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June 29, 2015

Leonard J. Howie III, Director
Office of Workers' Compensation Programs
U.S. Department of Labor
200 Constitution Avenue NW, Room C-3520
Washington, DC 20210

Re: RIN 1240-AA10
Comments to Proposed Regulations "*Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits*"

Dear Mr. Howie:

I am submitting these comments on behalf of the Appalachian Citizens' Law Center, Inc., in support of the proposed regulations that the U.S. Department of Labor ("the Department") published on April 29, 2015. The Appalachian Citizens' Law Center is a non-profit law office located in the coal mining region of eastern Kentucky. The attorneys at the Appalachian Citizens' Law Center regularly represent claimants in black lung benefits claims at all stages of the adjudication process from proceedings before the District Director to hearing before the Office of Administrative Law Judges and appeals before the Benefits Review Board, the U.S. Courts of Appeals, and the Supreme Court. Our experience representing hundreds of claimants has exposed us to many of the issues that the Department addresses via its proposed rule and our comments are informed by our direct experience with these issues.

Appalachian Citizens' Law Center strongly supports the proposed regulations. The following comments are meant to explain our support and suggest clarifications for the final rule to improve the rule and to avoid unnecessary litigation.

A. DISCLOSURE OF MEDICAL EVIDENCE - PROPOSED 20 C.F.R. § 725.413

The proposed rule regarding disclosure of medical evidence is a much-needed improvement to the black lung benefits program. The rule would not only make the claims process more fair for claimants who need information about their health, but also would improve the quality of decisions in black lung benefits claims by increasing the likelihood that the most relevant information is available to the decisionmaker.

The preamble provides the tragic case of Gary Fox as an example demonstrating the need for disclosure. Mr. Fox is clearly an individual who the Black Lung Benefits Act entitles benefits to. The failure of his first claim to be awarded shows that the rules need to be changed to ensure that no family has to endure what the Fox family has suffered.

Without the proposed rule going into effect, there is the real potential of more tragic cases of miners being denied benefits solely because they do not have access to existing medical information proving that they are disabled due to black lung.

There are currently three levels of barriers to claimants obtaining medical information from attorneys representing the operator or carrier. First, claimants who do not have representation or have nonattorney representatives seldom, if ever, use technical discovery methods to seek information that the attorneys for the operator or carrier possess. Second, even when a claimant does have a lawyer, many lawyers do not make full use of all discovery methods for a variety of reasons. Third, even if a lawyer does use discovery methods, the attorneys for the operator or carrier often object, refuse to disclose medical information, and assert various privileges against disclosure. This forces the claimants' attorney to invest more time in litigation over discovery without knowing whether the withheld information will make a difference in the claim and without any guarantee that the time invested will be compensable for the attorney.

The third barrier is exacerbated by recent changes to the procedural rules before the Department's Office of Administrative Law Judges. Effective June 18, 2015, a claimant cannot discover medical information developed by a nonexamining expert who is not anticipated to testify unless the claimant can prove "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." *Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges*, 80 Fed. Reg. 18,768, 28,793 (May 19, 2015) (to be codified at 29 C.F.R. § 18.51(d)(4)(ii)). This is a higher standard than would have been necessary to prove at the time of Mr. Fox's case. The previous standard only required a claimant to prove a "substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means." 29 C.F.R. § 18.14(c) (2014). In the black lung context, where nonexamining expert physicians are regularly used to provide opinions about the claimants' health, it is vitally important that coal miners pursuing black lung benefits be provided with all available information about their health. The recent OALJ rule makes it all the more imperative that there be a black lung specific rule.

