

# Chapter 1

## Introduction to the Claims Process and Research Tools

---

I.	Filing the claim and adjudication by the District Director.....	1.1
A.	The Director, OWCP and District Director .....	1.1
B.	Development of the record and the 20 C.F.R. § 725.406 examination .....	1.2
C.	The evidentiary limitations at 20 C.F.R. § 725.414 .....	1.2
D.	Adjudication by the District Director .....	1.3
E.	Determination of the responsible operator.....	1.5
1.	Claims filed on or before January 19, 2001 .....	1.5
2.	Claims filed after January 19, 2001 .....	1.5
F.	The District Director’s proposed decision and order .....	1.6
II.	The request for a formal hearing .....	1.6
A.	Generally .....	1.6
B.	The parties have 30 days to request a hearing .....	1.8
C.	How decisions are captioned .....	1.8
D.	Party qualified to pursue the claim .....	1.9
III.	The appellate process .....	1.10
A.	Circuit court jurisdiction .....	1.10
B.	Appeal to the U.S. Circuit Court of Appeals .....	1.11
C.	Claims processing .....	1.12
IV.	Research tools .....	1.12
V.	Audio-visual coverage of hearings .....	1.14

# Chapter 2

## Introduction to the Medical Evidence

---

I.	Generally .....	2.1
II.	Interpretation of the chest x-ray study.....	2.1
A.	Generally .....	2.1
B.	Elements of the x-ray report .....	2.5

1.	Date of the x-ray study and date of the reading .....	2.5
2.	Qualifications of the physician .....	2.5
a.	The C-reader .....	2.5
b.	The B-reader .....	2.6
c.	The Board-certified radiologist .....	2.6
d.	The A-reader .....	2.6
e.	The Board-eligible radiologist .....	2.7
3.	Film quality .....	2.7
4.	The quantity of opacities .....	2.7
5.	The size and type of opacities .....	2.8
III.	The pulmonary function (ventilatory) study .....	2.8
A.	Generally.....	2.8
B.	Height, age, and gender of the miner.....	2.9
C.	The forced expiratory volume (FEV <sub>1</sub> ).....	2.10
D.	The forced vital capacity (FVC) and the maximum voluntary volume (MVV).....	2.10
E.	The use of bronchodilators.....	2.10
IV.	The blood gas studies .....	2.10

## Chapter 3

# General Principles of Weighing Medical Evidence

---

I.	An introduction .....	3.1
A.	Burdens, generally.....	3.1
B.	Claims adjudicated under 20 C.F.R. Part 727 or 20 C.F.R. § 410.490 .....	3.2
C.	Claims adjudicated under 20 C.F.R. Part 718.....	3.2
II.	Rules of general application .....	3.2
A.	The “true doubt” rule .....	3.2
1.	For claims filed on or before January 19, 2001 .....	3.2
2.	For claims filed after January 19, 2001.....	3.3
B.	The “later evidence” rule.....	3.4
1.	The appellate tribunals.....	3.4
2.	Chest x-rays.....	3.7

	a.	Date of study relevant.....	3.7
	b.	Length of time between studies, qualifications of readers relevant .....	3.7
	3.	Ventilatory studies.....	3.7
	4.	Blood gas studies.....	3.8
	5.	Medical opinions.....	3.8
C.		Numerical superiority.....	3.8
	1.	Chest x-rays.....	3.9
	a.	Generally.....	3.9
	b.	Mechanical application, held improper.....	3.9
	2.	Blood gas studies.....	3.10
	3.	Medical opinions.....	3.11
D.		Quality standards.....	3.12
	1.	For medical evidence developed on or before January 19, 2001.....	3.12
	a.	Quality standards under Part 718 .....	3.12
	b.	Quality standards under 20 C.F.R. Parts 410 and 727 .....	3.12
	c.	Applicability of Part 718 standards to Part 727 claims .....	3.13
	2.	For medical evidence developed after January 19, 2001.....	3.13
	a.	Quality standards, generally .....	3.13
	b.	Chest x-rays .....	3.14
	c.	Pulmonary function studies .....	3.15
	d.	Blood gas studies .....	3.16
	e.	Autopsy and biopsy evidence .....	3.16
	f.	Medical opinion evidence.....	3.17
	g.	Hospitalization and treatment records .....	3.18
	3.	Challenging quality of evidence, burdens for .....	3.18
E.		Party affiliation .....	3.19
	1.	Allegations of bias based on adverse opinion or party affiliation .....	3.19
	2.	Department of Labor sponsored examination.....	3.20
F.		Cumulative, repetitious, or immaterial evidence.....	3.20
III.		Chest x-ray evidence .....	3.21
	A.	Physicians' qualifications .....	3.21
	1.	Dually qualified physicians .....	3.21

	a.	Over a board-certified radiologist.....	3.21
	b.	Over a B-reader.....	3.21
	2.	Board-certified and board-eligible radiologists.....	3.22
	3.	C-readers and B-readers .....	3.22
	4.	B-readers and A-readers .....	3.22
	5.	Credentials unknown.....	3.22
	6.	Taking official notice of credentials .....	3.23
B.		Format of the x-ray report .....	3.23
	1.	Use of ILO form not required .....	3.23
	2.	Use of the official ILO form, generally .....	3.24
	a.	Comments reflecting bias.....	3.24
	b.	No bias, alternative versus additional diagnosis.....	3.25
	3.	Treatment record and use of the ILO form.....	3.26
C.		Interpretation that is silent regarding pneumoconiosis.....	3.27
D.		Film quality.....	3.27
E.		Digital x-rays and CT-scans considered separately from chest x-ray evidence .....	3.28
IV.		Pulmonary function (ventilatory) studies.....	3.28
	A.	Resolving height discrepancies.....	3.28
	B.	Qualifying test results .....	3.29
	C.	Determination of reliability or conformity.....	3.29
	1.	Conformity issues.....	3.30
	a.	“Poor” cooperation or comprehension.....	3.30
	b.	“Fair” cooperation or comprehension .....	3.30
	c.	Non-conforming, non-qualifying study may be probative .....	3.30
	2.	Requirement of three tracings and flow-volume loop.....	3.31
	3.	Testing conducted during hospitalization.....	3.31
	D.	Miners over 71 years of age .....	3.32
V.		Blood gas studies.....	3.33
	A.	Cannot “round-up” or “round-down” values.....	3.33
	B.	Determination of reliability or conformity .....	3.34
	1.	Validation by medical opinion.....	3.34
	a.	Factors to consider, generally .....	3.34
	b.	Technical validation of study, value of .....	3.34
	2.	Test conducted during hospitalization .....	3.35

	a.	For testing conducted on or before January 19, 2001 .....	3.35
	b.	For testing conducted after January 19, 2001 .....	3.35
VI.		Medical reports .....	3.36
	A.	Well-documented, well-reasoned opinion defined .....	3.36
	B.	Undocumented and unreasoned opinion, little or no probative value .....	3.36
	1.	Generally .....	3.36
	2.	Separation of probative, non-probative components of report .....	3.37
	3.	Unsupported medical conclusion .....	3.38
	4.	Basis for opinion unclear .....	3.38
	5.	Opinion based on generalities .....	3.39
	6.	Reliance on unreliable study, subjective complaints .....	3.41
	7.	Inaccurate coal mine employment or smoking history .....	3.41
	8.	Inadequate reasoning .....	3.41
	a.	Reliance on negative x-ray alone .....	3.41
	b.	Reversibility on pulmonary function testing with residual disability .....	3.42
	9.	Legal pneumoconiosis, smoking versus coal dust exposure must be explained .....	3.43
	10.	Medical opinion cannot be based on chest x-ray alone .....	3.44
	C.	Physicians' qualifications .....	3.45
	1.	Treating physician .....	3.45
	a.	For medical opinions developed on or before January 19, 2001 .....	3.45
	b.	For medical reports generated after January 19, 2001 .....	3.48
	2.	Examining physicians .....	3.52
	3.	Non-examining or consultative physician .....	3.53
	4.	Conviction or lapse of licensure, effect of .....	3.54
	a.	Lapse in licensure standing alone; opinion may be probative .....	3.54
	b.	Conviction for activities related to Black Lung Program .....	3.55
	D.	Equivocal or vague conclusions .....	3.58

1.	Generally .....	3.58
2.	Inadvisability of return to coal mine employment .....	3.59
3.	Unable to assess impairment .....	3.59
4.	Should work in “dust-free environment” too vague.....	3.59
5.	Use of the AMA Guides .....	3.60
6.	Presumption at 20 C.F.R. § 718.203, effect of.....	3.61
E.	Physician’s opinion based on premises contrary to administrative law judge’s findings .....	3.62
1.	Benefits Review Board .....	3.62
2.	Third Circuit .....	3.63
3.	Fourth Circuit.....	3.63
4.	Seventh Circuit .....	3.64
F.	Silent opinion.....	3.65
G.	Inconsistent reports .....	3.65
H.	Better supported by objective medical data .....	3.66
I.	A physician’s views regarding the nature of pneumoconiosis are important.....	3.66
1.	Coal mine employment preserves lung function .....	3.68
2.	Simple pneumoconiosis cannot be totally disabling.....	3.69
3.	No pneumoconiosis based solely on negative x-ray.....	3.69
4.	Pneumoconiosis does not cause, or seldom causes, obstructive impairments.....	3.71
a.	Generally “hostile-to-the-Act” .....	3.71
b.	Not “hostile-to-the-Act,” but may be less probative .....	3.72
5.	Pneumoconiosis “not expected” to cause pulmonary impairment .....	3.74
6.	Pneumoconiosis does not progress after exposure to dust ceases .....	3.74
7.	Pneumoconiosis expected to cause “restriction .....	3.76
8.	Average loss of FEV <sub>1</sub> , not probative .....	3.77
9.	Use of the FEV <sub>1</sub> /FVC ratio.....	3.77
J.	The preamble to the amended regulations.....	3.78
1.	Benefits Review Board .....	3.78
2.	Third Circuit .....	3.79
3.	Fourth Circuit.....	3.80
4.	Sixth Circuit.....	3.82
5.	Seventh Circuit .....	3.83

K.	Citation to medical literature.....	3.84
1.	Generally .....	3.84
2.	The Surgeon General’s report.....	3.86
3.	Checklist for consideration of medical literature.....	3.86
L.	Reliance on non-qualifying or non-conforming testing .....	3.92
1.	Generally .....	3.92
2.	Benefits Review Board.....	3.93
3.	Fourth Circuit.....	3.93
4.	Sixth Circuit.....	3.94
5.	Seventh Circuit .....	3.94
M.	Extensive medical data versus limited data.....	3.94
1.	Extensive data considered, report probative.....	3.95
2.	Incomplete data considered, report less probative.....	3.95
N.	Physical limitations contained in medical report.....	3.95
O.	Death certificates .....	3.96
P.	Determinations by other agencies.....	3.97
Q.	Weighing “other evidence” under 20 C.F.R. § 718.107 .....	3.97
1.	CT-scans .....	3.97
a.	Should not be weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a) .....	3.97
b.	Not <i>per se</i> more probative than chest x-ray evidence .....	3.97
2.	Digital x-rays, not be weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a) .....	3.98
VII.	Autopsy reports .....	3.99
A.	Principles of weighing autopsy evidence .....	3.100
1.	Performing the autopsy versus review of the slides.....	3.100
a.	Greater weight to prosecutor’s report, held proper.....	3.100
b.	Greater weight to prosecutor’s report, held improper.....	3.101
2.	Opinion of autopsy prosecutor versus review of findings.....	3.102
B.	Quality standards.....	3.102

