 725 of this subchapter and not those contained in this part are applicable to the processing of such claims. Only the medical criteria for determining eligibility with respect to such claims are contained in this part.

§ 727.201 Persons entitled to benefits, dependents.

Benefits are provided under the Act to a miner who is totally disabled due to pneumoconiosis and to certain survivors of a miner who died due to or while totally (or in certain cases, partially) disabled by pneumoconiosis. The amount of benefits payable to a miner or survivor may be increased on account of certain dependents. For the purpose of determining whether a claimant is a miner or qualified survivor of a miner or a qualified dependent of a miner or survivor under this part, the provisions of Part 725 of this subchapter shall be applicable as appropriate.

Comments received: None.

§ 727.202 Definition of pneumoconiosis.

For the purposes of the act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosisanthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal mine employment. For purposes of this definition, a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by, dust exposure in coal mine employment.

Comments received: (a) A number of comments object to the exclusion of cancer and diseases of bacteriological or viral origin from being considered to have arisen out of dust exposure in coal mine employment. There is also some concern in this connection that benefits already awarded to persons suffering from cancer will now be terminated. Other comments approve this exclusion and argue that it should be expanded to include diseases of organic or congenital origin. (b) A few comments express the opinion that the law does not permit the payment of benefits to an individual who becomes totally disabled through aggravation of a preexisting condition as a result of exposure to coal dust. It is urged, therefore, that the term "aggravation" be removed from this section.

Discussion and changes. (a) The definition of pneumoconiosis is changed to delete the exclusion of cancer and diseases of bacteriological or viral origin. Since it is possible that a relationship between these diseases and exposure to coal mine dust may be established by medical evidence in a particular case, the Department has determined that the exclusion contained in the proposed rule is not appropriate. By deleting the exclusion, findings of a reationship between these diseases and dust exposure in coal mine employment are permitted if the medical evidence supports such findings.

The proposed rule's exclusion of cancer from the definition of pneumoconiosis was never intended to affect previously made determinations. In any event, deletion of the exclusion will relieve the concern expressed by some persons that benefits already awarded to persons suffering from cancer might be terminated.

The recommendation that the exclusion in this section be expanded to include diseases of organic or congenital origin is not accepted. Organic or congenital conditions which are themselves related to coal dust exposure may play an integral role in the development and progression of pneumoconiosis in an individual case. The presence of preexisting conditions should never be considered to prejudice the claim of a miner who suffers the consequences of pneumoconiosis at an earlier time, or more severely because of those very conditions. A contrary view would not be in keeping with the letter or spirit of the Act.

(b) The Department rejects the view that the significant aggravation of a preexisting condition by coal dust exposure should not be considered a basis for eligibility under the Act. It is a commonly agreed upon and salutary principle of workers' compensation law that an employer takes an employee with whatever underlying conditions the employee has. Accordingly, aggravation of a preexisting condition to the point of disability is considered a proper basis for awarding benefits under many compensation laws. Contrary to the commentator's argument, this is a well established principle under the Longshoremen's and Harbor Workers' Compensation Act, which Act sets the pattern for the consideration of claims under Part C of the Black Lung Benefits Act. The "aggravation" question has caused considerable confusion in the past and the Department hopes that the clarification in this section will put the matter to rest.

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV$_1$	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pCO_2	Arterial pO_2 equal to or less than (mm. Hg.)
30 or below	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.

Comments received: The greatest amount of controversy in the comments received has been generated in connection with this section. (a) A number of comments argue that the section is far less restrictive than the standards applied by the Social Security Administration and that these standards are accordingly not authorized by the Act. Others argue that the requirement that all relevant evidence be considered is more restrictive than the Social Security standards and is contrary to law for that reason. A physician commented that the disability tables show no disability and should be eliminated. Some comments urge that the blood gas table should be raised by 5mm. Hg in the PO_2 column while others argued that it should be lowered by 5mm. Hg. There were suggestions that the interim presumption should be made available on the basis of A-aO_2 gradient standards. Other comments argue that blood gas test results are a poor measure of disability and should be eliminated. A few comments urge that the Social Security interim standards (20 CFR § 410.490) be adopted verbatim. (b) A few comments urge the Department to delete the term "documented" from paragraph (a)(4), permit lay evidence to give rise to the presumption in the case of a living miner and require that a medical report which gives rise to the presumption should be filed by a pulmonary specialist.

