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Chapter 2-1105

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### 1. Proposed Decisions & Orders.

This chapter establishes guidelines and procedures for the preparation, proper use, and issuance of Proposed Decisions and Orders (PDO), and actions to be taken after issuance of the PDO and prior to forwarding a claim to the Office of Administrative Law Judges (OALJ), when appropriate.

### 2. Authority.

Section 19 of the LHWCA, incorporated by reference in Section 422(a) of the BLBA; 20 CFR 725.418-.421; 29 CFR 18.1(a).

### 3. Policy.

The Proposed Decision and Order is a document issued by the District Director after the evidentiary development of the claim is completed and all contested issues are joined. The PDO purports to resolve a claim on the basis of the evidence submitted. It addresses all issues of entitlement, and includes a summary of all medical evidence submitted to and not excluded by the district director, the designation of the responsible coal mine operator (RO), if any, liable for payment of benefits, and an order dismissing any other coal mine operators previously notified as potentially liable.

### 4. References.

Reserved.

### 5. Responsibilities.

The District Director (DD) is responsible for ensuring that the PDO is properly prepared and issued. (See 20 CFR 725.309-.310, .351, .409-.412, .417 - .421, .450 and .451, as appropriate.)

### 6. When the PDO should be issued.

The DD will issue a Proposed Decision and Order at the conclusion of the period permitted by 725.410(b) for the submission of evidence as outlined in the Schedule for the Submission of Additional Evidence (SSAE) or, if an informal conference is held, within 20 days after the termination of all informal conference proceedings, or 30 days after the issuance of an Order To Show Cause if an SSAE was not issued. (Refer to PM 2-1103 (SSAE) and PM 2-1104 (OSC) for the relevant procedures.)

In general, a Proposed Decision and Order will be issued no less than 90 days after issuance of the SSAE unless all parties waive,

in writing, their right to submit additional evidence. This is because section 725.410(b) allows the parties 90 days to submit evidence after the SSAE is issued: 60 days to submit evidence following the issuance of the SSAE and another 30 days to respond to evidence submitted by another party. Note that because the Director is a party, the additional 30 days for response to the DD's medical evidence is required even if the evidence had been shared previously prior to issuance of the SSAE. In accordance with 20 CFR 725.423 (Extensions of Time), all time limits can be extended for good cause shown, EXCEPT for the 30-day time limit set forth in 725.419 for a response to a Proposed Decision and Order. Consequently, if the RO or claimant timely requests and receives from the DD an extension of the period of time for the submission of evidence following the SSAE, the DD must wait until the extension period has expired before issuing the PDO.

If an Order To Show Cause (OSC) was issued instead of an SSAE, the DD may issue the PDO 30 days after the issuance of the OSC, assuming the DD decides to dismiss the claim. The DD should not extend the time for responding to the OSC. If the OSC has been issued because the DD has concluded that the claimant is not a covered miner, and the claimant requests a hearing, the DD should follow normal claim procedures. That is, the section 725.406 medical examination should be authorized, and the DD should proceed to issue an SSAE followed by a PDO.

#### 7. Contents of the PDO.

The Proposed Decision and Order must contain an appropriate order that includes:

a. Findings of fact and conclusions of law on all issues of entitlement, including the eligibility of any dependents; the existence of any State workers' compensation award for pneumoconiosis that might offset any award; and the length of coal mine employment. The PDO should also include a summary of all medical evidence submitted, including the evidence considered when the SSAE was issued and evidence submitted by all parties after the SSAE.

b. The district director's final designation of the Responsible Operator liable for the payment of benefits, if applicable. The district director also shall dismiss, as parties to the claim, all other potentially liable operators that received notification pursuant to 20 CFR 725.407 that were not previously dismissed.

(1) In every case where the operator finally designated as responsible pursuant to 725.418(d) is NOT the operator that most recently employed

the miner, section 725.495(d) requires the DD to include in the PDO a statement explaining the reasons for assigning liability to the designated RO. Examples of such cases include those in which the most recent employer did not employ the miner for a period of one year or those in which the miner's most recent employer is incapable of providing for the payment of benefits.

If the reasons for not naming the most recent employer include the most recent employer's failure to meet the conditions of section 725.494(e) (operator's capability for assuming liability for the payment of benefits), the file shall also contain a statement from the RO section stating that "the Office has searched the files it maintains pursuant to part 726, and that the Office has no record of insurance coverage for that employer, or of authorization to self-insure, that meets the conditions of § 725.494(e)(1) or (e)(2)." 20 CFR 725.495(d). It is not sufficient merely to include in the file a printout of the RO screen showing that the most recent employer was uninsured. Note that this statement from the RO section is in addition to the statement from the DD described in the paragraph above which explains why the designated RO is not the most recent employer.

(2) If the RO has failed to respond or responded untimely to the Notice of Claim, or failed to submit evidence regarding its liability following the period specified by the Notice of Claim, the PDO narrative should include a paragraph explaining these facts. Similarly, the PDO narrative should indicate whether the RO has failed to respond or responded untimely to the SSAE. If the RO has accepted liability or has accepted the five assertions regarding its liability set forth at 725.408(a)(2), the PDO narrative should so state.

