

statutory terms. *Id.* The court upheld § 718.201(c), holding it had sufficient support in the rulemaking record. The court cited scientific evidence in the rulemaking record indicating that pneumoconiosis can be latent and progressive. The court cited two studies, one “indicating that pneumoconiosis is latent and progressive in—at most—eight percent of cases,” and the other “indicating that pneumoconiosis is latent and progressive as much as 24% of the time.” 292 F.3d at 869. Consistent with the Department’s argument, the court therefore interpreted the regulation to mean that pneumoconiosis can be a latent and progressive disease, not that pneumoconiosis is always or typically a latent and progressive disease. *Id.* There is no irrebuttable presumption that each miner’s pneumoconiosis is latent or progressive. The burden of proving the presence of pneumoconiosis is always on the miner. As the Department explained in the preamble to the final rule, “the miner continues to bear the burden of establishing all of the statutory elements of entitlement.” 65 FR at 79972 (Dec. 20, 2000).

Total Disability Rule—20 CFR 718.204(a)

Section 718.204(a) provides, in part, that “any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner’s pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis.” In upholding this provision, the court stated that there is “an obvious rational basis for the rule: the statute only pertains to whether a miner is disabled ‘due to pneumoconiosis,’ and evidence of nonpulmonary conditions has no relevance to that inquiry.” 292 F.3d at 873. Recognizing that the rule is consistent with the holdings of three circuits and abrogates the holding of another, *see* 65 FR 79947, ¶ (c) (Dec. 20, 2000), the court explained that “regulations promulgated to clarify disputed interpretations of a regulation are to be encouraged. Tidying-up a conflict in the circuits with a clarifying regulation permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable regulation.” 292 F.3d at 873 (quoting *Pope v. Shalala*, 998 F.2d 473, 486 (7th Cir. 1993)).

Establishing Death Due to Pneumoconiosis—20 CFR 718.205(c)

Section 718.205(c)(2) provides, in part, that for the purpose of adjudicating

survivors’ claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis “[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. * * *” Section 718.205(c)(5), in turn, provides that “[p]neumoconiosis is a ‘substantially contributing cause’ of a miner’s death if it hastens the miner’s death.” In upholding this provision, the court noted that the rulemaking record supported the Department’s conclusion that “pneumoconiosis [can] weaken the body’s defenses to infections and increase susceptibility to other disease processes.” 292 F.3d at 871 (quoting 65 FR 79950 (Dec. 20, 2000)). The court recognized that the provision “nowhere mandates the conclusion that pneumoconiosis be regarded as a hastening cause of death,” and that it “expressly requires claimants to prove that pneumoconiosis is the hastening cause” of death. 292 F.3d at 871. As the Department explained in the preamble to the final rule: (1) the survivor must “submit credible medical evidence establishing a detectable hastening of the miner’s death on account of pneumoconiosis,” 65 FR 79949, ¶ (b) (Dec. 20, 2000); and (2) “the burden of persuasion remains with the survivor to prove that the miner’s death was due to pneumoconiosis.” 65 FR 79951, ¶ (f) (Dec. 20, 2000).

Definition of “Benefits”—20 CFR 725.101(a)(6)

Section 725.101(a)(6) includes in the definition of “benefits” the “expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406.” The costs of such medical examination and testing are paid by the Black Lung Disability Trust Fund and are reimbursed by the employer only if benefits are ultimately awarded. *See* 20 CFR 725.406(e); 292 F.3d at 865–866. In upholding the substance of this provision, the court noted “the Black Lung Benefits Act’s express authorization to [t]he Secretary * * * to charge the cost of examination * * * to the employer.” 292 F.3d at 875 (quoting 33 U.S.C. 907(e), as incorporated by 30 U.S.C. 932(a)).

Subsequent Claims—20 CFR 725.309(d)

Section 725.309(d) provides, in part, that a subsequent claim “shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement * * * has changed since the date upon which the order denying the prior claim became final.” A subsequent or additional claim is a claim filed more than one year after the denial of a claim

previously filed by the same claimant. The court upheld this provision because: (1) The regulatory language squarely places the burden of proving a change in a condition of entitlement on the claimant; and (2) § 725.309(d) does not violate *res judicata* or traditional notions of finality because proof of the change must be based on evidence of the claimant’s current condition. 292 F.3d at 870. *See also* 65 FR 79973, ¶ (d) (Dec. 20, 2000) (explaining that “new evidence establish[ing] that [a miner’s] condition has worsened” is required to establish the necessary change). The claimant’s condition at the time the previous claim was denied is not relevant to proving a change in a condition of entitlement. 292 F.3d at 870. Moreover, even after establishing a change in one condition of entitlement, the miner still bears the burden of proving the remaining conditions of entitlement. 292 F.3d at 861.

Attorneys’ Fees—20 CFR 725.366(b)

Section 725.366(b) provides that in calculating an award of an attorney’s fees, the ALJ “shall take into account” a number of factors, including “the quality of the representation, the qualifications of the representative, [and] the complexity of the legal issues involved.” The court upheld this provision, noting it required consideration of no factors not already included in the calculation of shifted attorneys’ fees by the Supreme Court. In response to the argument that the rule would result in the “double counting” of some factors, the court stated that “the factors identified in § 725.366(b) do not supplant the ‘lodestar’ method of calculating reasonable fees, or enhance the lodestar fee once it is calculated.” 292 F.3d at 875 (quoting government’s brief).

Evidence Limitations—20 CFR 725.310(b), .414, .456, .457(d), .458

Sections 725.310(b), 725.414, 725.456, 725.457(d), and 725.458 place various limits on the amount and timing of evidence admissible in claims proceedings. The court upheld all of these provisions, stating that the Administrative Procedure Act and the Black Lung Benefits Act authorize them. In holding that the new evidentiary limits are not at all “artificial,” the court quoted the Department’s explanation for these limitations: they “will enable ALJs to focus their attention ‘on the quality of the medical evidence in the record before [them].’” 292 F.3d at 874 (quoting 64 FR 54994 (Oct. 8, 1999)).