Discussion and changes: The Department believes that the interim presumption format provided by this section is both practicable and fully in accordance with law.

More specific responses to the comments received are as follows:

1. The Department does not agree with the view that the interim standards cannot as a matter of law be more favorable to claimants than the Social Security Administration standards. The Act requires only that the Department's standards be no more restrictive than those applied by the Social Security Administration.

2. The many comments which urge that all relevant evidence should not be considered in rebutting the interim presumption must also be rejected. The Conference Report accompanying the 1977 Reform Act provides, in connection with the interim criteria, "except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the FEDERAL REGISTER." (See also Act, section 413(b).) Moreover, the Social Security regulations, while less explicit, similarly do not limit the evidence which can be considered in rebutting the interim presumption. For these reasons, the rule is not more restrictive than the criteria applicable to a claim filed on June 30, 1973, and is otherwise fully in accordance with law.

Some of the commentators felt that the "all relevant evidence" rule would cause claims adjudicators to ignore the presumption, and simply pick from all the evidence those items on which they wish to rely. This is certainly not authorized by the interim presumption. However, the Department believes that use of the presumption should be clarified.

The interim presumption is, by statute, rebuttable and the Department has no authority to make it irrebuttable. Nor does the Department have authority to exclude any relevant evidence from consideration in connection with any case, or mandate a result which is contrary to the evidence in a case. However, the Department cannot, as has been requested by some, look for the single item of evidence which would qualify a claimant on the basis of the interim presumption, and ignore other previously obtained evidence. This does not mean that the single item of evidence which establishes the presumption is overcome by a single item of evidence which rebuts the presumption. The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise.

3. The comment that the pulmonary function tables show no disability and should be eliminated is rejected. The pulmonary function tables to be used in the application of the interim presumption were developed by the Social Security Administration. They have proved to be an effective measure of disability. These tables were the subject of Congressional inquiry, and in light of that inquiry have been mandated by the 1977 amendments.

4. The suggestions that the blood gas disability table be eliminated or raised or lowered by certain specified values are rejected. Building upon the Department's earlier experience with blood gas test results, and after consultation with knowledgeable medical authorities, it has been determined that the values embodied in the blood gas table are an accurate and useful measure of disability and are particularly useful in determining respiratory or pulmonary impairment in a person suffering from pneumoconiosis.

The Department will, however, in connection with the public hearings being held on the permanent medical criteria (20 CFR Part 718), which criteria contain an identical blood gas study table, consider comments and testimony relating to those criteria and make changes in this section if appropriate.

5. The Department cannot accept the suggestions that an A-aO_2 gradient standard be included within the interim presumption. In developing the standards contained in this section as well as the permanent criteria, the Department has inquired into the reliability of the A-aO_2 gradient as a measure of respiratory or pulmonary disability and impairment. The authorities contacted shared the view that the A-a O_2 gradient test is often not a reliable measure of disability or impairment because it is difficult to administer and reliable, uniform standards for administering the test have not been developed and could not readily be developed. While sufficient justification has not been provided to warrant building an A-aO_2 gradient test into the interim presumption, consideration of individual A-aO_2 gradient results accompanied by a reasoned medical report may, of course, be undertaken by a claims adjudicator, and weight may be accorded these results when appropriate.

The Department will reconsider its views on the A-aO_2 gradient if testimony or evidence presented at the hearing on the permanent standards (20 CFR Part 718) so warrants.

(b)(1) Some of those who commented expressed the opinion that the word "documented" in paragraph (a)(4) is unclear and should be deleted. This paragraph extends the application of the interim presumption on the basis of a medical report alone. This could not be done with respect to a claim filed on June 30, 1973. In order to justify this extension, the Department believes it is necessary to require both a documented and reasoned report. It is not, however, intended that documentation should consist exclusively of objective medical tests. It is intended that the physician's observation of the miner, personal knowledge of the miner's condition and work history, and other similar matters would constitute documentation.

(2) Additional commentators recommended that lay evidence should be sufficient to establish the interim presumption in the case of a living miner. Lay evidence may, of course, be considered in every claim. However, in the case of a living miner who can be examined by a physician at no cost to the miner, the Department is convinced that it would be improper to extend the applicability of the interim presumption on the basis of lay evidence alone, notwithstanding contrary medical evidence or the refusal of the miner to obtain medical evidence.

