

#### Criteria for Determining a Responsible Operator—20 CFR 725.408, .495(c)

Section 725.408 establishes a deadline for a coal mine operator named a “potentially liable operator” in a specific claim to submit evidence regarding its financial status and employment of the miner if it disagrees with its identification. Upholding the validity of this provision, the court stated that the section shifted only the burden of production, not the burden of proof, and that “it requires nothing more than that operators must submit evidence rebutting an assertion of liability within a given period of time.” 292 F.3d at 871. “[T]he evidence required by § 725.408 is limited to evidence relevant to the notified operator’s own employment of the miner and that operator’s financial status.” 65 FR at 79986, ¶ (e) (Dec. 20, 2000)).

Section 725.495(c) provides that once an operator has been designated as the “responsible operator” (the operator responsible for a specific claim) from among the companies named potentially liable operators, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability or that another potentially liable operator more recently employed the miner and is capable of assuming liability. The court upheld this provision, recognizing that it shifted the burden of proof, because it applies only after the operator has been designated as the responsible operator. 292 F.3d at 872. *See also* 65 FR 80009, ¶ (e) (Dec. 20, 2000); 64 FR at 54973 (Oct. 8, 1999); 62 FR at 3365 (Jan. 22, 1997). In seeking to be excused from liability in such circumstances, the court noted “the operator becomes the ‘proponent’ of a remedial order of the ALJ and, therefore, the party to which [the APA] assigns the burden of proof.” 292 F.3d at 872 (quoting 160 F.Supp.2d at 71). Given that the provision “affords a mine operator liable for a claimant’s black lung disease the opportunity to shift liability to another party, it is hardly irrational to require the operator to bear the burden of proving that the other party is in fact liable.” 292 F.3d at 872.

#### Medical Benefits Presumption—20 CFR 725.701(e)

Section 725.701(e) provides that if a miner who is totally disabled due to pneumoconiosis receives treatment for a pulmonary disorder, there is a rebuttable presumption that the disorder is caused or aggravated by the miner’s pneumoconiosis. If the presumption is not rebutted, the cost of the treatment is compensable. The court upheld this

provision, noting that the Department explained in the preamble to the final rule that the provision “shifts only the burden of *production* to operators to produce evidence that the treated disease was unrelated to the miner’s pneumoconiosis; the ultimate burden of proof remains on claimants at all times.” 292 F.3d at 872 (citing 65 FR 80022 (Dec. 20, 2000)). The court also agreed with the Department’s preamble explanation, stating that “there is a clear rational relationship between the fact proved (that a miner suffered from totally disabling pneumoconiosis in the past) and the fact presumed (that the miner’s treated pulmonary disorder is related to that pneumoconiosis).” 292 F.3d at 873 (citing 65 FR 80023 (Dec. 20, 2000)). The court concluded that this rational relationship “suffices for purposes of our review.” 292 F.3d at 873.

#### Retroactivity Challenges

The court also addressed the contention that some of the new provisions were impermissibly retroactive, that is, could not be applied to claims for benefits pending on January 19, 2001, the effective date of the final rule. The court agreed with this contention as to eight provisions—the second sentence of § 718.204(a), as well as §§ 725.101(a)(31), 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d), and 725.701(e). The court noted, as had the Department in the preamble to the initial notice of proposed rulemaking (*see* 62 FR at 3347 (Jan. 22, 1997)), that the Department is not authorized to promulgate retroactive black lung benefits regulations. The court explained that application of a regulation to a claim pending on the regulation’s effective date would be impermissibly retroactive if the regulation “change[d] the legal landscape.” 292 F.3d at 859. The court determined that the eight provisions listed above did change the legal landscape, and that application of these provisions to claims pending on the effective date of the final rule was therefore improper. 292 F.3d at 864–868. The Department’s revisions to effectuate the court’s holdings are found at 20 CFR 718.2 and 725.2(c), and are explained in detail under III, Explanation of Changes.

In rejecting challenges to the applicability of 20 CFR 718.104(d), 718.201(a)(2) and (c), 725.101(a)(6), and 725.309(d), the court reasoned as follows:

#### Treating Physicians’ Opinions—20 CFR 718.104(d)

In holding that the treating physician rule, § 718.104(d), is not impermissibly retroactive, the court explained that the rule “codifies judicial precedent and does not work a substantive change in the law.” 292 F.3d at 861.

#### Definition of “Pneumoconiosis”—20 CFR 718.201

Holding that § 718.201(a)(2)—which includes “chronic restrictive or obstructive pulmonary disease arising out of coal mine employment” in the definition of “pneumoconiosis”—is not impermissibly retroactive, the court concluded that the provision “does not alter the requirement that individual miners must demonstrate that their obstructive lung disease arose out of their work in the mines.” 292 F.3d at 863 (citing 65 FR 79938 (Dec. 20, 2000)). The court noted that the rulemaking record supports the premise that obstructive lung disease may be caused by coal mining exposure, and that this provision “does no more than reflect this reality.” 292 F.3d at 862. It rejected the argument that the provision creates a presumption that a miner’s obstructive lung disease is caused by exposure to coal dust. It held, consistent with the Department’s preamble explanation, that the provision requires “that each miner bear the burden of proving that his obstructive lung disease did in fact arise out of his coal mine employment.” 65 FR at 79938 (Dec. 20, 2000). *See* 292 F.3d at 862–863. The court also rejected as “meritless” the contention that the regulation permits an adjudicator to “ignore a medical report if the reporting doctor concludes that a miner’s obstructive lung disease was caused by smoking, rather than mining.” 292 F.3d at 863. “The regulation’s plain text in no way indicates that medical reports will be excluded if they conclude that a particular miner’s obstructive disease was caused by smoking, rather than mining.” *Id.*

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.” Holding that this regulation is not impermissibly retroactive, the court rejected the argument that the rule assumes that all pneumoconiosis is latent and progressive as “based on a false reading of the rule.” 292 F.3d at 863. The court explained that “[t]he rule simply prevents operators from claiming that pneumoconiosis is never latent and progressive. The medical literature