

effective date” because they “expand the scope of coverage by making more dependents and survivors eligible for benefits.” 292 F.3d at 866–867. The court recognized that the Department’s regulations also contemplated application of these revisions to “all benefits payments made” after January 19, 2001, even payments made on claims finally adjudicated prior to that time. The court rejected the Department’s approach and reiterated that “it would be unlawfully retroactive to apply the definitions to any claims other than those filed on or after the regulations’ effective date.” 292 F.3d at 867. (iii) To reflect the D.C. Circuit’s decision, the Department has revised § 725.2(c) in two ways. First, the Department has included §§ 725.204, 725.212(b), 725.213(c), 725.214(d), and 725.219(d) 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 benefits payments made on claims pending on January 19, 2001, even where the benefit payments are made after January 19, 2001. Through these two revisions, the Department has ensured that the regulations deemed impermissibly retroactive by the D.C. Circuit will not be applied either to claims filed before the effective date of the regulations or to any benefits paid on those claims. Under the plain language of the revised regulation, the regulations that are not listed will continue to apply to all benefits payments made, including those paid pursuant to claims filed prior to the effective date of the regulations. The regulations listed in § 725.2(c) apply only to claims filed after January 19, 2001.

(c) The court mentioned both § 725.209 and § 725.219(c) in the course of discussing whether revisions made to the criteria for determining the relationship and dependency of a miner’s dependents and survivors found in Part 725, Subpart B could be applied to pending claims, but did not hold that either regulation is impermissibly retroactive. 292 F.3d at 867. Neither of these regulations was revised in any substantive way in the final rule issued on December 20, 2000. Although the Department initially proposed substantive changes to § 725.209, finally-revised § 725.209 contains only one revision, which eliminated unnecessary words. Compare 20 CFR 725.209(a)(2)(ii) (1999) with 20 CFR 725.209(a)(2)(ii) (2002); Compare 62 FR at 3350 (Jan. 22, 1997) with 65 FR at

79963 (Dec. 20, 2000). And § 725.219(c) was not revised at all. Compare 20 CFR 725.219(c) (1999) with 20 CFR 725.219(c) (2002). Accordingly, the Department has not added either of these regulations to the list set forth in § 725.2(c), and both regulations apply to claims pending on January 19, 2001.

(d)(i) In the final rule issued on December 20, 2000, the Department added § 725.701(e) to establish a rebuttable presumption of medical benefits coverage for the treatment of any pulmonary disorder suffered by a miner totally disabled due to pneumoconiosis arising out of coal mine employment. This presumption is derived from a judicially-created presumption first announced by the Fourth Circuit in *Doris Coal Co. v. Director, OWCP*, 938 F.2d 492 (4th Cir. 1991), and later refined by that court in *Gulf & Western Indus. v. Ling*, 176 F.3d 226 (4th Cir. 1999), and *General Trucking Corp. v. Salyers*, 175 F.3d 322 (4th Cir. 1999). 65 FR at 80021–80022 (Dec. 20, 2000). The Department also recognized the Sixth Circuit had held in *Glen Coal Co. v. Seals*, 147 F.3d 502 (6th Cir. 1998), that the administrative law judge and the Benefits Review Board erred in applying the *Doris Coal* presumption to a miner whose coal mine employment took place within the jurisdiction of the Sixth Circuit. 65 FR at 80021–80022, ¶ (a) (Dec. 20, 2000). (ii) Because the D.C. Circuit found the rebuttable presumption established by § 725.701(e) contradicted by the Sixth Circuit’s decision in *Seals*, it held that the rule is impermissibly retroactive when applied to pending claims. The court explained that its holding was “not intended to affect the law in the Fourth Circuit or any other circuit that would have embraced the *Doris Coal* presumption. The judicial presumption remains the law in the circuits that adopt it.” 292 F.3d at 865. (iii) To reflect the D.C. Circuit’s decision, the Department has revised § 725.2(c) to include § 725.701(e) in the list of regulations that do not apply to claims pending on January 19, 2001.

20 CFR 725.459

(a) In the final rule issued on December 20, 2000, the Department revised § 725.459(b) to include a provision relieving an indigent claimant of the cost of producing his or her witnesses for cross-examination, regardless of whether such indigent claimant ultimately prevailed: “If the claimant is the proponent of the witness whose cross-examination is sought, and demonstrates, within time limits established by the administrative law judge, that he would be deprived of

ordinary and necessary living expenses if required to pay the witness fee and mileage necessary to produce that witness for cross-examination, the administrative law judge shall apportion the costs of such cross-examination among the parties to the case.” The Department also added a new subsection (d) adopting certain criteria for determining indigency in this context. See 64 FR at 54996–54997 (Oct. 8, 1999); 65 FR at 80003, ¶ (a) (Dec. 20, 2000).

(b) The D.C. Circuit held these provisions in § 725.459 invalid under *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 97–100 (1991), because the court found no specific statutory authority for shifting this cost to an employer in the absence of a successfully prosecuted claim. 292 F.3d at 875.

(c) To reflect the D.C. Circuit’s decision, the Department has revised § 725.459 to eliminate the fourth sentence and the beginning of the fifth sentence of paragraph (b). The Department has also eliminated paragraph (d). Thus, “the proponent of [a] witness [called for cross-examination] shall pay the witness’ fee,” 20 CFR 725.459(b). This rule applies to all parties, including the claimant.

IV. Rulemaking Analyses

Administrative Procedure Act

Section 553 of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. The Department has determined that there is good cause to conclude that notice and public procedure are unnecessary because this action is taken merely to conform the regulations to the D.C. Circuit’s decision. Because this action does not change the law, but merely reflects the state of the law as determined by the D.C. Circuit, there is good cause, within the meaning of 5 U.S.C. 553(d)(3), to make the action effective upon publication.

Regulatory Flexibility Act

Because the Department has found good cause to conclude that this action is not subject to notice and public procedure under the Administrative Procedure Act, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).