(3) Some commentators recommended that the Department require that paragraph (a)(4) reports be submitted by pulmonary specialists only. The physician who is most likely to have knowledge of the miner's work and health history necessary to prepare a paragraph (a)(4) report is the miner's family physician, who may or may not be a pulmonary specialist.

§ 727.204 Presumption of entitlement applicable to certain death claims.

(a) In the case of a miner who died on or before March 1, 1978, who was employed for 25 or more years in one or more coal mines prior to June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, unless it is established that at the time of death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Office, furnish such evidence as is available with respect to the health of the miner at the time of death, and the length of the miner's coal mine employment.

(b) For the purpose of this section a miner will be considered to have been "partially disabled" if he or she had reduced ability to engage in his or her usual coal mine work or "comparable and gainful work" (see part 718 of this subchapter as amended from time to time).

(c) In order to rebut this presumption the evidence must demonstrate

that the miner's ability to perform his or her usual and customary work or "comparable and gainful work" was not reduced at the time of his or her death or that the miner did not have pneumoconiosis.

(d) The following evidence alone shall not be sufficient to rebut the presumption:

(1) Evidence that a deceased miner was employed in a coal mine at the time of death;

(2) Evidence pertaining to a deceased miner's level of earnings prior to death;

(3) A chest X-ray interpreted as negative for the existence of pneumoconiosis;

(4) A death certificate which makes no mention of pneumoconiosis.

Comments received: The comments recommend that the definition of "partial disability" be revised either to include only reduced ability for coal mine work or reduced ability to engage in any work.

Discussion and changes: The act defines "total disability" to mean the inability to engage in the miner's regular coal mine work or comparable and gainful work. In this context, partial disability must mean something less than total disability for the same type of work. A change is included to more clearly reflect this result. However, for this same reason, the act provides no authority to limit the definition of partial disability to encompass only coal mine work or extend it to any work.

§ 727.205 Effect of current coal mine employment or coal mine employment at the time of death.

In the case of a miner who is working in coal mine employment or was employed in coal mine employment at the time of death, the following shall apply:

(a) A deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled. In the case of a deceased miner who was employed in a coal mine at the time of death, all relevant evidence, including the circumstances of such employment and the statements of the miner's spouse, shall be considered in determining whether the miner was totally disabled due to pneumoconiosis at the time of death. In the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her coal mine work, the miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled.

(b) Notwithstanding any other provision of this section, and except as provided in section 411(c)(3) of the act, no miner shall be found to be totally disabled if the miner is found to be doing his or her customary coal mine work or "comparable and gainful work" (see § 410.412(a)(1) of this title) and there are no changed circumstances of employment indicative of reduced ability to perform coal mine work.

(c) No miner who is engaged in coal mine employment shall (except as provided in section 411(c)(3) of the act) be entitled to any benefits under this part while so employed. Any miner who has been determined to be eligible for benefits for any period during which such miner is engaged in coal mine employment shall be entitled to benefits if the miner's employment terminates within 1 year after the date such determination becomes final (see § 725.503A of this subchapter).

Comments received: Some comments express concern that a formal change of work circumstances will be required before a working miner may be informed of his or her possible eligibility for benefits. One comment suggests that medical evidence alone, regardless of circumstances of employment, should form a basis for informing a miner of his or her eligibility if work is terminated.

Discussion and changes: The Act provides that a miner's employment in a mine shall not be conclusive evidence that the miner is not totally disabled "if there are changed circumstances of employment indicative of a reduced ability to perform his or her usual coal mine work." In view of this provision it is clear that a change in circumstances is essential to a finding of total disability in the case of a working miner, unless the section 411(c)(3) presumption applies.

The concern that the change in circumstances must be a formal change is unwarranted. It is intended that any change in circumstances, including frequent absences from work because of respiratory illness, the inability to carry out regular duties without assistance, frequent unauthorized rest periods and the like, may be considered a change in circumstances. A formal reassignment or transfer is not required.

§ 727.206 Quality standards applicable to evidence.

(a) No chest X-ray or X-ray report, ventilatory study or blood gas study which does not or did not meet the quality standards applicable at the time the evidence was submitted shall be considered sufficient to invoke the interim presumption provided in § 727.203(a) of this part. With respect to evidence submitted prior to the effective date of Part 718 of this title, the standards to be applied in the evaluation of evidence are contained in subpart D of Part 410 of this title. Evidence submitted after the effective date of the revised Part 718 shall be evaluated as provided in that part.

