

CHAPTER 2-1104, ORDERS TO SHOW CAUSETABLE OF CONTENTS

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1. Purpose and Scope.

This Procedure Manual (PM) chapter's primary focus is the proper processing of claims by the Division of Coal Mine Workers' Compensation (DCMWC) Program in which an Order to Show Cause (OSC) would be appropriate at any time prior to a Proposed Decision & Order (PDO). It establishes guidelines and procedures for the proper use and issuance of Orders to Show Cause. The chapter addresses claims in which the claimant is not a coal miner or is the survivor of an individual who is not a coal miner; claims in which the claimant is uncooperative; claims in which the survivor does not initially appear to meet the dependency criteria; and subsequent survivors' claims. Orders to Show Cause issued following non-receipt of CM-929 letters or other benefit notices are not addressed in this chapter. (See PM 2-1406 for Post Entitlement guidance.)

2. Legislative Authority.

Section 19 of the Longshore and Harbor Workers' Compensation Act, incorporated by Section 422(a) of the Black Lung Benefits Act (BLBA); 20 CFR 725.202, 212-228, 309, 351, 409, 417, 421, 450, & 451.

3. Policy.

The Schedule for the Submission of Additional Evidence (SSAE) serves as a preliminary notification to the parties of the District Director's (DD's) analysis of the initial evidence, provides a guide to the submission of additional evidence, and sets time frames for such submission (see PM Chapter 2-1103, SSAE.) The Proposed Decision and Order (PDO) generally follows the SSAE, and is the DD's decision concerning all factors of entitlement, including medical, employment, and dependency issues, offsets, and identification of the liable party (See PM Chapter 2-1105, Proposed Decision and Orders.) In certain cases, however, as delineated below in Section 7, the SSAE would serve no useful purpose and an Order to Show Cause is issued instead. Also, an Order may be issued to compel a claimant to comply with the DD's or Responsible Operator's (RO's) development of the claim.

4. References.

(Reserved)

5. Definitions.

(Reserved)

6. Responsibilities.

a. District Director. The District Director (DD) is responsible for determining when an OSC should be issued, and for ensuring that the Order is issued correctly and is properly served on all parties to the claim (20 CFR 725.351).

b. Claims Staff. The claims staff, as the DD's delegated

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representative, is responsible for developing the evidence, preparing appropriate documents and notices using the automated correspondence system, and bronzing all correspondence and supporting documentation into the appropriate claim file in the OWCP Imaging System (OIS).

7. When Orders to Show Cause Should Be Issued.

An OSC should be issued whenever the DD believes it to be appropriate. This will usually be when the DD requires a party's cooperation in developing the claim or when the DD otherwise requires a party to address an entitlement issue. Generally, there are six instances in which an Order may be issued. They are cases in which the claimant:

- a. Not a Miner. Is not a coal miner or is the survivor of an individual who is not a coal miner (see 20 CFR 725.202);
- b. Failure to Undergo Medical Examination. Has failed to undergo a required medical examination without good cause, or to submit evidence sufficient to make a determination on the claim, or to pursue the claim with reasonable diligence, or to attend an informal conference without good cause (see 20 CFR 725.409);
- c. Failure to Cooperate. Has failed to cooperate with the RO in its development of evidence. This may include such actions as refusing to take scheduled evaluations or tests, refusing to respond to reasonable requests for relevant evidence, or refusing to allow access to medical records;
- d. Dependency Criteria. Is a survivor who does not initially appear to meet the dependency criteria;
- e. Refiled Survivor. Has previously filed a survivor's claim that was finally denied, more than one year has passed since the denial became final, and none of the applicable conditions of entitlement has changed since the prior denial became final [see 20 CFR 725.309(c)]. Note that the "change" requirement does not apply to certain survivors eligible for automatic entitlement under Section 422(1) [see 725.309(c)(1)].
- f. Modification. Has filed a request for modification and the district director proposes to grant the request. The Order to Show Cause related to a modification request is addressed in PM Chapter 2-1302, Modification Procedures.

8. Actions by the District Director.

The DD will issue Orders to Show Cause in the standard manner (as described in the CORS User Manual) and in the following instances:

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a. Not A Miner.(1) Initial Development - Coal Mine Employment Alleged.