# Chapter 4

## Limitations on Admission of Evidence for Purposes of Entitlement and Responsible Operator Designation

---

I.	Limitation of documentary medical evidence.....	4.1
A.	Limitations are mandatory.....	4.1
1.	Cannot be waived by the parties.....	4.1
2.	Failure to object to evidence irrelevant.....	4.1
3.	Parties must designate evidence; use of the evidence summary form .....	4.2
4.	Substitution of evidence.....	4.2
5.	Administrative Law Judge not required to retain excluded evidence.....	4.3
6.	Special circumstances .....	4.3
a.	State claim evidence .....	4.3
b.	Living miner’s and survivor’s claims.....	4.3
c.	Subsequent claim.....	4.4
d.	Evidence generated by opposing, dismissed party ..	4.4
B.	Evidence rulings must be made <i>prior to</i> issuance of decision on the merits .....	4.4
C.	An original claim or a claim filed pursuant to 20 C.F.R. § 725.309.....	4.5
1.	In support of claimant’s position.....	4.5
2.	In support of responsible operator’s or Trust Fund’s position.....	4.7
3.	“Rebuttal” of x-ray study conducted as part of the 20 C.F.R. § 725.406 examination.....	4.8
4.	Rebuttal of each case-in-chief x-ray interpretation permitted.....	4.10
5.	No operator, the Director, OWCP may exercise the rights of an operator .....	4.10
D.	On modification .....	4.10
1.	The regulation.....	4.10
2.	Parties allowed to “back-fill” slots .....	4.11

3.	Rebuttal provisions from 20 C.F.R. § 725.414 are incorporated into 20 C.F.R. § 725.310.....	4.11
E.	Hospitalization and treatment records unaffected .....	4.11
1.	The regulation.....	4.11
2.	Treatment records.....	4.12
a.	Rebuttal of.....	4.12
b.	“Affirmative” evidence allowed .....	4.12
c.	“Medical report” versus treatment record.....	4.13
F.	“Other evidence” under 20 C.F.R. § 718.107 .....	4.13
1.	No quality standards, evidence of reliability under 20 C.F.R. § 718.107(b) required.....	4.13
2.	Limitations on admission of .....	4.14
a.	Limited to one case-in-chief report for each scan, study, or procedure.....	4.14
b.	Rebuttal of case-in-chief report allowed .....	4.14
3.	“Other evidence” in treatment records; criteria at 20 C.F.R. § 718.107(b) must be met.....	4.15
G.	Medical reports under 20 C.F.R. § 725.414.....	4.16
1.	Defined in the regulation .....	4.16
2.	Separate physical examination by same physician, may be deemed two separate reports.....	4.16
3.	Distinction between treatment note and medical report .....	4.17
4.	Expert’s consideration of inadmissible evidence, consequences of.....	4.18
H.	Autopsy and biopsy reports .....	4.20
1.	Report of autopsy, defined .....	4.20
2.	Rebuttal of report of autopsy.....	4.20
3.	Report of biopsy, defined.....	4.20
I.	“Good cause” standard for admitting evidence over limitations.....	4.21
1.	The regulatory amendments.....	4.21
a.	Introduction .....	4.21
b.	<i>National Mining Association</i> .....	4.23
c.	“Good cause” and <i>Shedlock</i> .....	4.23
d.	Applying “good cause” under 20 C.F.R. § 725.456(b)(1), an overview.....	4.27
e.	“Good cause” under 20 C.F.R. §§ 725.414	

	and 725.456(b)(1).....	4.30
J.	Referral of claim by District Director; not required to include all medical evidence.....	4.32
II.	Responsible operator designation.....	4.33
A.	Limitations on testimony .....	4.33
B.	Evidence related to responsible operator excluded absent “extraordinary circumstances” .....	4.34
1.	The regulation.....	4.34
2.	Case law interpreting “extraordinary circumstances” .....	4.34
a.	Medical records cannot be offered absent showing of “extraordinary circumstances” .....	4.34
b.	Carrier bound by same standard as employer .....	4.36
C.	Dismissal by Administrative Law Judge not permitted.....	4.36
D.	Remand by Administrative Law Judge .....	4.37
E.	On modification .....	4.37
F.	Filing a subsequent claim under 20 C.F.R. § 725.309 .....	4.38
III.	Witness testimony .....	4.39
A.	Limitations on expert medical testimony.....	4.39
1.	Must provide one of two “medical reports” .....	4.39
2.	Testimony of radiologist inadmissible except as related to 20 C.F.R. § 718.107(b) .....	4.40
3.	Testimony of treating physician, special considerations .....	4.40
B.	Must be based on admissible evidence .....	4.41
C.	At the hearing.....	4.41
D.	By deposition.....	4.42
E.	Notice to opposing party .....	4.43
F.	Expert witness fees, apportionment of.....	4.43

## Chapter 5

# What Is the Applicable Law?

---

I.	Overview of the Black Lung Benefits Act .....	5.1
A.	Generally.....	5.1
B.	The amended regulations promulgated in	

	December 2000 at 20 C.F.R. Parts 718, 725, and 726 .....	5.2
II.	Types of claims.....	5.5
	A. The living miner’s claim (BLA).....	5.5
	B. The survivor’s claim (BLA).....	5.5
	C. Medical Benefits Only (BMO).....	5.6
	D. Medical Treatment Dispute (BTD) .....	5.6
	E. Medical Interest (BMI) .....	5.6
	F. Overpayment (BLO).....	5.6
	G. Black Lung Civil Money Penalty (BCP) .....	5.7
	H. Black Lung Part B Claim (BLB).....	5.7
III.	Department of Labor jurisdiction.....	5.8
IV.	The applicable regulatory scheme.....	5.9
V.	Circuit court jurisdiction.....	5.9
VI.	Addresses and phone numbers of Circuit Courts; jurisdiction.....	5.10

## Chapter 6

# Definition of Coal Miner and Length of Coal Mine Employment

---

I.	Coal miner defined under 20 C.F.R. Part 410 and § 410.490.....	6.1
II.	Coal miner defined under 20 C.F.R. Parts 718 and 727 .....	6.1
	A. Generally.....	6.1
	1. For claims filed on or before January 19, 2001 .....	6.1
	2. For claims filed after January 19, 2001.....	6.2
	a. Coke oven workers excluded.....	6.2
	b. Rebuttable presumption of “miner” status.....	6.3
	B. The three-prong test.....	6.3
	1. Generally .....	6.3
	2. Merger of “status” and “function” prongs in some circuits .....	6.4
	a. Third Circuit.....	6.4
	b. Fourth Circuit .....	6.4
	c. Sixth and Seventh Circuits .....	6.4
	d. Eleventh Circuit .....	6.4
	3. Status of the coal.....	6.4

4.	Function of the miner .....	6.5
a.	Integral to the process .....	6.5
b.	Construction workers .....	6.5
c.	Electrician .....	6.7
d.	Bulldozer operator .....	6.7
e.	Consumer coal handler-ore mine power plant .....	6.7
f.	Mine inspector .....	6.7
g.	Inventory work .....	6.8
h.	Transportation workers .....	6.8
i.	Administrative employee .....	6.10
j.	Security guard .....	6.11
5.	Situs of the work performed .....	6.12
C.	“Coal dust” versus “coal mine dust” .....	6.13
1.	For claims filed on or before January 19, 2001 .....	6.13
a.	Benefits Review Board and Third Circuit .....	6.13
b.	Tenth and Eleventh Circuits .....	6.13
2.	For claims filed after January 19, 2001 .....	6.14
III.	Length of coal mine employment .....	6.14
A.	The 125-day rule should not be used .....	6.14
1.	The 125-day rule, generally .....	6.14
2.	The 125-day rule is used for responsible operator designation .....	6.15
3.	The 125-day rule is not used for purposes of presumptions or weighing medical opinions .....	6.16
B.	For claims filed on or before January 19, 2001 .....	6.18
1.	Burden of production/persuasion on Claimant .....	6.18
2.	Any reasonable method of computation acceptable .....	6.18
C.	For claims filed after January 19, 2001 .....	6.19
1.	The regulatory requirements .....	6.19
2.	Bureau of Labor Statistics table-Exhibit 609, “Wage Base History” .....	6.20
D.	Documentation supporting length of coal mine employment .....	6.22
1.	Social Security earnings records .....	6.22
2.	Affidavits .....	6.23
3.	Coal mine employment form completed by the miner .....	6.24

4.	Claimant’s testimony .....	6.24
5.	Other evidence.....	6.24
E.	Periods included in computing length of coal mine employment.....	6.24
1.	Vacation time .....	6.24
a.	For claims filed on or before January 19, 2001; vacation included.....	6.24
b.	For claims filed after January 19, 2001 .....	6.25
2.	Injury or sick time.....	6.26
a.	For claims filed on or before January 19, 2001; injury and sick time included .....	6.26
b.	For claims filed after January 19, 2001; sick leave included .....	6.26
3.	Seasonal employment .....	6.27
F.	Periods not included in computing length of coal mine employment.....	6.28
1.	Seniority time.....	6.28
2.	Voluntary strike time.....	6.28
3.	Laid off .....	6.28
4.	Time spent as a state mine inspector .....	6.28

## Chapter 7

# Designation of Responsible Operator

---

I.	Generally.....	7.1
II.	“Operator” defined.....	7.1
III.	Most recent operator liable.....	7.3
A.	For claims filed on or before January 19, 2001.....	7.3
B.	For claims filed after January 19, 2001 .....	7.4
1.	Only one operator may be identified .....	7.4
2.	“Extraordinary circumstances” and presentation of evidence on the operator issue.....	7.4
3.	Most recent operator for at least one year .....	7.5
IV.	Identifying the proper operator; burden of production/persuasion.....	7.5
A.	Director’s burden to investigate and assess liability.....	7.5
1.	For claims filed on or before January 19, 2001 .....	7.5
2.	For claims filed after January 19, 2001.....	7.6
B.	Proceeding against the potential operator at every stage of litigation.....	7.6