(b)(1) In all claims where there is other evidence of a pulmonary or respiratory impairment, a board-certified or board-eligible radiologist's interpretation of a chest X-ray shall be accepted by the Office if the X-ray is in compliance with the requirements of § 410.428(b) of this title and if such X-ray has been taken by a radiologist or qualified radiologic technologist or technician and there is no evidence that the claim has been fraudlently represented.

(2) The following definitions shall apply when making a finding in accordance with this paragraph:

(i) The term "other evidence" means medical tests such as blood-gas studies, pulmonary function studies or physical performance tests, physical examinations or medical histories which establish the presence of a chronic respiratory or cardio-pulmonary condition and the spouse's affidavit except that the spouse's affidavit alone shall not be sufficient in the case of a living miner to establish the existence of a respiratory or pulmonary impairment. In the case of a deceased miner, in the absence of medical evidence to the contrary, affidavits of persons with knowledge of the miner's physical condition may be sufficient to establish the presence of a respiratory or pulmonary impairment.

(ii) "Pulmonary or respiratory impairment" means an inability of the human respiratory apparatus to perform satisfactorily one or more of the three components of respiration, viz., ventilation, perfusion, and diffusion.

(iii) "Board-certified" means certification in radiology or diagnostic roentgenology by the American Board of Radiology, Inc. or the American Osteopathic Association.

(iv) "Board-eligible" means the successful completion of a formal accredited residency program in radiology or diagnostic roentgenology.

(v) "Qualified radiologic technologist or technician" means an individual who is either certified as a registered technologist by the American Registry of Radiologic Technologists or licensed as a radiologic technologist by a State licensing board.

Comments received: (a) Some comments urge that it be made clear that a qualifying X-ray is sufficient to satisfy the interim presumption. (b) Many comments take exception to proposed paragraph (b)(1) which provided that this section did not preclude the consideration of any relevant evidence including other X-rays and X-ray reports in determining the presence or absence of pneumoconiosis. One comment suggests that only a qualifying X-ray should be deemed admissible evidence. (c) A few comments suggest that evidence of a respiratory or pulmonary impairment should not be required to justify acceptance of an otherwise valid X-ray, or that the definition of "other evidence" should be clarified to indicate that evidence of total disability is not required. A few comments suggest that "other evidence" should include lay evidence in the case of a living miner. (d) Much concern was expressed over the requirement that X-rays and X-ray reports meet Department of Labor quality standards. It is suggested that the quality determination be made by the examining physician and not Department of Labor experts. A few comments insist that the qualifications of Department of Labor experts should be set forth in detail. There is some fear that by having Department of

Labor experts examine X-rays for quality, the Department will ignore the Congressional mandate to accept certain X-rays as valid, or will use quality review procedures to circumvent Congress' intent.

Discussion and changes: The purpose of § 727.206 is to properly implement the requirements of Sections 413(b) and 402(f)(1)(D) of the Act. Responses to specific comments are as follows:

(a) This section provides that the X-ray re-reading provision is applicable to reviewed claims. The section is not intended to suggest whether a particular X-ray is sufficient to satisfy the interim presumption and establish entitlement. It provides only that an X-ray which is not of sufficient quality for determining the presence or absence of pneumoconiosis shall not be considered relevant evidence for the purpose of a claim reviewed under this part.

(b) While the Act requires that all relevant evidence be considered in determining the validity of claims, proposed section (b)(1) has been eliminated because it had been incorrectly interpreted to mean that the Department would reinterpret X-rays and use such reinterpretation for the purpose of denying claims. The intention of the Department is to re-read X-rays to determine whether they are of sufficient quality to be considered relevant evidence.

(c) It is made clear in the Act and its legislative history that the Department of Labor must accept the X-ray interpretation submitted by, or on behalf of, the claimant only in those cases where there is "other evidence that a miner has a pulmonary or respiratory impairment * * *." The statute does not require the Department to accept an X-ray interpretation in the absence of such evidence.

The view that lay evidence alone should be considered sufficient "other evidence of impairment" in this connection in the case of a living miner cannot be accepted. The law requires, in the case of a living miner, that the presence of a respiratory or pulmonary impairment be established by medical evidence. The miner is entitled to free medical examinations and tests, and these will be provided. The results of these examinations and tests are the best evidence of a respiratory or pulmonary impairment. Lay evidence may be used as appropriate in the case of a deceased miner.