It is expected that some comments may argue that required disclosure will violate the protection of attorney work product. However this objection should not prevent or delay the proposed rule. Work product is a conditional protection that flows from the applicable rules of procedure, not from the constitutional requirements of due process. *See Hickman v. Taylor*, 329 U.S. 495 (1947) (basing work product doctrine on the Federal Rules of Civil Procedure). The work product of an attorney is likely to reflect the party's legal strategy and therefore may warrant protection. However, the work product of a medical expert does not reflect the party's legal strategy; it is an assessment of an individual's health. Disclosure of a medical expert's

opinion implicates the work product rule to a minimal extent and concerns about work product disclosure are outweighed by concerns about ensuring that the miner has access to information about his health. Accordingly, because the Department has rulemaking authority under the Black Lung Benefits Act, the Department has the power to ensure that the applicable procedural rules fit the context of the black lung benefits system. The Notice of Proposed Rulemaking correctly stated that the black lung benefits program must be understood within the context of the Mine Act's statement that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner," 30 U.S.C. § 801(a), and that the Black Lung Benefits Act allows for departures from general rules of evidence and procedure "to best ascertain the rights of the parties." 33 U.S.C. § 923(a), *as incorporated by* 30 U.S.C. 932(a). In short, there is no legal barrier to mandating disclosure of medical evidence via a procedural rule.

While Appalachian Citizens' Law Center strongly supports the proposed rule, there are ways that it could be improved, primarily to avoid confusion that would generate unnecessary litigation over the scope of the rule.

A.1. **Insert the Treatment Record Exception into the Regulation and Clarify that All Medical Data from a Treating Physician Is a Treatment Records Excepted from Disclosure**

Proposed 20 C.F.R. § 725.413(a) requires disclosure of "any medical data about the miner that a party develops in connection with a claim for benefits." The preamble to the Notice of Proposed Rulemaking, states, "Treatment records are not information developed in connection with a claim and thus do not fall within this definition." 80 Fed. Reg. at 23,747.

The exception for treatment records is very important. Either party may obtain the claimant's treatment records. There is no reason to place the burden of reproducing and sending treatment records on claimants. Many times treatment records are extensive. And claimants are less likely to have the means to comply with the rule.

Appalachian Citizens' Law Center proposes that the treatment-record exception be codified in the regulation as a subsection to 725.413(a) along with the other clarifying provisions. This will make it more clear to parties who may not read the Federal Register. In addition, putting the statement in the regulation will avoid any litigation about the weight that should be given to the Department's positions that are expressed in the preamble but not codified in the Code of Federal Regulations.

A.2. **Clarify That Physicians' Draft Reports and Most Attorney Correspondence Are Not Subject to Disclosure**

Proposed 20 C.F.R. § 725.413(a) broadly covers all written assessments of a miner by a physician. The Department should clarify that—consistent with the OALJ procedural rules—this does not cover draft reports by physicians and the physician's correspondence with an attorney, unless the communications concern the physician's compensation or the facts or assumptions provided to the physician.

Consistent with the Department's rules of procedure before its ALJs, drafts of physicians' reports should generally be protected and not subject to disclosure. *See* 80 Fed. Reg. at 28,793 (to be codified at 29 C.F.R. § 18.51(d)(2)); Federal Rule of Civil Procedure 26(b)(4)(B).

Similarly written communications from attorneys should only be disclosed to the degree that they "(i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." 80 Fed. Reg. at 28,793 (to be codified at 29 C.F.R. § 18.51(d)(3)); Federal Rule of Civil Procedure 26(b)(4)(C).

Forcing disclosure of attorneys' written communications comes too close the core protection of attorney work product. As the Supreme Court recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), there are important policy purposes for respecting the privacy of an attorney's communications about her party's case.

As mentioned previously though, the work product protection is conditional, and the same exceptions that exist in the Federal Rules of Civil Procedure and the new procedural rules for the Department's Office of Administrative Law Judges should exist so that parties can obtain information about physicians' compensation and the facts or assumption that the attorney provided to the physician. In addition, if there is reason to believe that the attorney's communications sought to improperly influence the physician, the attorney's communications should be discoverable.

To illustrate the issue, here is a hypothetical to illustrate how this issue could come up in the black lung context. Most physicians are understandably unfamiliar with the law related to federal black lung benefits (for example, the definition of "legal pneumoconiosis"). A physician may issue a draft report with statements that are contrary to the regulations. An attorney may then write back to the physician to explain the law and ask the physician to consider revising her report. Physicians generally prefer candid letters from attorneys. Such communications are not necessarily improper, and a lawyer should not have to self-censor his communications with the physician out of the fear that a judge or the other party will be reviewing the lawyer's letter. In addition, requiring disclosure of attorneys' communications will not reduce the communications, but rather simply force them to be done orally rather than in written form.