	1.	For claims filed on or before January 19, 2001 .....	7.6
	2.	For claims filed after January 19, 2001.....	7.7
V.		Requirements for responsible operator designation.....	7.8
	A.	Powers of supervision and control .....	7.8
		1. Independent contractors .....	7.9
		a. For claims filed on or before January 19, 2001 .....	7.9
		b. For claims filed after January 19, 2001 .....	7.9
		2. Franchised equipment dealer .....	7.9
		3. Lessors .....	7.9
		a. For claims filed on or before January 19, 2001 .....	7.9
		b. For claims filed after January 19, 2001 .....	7.10
		4. The parent company .....	7.12
		a. For claims filed on or before January 19, 2001 .....	7.12
		b. For claims filed after January 19, 2001 .....	7.12
		5. The self-employed miner .....	7.12
		a. For claims filed on or before January 19, 2001 .....	7.12
		b. For claims filed after January 19, 2001 .....	7.13
		6. Successor liability.....	7.13
		a. For claims filed on or before January 19, 2001 .....	7.13
		b. For claims filed after January 19, 2001 .....	7.15
		7. The federal government.....	7.16
		a. For claims filed on or before January 19, 2001 .....	7.16
		b. For claims filed after January 19, 2001 .....	7.16
		8. Partnerships .....	7.16
		a. For claims filed on or before January 19, 2001 .....	7.16
		b. For claims filed after January 19, 2001 .....	7.17
		9. A “reorganized” company.....	7.17
		a. For claims filed on or before January 19, 2001 .....	7.17
		b. For claims filed after January 19, 2001 .....	7.17
		10. State government.....	7.18
		a. For claims filed on or before January 19, 2001 .....	7.18
		b. For claims filed after January 19, 2001 .....	7.18
	B.	Situs of the work performed .....	7.18
	C.	Miner’s disability or death arose out of coal mine employment with the operator .....	7.18
		1. Generally .....	7.18
		2. Rebuttable presumptions .....	7.19
		a. Presumption that the miner was regularly and continuously exposed to coal dust.....	7.19

	b.	Presumption that the miner’s pneumoconiosis arose out of coal mine employment with the operator .....	7.20
D.		Operation of a coal mine after June 30, 1973 .....	7.21
E.		Employment after December 31, 1969 .....	7.21
	1.	Generally .....	7.21
	2.	“Working day” defined .....	7.21
F.		Cumulative employment of one year or more and the 125-day rule .....	7.22
	1.	Generally .....	7.22
	2.	Injury time not counted for purposes of 125 days.....	7.22
	3.	Use of the 125-day rule for claims filed on or before January 19, 2001 .....	7.23
	a.	Constitutes one year of cumulative employment for operator.....	7.23
	b.	Does not constitute one year of cumulative employment for operator.....	7.23
	c.	Provisions at 20 C.F.R. § 725.493 (2000) provide guidance only in factually disputed claims.....	7.27
	d.	Source of the 125-day rule.....	7.28
	4.	Use of the 125-day rule for claims filed after January 19, 2001 .....	7.28
	a.	Generally.....	7.28
	b.	Bureau of Labor Statistics table.....	7.29
	5.	Employment for fewer than 125 days.....	7.31
	6.	Intermittent employment, effect of .....	7.32
G.		Ability to pay.....	7.32
	1.	For claims filed on or before January 19, 2001 .....	7.32
	a.	Contract dispute regarding carrier coverage must be resolved.....	7.33
	b.	Period of bond coverage must be resolved.....	7.33
	c.	Mine owner insured notwithstanding failure to pay .....	7.33
	d.	Bankruptcy of the employer .....	7.34
	2.	For claims filed after January 19, 2001.....	7.39
	a.	Generally.....	7.39
	b.	Employer insolvent; intervention of surety or carrier .....	7.41

H.	Insurance carrier as a named party .....	7.46
1.	Generally .....	7.46
2.	Insolvent carrier, liability of guaranty association .....	7.47
I.	Liability of corporate officers .....	7.48
1.	For claims filed on or before January 19, 2001 .....	7.48
2.	For claims filed after January 19, 2001.....	7.49
J.	Due process rights of the employer violated; Trust Fund held liable for payment of benefits.....	7.49
1.	Lost records .....	7.49
a.	The Sixth Circuit.....	7.49
b.	The Tenth Circuit .....	7.50
2.	Delay in notice of claim.....	7.51

## Chapter 8

# Living Miners' Claims: Entitlement Under 20 C.F.R. Part 410

---

I.	Applicability of 20 C.F.R. Part 410, generally .....	8.1
II.	Elements of entitlement .....	8.1
III.	The existence of pneumoconiosis .....	8.2
A.	"Pneumoconiosis" defined .....	8.2
B.	Chest x-ray evidence.....	8.2
C.	Autopsy or biopsy.....	8.2
D.	Rebuttable presumptions regarding the existence of pneumoconiosis .....	8.3
1.	Fifteen years or more of coal mine employment.....	8.3
a.	"Substantially similar" working conditions.....	8.3
b.	Medical evidence.....	8.3
c.	Rebuttal of the presumption.....	8.4
2.	The "many years" presumption .....	8.4
a.	"Many years" defined .....	8.4
b.	Severe lung impairment required .....	8.5
E.	Other relevant evidence.....	8.5
1.	Elements to be considered .....	8.5
2.	Totally disabling respiratory condition.....	8.6

IV.	Etiology of the pneumoconiosis.....	8.6
V.	Total disability and its etiology.....	8.7
A.	“Total disability” defined.....	8.7
1.	Methods of establishing total disability.....	8.7
2.	Rebuttal.....	8.7
B.	Pneumoconiosis is the impairment involved.....	8.8
1.	Complicated pneumoconiosis.....	8.8
2.	Multiple disabling conditions.....	8.8
C.	Establishing total disability; medical evidence listed in the Appendix.....	8.9
D.	Total disability established; factors not in the Appendix.....	8.10
E.	Other relevant evidence.....	8.11
1.	Burden of proof.....	8.11
2.	Use of lay testimony.....	8.12
3.	Pulmonary function studies.....	8.12
4.	Physical performance tests.....	8.12
F.	Irrebuttable presumption; complicated pneumoconiosis.....	8.13
1.	Conflicting evidence.....	8.13
2.	Autopsy evidence.....	8.14
VI.	Applicability of 20 C.F.R. § 410.490 and 20 C.F.R. Parts 727 and 718.....	8.14

## Chapter 9

# Living Miners’ Claims: Entitlement Under 20 C.F.R. § 410.490

---

I.	Applicability of 20 C.F.R § 410.490, generally.....	9.1
A.	Applies to Part B claims (claims filed prior to July 1, 1973).....	9.1
B.	Applies to 20 C.F.R. Part 727 claims where miner has fewer than 10 years employment.....	9.1
II.	Invocation of presumption of total disability due to pneumoconiosis.....	9.2
III.	Etiology of the pneumoconiosis.....	9.2
IV.	Rebuttal of the presumption of total disability	

due to pneumoconiosis .....	9.3
A. Comparison with rebuttal at 20 C.F.R. Part 727 .....	9.3
B. Incorporation of rebuttal at 20 C.F.R. § 727.203(b)(3) and (b)(4) .....	9.3
C. Physical capability versus vocational capability .....	9.4
V. Applicability of 20 C.F.R. Parts 410, 727, and 718 .....	9.4

## Chapter 10

# Living Miners' Claims: Entitlement Under 20 C.F.R. Part 727

---

I. Applicability of 20 C.F.R. Part 727, generally .....	10.1
II. The interim presumptions .....	10.2
A. Generally.....	10.2
B. "Pneumoconiosis" defined .....	10.3
C. Invocation of the rebuttable presumption of total disability due to pneumoconiosis .....	10.3
1. Chest x-ray evidence .....	10.4
a. Generally.....	10.4
b. The "Tobias rule" and rereading chest x-rays .....	10.4
2. An autopsy or biopsy .....	10.5
3. Pulmonary function (ventilatory) studies .....	10.6
4. Blood gas studies .....	10.6
5. Reasoned medical opinions .....	10.6
a. Generally.....	10.6
b. All evidence weighed before invoking the presumptions .....	10.7
c. Parsing probative and non-probative portions of a medical opinion.....	10.7
6. Lay evidence .....	10.7
a. Evaluation of.....	10.8
b. Benefits Review Board and Sixth Circuit.....	10.8
c. Third, Fourth, and Seventh Circuits.....	10.8
III. Rebuttal of the interim presumption of	

total disability due to Pneumoconiosis .....	10.9
A. Generally.....	10.9
1. Burden on party opposing entitlement.....	10.9
2. All evidence must be considered .....	10.9
3. One method of rebuttal established, entitlement to benefits precluded .....	10.9
B. Total disability; weighing the medical opinion evidence .....	10.9
1. Exertional requirements; claimant’s burden .....	10.9
2. Specific medical opinion of severity of impairment required .....	10.10
3. Medical assessment versus subjective narration of limitations .....	10.10
a. Benefits Review Board .....	10.10
b. Third, Fourth, and Eleventh Circuits .....	10.11
4. Exertional requirements versus physical limitations .....	10.11
5. No respiratory or pulmonary impairment supports rebuttal.....	10.12
C. Means of rebuttal.....	10.12
1. Miner is engaged in usual coal mine work or comparable and gainful work.....	10.12
a. Generally.....	10.12
b. “Usual coal mine work” under subsection (b)(1) .....	10.12
c. “Comparable and gainful work” under subsection (b)(1).....	10.13
2. Miner is <i>able</i> to perform usual coal mine work or comparable and gainful work.....	10.14
a. Standard for subsection (b)(2) rebuttal .....	10.14
b. “Usual coal mine work” under subsection (b)(2).....	10.16
c. “Comparable and gainful work” under subsection (b)(2).....	10.18
3. Total disability did not arise in whole or in part out of coal mine employment.....	10.19
a. Evolution of the “rule out” standard.....	10.19
b. Standards for establishing subsection (b)(3) rebuttal.....	10.20

c.	Specific principles of weighing evidence under 20 C.F.R. § 727.203(b)(3) .....	10.23
d.	A finding of “no impairment” .....	10.25
4.	The miner does not suffer from pneumoconiosis .....	10.27
a.	Rebuttal under subsection (b)(4) precluded if invoked under subsection (a)(1) .....	10.28
b.	Specific principles of weighing evidence under subsection (b)(4).....	10.28
IV.	Applicability of 20 C.F.R. Parts 410 and 718 and § 410.490.....	10.30

## Chapter 11

### Living Miners’ Claims: Entitlement Under 20 C.F.R. Part 718, Official Notice, Stipulations, and the Statute of Limitations at 20 C.F.R. § 725.308