Where the claimant has alleged employment in or around a coal mine, evidence of possible covered work should be developed. Refer to PM Chapter 2-600, Definition of a Coal Miner for guidance.

On the basis of the body of evidence developed in each case, make a determination on the employment issue.

If the claimant or alleged miner clearly meets the Act's definition of a coal miner, proceed with normal development.

If the claimant is determined not to meet the definition of a coal miner, do not schedule the 20 CFR 725.406 complete pulmonary evaluation. If the claimant requests a hearing, refer to PM 2-501 for guidance regarding authorization of medical testing.

If the evidence suggests the claimant is not a miner, the DD will issue an Order to Show Cause Why the Claim Should Not Be Denied/Not a Miner. This Order shall include a description of the statement or evidence that led the DD to believe that the worker on whom the claim is based was not a miner, and will give the claimant 30 days in which to submit either additional evidence or a statement that such evidence will be forthcoming.

In all cases, promptly notify the potentially liable operator with Form CM-971a (Notice of Claim), if the alleged employment ended after December 31, 1969.

(2) Initial Development - No Coal Mine Employment Alleged.

When the initial review of a claim by the DD reveals that there is no allegation by the claimant that the worker's employment was covered by the Act (see PM Chapter 2-600), the DD will issue an Order to Show Cause Why the Claim Should Not Be Denied/Not a Miner. This Order shall include a description of the statement or evidence that led the DD to believe that the worker on whom the claim is based was not a miner, and will give the claimant 30 days in which to submit either additional evidence or a statement that such evidence will be forthcoming.

A Notice of Claim need not be issued *IF* it is clear that the employer could not be considered to be an RO. For example, if the employer operates a shoe store there is no question that the employer would not be a RO. On the other hand, if the employer is

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a railroad or a construction company that could have been involved in the extraction, processing, or transportation of coal, it should be sent a Notice of Claim if the alleged employment is after December 31, 1969.

Again, the section 725.406 complete pulmonary evaluation will not be scheduled.

(3) Claimant does not Respond to Order to Show Cause or does not Satisfy the Conditions of the Order. If the claimant does not respond to the Order to Show Cause or does not present evidence that would support a finding that he/she is a miner, proceed to deny the claim via a Proposed Decision and Order Denying Claim - Not a Miner. If an Operator has been served with a Notice of Claim, that operator should remain a party to the claim. Do not dismiss the potentially liable operator simply because the claimant has been found to be "not a miner." The operator is still potentially liable AND must be named as the designated RO on the PDO. As in any other claim, if the employer who was named as a potentially liable operator is determined NOT to be liable for reasons other than the worker's miner status (for example, because it is deemed incapable of providing for payment of benefits), it should be dismissed as a party to the claim.

The "Summary of Employment Evidence/Not a Miner" narrative must include a statement that the potentially liable operator has been designated as the RO. It is not necessary to wait for the Notice of Claim to mature before issuing a PDO - Not a Miner.

Include your findings regarding the applicable assertions pertinent to the operator's status as a potentially liable operator. A complete narrative should follow the findings in regard to the assertions and should list the evidence obtained and the rationale for reaching the conclusion that the employee was not a miner. Be careful to alter the assertions to fit the actual claim. For example, the assertion should state that the "worker" was not exposed to coal mine dust rather than the "miner" was not exposed or that the "worker's" employment included at least one working day after December 31, 1969, instead of the "miner's" employment, and so on.

(4) Claimant Requests a Hearing Before the Office of the Administrative Law Judges (OALJ). If the claimant requests a hearing before the OALJ, he/she will be scheduled for the complete pulmonary evaluation even if an OALJ, the Benefits Review Board (BRB) or a court previously ruled that the claimant

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was not a miner and the alleged mining history has not changed since the prior filing(s). Following receipt of the medical evidence an SSAE will be issued. All parties will be given the opportunity to submit evidence. Following the full period for the submission of evidence, including extensions, a PDO will be issued. The PDO will include the usual discussion of medical-related issues as well as the language from the prior OSC PDO denying the claim because the claimant was not a miner. Ensure that the potentially liable operator is designated in the event that the claimant is found to be a miner at a higher level. (See section 3 above as well as PM Chapters 2-600, Definition of a Coal Miner, and 2-700, Documentation of Coal Mine Employment.)

b. Abandonment.