For these reasons, Appalachian Citizens' Law Center suggests clarifying (preferably via the codified regulatory language) that neither physicians' draft reports nor communications from attorneys are subject to required disclosure unless they fit into one of the exceptions at Federal Rule of Civil Procedure 26(b)(4)(C) or 29 C.F.R. § 18.51(d)(3). If the disclosed statements suggest improper communications by the attorney, additional discovery may be warranted. This nuanced approach predicts a likely point of dispute and balances the goals of the Department's medical disclosure rule with the confidence that parties place in their attorney.

A.3. **Clarify How Disclosure to Director, OWCP Should Work**

Proposed 20 C.F.R. § 725.413(b) says that disclosure must be made to "all other parties." The problem is how disclosure to the Director, OWCP as a required party-in-interest should work before the District Director's office, where the District Director serves both as the representative of the Director, OWCP and the adjudicator. This is true because the Director, OWCP's lawyers in the Department of Labor's Solicitor's Office do not become involved with black lung benefits claims until after the District Director's decision. Requiring disclosure of all evidence to the District Director could create confusion for claims examiners about which evidence is submitted as evidence for consideration versus which evidence is submitted for disclosure purposes. This could also create administrative difficulties as claims examiners are forced to process more paperwork and decide what becomes a part of the miner's permanent file.

Appalachian Citizens' Law Center suggests that disclosure to the Director, OWCP while the claim is before the District Director's office is not necessary. It is conceivable that a claims examiner might notice relevant information that would improve the quality of a decision, but this potential benefit has to be weighed against the administrative difficulty at the District Director's office. Disclosure to the Director, OWCP could only be required once a formal hearing is sought or the Department of Labor's Solicitor's Office makes its appearance in the case.

A.4. **Increase the Potential Punishment for Non-disclosing Attorneys**

Proposed 20 C.F.R. § 725.413(c)(2) provides a nonexclusive list of sanctions that can result from violation of the medical disclosure rule. Subsection (v) lists "Disqualifying the non-disclosing party's attorney from further participation in *the claim* proceedings." (emphasis added). This phrasing suggests that the disqualification only be from the claim at issue, not from black lung benefits practice more generally.

Appalachian Citizens' Law Center suggests that proposed § 725.413(c)(2)(v) be clarified to add disqualification could be from black lung benefits practice as a whole. This would ensure that attorneys are aware that if they violate the disclosure rule, they risk not only the individual claim, but also their ability to appear before the Department and represent parties in other claims.

B. LESSENED EVIDENTIARY LIMITATIONS FOR THE DIRECTOR, OWCP IN CASES INVOLVING AN OPERATOR WHO CEASES DEFENDING THE CLAIM - PROPOSED CHANGES TO § 725.414(A)(3)(III)

B.1. **Require an Operator to Certify that It Has Ceased Defending the Claim Due to Its Inability to Pay Continuing Benefits Before Allowing the Director to Use the Operator's Slots**

Appalachian Citizens' Law Center suggests clarifying exactly what will trigger the Director's determination that a liable operator "ceases to defend the claim on grounds of an inability to provide for payment of continuing benefits." This provision should not be triggered unless an operator certifies that the reason for its inaction is its inability to provide for payment of continuing benefits. This determination should be as clear as possible to avoid litigation about

the grounds of an operator's decision to cease defending the claim in the way that the Director may expect.

B.2. **Clarify that The Director Will Only Consider a Claim Unmeritorious if the District Director's Office Denied the Claim**.

The preamble to the proposed rule says that the purpose of allowing the Director to use the operator's evidentiary slots is to defend the Trust Fund "against an unmeritorious claim." 80 Fed. Reg. at 23,748.

The Department should clarify that when its District Directors' offices award a claim of benefits, that the claim is a meritorious claim and that the Director should not fight the claim using evidence developed by the operator. This is important for consistency within the Department and for predictability for claimants.