---

I.	Applicability of 20 C.F.R. Part 718, generally.....	11.1
II.	Official notice and stipulations .....	11.2
A.	Official notice .....	11.2
1.	Procedure used.....	11.2
2.	Taking official notice of one expert but not another expert constitutes error.....	11.3
3.	Examples of official notice .....	11.3
a.	Medical opinion; no official notice.....	11.3
b.	Unreliability of early Social Security records.....	11.3
c.	Dictionary of Occupational Titles.....	11.3
d.	Directory of Medical Specialists.....	11.4

	e.	Criminal conviction of a physician.....	11.4
B.		Stipulations.....	11.4
	1.	Binding regardless of underlying evidence .....	11.4
	2.	Stipulation against <i>pro se</i> claimant’s interest; not binding.....	11.6
	3.	Stipulation of pneumoconiosis in miner’s claim, effect of in survivor’s claim .....	11.6
	4.	Stipulation of pneumoconiosis does not constitute stipulation of impairment.....	11.7
	5.	Legal effect of stipulation of fact decided by trier-of-fact .....	11.7
	6.	Stipulation that claim timely filed, binding on employer .....	11.7
	7.	Application of 20 C.F.R. § 725.309(d)(4) .....	11.8
	a.	Applies to stipulations in claims filed after January 19, 2001.....	11.8
	b.	Immediately preceding claim .....	11.8
	8.	Pre-PPACA length of coal mine employment stipulation not binding in post-PPACA claim .....	11.8
	9.	Stipulation of complicated pneumoconiosis .....	11.9
III.		Elements of entitlement under 20 C.F.R. Part 718 .....	11.9
	A.	For claims filed on or before January 19, 2001.....	11.9
	B.	For claims filed after January 19, 2001.....	11.9
IV.		The existence of pneumoconiosis.....	11.10
	A.	“Pneumoconiosis” defined.....	11.10
	1.	The regulatory provisions .....	11.10
	a.	For claims filed on or before January 19, 2001 .....	11.10
	b.	For claims filed after January 19, 2001 .....	11.10
	2.	“Clinical” versus “legal” pneumoconiosis, a critical distinction .....	11.11

a.	Pneumoconiosis is progressive.....	11.13
b.	Latency and development after exposure to coal mine dust ceases .....	11.14
3.	“Legal” coal workers’ pneumoconiosis.....	11.15
a.	Established .....	11.15
b.	Not established.....	11.16
4.	“Clinical” or “medical” pneumoconiosis on autopsy or biopsy under 20 C.F.R. § 718.202(a)(2) .....	11.16
a.	Pigment with associated fibrosis, required .....	11.17
b.	Anthracosis in lymph nodes must be considered.....	11.18
c.	Finding of no pneumoconiosis on biopsy not preclude finding of pneumoconiosis .....	11.19
5.	Use of blood gas and pulmonary function testing.....	11.19
a.	Blood gas testing.....	11.19
b.	Pulmonary function testing .....	11.19
6.	Admission against interest.....	11.21
B.	Regulatory methods of establishing pneumoconiosis.....	11.21
1.	The “Tobias rule” and re-reading chest x-rays .....	11.21
2.	Weighing evidence together versus weighing evidence separately.....	11.22
a.	Benefits Review Board.....	11.22
b.	Third Circuit.....	11.23
c.	Fourth Circuit.....	11.24
d.	Sixth Circuit.....	11.25
e.	Eleventh Circuit.....	11.26
C.	Presumption at 20 C.F.R. § 718.304, complicated pneumoconiosis.....	11.26
1.	The “equivalency” determination .....	11.27

a.	An overview .....	11.28
b.	Additional case law summaries .....	11.29
2.	Chest x-ray evidence .....	11.35
a.	Use of the ILO form, must find A, B, or C opacity .....	11.35
b.	Cause of the opacities .....	11.35
3.	Autopsy or biopsy evidence.....	11.40
a.	Progressive massive fibrosis .....	11.40
b.	Lesions must be comprised of pigment related to coal dust exposure.....	11.41
c.	Two centimeter lesion not required.....	11.41
4.	Medical opinion evidence .....	11.42
5.	“Other evidence” under 20 C.F.R. § 718.107, consideration of.....	11.42
a.	Generally.....	11.42
b.	Background of Category 2 or 3 pneumoconiosis is not required .....	11.43
6.	Weighing the evidence as a whole .....	11.44
a.	No complicated pneumoconiosis established under (a)-(c), not preclude finding of disease based on weighing evidence as a whole.....	11.44
b.	Non-qualifying ventilatory and blood gas testing, effect of .....	11.46
D.	Fifteen-year presumption at 20 C.F.R. § 718.305.....	11.47
1.	A background.....	11.47
2.	General structure.....	11.49
3.	Constitutionality of Section 1556 of the PPACA .....	11.50
4.	Method of calculating length of coal mine employment.....	11.51
5.	Underground mine versus surface mine, an important distinction.....	11.51

a.	Generally.....	11.51
b.	“Substantially similar” conditions at a surface mine, deference to the Administrative Law Judge .....	11.53
6.	Rebuttal.....	11.53
a.	Apply rebuttal standards at 20 C.F.R. § 727.203(b)(3) and (b)(4).....	11.53
b.	Applicability of rebuttal to employer .....	11.55
c.	Rebuttal in the miner’s claim, case law examples .....	11.56
d.	Rebuttal in a survivor’s claim, death causation.....	11.57
E.	Presumption at 20 C.F.R. § 718.306, survivors’ claims .....	11.59
F.	Reasoned medical opinions .....	11.59
1.	Generally.....	11.59
2.	No “cohesive theory” required .....	11.60
V.	Etiology of the pneumoconiosis .....	11.60
A.	Applicability .....	11.60
1.	Applies to “clinical” pneumoconiosis .....	11.60
2.	Applies to complicated pneumoconiosis .....	11.61
3.	Inapplicable to finding of “legal” pneumoconiosis.....	11.61
B.	Differential diagnosis or apportionment; causation .....	11.62
1.	Benefits Review Board .....	11.62
2.	Fourth Circuit .....	11.63
3.	Sixth Circuit.....	11.64
4.	Tenth Circuit .....	11.64
C.	Ten years or more coal mine employment .....	11.65
D.	Fewer than ten years of coal mine employment .....	11.65
1.	Claimant’s burden .....	11.65
2.	Case law.....	11.65

	a.	Benefits Review Board.....	11.65
	b.	Third Circuit.....	11.65
	c.	Sixth and Seventh Circuits.....	11.65
	3.	Medical evidence required .....	11.66
	4.	Inaccurate employment history, opinion less probative .....	11.66
VI.		Establishing total disability.....	11.66
	A.	For claims filed on or before January 19, 2001.....	11.66
	B.	For claims filed after January 19, 2001.....	11.67
	C.	Methods of demonstrating total disability.....	11.68
	1.	Ventilatory and blood gas testing measure different types of impairment.....	11.68
	2.	Pulmonary function (ventilatory) studies.....	11.69
	3.	Blood gas studies .....	11.69
	4.	Cor pulmonale with right-sided congestive heart failure .....	11.70
	5.	Reasoned medical opinions .....	11.70
	a.	Burden of proof .....	11.70
	b.	Physician’s knowledge of duties important .....	11.71
	c.	Non-respiratory, non-pulmonary impairments irrelevant.....	11.72
	6.	Lay testimony .....	11.73
	a.	In miner’s claims filed after January 1, 1982.....	11.73
	b.	Claim filed prior to January 1, 1982.....	11.73
VII.		Etiology of total disability .....	11.74
	A.	“Contributing cause” standard.....	11.74
	1.	For claims filed on or before January 19, 2001 .....	11.74
	a.	Benefits Review Board.....	11.74
	b.	Third Circuit.....	11.74
	c.	Fourth Circuit .....	11.75

d.	Sixth Circuit.....	11.75
e.	Seventh Circuit.....	11.76
f.	Tenth Circuit.....	11.76
g.	Eleventh Circuit.....	11.76
2.	For claims filed after January 19, 2001 .....	11.76
a.	The regulation.....	11.76
b.	Pre-existing, non-coal-dust-related disability does not preclude entitlement .....	11.77
B.	Blood gas and ventilatory studies not determinative .....	11.78
C.	Weighing medical opinion evidence .....	11.78
	Underlying finding regarding pneumoconiosis is important .....	11.78
VIII.	Applicability of 20 C.F.R. Parts 410 and 727 and § 410.490 .....	11.79
IX.	Applicability of 20 C.F.R. § 718.308, statute of limitations for filing a miner’s claim .....	11.79
A.	The statute and regulation .....	11.79
B.	Waiver or tolling of the statute, “extraordinary circumstances” required .....	11.80
1.	Waiver of challenge to timeliness .....	11.80
a.	Withdrawal of contest at hearing.....	11.80
b.	Stipulation of timeliness at hearing .....	11.80
2.	Tolling of statute, considerations for.....	11.81
a.	Generally.....	11.81
b.	A hearing is required .....	11.81
C.	Applicability to initial claim .....	11.82
1.	Generally.....	11.82
2.	Applicable to second claim where first claim denied as untimely.....	11.82
D.	Applicability to subsequent claim under 20 C.F.R. § 725.309 .....	11.82
1.	Generally.....	11.82

a.	Benefits Review Board.....	11.82
b.	Third Circuit.....	11.83
c.	Fourth Circuit.....	11.83
d.	Sixth Circuit.....	11.83
2.	Medical opinions from prior claim; deemed premature or misdiagnosis .....	11.84
a.	Benefits Review Board.....	11.84
b.	Third Circuit.....	11.84
c.	Fourth Circuit.....	11.85
d.	Sixth Circuit.....	11.85
e.	Tenth Circuit.....	11.89
3.	Inadvisability of return to coal mine work, insufficient to commence running of statute .....	11.90
4.	Failure to attribute condition to coal dust exposure, insufficient.....	11.91
F.	Commencement of the three-year period .....	11.91
1.	Written communication.....	11.91
a.	Required .....	11.91
b.	Not required.....	11.92
2.	Nature of medical opinion required.....	11.93
3.	State workers' compensation award, effect of .....	11.94
4.	Receipt of communication by miner .....	11.96

## Chapter 12

### Introduction to Survivors' Claims

---

I.	Generally.....	12.1
A.	Distinction between survivor and augmentee .....	12.1
B.	Survivor and miner claims—consolidated for hearing, adjudicated independently.....	12.1

C.	Entitlement precluded, felonious and intentional homicide of the miner or other beneficiary.....	12.2
II.	Qualifying for benefits.....	12.2
A.	Surviving spouse and surviving divorced spouse.....	12.2
1.	Spouse—relationship to the miner .....	12.2
a.	Surviving spouse .....	12.2
b.	Surviving divorced spouse.....	12.3
2.	Spouse and divorced spouse, dependency on the miner .....	12.3
a.	The regulation, surviving spouse.....	12.3
b.	The regulation, surviving divorced spouse.....	12.4
c.	“Support,” defined .....	12.5
3.	Spouse and divorced spouse, each entitled to full share of benefits.....	12.6
B.	Child.....	12.7
1.	Relationship to the miner .....	12.7
a.	Paternity issues, state law controls.....	12.8
b.	Adoption .....	12.9
2.	Dependency on the miner.....	12.9
a.	Generally.....	12.9
b.	Dependency status as “augmentee” not determinative .....	12.10
3.	Disabled child, special issues .....	12.10
a.	“Disabled” child, defined.....	12.10
b.	Distinction between “augmentee” and “survivor” .....	12.10
c.	Retroactive benefit award.....	12.11
d.	Remarriage of disabled child, effect of .....	12.11
e.	How is “disability” determined?.....	12.12
C.	Parent, brother, or sister .....	12.15
D.	Multiple survivors .....	12.15
III.	Entitlement to survivors’ benefits—considerations beyond relationship and dependency .....	12.16
A.	Surviving spouse or surviving divorced spouse.....	12.16
1.	Period of entitlement.....	12.17
2.	Subsequent remarriage, effect of.....	12.17
3.	Predeceasing the miner .....	12.18
B.	Child.....	12.18