(1) Reasons for Abandonment. A claim may be denied at any time by the DD by reason of abandonment where the claimant fails:

(a) To undergo a required medical examination without good cause; or

(b) To submit evidence sufficient to make a determination on the claim; or

(c) To pursue the claim with reasonable diligence; or

(d) To attend an informal conference without good cause; or

(e) To cooperate with reasonable requests from the RO.

(2) Abandonment - Reasons: (a), (b), & (c).

If the DD determines that a denial by reason of abandonment for reasons a, b, or c is appropriate, he/she must issue an OSC to notify the claimant of the reasons for such denial and of the action which must be taken to avoid a denial by reason of abandonment. If the claimant completes the action requested by the OSC within the time allowed, the claim will be developed, processed and adjudicated following the usual development and adjudication process.

If the claimant does not fully comply with the action requested by the DD, the DD will issue a PDO notifying the claimant that the claim has been denied by reason of abandonment. The PDO must be served on the claimant and all other parties to the claim by certified mail. It is not necessary to wait for a Notice of Claim to mature if pending.

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A claim may be abandoned at any time before the issuance of the PDO, not just during initial development. For example, if a miner unreasonably refuses to undergo testing requested by the designated RO following the issuance of the SSAE, the DD may still issue an order of abandonment. Note that the claim may be found abandoned even if the initial evidence discussed in the SSAE is favorable to the miner.

(3) Abandonment - Reason (d) - Failure to attend an Informal Conference without Good Cause. In any case in which a claimant has failed to attend an informal conference and has not provided the DD with the reasons for failing to attend, the DD must issue an OSC instructing the claimant to explain the absence. In determining whether the claimant has established good cause for the failure to attend the conference, the DD must consider all relevant circumstances, including the age, education, and health of the claimant, as well as the distance between the claimant's residence and the location of the conference. If the DD concludes that the claimant had good cause for failing to attend the conference, he/she may continue processing the claim, including, where appropriate, rescheduling of the informal conference. If the claimant continues to cooperate the claim will move to the next adjudicative step as appropriate based upon the merits of the claim.

If the claimant does not supply the DD with the reasons for failing to attend the conference within 30 days of the date of the DD's request, or the DD concludes that the reasons supplied by the claimant do not establish good cause, the DD will issue a PDO - Abandonment of Claim to notify the claimant that the claim has been denied by reason of abandonment. The PDO - Abandonment of Claim shall be served on the claimant and all other parties via certified mail.

(4) Abandonment - Reason (e) - Failure to Cooperate With RO. The DD may issue an OSC if the claimant has failed to cooperate with reasonable and appropriate requests by a coal mine operator. The DD may issue an OSC for a specific purpose. For example, the designated RO may establish that it has asked the claimant several times to respond to an interrogatory, but has never received a response. The DD may issue an Order asking the claimant to explain the refusal and/or comply with the RO's request. The DD will review any response to the OSC to determine if good cause can be found for failure to cooperate.

NOTE: The extent of a claimant's duty to cooperate with a coal

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mine operator will depend on whether an SSAE has been issued. Prior to the issuance of an SSAE, the claimant's duty to cooperate with an operator is limited to answering questions regarding the claimant's employment with that operator. Thus, an OSC may be issued only to compel the claimant to cooperate with an operator regarding those questions. At that time, the claimant cannot be compelled to respond to requests to attend a medical examination, to respond to a request for medical history, or to respond for a request for work history with other employers.