Any significant and measurable level of respiratory or pulmonary impairment, which activates the X-ray re-reading prohibition, should be sufficient for purposes of this section.

(d) The Department is charged with the responsibility to insure that an X-ray which purports to demonstrate the existence of pneumoconiosis is of adequate quality and is, therefore, reliable evidence of the existence of the disease. The Department's review of X-rays is for the purpose of making an objective determination of quality.

Suggestions relating to the qualifications of the experts to be used for determining X-ray quality by the Department are outside the scope of this section.

Subpart D—Payment of Benefits/ Liability

§ 727.300 Conditions and duration of eligibility.

The provisions of subpart B of Part 725 of this subchapter shall be applicable in determining the conditions and duration of eligibility applicable with respect to a claim approved under this part.

Comments received: No comments for which a response is required.

§ 727.301 Amounts payable, other payment provisions.

Except as is otherwise provided in this part (see § 727.302), provisions relating to the amount of benefits payable, the manner of payment and all other provisions contained in subpart G of Part 725 and § 725.309 of this subchapter, shall be applicable to a claim approved under this part. A miner whose claim is approved under this part shall be entitled to medical benefits to be determined and administered in accordance with the provisions of subpart I of Part 725 of this subchapter.

Comments received: None.

§ 727.302 Date from which benefits are payable after review and approval.

(a) Section 435(c) of the act provides that any individual whose claim is approved after review shall be awarded benefits on a retroactive basis for a period which begins no earlier than January 1, 1974. This section implements section 435(c) of the act and sets forth provisions governing the date from which benefits shall be payable with respect to a claim reviewed under this part. (See also section 6(a) of the Longshoremen's Act as incorporated by section 422(a) of the act.)

(b) In the case of a claim reviewed and finally approved under § 727.105, benefits shall be payable for all periods of eligibility occurring on or after January 1, 1974.

(c)(1) In the case of a miner whose claim is reviewed and finally approved under § 727.106, benefits shall be payable for all periods of eligibility beginning with the month of onset of total disability due to pneumoconiosis or January 1, 1974, whichever is later. Where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review under § 727.104.

(2) In the case of a survivor whose claim is reviewed and finally approved under § 727.106, benefits shall be payable for all periods of eligibility occurring on or after the month of the miner's death or January 1, 1974, whichever is later.

(d)(1) In the case of a miner's claim which is reviewed and finally approved under § 727.107, benefits shall be payable for all periods of eligibility beginning with the month of onset of total disability due to pneumoconiosis or January 1, 1974, whichever is later. Where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review under § 727.104.

(2) In the case of a survivor whose claim is reviewed and finally approved under § 727.107, benefits shall be payable for all periods of eligibility occurring on or after the month of the miner's death or January 1, 1974, whichever is later.

(e) In the case of a claim reviewed and finally approved under § 727.108, benefits shall be payable as provided in § 725.503 of this subchapter.

(f) For the purposes of this section, the term "finally approved" means that an award of benefits has been made or affirmed by a deputy commissioner, administrative law judge, the Benefits Review Board, or a U.S. court of appeals, that no further hearing, appeal, or reconsideration is pending, and the time to request such hearing, appeal, or reconsideration has expired. (See part 725 of this subchapter generally.) Benefit payments shall be initiated prior to final approval in accordance with the provisions of § 725.522 of this subchapter.

Comments received: (a) A few comments indicated that the term "finally approved" as it appears in this section will require a claimant to wait until all proceedings with respect to the claim are completed before any payments will be made, or before full retroactive payments, if any, will be made, (b) many commentators strongly object to the provisions which establish the first month of entitlement as the month of election in certain cases, if the actual month of onset cannot be established.

Discussion and changes: (a) The term "finally approved" is not intended to deprive a claimant of any payments, including full retroactive payments to which he or she is entitled, prior to the final adjudication of the claim. Those "interim payments" are guaranteed by the revised § 727.105 and § 725.522 of this subchapter which is cross cited in this section. However, the term "finally approved" makes clear that the claimant's right to benefits paid or payable is not fully established until the claim is finally adjudicated, and that any interim payments made are subject to recovery or offset if a determination by a deputy commissioner is not sustained by a higher level adjudicator.

(b) Many commentators expressed the view that by establishing the first month of entitlement as the date of election in the absence of evidence of the month of onset, certain claimants would be deprived of retroactive benefits back to January 1, 1974. The Department does not agree.