1.	Period of entitlement.....	12.18
2.	Status as student.....	12.19
3.	Disabled child, gainful employment precludes entitlement .....	12.20
IV.	Automatic entitlement to survivors' benefits .....	12.20
A.	Where miner's claim filed prior to January 1, 1982.....	12.20
B.	Where miner's claim filed on or after January 1, 1982.....	12.21
C.	Revival of automatic entitlement for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the miner was finally awarded benefits in a lifetime claim.....	12.21

## Chapter 13

# Survivors' Claims: Entitlement Under 20 C.F.R. Part 410

---

I.	Applicability.....	13.1
II.	The regulation.....	13.1
III.	Presumptions available to certain survivors.....	13.2
A.	Ten years or more coal mine employment; death from respirable disease.....	13.2
1.	General burdens.....	13.2
2.	Invoking the presumption.....	13.2
3.	Death due to multiple causes .....	13.3
4.	Medically infeasible to distinguish cause of death.....	13.3
5.	Total disability due to pneumoconiosis at the time of death.....	13.3
B.	The 15-year presumption and the "many years" presumption .....	13.4
1.	The 15-year presumption.....	13.4
2.	The "many years" presumption .....	13.4
C.	Complicated pneumoconiosis.....	13.4

# Chapter 14

## Survivors' Claims: Entitlement Under 20 C.F.R. § 410.490

---

I.	Applicability.....	14.1
II.	Invocation of the interim presumptions .....	14.1
III.	Rebuttal of the interim presumptions.....	14.2
	A. Physical versus vocational capability.....	14.2
	B. Rebuttal methods under 20 C.F.R. Part 727 incorporated into 20 C.F.R. § 410.490.....	14.2

# Chapter 15

## Survivors' Claims: Entitlement Under 20 C.F.R. Part 727

---

I.	Applicability.....	15.1
	A. Fewer than 10 years of coal mine employment; analyze claim under 20 C.F.R. § 410.490 .....	15.1
	B. Denial under 20 C.F.R. Part 727; analyze claim under 20 C.F.R. Parts 410 or 718 .....	15.1
	C. Rebuttal under subsection (b)(2) precludes entitlement under 20 C.F.R. Parts 410 and 718.....	15.2
	D. Rebuttal under subsection (b)(3) or (b)(4) precludes entitlement under 20 C.F.R. Part 410 .....	15.2
II.	The regulation.....	15.2
III.	The interim presumptions .....	15.3
	A. Methods of invocation .....	15.3
	B. Lay evidence.....	15.3
	C. Rebuttal of the interim presumptions .....	15.4
	1. Methods of rebuttal .....	15.4
	2. Party opposing entitlement carries burden.....	15.5
	3. Employment in mines at time of death.....	15.5

IV.	Presumption of survivor’s entitlement to benefits – 25 years or more of coal mine employment.....	15.5
A.	Requirements for invocation.....	15.5
B.	Rebuttal of.....	15.6

## Chapter 16

# Survivors’ Claims: Entitlement Under 20 C.F.R. Part 718

---

I.	Applicability.....	16.1
II.	Standards of entitlement.....	16.2
A.	Survivor’s claim filed prior to January 1, 1982, and the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982.....	16.2
B.	Survivor’s claim filed prior to January 1, 1982 and there is no miner’s claim, or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982.....	16.2
1.	Death due to pneumoconiosis.....	16.2
a.	Must make threshold finding of pneumoconiosis.....	16.3
b.	No entitlement for “psychological” injury attributable to pneumoconiosis .....	16.3
2.	Lay evidence .....	16.3
C.	Survivors’ claims filed on or after January 1, 1982, where the miner is entitled to benefits as a result of a claim filed prior to January 1, 1982.....	16.5
1.	Generally .....	16.5
2.	Automatic entitlement, miner in payment status based on claim filed before January 1, 1982.....	16.5
D.	Survivors’ claims filed on or after January 1, 1982 where there is no miner’s claim or miner not found entitled to benefits as a result of claim filed prior to January 1, 1982.....	16.5
1.	Death due to pneumoconiosis.....	16.6

2.	“Hastening death” standard.....	16.7
a.	For claims filed on or before January 19, 2001 .....	16.7
b.	For claims filed after January 19, 2001 .....	16.11
3.	Traumatic injury or principal cause of death is an unrelated medical condition.....	16.12
E.	The survivor’s claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was finally awarded benefits in his or her lifetime claim.....	16.13
1.	Section 1556 of the PPACA held constitutional.....	16.13
a.	Benefits Review Board .....	16.13
b.	Third Circuit.....	16.14
c.	Fourth Circuit .....	16.14
d.	Sixth Circuit.....	16.14
e.	Seventh Circuit.....	16.15
2.	Applicability of automatic entitlement .....	16.15
a.	Threshold criteria.....	16.15
b.	Date of filing survivor’s claim controls.....	16.15
c.	Automatic entitlement, date of onset.....	16.18
d.	No hearing required; automatic entitlement.....	16.21
3.	Revival of 15-year presumption in certain survivors’ claims.....	16.22
a.	Threshold criteria.....	16.22
b.	General structure .....	16.24
c.	Disease of unknown origin, no rebuttal .....	16.26
d.	Lay testimony .....	16.26
III.	Presumptions available under 20 C.F.R. Part 718.....	16.26
A.	Ten years or more of coal mine employment and death from a respirable disease (20 C.F.R. § 718.303).....	16.27
1.	Applicability.....	16.27
2.	Requirements.....	16.27
B.	The “25 year” presumption .....	16.28
1.	Applicability.....	16.28
2.	Requirements.....	16.28
3.	Rebuttal .....	16.28
4.	Lay testimony.....	16.28

# Chapter 17

## Onset, Augmentation, Termination, and Interest

---

I.	Commencement of the payment of benefits.....	17.1
A.	Claims filed before July 1, 1973 (Part B claims) .....	17.1
B.	Claims filed on or after July 1, 1973 (Part C claims).....	17.1
1.	Onset of disability.....	17.2
a.	Claimant’s burden to establish.....	17.2
b.	Based on medical evidence.....	17.2
c.	Initial evidence of disability .....	17.3
d.	Use of lay testimony.....	17.3
e.	X-ray reading of simple pneumoconiosis, insufficient standing alone.....	17.3
f.	Complicated pneumoconiosis.....	17.3
g.	Not based on retirement date.....	17.4
2.	Effect of continuing employment .....	17.4
3.	Petitions for modification.....	17.4
a.	The regulation.....	17.4
b.	Section 1556 of the PPACA; the 15-year presumption .....	17.5
C.	Survivors’ claims .....	17.6
1.	Generally.....	17.6
2.	Automatic entitlement under the PPACA.....	17.6
II.	Augmentation of benefits.....	17.7
A.	Generally.....	17.7
B.	Date of commencement.....	17.7
C.	“Augmentee” and “survivor,” a distinction .....	17.7
D.	Special rules for Part B claims.....	17.7
III.	Interest on overdue benefits .....	17.7
A.	Assessed against employer, not Trust Fund.....	17.8
B.	Date of accrual.....	17.8
C.	Payments made by the Trust Fund .....	17.8
D.	The interest rate.....	17.9
IV.	Termination of benefits .....	17.9

# Chapter 18

## Overpayment, Waiver, and Recovery

---

I.	“Overpayment” defined .....	18.1
A.	The regulation .....	18.1
B.	Oversight of recovery efforts by OWCP .....	18.2
II.	Jurisdiction .....	18.2
A.	Federal Claims Collection Act .....	18.2
B.	Six-year statute of limitations inapplicable .....	18.2
III.	Waiver of recovery of overpayment .....	18.3
A.	Entitlement to a hearing .....	18.4
B.	“Without fault” defined .....	18.4
1.	Honest mistake .....	18.4
2.	Erroneous information .....	18.4
a.	For claims filed on or before January 1, 2001 .....	18.4
b.	For claims filed after January 19, 2001 .....	18.6
C.	“Defeat the purpose of title IV of the Act” defined .....	18.8
1.	Generally .....	18.8
2.	Prospective expenses excluded .....	18.8
3.	Spouse’s income considered .....	18.9
4.	Installment and credit card payments considered .....	18.9
5.	Gifts to others .....	18.9
6.	Child support, considered only if legally required .....	18.9
D.	“Against equity and good conscience” defined .....	18.9
1.	Generally .....	18.9
2.	Factors considered .....	18.10
a.	Financial circumstances irrelevant .....	18.10
b.	Extended vacation .....	18.10
c.	Resignation prior to receipt of benefits, no waiver .....	18.10
d.	Purchase camper, no waiver .....	18.10
e.	Relinquish savings for lump sum payment, no waiver .....	18.11
V.	Amount of the overpayment .....	18.11
A.	Federal overpayment reduced due to expenses incurred for	

	pursuit of state award.....	18.11
B.	Lump sum state award, apportionment of .....	18.12
VI.	Recovery of the overpayment.....	18.12
A.	Entitlement to a hearing.....	18.12
B.	Repayment amount and schedule .....	18.13
C.	Offset of a state benefit award.....	18.14
	1. The “up-front” method; attorney fees .....	18.15
	2. Survivors’ benefits .....	18.15
D.	The Federal Employees Compensation Act.....	18.15
E.	Collection and reimbursement, no jurisdiction to consider .....	18.16

## Chapter 19

### Medical Benefits Only (BMO) and Black Lung Part B Claims (BLB)

---

I.	Medical Benefits Only (BMO) claims.....	19.1
A.	Generally.....	19.1
B.	Entitlement to hearing.....	19.1
C.	Scope of hearing .....	19.2
D.	Employer’s initial payment not preclude later challenge to reasonableness .....	19.3
E.	Eligibility to medical benefits .....	19.3
F.	Liability for medical benefits .....	19.3
	1. Reimbursement.....	19.3
	2. Challenge to liability.....	19.4
	3. Interest on reimbursable costs.....	19.4
G.	Onset of medical benefits .....	19.4
II.	Black Lung Part B Claims (BLB).....	19.5
A.	An introduction.....	19.5
B.	Must be filed within six months of miner’s or survivor’s death .....	19.5
C.	Disabled child .....	19.6
D.	Proceedings are non-adversarial .....	19.7
E.	Appellate jurisdiction lies with the	

Administrative Review Board .....	19.7
-----------------------------------	------

## Chapter 20

### Medical Treatment Dispute (BTD)

---

I.	Generally .....	20.1
A.	Reimbursement of Trust Fund, no jurisdiction.....	20.1
B.	Concession, effect of .....	20.1
II.	Entitlement to a hearing and scope of consideration .....	20.2
III.	Treatment related to the miner's black lung condition .....	20.3
A.	Burden of persuasion/production .....	20.3
1.	For claims filed on or before January 19, 2001 .....	20.3
a.	Benefits Review Board .....	20.3
b.	Fourth Circuit .....	20.4
c.	Sixth Circuit .....	20.5
2.	For claims filed after January 19, 2001.....	20.6
a.	Amendment applied in Sixth Circuit.....	20.7
b.	Lung transplant .....	20.8
B.	Treatment of respiratory and non-respiratory conditions .....	20.8