Claimant's limited duty to cooperate is due to the limited response required of an operator that receives a Notice of Claim. When the Notice of Claim is issued the RO is given a finite period of time to develop evidence relating to its status as a potentially liable operator. This involves refuting or accepting five separate assertions. The miner would have knowledge of only three of the five assertions - the timing of employment, duration of employment, and dust exposure during employment. 20 CFR 725.408(a)(2)(ii)-(iv). The claimant must, therefore, cooperate in the development of those specific issues. If a claimant refuses to cooperate with the RO in completing interrogatories or depositions that relate to employment history and exposure, the DD can issue an OSC even prior to issuing an SSAE designating a RO. Prior to the SSAE, do not compel the claimant to respond to questions about medical history or even employment history, other than with the requesting coal mine operator. Issue an OSC requiring the claimant to respond only to those questions on the interrogatories that directly address the three assertions noted above. If none of the unanswered questions address those assertions, do not issue an OSC. Instead, notify the RO of the reasons why the claimant's cooperation cannot be compelled.

(5) Whereabouts Unknown. If the claimant moves and cannot be located, the claims staff should make an effort to locate the claimant prior to making any finding that the claim has been abandoned. The following are means that can be used to attempt to locate a claimant:

- (a) Contact the Post Office for forwarding address.
- (b) Contact directory assistance for a new phone number.
- (c) Contact any person who provided a statement concerning employment or physical condition of the miner.
- (d) Contact the family doctor if listing in file.

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(e) Contact SSA.

(f) Conduct on-line research utilizing Google, Bing or a similar search engine and/or websites such as White Pages and [zabasearch.com](http://zabasearch.com).

When all attempts to locate the claimant have failed, the claims staff will prepare a memorandum to be bronzed into the file describing the attempts made, and will send the Order to Show Cause and Proposed Decision and Order to the claimant's last known address.

(6) Summary - Adjudication Process. If the DD determines that denial by reason of abandonment is necessary because of the claimant's failure to take required actions, the following steps will be taken:

(a) The claims staff will issue an OSC to notify the claimant that he/she has 30 days to respond by indicating an intention to pursue the claim.

(b) If the claimant fails to respond to the notification within the allocated time, the claim will be considered to be denied by reason of abandonment and a PDO will be issued.

(c) If the claimant responds in a timely fashion to the OSC, the claims staff will allow a reasonable period for the claimant to take specified remedial action. The time frame and actions needed should be clearly communicated to all parties in writing.

(d) If the claimant does not fully comply with the remedial action, the claims staff will deny the claim by reason of abandonment. A second OSC would not be issued if the claimant failed to fully comply with the original OSC. Instead a PDO denying the claim by reason of abandonment would be issued. It is not necessary to wait for the Notice of Claim timeframe to mature if pending.

The Order is available through the correspondence system and shall include copies of evidence request letters and a statement concerning non-compliance and failure to undergo testing, if applicable. The claimant will be given 30 days to comply with the DD's order.

Part 2 - Claimsc. Ineligible Survivor's Claim.

(1) Relationship and Dependency. If a claim is received from a survivor who does not initially appear to meet the dependency and/or relationship criteria as set out in 20 CFR 725.213 - 228 (addressed in PM Chapter 2-900), the DD will issue an Order to Show Cause requesting dependency and relationship documentation.

(2) Summary - Adjudication Process.

(a) The claims staff will issue an OSC to notify the claimant that he/she has 30 days to provide documentation to support both dependency and relationship.

(b) Promptly notify the potentially liable operator with Form CM-971a (Notice of Claim), if the alleged employment ended after December 31, 1969.

(c) If the claimant fails to provide the requested documentation within the allocated time, the claim will be reviewed again to ensure that relationship and dependency are not established. If so, a PDO will be issued denying benefits as an ineligible survivor. It is not necessary to wait for the Notice of Claim to mature if pending.

(d) If the claimant provides the requested documentation, the claims staff will review the claim to determine if the dependency and relationship criteria are met (PM 2-900).

1) If the dependency and relationship criteria are met, the claims staff will initiate development of the employment and medical criteria, followed by an SSAE and PDO based on the medical criteria.

2) If the criteria are not met, the claims staff will issue the PDO, denying benefits as an ineligible survivor. It is not necessary to wait for the Notice of Claim timeframe to mature if pending.

d. Subsequent Survivor's Claim.