(3) In cases in which the claim is dismissed as abandoned, the designation of the proper RO may be omitted from the PDO. The reason is that the DD is unable to develop the claim because it has been abandoned by the claimant. Since development is curtailed prior to the designation of the RO in the SSAE, the DD is unable to definitively name the RO as the liable party in the PDO. Accordingly, if the claimant requests a hearing, the only issue open for consideration is whether the claim was properly deemed

abandoned. If the ALJ remands the claim to the DD for development, 725.409 allows the DD to designate the liable party.)

c. A clear, thorough and detailed discussion in which all relevant evidence submitted in the claim, including medical and RO liability evidence, is evaluated and weighed and any conflicts in the evidence are addressed. This discussion should relate to the DD's findings of fact and conclusions of law. With regard to the RO designation, the DD should explain the reasons for designating an operator that was not the claimant's last coal mine employer, and discuss the response by the RO regarding acceptance of the assertions in the Notice of Claim and its liability. In addition, in the case of a subsequent claim, 20 CFR 725.309(d) requires a finding on whether there has been a change of one of the applicable conditions of entitlement since the date upon which the order denying the prior claim became final.

d. A notice of the right of any interested party to request within 30 days a revision of the PDO or a formal hearing before the OALJ. In accordance with 20 CFR 725.418, if the PDO is a denial of benefits, and the claimant has previously filed a request for a hearing, the PDO shall notify the claimant that the case will be referred for a hearing pursuant to the previous request unless the claimant notifies the DD that s/he no longer desires a hearing. If the PDO is an award of benefits and the designated RO has previously filed a request for a hearing, the PDO shall notify the RO that the case will be referred for a hearing pursuant to the previous request unless the RO notifies the DD that it no longer desires a hearing.

e. The PDO must be sent out without delay after it is prepared and printed, and must be served on all parties to the claim by certified mail. The time frames allowed for response to the PDO are strict and assume proper service, so the document must be sent to all parties on the day it is signed and dated. Within 30 days after the date of issuance of a PDO, any party may, in writing, request a revision of the proposed decision and order or a hearing. For the request to be timely, the request must be postmarked by the thirtieth day following the issuance of the PDO. A party's unreasonable refusal to accept a PDO properly sent by certified mail will not affect the running of the 30-day response time. Nevertheless, under such circumstances, the PDO should also be sent by regular mail. In the event the certified mailing is later found to be defective for any reason, the party's actual receipt of the PDO would commence the 30-day response period.

## 8. Actions Following PDO.

a. Request for Hearing or Revision. Within 30 days after the issuance of a PDO, any party may request, in writing, a revision of the PDO or a hearing. Any response by a party to the PDO or Revised PDO must specify the findings and conclusions with which the responding party disagrees. The failure to include a list of challenged findings does not nullify a request for a hearing or a revision, however. The DD must still act on either request. The response must be served on the DD and all other parties to the claim.

b. Grounds for Revision of PDO. A party may request revision of a PDO on the basis of a legal argument or on the basis of an error in the findings of fact or conclusions of law. For example, the Proposed Decision and Order may state that the child of the miner ceased school attendance in April 2001. The claimant may protest that the evidence from the school shows that the student ceased attendance in May. When the file is reviewed, it is determined that the evidence does in fact show school attendance in May. A revised Proposed Decision and Order would then be issued. A Revised PDO might also be appropriate to resolve a dispute regarding the date of entitlement. With one limited exception, discussed below, the DD should not allow submission of additional evidence at this stage. All time periods for the submission of evidence before the DD have expired prior to the issuing of a Proposed Decision and Order and the DD cannot consider any additional evidence submitted.

A timely request for revision of a PDO's finding regarding the liability of the identified coal mine operator may be based on newly submitted evidence but only if the DD determines that submission of the late evidence is justified by extraordinary circumstances. In such cases, the late evidence must address the potential liability of another coal mine operator; late evidence addressing the named operator's status as a potentially liable operator cannot be admitted under any circumstances outside of the 90 day period provided in 725.408(b). All other evidence must be returned with notice to the parties that it will not be considered because it was not received prior to the issuance of the PDO.

c. Revised PDOs. If a timely request for revision of a Proposed Decision and Order is made, the DD will review the determination and take one of three steps:

- (1) revise the PDO and issue a new statement of the

right to request a hearing;

(2) take any other appropriate action, such as reconsidering Responsible Operator liability. If it is appropriate to name a different Responsible Operator, the DD must issue a new Notice of Claim, and a new Schedule for Submission of Additional Evidence; or

(3) issue a revised PDO stating that the issues raised in the request for revision have been considered, but that no change is warranted and again stating the right of the parties to request a hearing.