## Chapter 21

### Interest on Past-Due Medical Bills (BMI) and Penalties

---

I.	Generally .....	21.1
II.	Jurisdiction.....	21.1
A.	Benefits Review Board .....	21.1
B.	Third Circuit.....	21.2
C.	Sixth Circuit.....	21.2

# Chapter 22

## Transfer of Liability to the Trust Fund

---

I.	Generally .....	22.1
II.	The regulation.....	22.1
III.	Determination of eligibility for transfer by the District Director .....	22.2
	A. Burden of persuasion/production .....	22.3
	1. District Director has initial burden.....	22.3
	2. Modification, benefits paid by employer.....	22.3
	B. Part C claim must be “finally denied” .....	22.3
	1. Informal denial insufficient.....	22.3
	2. District Director’s failure to act insufficient .....	22.3
	3. Date of last denial determines whether subject to transfer .....	22.4
	C. Claim must be approved under 20 C.F.R. Part 727.....	22.4
	1. Generally .....	22.4
	2. Approval of Part C claim must be “final” .....	22.4
	3. Director, OWCP has authority to contest claim.....	22.5
	4. Filing the election card.....	22.6
	a. Prerequisite to transfer.....	22.6
	b. Claimant’s election of review, Employer’s burden to establish.....	22.6
IV.	Separate consideration of survivors’ claims.....	22.7
V.	Merger of claims to support transfer .....	22.8
	A. Merger of multiple claims under 20 C.F.R. § 725.309 .....	22.8
	1. Benefits Review Board.....	22.8
	2. Seventh Circuit .....	22.9
	B. Merger of 20 C.F.R. § 410.490 and Part 727 claims and transfer .....	22.9
	C. No merger of survivor’s and miner’s claims to support transfer .....	22.10

# Chapter 23

## Petitions for Modification under 20 C.F.R. § 725.310

---

I.	Generally .....	23.1
A.	Proponent of petition carries burden .....	23.1
B.	Mistake (or change) of law, not a basis for modification.....	23.1
1.	Generally .....	23.1
2.	Circumvention of law, not a proper basis for modification.....	23.1
C.	Discretionary ruling on procedural issue, not a basis for modification .....	23.2
D.	Modification available to any party .....	23.2
1.	Generally .....	23.2
2.	Medical examinations and testing on modification.....	23.3
E.	Two-level inquiry.....	23.5
1.	Benefits Review Board.....	23.5
2.	Fourth Circuit.....	23.5
3.	Sixth Circuit.....	23.8
4.	Seventh Circuit .....	23.9
F.	Petition for modification of denial of subsequent claim, standard of review .....	23.11
G.	Modification of attorney fee award, not permitted.....	23.11
II.	Procedural issues .....	23.12
A.	One year time limitation .....	23.12
1.	Denial by Administrative Law Judge, effective when “filed” with District Director .....	23.12
2.	Denial by Benefits Review Board, effective when issued .....	23.13
3.	For claims filed on or before January 19, 2001 .....	23.13
a.	Seven days added for mailing.....	23.13
b.	Transfer liability from Trust Fund, filing within one year of last payment.....	23.13
c.	Circuit court opinion “final” when petition for rehearing denied.....	23.13

4.	For claims filed after January 19, 2001.....	23.14
a.	Applicability.....	23.14
b.	Seven days not added for mailing.....	23.14
c.	Saturdays, Sundays, and holidays, effect of.....	23.14
B.	Multiple modification petitions permitted.....	23.14
1.	Benefits Review Board.....	23.14
2.	Fourth Circuit.....	23.15
C.	Informal communication sufficient to constitute petition for modification.....	23.15
1.	Survivor’s claim may qualify as modification petition.....	23.15
2.	Submission of work evaluation questionnaires.....	23.16
3.	Must be filed by a party.....	23.16
D.	Exclusion of evidence on modification.....	23.16
1.	For claims filed on or before January 19, 2001.....	23.16
2.	For claims filed after January 19, 2001.....	23.17
E.	Medical reexamination on modification.....	23.17
1.	For claims filed on or before January 19, 2001.....	23.17
2.	For claims filed after January 19, 2001.....	23.18
F.	Failure to timely controvert original claim; limitation on scope of modification.....	23.18
1.	For claims filed on or before January 19, 2001.....	23.18
2.	For claims filed after January 19, 2001.....	23.19
III.	Commencement with the District Director.....	23.20
A.	The Benefits Review Board.....	23.21
B.	Circuit courts of appeals.....	23.21
IV.	Review by the Administrative Law Judge.....	23.21
A.	<i>De novo</i> review.....	23.21
B.	Entitlement to a hearing.....	23.21
1.	For claims filed on or before January 19, 2001.....	23.21
a.	Benefits Review Board.....	23.21
b.	Sixth and Seventh Circuits.....	23.22
2.	For claims filed after January 19, 2001.....	23.23
C.	Proper review of the record.....	23.23
1.	“Change in conditions”.....	23.23
a.	Defined.....	23.23
b.	Scope of review.....	23.24
c.	Submission of “new” evidence to support	

	change in condition.....	23.24
2.	“Mistake in a determination of fact” .....	23.25
	a. May include challenge to ultimate issues of entitlement .....	23.26
	b. Party bound by acts of attorney .....	23.27
	c. Evidence obtained using forged release, excluded from consideration .....	23.27
	d. Scope of review .....	23.28
	e. Correcting misidentified carrier.....	23.28
	f. Survivor’s claim .....	23.28
3.	Responsible operator designation on modification .....	23.29
	a. For claims filed on or before January 19, 2001 .....	23.29
	b. For claims filed after January 19, 2001 .....	23.30
V.	Onset date for the payment of benefits.....	23.32
	A. For claims filed on or before January 19, 2001.....	23.32
	B. For claims filed after January 19, 2001 .....	23.32
VI.	Review of entire claim without “mistake of fact” or “change in conditions” analysis, harmless error .....	23.33

## Chapter 24

### Subsequent Claims Under 20 C.F.R. § 725.309

---

I.	Generally .....	24.1
	A. Miners .....	24.1
	1. Progressive and irreversible .....	24.2
	2. Latency.....	24.2
	3. Amended regulations, progressive and latent codified.....	24.3
	B. Survivors .....	24.3
	1. For claims filed on or before January 19, 2001 .....	24.3
	2. For claims filed after January 19, 2001.....	24.4
	a. Generally.....	24.4
	b. Constitutionality upheld .....	24.4

3.	Attempt to re-litigate cause of death, subsequent claim dismissed.....	24.5
4.	Attempt to re-litigate “dependency” at time of death, subsequent claim dismissed.....	24.5
C.	Filing requirements are formal.....	24.6
D.	Lack of continued exposure to coal dust does not preclude filing a subsequent claim.....	24.6
1.	For claims filed on or before January 19, 2001.....	24.6
2.	For claims filed after January 19, 2001.....	24.7
II.	Providing a complete pulmonary evaluation by DOL.....	24.7
III.	Entitlement to a hearing.....	24.8
A.	Miner’s claim, claimant entitled to hearing.....	24.8
B.	Subsequent survivor’s claim, no entitlement to a hearing.....	24.8
1.	For claims filed on or before January 19, 2001.....	24.8
2.	For claims filed after January 19, 2001.....	24.9
IV.	Proper review of the record.....	24.9
A.	For claims filed on or before January 19, 2001, “material change in conditions”.....	24.9
1.	Generally.....	24.9
2.	Threshold determination must be made before <i>de novo</i> review of record.....	24.9
a.	Benefits Review Board.....	24.10
b.	Third Circuit.....	24.11
c.	Fourth Circuit.....	24.12
d.	Sixth Circuit.....	24.12
e.	Seventh Circuit.....	24.14
f.	Eighth Circuit.....	24.16
g.	Tenth Circuit.....	24.17
h.	Eleventh Circuit.....	24.18
B.	For claims filed after January 19, 2001.....	24.18
1.	Establishing an element of entitlement previously denied.....	24.18
a.	Causation elements, capable of change.....	24.19
b.	No “qualitative” analysis required.....	24.20
c.	Failure to establish any element of entitlement in previous claim.....	24.21
d.	Cause of large masses in the lungs.....	24.21

e.	Application of the 15-year presumption; used to demonstrate element of entitlement.....	24.22
2.	Responsible operator designation.....	24.24
V.	Onset date under 20 C.F.R. § 725.309.....	24.25
A.	For claims filed on or before January 19, 2001.....	24.25
B.	For claims filed after January 19, 2001 .....	24.25

## Chapter 25

### Principles of Finality

---

I.	Appellate decisions.....	25.1
A.	Holding vacated.....	25.1
B.	Effect of remand .....	25.1
C.	Law of the case.....	25.1
1.	Generally.....	25.1
2.	Clearly erroneous, “law of the case” inapplicable .....	25.2
3.	Petition for modification, “law of the case” inapplicable.....	25.2
D.	Changes in the law.....	25.2
E.	Effect of multiple motions for reconsideration.....	25.2
F.	Interlocutory appeals, criteria for accepting .....	25.3
II.	Clerical corrections.....	25.4
III.	Res judicata .....	25.4
A.	Generally.....	25.4
B.	Subsequent claims under 20 C.F.R. § 725.309.....	25.4
C.	Prior claim untimely, <i>res judicata</i> bars subsequent claim .....	25.5
IV.	Collateral estoppel.....	25.5
A.	Factors to consider.....	25.5
B.	Losing on an issue, prevailing overall.....	25.5
C.	Subsequent claims.....	25.6
1.	Stipulation in prior claim, effect of .....	25.6
2.	Findings by Administrative Law Judge, effect of.....	25.7
D.	20 C.F.R. Parts 718 and 727, collateral estoppel inapplicable.....	25.7
E.	Subsequent state agency determinations, collateral estoppel inapplicable .....	25.7

F.	Social Security Administration findings, collateral estoppel generally inapplicable.....	25.8
G.	Miner’s and survivor’s claims, existence of pneumoconiosis.....	25.8
1.	<i>Parklane Hosiery</i> factors.....	25.8
a.	Generally.....	25.8
b.	Application of factors.....	25.8
c.	No opportunity to fully litigate, “unfair” to apply collateral estoppel.....	25.9
2.	Miner’s claim denied, collateral estoppel inapplicable.....	25.9
3.	Collateral estoppel <i>may</i> apply if miner’s claim awarded and no autopsy evidence.....	25.9
4.	<i>Williams and Compton</i> , applicability of collateral estoppel.....	25.10
5.	Miner’s claim filed on or before January 19, 2001 awarded, effect of.....	25.11
6.	Stipulation of pneumoconiosis in miner’s claim binding in survivor’s claim.....	25.12
7.	Applies to findings of clinical <i>and</i> legal coal workers’ Pneumoconiosis.....	25.12
8.	Applicable to findings of complicated pneumoconiosis.....	25.12