Section 435 of the act requires that each of these cases be treated as a part C claim. The date benefits begin under part C, which incorporates section 6(a) of the Longshore-

men's Act, is the date of onset of total disability due to pneumoconiosis. Under the Department's prior part C regulations (as well as the revised regulations), the date of onset must be established by evidence. If the evidence does not establish that date, the date of filing was and is considered to be the date of onset. This approach was adopted in view of the great difficulty encountered in establishing a date certain on which pneumoconiosis, often a latent, progressive, and insidious disease, progressed to total disability. The filing date was thought to be fair since proof of onset, which was usually obtained after filing, would likely fix the date of total disability at the time at which the medical tests were administered. The filing date, on the other hand, was likely to be a more accurate measure of onset since it would be the date, or close to the date, on which the claimant felt the need to file for benefits, presumably because disability had become total.

It is the Department's view that Congress recognized and adopted this approach in section 435(a)(4) of the act, which establishes the date of filing in the case of a social security election as the date of the election. There could be no other purpose for section 435(a)(4), since the date of filing of a prior part B denial is not relevant to anything but the date of payments under part C. There clearly is no statute of limitation applicable to such a claim.

In any event, the Department does not intend to use this provision to deny eligible part B claimants full retroactive benefits if an onset date is established at any time before the date of election. Every effort will be made to establish the onset date but experience dictates that in some cases it will not be determinable. This is particularly true in the case of claimants who must submit additional evidence after election in order to establish entitlement. This group should include most claimants affected by the filing date problem. In any case where earlier evidence of onset is in the file, an earlier date than the date of election will be selected.

It should be noted as well that all social security approvals will receive benefits retroactive to January 1, 1974, and all part C review claimants will also receive benefits on a retroactive basis if appropriate.

§ 727.303 Claims filed under section 415 of the act.

(a) A claim filed by a miner between July 1 and December 31, 1973, with the Secretary of Labor under section 415 of the act is subject to review under this section if it was pending or had been denied on or before March 1, 1978. Prior to the enactment of the Black Lung Benefits Reform Act of 1977, benefits with respect to a section 415 claim may have been payable by the Secretary of Labor from Federal funds for periods of eligibility between July 1 and December 31, 1973. However, under section 435 of the act, no benefits may be paid with respect to a claim reviewed under that section, including a section 415 claim, for any period of eligibility prior to January 1, 1974. Accordingly, in the case of any claim filed under section 415 of the act with respect to which no benefits have been awarded prior to March 1, 1978, for any period of eligibility between July 1 and December 31, 1973, no benefits which might have been awarded for this period shall be awarded in any adjudication of the claim taking place after the effective date of this part.

(b) A claim filed under section 415 of the act which is reviewed under this part shall for all purposes be considered as if it was filed on January 1, 1974, under part C of title IV of the act.

Comments received: A few comments argue that it is wrong to preclude eligibility for section 415 benefits if any were obtainable before the enactment of the 1977 amendments but were not awarded.

Discussion and changes: While the Department recognizes that a few section 415 claimants might be denied benefits for the period from July 1 to December 31, 1973, if any were payable, the 1977 amendments clearly extinguish the right of section 415 claimants to obtain benefits for that period. Section 435(b) of the act provides that the review of all pending and denied section 415 and part C claims is automatic. Section 435(c) provides that a claim which is approved on review can be paid retroactive to January 1, 1974, and no earlier.

Moreover, the trust fund is prohibited from making payments for any period before January 1, 1974. There is no independent authority provided to the Secretary to spend money for benefits from any source other than the fund, and the Department cannot create such spending authority by regulation. Accordingly the comments must be rejected.

§ 727.304 Liability for benefit payments.

A claim approved under this part shall be payable either by a coal mine employer (see subpart F of Part 725 of this subchapter) or the black lung disability trust fund. Benefits shall be payable by a responsible coal mine employer if the miner's last date of coal mine employment occurred on or after January 1, 1970, and if the miner's last coal mine employer or a successor to such employer is found liable under the provisions of subpart F of Part 725 of this subchapter. Where it is determined that the employer liable for the payment of such benefits has not commenced payment of benefits within 30 days after the date the claimant is initially determined eligible or within 30 days after a payment is due, the fund will make the required payments. The employer is required by section 424 of the act to reimburse the fund where its liability is finally determined. For the purposes of determining the liability of a coal mine employer or the fund for the payment of an approved claim, the provisions of subparts F and H of Part 725 of this subchapter shall be applicable to a claim considered under this part, including any claim originally filed under part B of title IV of the act with the Social Security Administration. In all other cases, benefits shall be payable by the fund. Nothing in this part shall be construed in derogation of the terms of Part 725 of this subchapter insofar as Part 725 affects the liability of a coal mine employer.