If a revised Proposed Decision and Order is issued, each party to the claim will be given 30 days from the date of issuance of that revised Proposed Decision and Order within which to request a hearing.

d. Action by the DD if Parties do not Respond to PDO. If no response to a PDO or revised PDO is sent to the DD within the time period allocated, it will become final and effective with the expiration of the applicable 30-day period. Once a PDO or revised PDO becomes final and effective, all rights to further proceedings with respect to the claim will be deemed waived, except as provided in 725.310 (modification). In accordance with 20 CFR 725.419(d), the PDO is not final until thirty days after it is issued. Modification can only be considered when the decision and order has become final. Therefore, a modification request made when the PDO is not yet final has no effect, and the parties must be so notified.

If the Responsible Operator does not respond timely to a PDO or Revised PDO that finds the claimant entitled to benefits and has not previously requested a hearing, the PDO becomes final and effective in 30 days. If the RO has not initiated benefits to the claimant, the RO must be notified in writing that the PDO is final and the operator must begin payments. If the RO does not respond and does not initiate benefits, the claim must be referred for enforcement and the claimant put in interim pay from the Trust Fund.

e. Requests for Hearings after Issuance of PDOs. If a hearing is requested, the DD will refer the claim to the OALJ in accordance with BLBA PM 2-1500. If the claimant requests a hearing after an RO PDO denying the claim, a CM-971b will be issued, accompanied by forms CM-2970 and 2970a. This notice will advise the RO that the claimant has requested a formal hearing, and that it will be liable for benefits and fees should the claim be awarded. It also

affords the designated RO the opportunity to record its position on the entitlement issues in the claim. By this point, the employer has already responded to its identification as liable responsible operator. The only timeframe involved in the notice is the period of thirty days for submitting a completed form listing contested issues. Note that the form is optional and, therefore, the RO is not required to respond.

For an RO approval case in which a hearing has been requested, the DD must issue an Initial Determination Letter (IDL) in addition to the PDO. The IDL directs the RO to commence the payment of benefits. If the RO refuses to pay benefits within 30 days from the date of the initial determination, the claimant's benefits will be paid by the Trust Fund. (See BLBA PM 2-1301). It is unlikely that the RO will decide that a hearing is NOT needed following the initial determination letter. The district office, therefore, should not wait 30 days to see what the RO will do before starting to prepare the case for referral to the OALJ. If the RO pays but does not rescind the request for a hearing, the case will go to hearing with the claim in RO pay rather than in interim pay.

f. Note that if there is a request for withdrawal of the claim more than 30 days after issuance of the PDO/revised PDO, it cannot be considered by the DD. If the PDO has become final and effective, the withdrawal request is untimely and cannot be considered. If there has been a request for hearing, the DD lacks jurisdiction to review the request for withdrawal and it must be directed to OALJ. The only exception is if the case is later remanded to the DD for reconsideration and issuance of a revised PDO.

#### 9. Special Procedures for Survivors' Claims Awarded Under Section 422(1).

The DD should take the following actions when an eligible survivor of a miner files a conversion claim subject to Section 1556 of the PPACA, the miner's claim was filed on or after January 1, 1982 and has been finally awarded, and review of the evidence in the miner's claim and any additional evidence that the District Director deems necessary to develop (including a new 725.495(d) statement if applicable) establishes that a Responsible Operator is liable for benefits:

- The claim should be awarded in a Proposed Decision and Order with the standard sentence addressing the RO designation amended to read "That «RO» has been determined to be the liable party based on its designation and the supporting

evidence in the miner's claim and on any additional evidence developed by the District Director (enclosed), and that it is responsible for payment of benefits to the claimant as provided by the Act."

- No Notice of Claim should be sent - 725.418(a).
- If the RO does not request a hearing or revision within 30 days pursuant to 725.419, current procedures should be followed to ensure that the RO initiates benefits to the survivor.
- If the RO timely requests a hearing and challenges the claimant's entitlement but not the designation of liability, the DD should initiate interim payments and refer the claim to the OALJ.
- If the RO timely challenges its liability, regardless of whether a hearing or a revision is requested, the District Director should vacate the PDO and allow the operator the opportunity to submit evidence on the liability issue. Any medical evidence submitted should be accepted into the record, but it is not relevant to the decision and should not be addressed. The District Director should evaluate any liability evidence submitted by the operator and, if necessary, develop his/her own, including a new 725.495(d) statement if applicable. If the evidence establishes the RO's liability, the District Director should issue another conversion award PDO, pursuant to 725.418(a)(2). If the RO does not agree to pay benefits after the PDO, the survivor should be put into interim payment status and the claim referred to the Office of Administrative Law Judges.
- When the first PDO is issued, the claims examiner should update CAPS by completing the PDO Adjudication Data Set with the appropriate information, including a 209 Determination Basis Code.
- If the PDO is vacated, the CE should record this action by completing a REC Adjudication Data Set showing a Reconsideration requested by the Responsible Operator. The Determination Basis Code should be left blank until the time for additional evidence expires, at which point code 209 should be entered.

In all cases in which the RO requests a hearing, whether the first PDO is vacated or not, the OALJ and IDL Adjudication Data Sets should be completed in the usual manner. When any 422(1) conversion claim is referred to the OALJ, a copy of the miner's claim should be included as an exhibit.