

makes it clear that pneumoconiosis may be latent and progressive. * * * *Id.*

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

In holding that § 725.101(a)(6)—which defines “benefits” to include “any expenses related to the medical examination and testing authorized by the district director pursuant to § 725.406”—is not impermissibly retroactive, the court stated that the operators “have not pointed to anything in the new definition that departs from the system already in place under the old § 725.406(c). Thus, the new definition changes nothing and is not impermissibly retroactive.” 292 F.3d at 866.

Subsequent Claims—20 CFR 725.309(d)

Holding that the subsequent claims rule, § 725.309(d), is not impermissibly retroactive, the court stated that the regulation “applies only to claims filed after the regulations’ effective date” and, in any event, is not substantively new and therefore “does not change the legal landscape.” 292 F.3d at 863–864.

III. Explanation of Changes

In order to conform to the D.C. Circuit’s holding invalidating the witness-fee-shifting provision in § 725.459, the Department must revise that regulation. Similarly, to conform to the regulations to the court’s retroactivity holdings, the Department must revise both § 718.2 and § 725.2(c). Those sections address the applicability of the regulations in Parts 718 and 725. Since the court ruled that one provision in Part 718 and several regulations in Part 725 were impermissibly retroactive if applied to claims pending on January 19, 2001, both § 718.2 and § 725.2(c) must be revised.

20 CFR 718.2

(a) In the final rule promulgated on December 20, 2000, the Department revised § 718.204(a) by adding the following sentence: “For purposes of this section, 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.” This revision clarified that non-respiratory/pulmonary impairments are not relevant to the total disability determination; thus, a miner who suffers from disabling pneumoconiosis is totally disabled for purposes of the Black Lung Benefits Act notwithstanding the existence of any independently disabling non-

respiratory/pulmonary impairments. The change codified the holdings in *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 216–217 (6th Cir. 1996); *Youghioghny & Ohio Coal Co. v. McAngues*, 996 F.2d 130, 134–135 (6th Cir. 1993), *cert. den.* 510 U.S. 1040 (1994); *Twin Pines Coal Co. v. U.S. Dept. of Labor*, 854 F.2d 1212, 1215 (10th Cir. 1988); and *Peabody Coal Co. v. Director, OWCP [Huber]*, 778 F.2d 358, 363 (7th Cir. 1985), and emphasized the Department’s disagreement with *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 1394–1395 (7th Cir. 1994) (holding claimant’s entitlement precluded by disabling stroke which was unrelated to coal mine employment and occurred before evidence of disability due to pneumoconiosis). See 62 FR at 3344–3345 (Jan. 22, 1997); 64 FR at 54979, ¶ (b) (Oct. 8, 1999); 65 FR at 79947, ¶ (c) (Dec. 20, 2000). By virtue of § 718.2, this provision, located in the second sentence of § 718.204(a), applied to the adjudication of all claims filed after March 31, 1980, including those pending on January 19, 2001. 20 CFR 718.2 (“This part is applicable to the adjudication of all claims filed after March 31, 1980. * * *”).

(b) Because the second sentence of § 718.204(a) is a departure from the Seventh Circuit’s *Vigna* decision, the D.C. Circuit held the rule impermissibly retroactive as applied to claims pending on January 19, 2001, the regulation’s effective date. 292 F.3d at 864–865. The court stressed, however, that it did not “intend to affect the law in circuits that have adopted or might adopt positions that conform with the Secretary’s interpretation. * * * Instead, the effect of our ruling is to leave the state of the law on this question exactly as it was prior to the regulations’ promulgation” for pending cases. *Id.* The court otherwise upheld the substance of the regulation, holding that the “regulation has a rational basis and is consistent with the APA.” 292 F.3d at 873.

(c) The Department has revised § 718.2 to reflect the D.C. Circuit’s conclusion that the second sentence of § 718.204(a) may not be applied to claims pending on the effective date of the regulations: January 19, 2001.

20 CFR 725.2(c)

(a)(i) In the final rule issued on December 20, 2000, the Department amended the definition of “workers’ compensation law” (previously codified at 20 CFR 725.101(a)(4) (2000)) in § 725.101(a)(31) to clarify its longstanding interpretation of the statute that payments made from a state’s general revenues are not workers’

compensation benefits subject to offset under the Black Lung Benefits Act. 62 FR 3348–3349 (Jan. 22, 1997); 64 FR 54982–54983, ¶ (e) (Oct. 8, 1999); 65 FR 79958–79959, ¶ (e) (Dec. 20, 2000). The revision responded to a Third Circuit decision rejecting the Department’s position as inconsistent with the language of the prior implementing regulation. *Director, OWCP v. Eastern Associated Coal Co. [O’Brokta]*, 54 F.3d 141, 148–150 (3d Cir. 1995). Despite its holding, the Third Circuit agreed that the Department’s position reflected a permissible interpretation of the statute, and noted that the Department “has the means and obligation to amend its regulations to provide for” its interpretation. 54 F.3d at 150. (ii) Because the Third Circuit had rejected the Department’s position under the prior regulations, the D.C. Circuit held the revised rule impermissibly retroactive when applied “to claims that were already pending when the new regulation took effect” or to “adjust payments being made on settled or resolved claims.” 292 F.3d at 866. The court emphasized that “other circuits remain free to apply the Secretary’s longstanding interpretation of the prior regulation to pending claims.” *Id.* (iii) To reflect the D.C. Circuit’s decision, the Department has revised § 725.2(c) in two ways. First, the Department has included § 725.101(a)(31) in the list of regulations that do not apply to claims pending on January 19, 2001. Second, the Department has revised the first two sentences of the subsection to clarify that the regulations included in the list do not apply to benefit payments made on claims pending on January 19, 2001, even where the benefit payments are made after January 19, 2001. Thus, § 725.101(a)(31) applies only to claims filed after January 19, 2001.

(b)(i) In the final rule issued on December 20, 2000, the Department revised a number of provisions relating to the criteria for determining the relationship and dependency of a miner’s dependents and survivors, including §§ 725.204, 725.212(b), 725.213(c), 725.214(d), 725.219(d). These revisions were necessary to reflect certain amendments to the underlying incorporated Social Security Act provisions and to the Black Lung Benefits Act, and to clarify the Department’s policy with regard to the issues involved. 62 FR 3349–3351 (Jan. 22, 1997); 65 FR 79963–79967 (Dec. 20, 2000). (ii) The D.C. Circuit concluded that these revisions are impermissibly retroactive “as applied to claims other than those filed after the regulations’