Comments received: A few comments express concern that this section does not specify that payment will be made from the fund if an operator refuses to pay a claim.

Discussion and changes: This section has been clarified to indicate that the fund will initiate benefit payments where the liable operator refuses to make such payments within the period specified by section 424(a)(1)(A) of the act.

Subpart E—Special Review Provisions Relating to Claims Pending Before an Administrative Law Judge or the Benefits Review Board

§ 727.401 General.

Section 435 of the act requires the Secretary of Labor to establish a consistent and effective procedure for the review of pending and denied claims in light of the amendments made by the Black Lung Benefits Reform Act of 1977. A number of the claims encompassed by section 435 are pending in the Office of Administrative Law Judges or before the Benefits Review Board. In order to insure a fair, orderly, and uniform disposition of claims pending before an administrative law judge or the Board which are subject to review under section 435 of the act, it has been determined that a return of many of these claims to the Office for expedited review is essential.

This subpart sets forth the procedures to be followed with respect to claims which are within the jurisdiction of the Office of Administrative Law Judges or the Benefits Review Board for which review under section 435 of the act is required. In order to carry out the purposes of section 435, certain of the procedures ordinarily applicable in the adjudication of a claim are changed in certain specified instances. These changes are intended exclusively to facilitate a uniform administrative review of all pending and denied claims where such review is appropriate. Once the administrative review of these claims has been completed, the hearing and appeal procedures set forth in subpart D of part 725 of this subchapter shall be available to all parties to a claim. Additional evidence may be submitted in connection with a reviewed claim by any party as is considered appropriate by the deputy commissioner or administrative law judge, and as is permitted by the act and this part.

Comments received: A few comments recommend that this section should clarify an operator's right to submit additional evidence in connection with a reviewed claim.

Discussion and changes: The Department agrees that in certain circumstances an operator may be allowed to submit additional evidence in connection with a reviewed claim and a correction has been made.

§ 727.402 Claims pending in the Office of Administrative Law Judges.

(a) A claim which is pending in the Office of Administrative Law Judges may be subject to review by a deputy commissioner under this part. This section sets forth criteria to be applied by the Chief Administrative Law Judge or an administrative law judge for determining whether a claim should be remanded to the deputy commissioner for review under § 727.108 or whether jurisdiction over the claim should be retained and sets forth a procedure to be followed if remand is required.

(b) A claim pending in the Office of Administrative Law Judges, which has been administratively denied by the deputy commissioner and with respect to which no decision has been issued, may be remanded to the deputy commissioner for consideration under § 727.108, upon the request of the Director or the claimant, or by the administrative law judge on his or her own motion.

(c) A claim pending in the Office of Administrative Law Judges, which has been administratively approved by the deputy commissioner and was forwarded for hearing at the request of a coal mine operator, shall be remanded to the deputy commissioner for payment if the miner on whose total disability or death the claim is predicated was last engaged in coal mine employment before January 1, 1970. If the miner's last coal mine employment occurred on or after January 1, 1970, the Office of Administrative Law Judges shall retain jurisdiction over the claim and proceed to adjudicate the claimant's eligibility and the liability of the named coal mine employer in accordance with the provisions of this part. If jurisdiction over a claim is retained under this paragraph, the administrative law judge may, on his or her own motion or at the request of the claimant, remand the claim to the deputy commissioner for consideration under § 727.108 if further evidentiary development of the claim is necessary. The right to review provided by § 727.108 is not available to a coal mine employer.

(d) A claim which has been denied by an administrative law judge and with respect to which no reconsideration or appeal is pending shall be automatically reviewed under § 727.108.