## Chapter 26

### Motions

---

I.	Generally.....	26.1
A.	Ten days to respond.....	26.1
B.	Dismissal of a claim, defense or party.....	26.1
C.	Caption.....	26.2
II.	Remand to the District Director.....	26.2
A.	District Director’s obligation to provide complete examination.....	26.2
1.	Generally.....	26.2
2.	Report credible on one issue, 20 C.F.R. § 725.406 requirements <i>may</i> be satisfied.....	26.2

3.	Claimant provided erroneous history, 20 C.F.R. § 725.406 requirements satisfied .....	26.3
4.	Incomplete or invalid examination, additional examination or testing required.....	26.3
a.	Benefits Review Board .....	26.3
b.	Sixth Circuit.....	26.5
5.	Evaluation outweighed but not discredited, 20 C.F.R § 725.406 requirements satisfied.....	26.6
6.	Director, OWCP has standing to contest whether complete evaluation provided .....	26.7
B.	Withdrawal of controversion or agreement to pay benefits.....	26.7
C.	Failure to timely controvert.....	26.7
1.	Generally .....	26.7
2.	Entitled to <i>de novo</i> consideration by Administrative Law Judge .....	26.7
3.	Employer thought Fund would be liable, no “good cause” established.....	26.8
D.	Inability to locate the claimant or abandonment of the claim .....	26.8
E.	Consolidation of claims .....	26.9
F.	Determination of responsible operator (or motion to dismiss as a party).....	26.9
1.	For claims filed on or before January 19, 2001 .....	26.9
a.	Generally.....	26.9
b.	Remand prior to hearing .....	26.10
c.	Criteria for remands .....	26.10
2.	For claims filed after January 19, 2001.....	26.11
G.	Remand for evidentiary development permitted only if record is incomplete.....	26.11
III.	Transfer of liability to the Black Lung Disability Trust Fund .....	26.12
IV.	Amending the Form CM-1025 (list of contested issues) .....	26.12
A.	Generally.....	26.12
B.	Limits scope of litigation, issues ascertainable at District Director level, but not noted on Form CM-1025.....	26.13
C.	Parties bound by “clerical error” on CM-1025.....	26.13
D.	Waiver of objection to new issue, failure to object .....	26.14
E.	Parties agree not to litigate issue, error to consider .....	26.14

V.	Motions for discovery and proffers of evidence .....	26.15
VI.	Medical examinations.....	26.16
	A. Multiple examinations permitted .....	26.16
	1. For claims filed on or before January 19, 2001 .....	26.16
	a. Generally.....	26.16
	b. Motion to compel examination, factors to consider .....	26.16
	c. Failure to cooperate.....	26.17
	d. Evidentiary development before District Director required.....	26.17
	e. Response to medical reports .....	26.19
	f. Physician may consider evidence not admitted.....	26.19
	2. For claims filed after January 19, 2001.....	26.19
	a. Generally.....	26.19
	b. Rebuttal of medical opinion .....	26.19
	c. Physician may consider only admitted evidence .....	26.20
	d. Failure to cooperate.....	26.20
	B. Failure or refusal to attend medical evaluation.....	26.21
	1. Physical examination not contraindicated, dismissal proper .....	26.21
	2. Blood gas testing contraindicated, dismissal improper.....	26.21
	C. Questionable test results; lack of cooperation.....	26.22
	D. District Director's failure to act on request for medical examination, remedy for .....	26.22
	E. Notice of examination provided to claimant's representative.....	26.23
	F. Limitations on requiring miner to travel for examination.....	26.23
VII.	Interrogatories .....	26.24
VIII.	Excluding evidence .....	26.24
	A. Motion to exclude evidence.....	26.24
	B. The 20-day rule.....	26.24
	1. Generally .....	26.24
	2. Allowing responsive evidence .....	26.24
	3. Post-hearing examination of the miner	

	Properly denied.....	26.25
C.	Due process .....	26.26
	1. Generally .....	26.26
	2. Lost x-ray evidence.....	26.26
D.	Depositions.....	26.26
E.	Claimant’s refusal to consent to release of records .....	26.26
IX.	Submission of post-hearing evidence and leaving the record open.....	26.26
A.	Curing a violation of the 20-day rule.....	26.27
B.	Lack of due diligence, no post-hearing submission .....	26.27
	1. Delay in obtaining the evidence .....	26.28
	2. Failure to timely request extension of time .....	26.28
C.	Post-hearing medical evaluation.....	26.28
	1. Factors to consider .....	26.28
	a. Benefits Review Board .....	26.28
	b. Third Circuit.....	26.29
	2. Post-hearing report based on pre-hearing examination .....	26.29
	3. Post-hearing evidence responsive to evidence filed on eve of 20-day deadline .....	26.30
X.	Reopening the record on remand.....	26.30
A.	Submission of additional evidence, change in legal standard .....	26.30
	1. Third Circuit .....	26.31
	2. Fourth Circuit.....	26.31
	3. Sixth Circuit.....	26.32
	4. Seventh Circuit .....	26.33
B.	On remand .....	26.34
	1. Within the Administrative Law Judge’s discretion .....	26.34
	2. Evidence is vague or unreliable, no “good cause” to reopen.....	26.34
	3. Miner’s condition worsening, no “good cause” to reopen.....	26.34
C.	<i>A de novo</i> hearing.....	26.35
XI.	“Good cause” generally .....	26.35
A.	The 20-day rule and violations of the rule.....	26.35
	1. “Good cause” not established.....	26.36
	a. Unreasonable delay.....	26.36

	b.	Knowledge of contents of late evidence not relevant .....	26.37
	c.	Relevancy of evidence not determinative .....	26.37
	2.	“Good cause” established .....	26.37
	a.	Evidence exchanged in earlier state claim .....	26.37
	b.	Evidence used for impeachment.....	26.38
	c.	Examination more than 20 days before hearing, report available after hearing.....	26.38
	B.	Admission of late evidence; must allow response.....	26.38
	1.	Record left open for both parties.....	26.40
	2.	Failure to timely submit response, waiver of right of cross-examination.....	26.40
XII.		Dispose of a claim.....	26.40
	A.	Withdrawal.....	26.40
	1.	Threshold requirements .....	26.41
	a.	No decision on the merits issued .....	26.41
	b.	Request is in writing.....	26.41
	c.	Withdrawal is in “best interests” of claimant .....	26.41
	d.	Claimant not receive interim benefits.....	26.42
	e.	Withdrawal of petition for modification.....	26.42
	2.	Withdrawal improper, example of.....	26.43
	3.	Employer’s interests not considered .....	26.43
	4.	Medical evidence generated in withdrawn claim excluded .....	26.44
	B.	Dismissal/abandonment .....	26.45
	1.	For claims filed on or before January 19, 2001 .....	26.45
	2.	For claims filed after January 19, 2001.....	26.46
	C.	Summary decision.....	26.47
	D.	Subject matter jurisdiction .....	26.47
XIII.		Representation issues .....	26.47
	A.	Appointment of a representative.....	26.47
	B.	Withdrawal as a representative .....	26.48
	C.	Sanctions.....	26.48
XIV.		Miscellaneous procedural motions and orders.....	26.48
	A.	Extension of time .....	26.48
	B.	Continuance/postponement of hearing.....	26.49
	C.	Decision on the record.....	26.49

D.	Reconsideration.....	26.49
1.	Consecutive motions not permitted.....	26.50
2.	Submission of evidence on reconsideration.....	26.50
3.	Benefits Review Board’s jurisdiction.....	26.50
E.	Petitions for modification.....	26.51
F.	Remand to organize or reconstruct the record.....	26.51
G.	Correcting a clerical mistake.....	26.52

## Chapter 27

# Representative’s Fees and Representation Issues

---

I.	Entitlement to fees.....	27.1
A.	Notice of appearance.....	27.1
B.	Privacy Act.....	27.2
C.	Successful prosecution of the claim.....	27.2
1.	Generally.....	27.2
2.	Representation at any time relevant.....	27.3
D.	Claimant’s interest; adversarial proceeding.....	27.4
1.	For claims filed on or before January 19, 2001, pre-controversion fees not awarded.....	27.4
a.	Benefits Review Board.....	27.4
b.	Third Circuit.....	27.5
c.	Sixth Circuit.....	27.5
2.	For claims filed after January 19, 2001, pre-controversion fees awarded.....	27.6
E.	Overpayment cases.....	27.7
F.	Medical treatment disputes.....	27.7
G.	Preparation of the fee application; litigation of the fee petition.....	27.8
H.	No separation of issues.....	27.9
I.	Survivor’s claim awarded under PPACA’s automatic entitlement provisions.....	27.9
II.	Fee Petitions.....	27.10
A.	Generally.....	27.10

B.	Limiting time to file fee petition.....	27.10
1.	Examples of reasonableness of time limitations.....	27.10
a.	Fifteen days reasonable .....	27.10
b.	Late petition still considered .....	27.10
C.	Fees awarded separately at each administrative level.....	27.11
1.	Determining whether services performed before the Administrative Law Judge .....	27.11
2.	Sample boilerplate .....	27.12
D.	Contents of the fee petition .....	27.12
E.	Contingency fees or other fee arrangements prohibited.....	27.12
III.	Amount of the fee award.....	27.13
A.	Factors considered.....	27.13
1.	Generally .....	27.13
2.	Administrative Law Judge’s discretion .....	27.13
3.	Proponent of petition carries burden of demonstrating reasonable and necessary.....	27.13
a.	Benefits Review Board .....	27.14
b.	Fourth Circuit .....	27.17
c.	Sixth Circuit.....	27.18
d.	Seventh Circuit.....	27.19
4.	<i>Survey of Law Firm Economics</i> .....	27.19
5.	Rates awarded in other litigation.....	27.20
6.	Other sources .....	27.20
7.	Amount of benefits awarded .....	27.21
B.	Enhancement of the fee for delay, proper for employer but not Director, OWCP.....	27.21
C.	“Necessary work” defined.....	27.21
1.	Two-prong test for establishing “necessary work” .....	27.22
2.	Examples .....	27.22
a.	Research time .....	27.22
b.	Contacting a congressional representative .....	27.22
c.	Preparing and litigating fee petition.....	27.23
d.	Advising the claimant.....	27.23
e.	Clerical work.....	27.23
f.	Reviewing file, traveling, organizing exhibits.....	27.24
g.	Co-counsel.....	27.24
D.	Expenses and costs.....	27.24

