

DEPARTMENT OF LABOR**Employment Standards Administration****20 CFR Parts 718 and 725**

RIN 1215-AB40

Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended**AGENCY:** Employment Standards Administration, Labor.**ACTION:** Final rule.

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

DATES: Effective December 15, 2003.**FOR FURTHER INFORMATION CONTACT:** James L. DeMarce, (202) 693-0046**SUPPLEMENTARY INFORMATION:****I. Regulatory History**

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

comment period. After carefully reviewing these comments, the Department issued its final rule on December 20, 2000. 65 FR 79920-80107 (Dec. 20, 2000).

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

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

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

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

Treating Physicians' Opinions—20 CFR 718.104(d)

Section 718.104(d) requires the adjudicator to give consideration to the relationship between the miner and any

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

Definition of "Pneumoconiosis"—20 CFR 718.201

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

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