(e) In the case of a claim with respect to which a decision has been issued by an administrative law judge but not filed with the deputy commissioner, or if the decision has been filed and the time for appeal to the Benefits Review Board has not expired, the provisions of this paragraph shall apply. If appropriate, such decision shall be immediately filed with the deputy commissioner. If the decision denied the claimant's entitlement to benefits, the claim shall be considered a pending claim subject to review by the deputy commissioner under § 727.108, or subject to an appeal to the Benefits Review Board. If the decision awards benefits to the claimant, the claim shall be paid as provided in part 725 of this subchapter and an appeal to the Benefits Review Board may be taken. If such an appeal is taken, the Board shall consider the appeal under the applicable provisions of this part, and may take such other action as is appropriate.

(f) Except as provided in paragraph (b) of this section, the remand of a claim authorized by this section shall be made by order of the Chief Administrative Law Judge or an administrative law judge on his or her own motion, or on the motion of any party to the claim as is appropriate.

Comments received: Many comments were received in support of this section. Some comments urge that the claimant alone should be allowed to decide whether to remain at the administrative law judge level or elect expedited review by the deputy commissioner.

Discussion and changes: Although a claimant has the right to elect whether to pursue the claim pending before an administrative law judge or to have the case remanded for review under section 435 of the act, the Director also has an interest in insuring that the claim has been fully developed before a formal hearing is conducted. The Director, both as a party to the proceedings and as administrator of the black lung program, must have the right to request remand, particularly where it is determined that further development of the evidence may result in a finding of entitlement without the necessity for formal hearing. In addition, the administrative law judge, as the fact finder in contested cases, has the authority to determine whether remand is appropriate, but is not in a position to gather evidence on behalf of the claimant or assist a claimant in obtaining new evidence. Accordingly, if new evidence is necessary, the claim may be remanded to the deputy commissioner who will help obtain this new evidence. These provisions are not designed to limit a claimant's right but rather are intended to insure compliance with the 1977 amendments and the proper utilization of available resources by avoiding, where possible, duplicative hearings.

§ 727.403 Claims pending before the Benefits Review Board.

(a) A claim pending before the Benefits Review Board which may be subject to review under this part shall be considered by the Board as the Board deems appropriate, in accordance with the authority given the Board by the act.

(b) If a claim subject to review under this part is pending before the Board, the Board may, on its own motion or at the request of the Director, remand such case to the deputy commissioner for review under § 727.108. The consent of the parties shall not be a prerequisite to a remand by the Board under this paragraph.

(c) A claimant whose claim is pending before the Board may request that his or her claim be remanded to the deputy commissioner for consideration under § 727.108.

Comments received: A few comments recommend additional standards for consideration of cases by the Board.

Discussion and changes: The law establishing the Board establishes its scope of authority and it is not proper for the Department to further affect that authority in the context of these rules.

§ 727.404 Claims pending in a U.S. Court of Appeals.

A claim pending in a U.S. court of appeals which may be subject to review under this part shall be considered by the court as the court deems appropriate.

Comments received: None.

§ 727.405 Expedited review of claims.

(a) A claim which is remanded to the deputy commissioner by an administrative law judge, the Benefits Review Board, or a court, under this subpart shall be reviewed under § 727.108 and in accordance with the provisions of this part on a priority basis. Such claim shall be reviewed by the deputy commissioner before any other claim, except for a claim remanded at an earlier date under this subpart. If no additional evidence is submitted or required with respect to a claim remanded under this subpart, the deputy commissioner shall make initial findings (see § 725.410 of this subchapter) on the claim within no more than 60 days from the date on which the claim was remanded.

(b) If, after appropriate notice has been given to the claimant of his opportunity to elect review by the deputy commissioner in accordance with this subpart, or to proceed through the administrative appeals process, the claimant chooses not to elect review by the deputy commissioner, the claimant's right to review provided by this part shall be considered fully satisfied, and no further review of the claim beyond that afforded by the appeals process shall be required under section 435 of the act.

Comments received: Many comments support this provision. A few comments urge that a claimant should not forfeit review if his or her claim is not remanded to the deputy commissioner.

Discussion and changes: The purpose of paragraph (b) is to preclude a claimant from seeking review of his or her claim under the new law by an administrative law judge and the Benefits Review Board and then, if not

satisfied, seeking further review by the deputy commissioner. The claimant's absolute right to review under the new law may be exercised only once and that should be done in the first instance before the deputy commissioner, after which a hearing and an appeal will be available if necessary. The paragraph is however, revised to more clearly reflect this intent.

Signed this 11th day of August 1978 at Washington, D.C.

RAY MARSHALL,
Secretary of Labor.

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