1.	Clerical costs.....	27.24
2.	Obtaining medical evidence.....	27.25
3.	Travel expenses .....	27.25
	a. Travel time.....	27.25
	b. Mileage costs.....	27.25
4.	Witness fees.....	27.25
	a. Generally.....	27.25
	b. Expert witness fees .....	27.27
5.	LEXIS research.....	27.27
IV.	Augmentation or enhancement based on unique circumstances.....	27.27
A.	Extended length of litigation.....	27.28
	1. Benefits Review Board.....	27.28
	a. Generally.....	27.28
	b. Enhancement against Trust Fund not permitted.....	27.28
	2. Fourth Circuit.....	27.29
B.	Contingent nature of black lung claims, not considered.....	27.30
C.	Risk of loss .....	27.30
	1. A background.....	27.30
	2. The case law.....	27.31
D.	Billing method .....	27.32
	1. Generally .....	27.32
	2. Use of quarter-hour billing method.....	27.32
	a. Benefits Review Board .....	27.32
	b. Fourth Circuit .....	27.32
	c. Fifth Circuit.....	27.33
	d. Sixth Circuit.....	27.33
E.	Interest on the fee awarded .....	27.33
	1. For claims filed on or before January 19, 2001 .....	27.33
	2. For claims filed after January 19, 2001.....	27.33
F.	Request for reconsideration .....	27.34
G.	Petition for modification of fee petition, not permitted.....	27.34
V.	Liability for payment .....	27.35
A.	Attorney and lay representative .....	27.35
	1. Generally.....	27.35
	2. Lay representatives.....	27.35
B.	Fees in Part C claims, miner had no post-1969	

	coal mine employment .....	27.35
	C. Liability of a surety.....	27.36
VI.	Enforcement of supplemental decision and order.....	27.36
VII.	Solicitor as counsel to claimant pursuant to 20 C.F.R. § 725.422 .....	27.37
VIII.	Right to counsel.....	27.38
	A. The regulation .....	27.38
	B. Notice to claimant required.....	27.38
	C. Waiver by claimant .....	27.39
	D. Notice to employer not required.....	27.39
IX.	Qualifications of representative.....	27.39
	A. Generally.....	27.39
	B. Licensed to practice in one state, may represent claimant in another state.....	27.40
	C. Criminal conviction.....	27.40
	D. Disqualification of representative; appearance of impropriety .....	27.40
X.	Costs for pursuit of frivolous claim .....	27.41

## Chapter 28

### Rules of Procedure and Evidence

---

I.	Applicability of Federal Rules of Civil Procedure .....	28.1
	A. Notice of deposition in writing .....	28.1
	1. FRCP 5(b) and 30(b)(1).....	28.1
	2. Errors in notice of deposition waived, FRCP 32(d)(1).....	28.2
	B. Sanctions and costs.....	28.2
	1. Questionable applicability, FRCP 11 .....	28.2
	2. Costs.....	28.2
	C. Discovery provisions of FRCP 26 .....	28.3
	1. Generally inapplicable.....	28.3
	2. “Undue hardship” and “substantial need,” FRCP 26(b)(3).....	28.3
	3. Protective order, FRCP 26(c) .....	28.4
	D. Physical examination may be discovered, FRCP 35(b).....	28.4

E.	Docket management, FRCP 41(b).....	28.4
F.	Summary decision, FRCP 56 .....	28.5
G.	Correction of a clerical error, FRCP 60 .....	28.5
H.	“Fraud on the court,” FRCP 60 (d)(3) applies.....	28.5
II.	Authority of the Administrative Law Judge .....	28.6
A.	Issues of constitutionality .....	28.6
B.	Determination of insurance coverage.....	28.6
C.	Overpayment and repayment.....	28.7
D.	Reconsideration.....	28.7
E.	Interest and penalties .....	28.7
F.	Summary decision .....	28.8
1.	<i>Sua sponte</i> authority.....	28.8
2.	No <i>sua sponte</i> authority .....	28.8
3.	Factual issues in dispute, summary decision improper .....	28.9
G.	Failure to file timely controversion .....	28.9
H.	Remand for further evidentiary development, authority limited .....	28.9
I.	Recusal.....	28.9
1.	Comments insufficient to demonstrate bias .....	28.9
2.	Referral of attorney for disciplinary action, recusal not required.....	28.10
J.	Failure to comply with order, adverse inferences.....	28.11
K.	Certification of facts under 29 C.F.R. § 18.29 .....	28.11
III.	Closing the record .....	28.12
A.	Decision on the record, discretion to consider briefs .....	28.12
B.	Evidence rulings must be made prior to issuing decision on merits.....	28.13
C.	Submission of evidence post-hearing .....	28.14
1.	Untimely .....	28.14
a.	Evidence excluded.....	28.14
b.	Evidence admitted.....	28.14
2.	Permitting responsive evidence where “late” evidence admitted .....	28.15
3.	Incomplete pulmonary evaluation under 20 C.F.R. § 725.406 .....	28.15
4.	Failure to provide copy of evidence offered at hearing to opposing party.....	28.15

D.	Issuance of decision before record closes constitutes error.....	28.15
IV.	Continuances.....	28.16
A.	Denial proper.....	28.16
1.	Untimely continuance request.....	28.16
2.	Party failed to timely obtain evidence.....	28.16
3.	Third continuance request, claimant failed to appear .....	28.16
B.	Denial improper .....	28.17
V.	Decision of the Administrative Law Judge.....	28.17
A.	Compliance with APA’s requirements .....	28.17
1.	Adopting party’s brief constitutes error .....	28.17
2.	Correction of clerical error.....	28.18
3.	Delay in issuance of decision and order .....	28.18
a.	Intervening case law.....	28.18
b.	Not filed within 20 days of the date the record closed .....	28.18
4.	Evidence generated by adverse, dismissed party .....	28.19
B.	Service by certified mail.....	28.19
1.	Decision final within 30 days .....	28.19
2.	Defect in notice; “actual” notice established.....	28.20
VI.	Depositions .....	28.20
A.	Adequate notice required.....	28.20
1.	Reasonable notice in writing; objections and waiver .....	28.21
2.	Location of deposition, right of cross-examination .....	28.22
3.	Expert witness provisions at 20 C.F.R. § 725.457, inapplicable to deposition testimony .....	28.22
4.	Lack of evidence that Claimant had notice of depositions.....	28.22
B.	Submission of pre-hearing deposition.....	28.23
1.	Generally .....	28.23
2.	Pre-hearing deposition submitted post-hearing .....	28.23
C.	Submission of post-hearing deposition.....	28.24
1.	Factors considered .....	28.25
2.	Exclusion proper.....	28.25
3.	Exclusion improper .....	28.25
a.	Admitting only one party’s	

	post-hearing evidence .....	28.25
	b. Opposing party had opportunity to cross-examine witness .....	28.26
	c. Evidence submitted on eve of the 20-day deadline .....	28.26
	d. Evidence unknown or unavailable prior to hearing due to failure to cooperate.....	28.26
VII.	Due process.....	28.27
	A. Transfer of case to another Administrative Law Judge.....	28.27
	1. On remand.....	28.27
	2. On modification.....	28.27
	B. Timely notice; opportunity to fully present case .....	28.28
	1. Presentation of evidence.....	28.28
	a. Copy of opposing party's evidence.....	28.28
	b. Discovery of communications between expert and counsel permitted.....	28.28
	c. Expert witness testimony.....	28.30
	d. Failure to notify representative of examination; exclusion proper .....	28.31
	e. Impeachment evidence, an exception to the 20-day rule.....	28.31
	2. Notice to carrier .....	28.32
	3. Delay in notice of liability .....	28.32
VIII.	Expert witness testimony .....	28.33
	A. Actual notice of intent to present required .....	28.33
	B. Expert witness provisions at 20 C.F.R. § 725.457 inapplicable to expert deposition testimony.....	28.33
IX.	Failure to attend hearing.....	28.34
	A. Physical ailment, obligation to provide reasonable accommodation.....	28.34
	B. Consideration of client's age and illness before binding client to acts of counsel .....	28.35
	C. Proceeding with hearing despite claimant's absence .....	28.35
	D. Error to dismiss claim—Director objected and payments were made by Trust Fund .....	28.35
	E. Inadvertent delay; no waiver of appeal rights .....	28.36
X.	Fair hearing.....	28.36
	A. Generally.....	28.36

B.	Importance of finality of hearing process .....	28.36
C.	Untimely hearing request.....	28.37
D.	Impartiality required .....	28.37
1.	Conduct of the Administrative Law Judge .....	28.37
2.	Treatment of witnesses .....	28.37
3.	Competency of witnesses.....	28.37
E.	Right to oral hearing.....	28.38
1.	On remand.....	28.38
a.	Witness credibility not dispositive.....	28.38
b.	New hearing required; witness credibility at issue .....	28.38
c.	Notice to parties .....	28.38
2.	Multiple claims under 20 C.F.R. § 725.309 .....	28.39
3.	Overpayment claims .....	28.39
F.	Waiver of hearing .....	28.39
1.	Waiver must be voluntary, intentional, and in writing.....	28.39
2.	Withdrawal of waiver of hearing.....	28.39
3.	Error to decide merits of claim where hearing not waived.....	28.40
G.	Hearing limited to contested issues.....	28.40
XI.	Hearsay .....	28.41
A.	Medical reports and testing.....	28.41
1.	Elements of reliability .....	28.41
2.	Reports based on physical examinations.....	28.41
3.	Consultative reports.....	28.42
4.	Results of objective testing .....	28.42
B.	Affidavits.....	28.42
C.	Death of authoring physician.....	28.42
D.	Evidence that is lost or destroyed .....	28.42
1.	Chest x-ray studies.....	28.42
2.	Autopsy evidence .....	28.43
XII.	Official notice .....	28.43
A.	Procedure used .....	28.43
B.	Taking official notice of one expert but not another expert constitutes error .....	28.44
XIII.	Reassignment/transfer of cases .....	28.44
A.	Bias by original deciding Administrative Law Judge.....	28.44

B.	Unavailability of original deciding	
	Administrative Law Judge.....	28.45
	1. On remand.....	28.45
	2. On modification.....	28.46
XIV.	Representatives.....	28.46
A.	Right to representation .....	28.46
	1. The <i>pro se</i> claimant, special considerations.....	28.46
	2. Claimant’s counsel fails to appear,	
	whether to proceed .....	28.49
	a. Proceeding not <i>per se</i> error .....	28.49
	b. Inquiring whether claimant wants to proceed.....	28.49
	c. Whether claimant has capacity to proceed.....	28.49
	d. Leaving record open for	
	post-hearing submissions .....	28.50
	3. Claimant unable to attend hearing .....	28.50
B.	Disqualification of representative;	
	appearance of impropriety.....	28.51
C.	Party bound by acts of representative.....	28.51
XV.	Right of cross-examination .....	28.53
A.	Generally.....	28.53
B.	Waiver of right of cross-examination.....	28.53
C.	Improper denial of right of cross-examination.....	28.53
	1. Delay in notifying employer of potential liability.....	28.53
	2. Party’s failure to cooperate during discovery.....	28.54
D.	The 20-day rule for exchanging evidence	
	and “good cause” .....	28.54
E.	Treating physician, right of cross-examination .....	28.55
XVI.	Settlements and withdrawals of claims.....	28.56
XVII.	Subpoenas .....	28.56
A.	Administrative Law Judge has subpoena power when the case is	
	pending before the District Director .....	28.56
B.	Party’s due process right limited to requesting subpoena .....	28.57
C.	Party may be subpoenaed to attend hearing.....	28.57