C. SUPPLEMENTAL MEDICAL REPORTS - PROPOSED CHANGES TO § 725.414(A)(1)

Appalachian Citizens' Law Center supports the Department's clarification about how supplemental reports count towards the evidentiary limits.

D. CHANGES TO MODIFICATION PROCEDURE - PROPOSED CHANGES TO § 725.310

Appalachian Citizens' Law Center strongly supports the proposed change, which would require an operator to comply with its existing obligations before seeking modification.

The broad nature of modification in the black lung context has made it subject to abuse and has delayed compensation and finality and compensation for claimants and their attorneys. As an example, Gary Looney's case demonstrates the delays that modification can bring. *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305 (4th Cir. 2012). Mr. Looney filed a claim in 1993. When the Benefits Review Board finally affirmed Mr. Looney's award in 2005, the operator simultaneously filed a modification request and petitioned the U.S. Court of Appeals for the Fourth Circuit to review the award and stay its effect pending modification. The Fourth Circuit granted the stay. The modification process then took four years before the ALJ and another three years on appeal, not being finally resolved until 2012 when the Fourth Circuit affirmed the original award and affirmed the ALJ's decision to deny the modification request. The Fourth Circuit correctly described the procedural path that Mr. Looney had to endure as "tortured." It is unclear during this time if Mr. Looney received his back benefits, but his attorney was not almost certainly not able to collect attorneys' fees until the claim was final in 2012. Mr. Looney's case is not alone. For another example, see the case of Mae Ann Sharpe, *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317 (4th Cir. 2012), and the cases cited in the Notice of Proposed Rulemaking, 80 Fed. Reg. at 23,744 (collecting cases).

Part of the problem with modification procedure is the stay orders that appellate courts issue that allow an operator not to comply with the underlying award pending modification. The Department cannot control whether courts issue stay orders, but it can control the requirement for opening modification proceedings.

The Department's proposed rule is a pragmatic way to address the problems with modification procedures. It allows operators with legitimate modification requests to exercise their rights, but reduces the incentive for operators who merely wish to delay their obligations. This change should reduce the number of "tortured" cases such as Mr. Looney's and ensure that the risk of overpayment is on an operator rather than the taxpayers.

E. THIRD OPERATOR EXAMINATIONS WITHOUT GOOD CAUSE

Clarify That Operators Are Limited to Two Examinations Absent Good Cause

Because the Department is modifying § 725.414(a)(3) and introduced some confusion about the rule via the preamble to the Notice of Proposed Rulemaking, this rule is a good time to clarify that, absent good cause, operators are limited to requiring a claimant to attend two examinations.

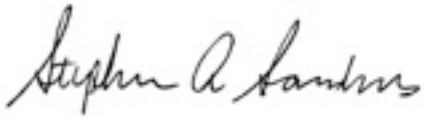
The preamble to the Notice of Proposed Rulemaking contains a confusing statement that raises the issue and warrants clarification. Page 23,745 of the Federal Register entry says "Currently, parties to a claim are free to develop medical information to the extent their resources allow and then select from that information those pieces they wish to submit into evidence, subject to the evidentiary limitations set out in § 724.414." This phrase has recently been understood by at least one Department ALJ to justify sending a miner to a third examination by a physician hired by the operator even though the miner cooperated by previously attending two other operator examinations. *See* Order, *McClanahan v. Brem Coal Co.*, No. 2013-BLA-05128 (June 4, 2015).

Appalachian Citizens' Law Center suggests clarifying that, regardless of the operator's resources, it is limited in its ability to develop evidence and may obtain only two examinations of the miner—absent good cause such as the discovery of information that raises a substantial issue about the accuracy of the prior testing. Preferably this could be addressed in § 725.414(a)(3) itself, but at the least, the preamble to the final rule should address this issue to avoid the confusion introduced by the preamble to the proposed rule.

CONCLUSION

Appalachian Citizens' Law Center thanks the Department for its responsiveness to these procedural issues in the black lung benefits system and the opportunity to provide these comments. If we may clarify our suggestions or provide further information about how experience informs our perspective, do not hesitate to contact us.

Sincerely,



Stephen A. Sanders
Director