(1) Automatic Denial. When a surviving spouse, child, parent, brother, or sister files a subsequent claim after a prior claim by the same claimant has been finally denied, the subsequent claim must be denied if the prior claim was denied solely for medical or employment reasons and the requirements of 20 CFR 725.309(c)(1), which addresses certain claims awardable under 30

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U.S.C. 932(1), do not apply. This requirement is based on the common-sense premise that a miner's physical condition and employment history cannot change after death. Thus, where the denial of a prior survivor's claim was based solely on the survivor's failure to establish that the miner suffered from pneumoconiosis, that the pneumoconiosis was caused by the miner's coal mine employment, or that the pneumoconiosis contributed to the miner's death, the subsequent survivor's claim must be denied, absent waiver by the liable party. In such cases, the DD will issue an Order to Show Cause/Denial of Subsequent Survivor Claim followed by a Proposed Decision and Order.

(2) Conditions Subject to Change. Where the prior denial was based in whole or in part on an applicable condition of entitlement that is subject to change, and the survivor proves that the condition has changed, the survivor's claim may be considered on its merits.

Issues such as the marital status of the survivor or the school attendance of a child are subject to change and such a change could result in the approval of the subsequent claim. For example, the widow (LW, i.e., living widow) of a miner who died in 1979, may have remarried in 1985 and filed a Part C Black Lung claim in 1988. The claim would have been denied at that time solely because her subsequent marriage made her ineligible, and no medical evidence would have been developed. If she files a new claim, reporting that her second husband has also died, the DD should develop medical and employment evidence to determine if the LW is eligible for benefits under the current regulations. After such development, an SSAE would be issued, not an OSC.

(3) Waiver of Automatic Denial. A subsequent survivor's claim must be denied if the prior claim was denied solely for medical or employment reasons and the provisions of 20 CFR 725.309(c)(1) do not apply.

(a) Despite this requirement, 725.309(c) states that the automatic denial provision *can be waived* by an operator or the fund.

For example, a widow filed a claim and was denied because she did not establish that the miner's death was due to pneumoconiosis. She filed a subsequent claim and submitted evidence that had not been available at the time of the first filing that demonstrates complicated pneumoconiosis. Although death due to pneumoconiosis is NOT a condition that can change after the death of the miner and,

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therefore, the claim would normally be automatically denied, the operator in an RO claim or the Department in a Trust Fund claim *could* waive this requirement, based on 725.309(c). If the requirement were to be waived the DD would issue an SSAE in an RO claim, followed by a PDO deciding the claim based on its merits. In a Trust Fund claim, the DD could waive the automatic denial provision and, if satisfied the new evidence credibly proves entitlement, move directly to a PDO awarding the claim.

(4) Summary - Adjudication Process. Any evidence submitted in connection with any prior claim will be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.

(a) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see 725.463) will be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim will be binding on that party in the adjudication of the subsequent claim.

(b) In any claim where no evidence relating to a material change of conditions is submitted or developed, no SSAE will be issued. In such a case, an OSC why the claim should not be denied will be issued followed by a PDO.

(c) When a relationship/dependency or other "condition of entitlement" has changed, the claim will not be automatically denied. If a change in an applicable condition of entitlement is established, the DD will issue an SSAE followed by a PDO or, in a TF case in which an award is appropriate, move directly to a PDO.

(d) If the survivor's subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

e. Certified Mail. In all cases, Orders to Show Cause must be sent by certified mail, with service to all parties.

9. Actions following the Order to Show Cause.

In all cases in which an OSC is issued (except 9c), the claimant has 30 days to respond by either complying with the action required by the Order (by submitting the necessary evidence or agreeing to undergo a required

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examination), or filing a written statement that the evidence will be submitted. In the case of abandonments, the claimant has 30 days to respond by either complying with the action required by the Order or by filing a written statement that the claimant wishes to pursue the claim and providing a date by which evidence will be submitted. If no evidence is received by the end of the 30-day period, or if evidence is submitted that does not address the reason for the OSC, the DD will issue a PDO denying the claim. The responses to different types of Orders will engender different actions by the DD.

In all cases where an OSC is being issued, the DD should consider the circumstances when establishing the time frame for response. A 30-day period is generally sufficient for a response and should be the usual period that is established. The DD can, however, at his/her discretion extend the period if the circumstances warrant a longer period for response.

- a. Not A Miner. An OSC is issued followed by a PDO denying the claim because the worker was not a miner.

If the claimant requests a hearing following the PDO the DD will schedule the complete pulmonary evaluation, then proceed with the SSAE and another PDO covering the medical determination as well as the "not a miner" issues. A complete pulmonary examination is obtained in order to forestall the possibility that an Administrative Law Judge will find the claimant's work to be covered, and then award the claim because DOL has not contested the assertion of disability due to pneumoconiosis.

If the claimant submits additional employment evidence following the OSC or following the SSAE, the DD will review the evidence to determine if the employment evidence indicates that the miner's work may be covered by the Act. If so, the DD will proceed with full evidentiary development.

If the additional evidence leads to no change in the DD's determination that the work is not covered by the Black Lung Benefits Act, the DD will issue the PDO.

- b. Abandonment. The regulations at paragraph 20 CFR 725.409(b) allow the claimant only two options following the DD's initial notice:

- (1) Correct the problem identified by the DD, or
- (2) If the claimant fails to comply fully with the evidence or actions required by the DD in the Order, the DD will issue a PDO denying the claim. The claimant may not submit evidence after the PDO is issued, because all time frames for such submission will have ended. The only recourse for the claimant is to request a

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hearing or withdrawal within 30 days. If the claimant requests a hearing, the ALJ may not address issues other than those relating to abandonment except by motion or written agreement of the Director. 20 C.F.R. 725.409(c). The claimant may also request modification within the standard modification period. In that case, the initial issue will be whether the claim was properly deemed to be abandoned by the DD. No entitlement issues will be addressed unless the claimant establishes that the abandonment denial should be modified. See PM 2-1302 for Modification guidance.

It is possible that more than one Order to Show Cause for Abandonment may be issued in a single claim. The DD must carefully determine if the claimant has complied with an Order before taking the next step. For example, the claimant may respond to an Order of Abandonment by agreeing to undergo an examination and making an appointment, then not keep the appointment. When the DD discovers this, the proper action would be to issue a PDO, not a second Order of Abandonment, because the claimant did not comply with the Order. On the other hand, if the claimant complied with an Order of Abandonment by responding to interrogatories submitted by an operator, but then later refused to undergo a medical evaluation for the designated RO, a second Order to Show Cause for Abandonment would be in order.

c. Failure to Cooperate. Generally, the DD will issue an OSC to compel cooperation with an RO for the production of documents or to require a medical examination. An Order of Abandonment normally requires compliance within 30 days, but there may be valid reasons why the time frame for compliance could be longer. For example, an RO may ask the DD to abandon the claim because the claimant has not completed the employer's interrogatories, but the DD has already granted the RO 90 days to submit evidence. The DD could issue an OSC requiring the claimant to return the interrogatories within 30 days or could extend that period to 60 days.

d. Ineligible Survivors' Claims. If the claimant submits evidence in response to the OSC establishing the dependency and relationship criteria, the DD will proceed with additional evidentiary development, ultimately leading to the issuance of an SSAE and/or PDO, as appropriate. (If a Notice of Claim has not been issued it should be issued, and all time frames shall have expired before the SSAE is issued.) Following full development, a PDO would be issued.

If the claimant does not submit the requested evidence, or if the evidence submitted does not establish the dependency and relationship criteria, the DD will issue a PDO denial - Not an Eligible Survivor.

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e. Subsequent Survivors' Claims. If the claimant submits evidence in response to the OSC establishing that there has been a change in an entitlement factor other than the medical condition and employment of the deceased miner, the DD will proceed to additional evidentiary development, ultimately leading to the issuance of an SSAE and/or PDO, as appropriate. (If a Notice of Claim has not been issued it should be issued, and all time frames shall have expired before the SSAE is issued.) Following full development, a PDO would be issued. (Generally, information potentially leading to a new determination in a subsequent survivor's claim would be submitted with the claim, not in response to an OSC, but this sequence of actions cannot be ruled out.)

10. Claim Master and Diary Action Screens.

Please refer to PM Chapters 2-302 and 2-303 for the correct codes to add to the Claim Master and Diary Action screens.