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U.S. Department of Labor
Division of Coal Miner Workers' Compensation Programs
Office of Workers' Compensation Programs
Room C-3520
200 Constitution Avenue NW
Washington, DC 20210

RE: Proposed Revisions to 20 CFR Part 725
RIN 1240-AA10
80 Fed. Reg. 23743-54

On behalf of Drummond Company, Inc., we submit the following comments in response to the regulatory revisions to 20 CFR Part 725 proposed by the Department of Labor ("DOL" or the "Department"), as published at 80 Fed. Reg. 23743-54 (April 29, 2015).

General Comments:

Thank you for the opportunity to address the DOL's proposed rulemaking. At the outset, we welcome several of the revisions and commend the Department for its efforts in this regard. For instance, the revisions to § 725.414(a)(1) provides needed clarification to the parties' and, in certain circumstances, the Director's, right to submit supplemental medical reports without affecting the evidentiary limitations of § 725.414. Likewise, § 725.414(a)(3)(iii) rightfully allows the Director to submit evidence in cases where the responsible operator is financially incapable of defending the claim, thereby protecting the limited resources of the Black Lung Trust Fund. However, there are certain of the proposed changes we believe are problematic. Many of our objections deal with several sections' ambiguity and the uncertainty they will impose upon federal black lung litigation. Others, such as the sanction provisions of § 725.413(c), exceed the Department's regulatory authority.

We are aware of the comments already submitted and anticipate several others being filed by affected parties. As such, we have attempted to keep ours as concise as possible. We hope you will find them to be well-taken and make the suggested changes.

Comments on Specific Regulations:

§ 725.310 Modification of awards and denials.

§ 725.310(e)(1)(ii) - Penalties

Proposed § 725.310(e)(1) generally requires an operator to satisfy specific payment obligations prior to prosecuting a petition for modification. Section 725.310(e)(1) states that one of these prerequisites is:

> (ii) Reimburse the Black Lung Disability Trust Fund for all benefits paid (including payments prior to final adjudication under § 725.522, costs for the medical examination under § 725.406, and other benefits paid on behalf of the operator) with such *penalties and interest as are appropriate*.

(emphasis added).

The term "penalties" in this context is ambiguous and open to differing interpretations. This is made even more apparent by the fact that the DOL has expressed an intent to move away from the notion of regulatory penalties in favor of the less imposing phrase "additional compensation." For example, in the DOL's Summary of Proposed Rule (the "Summary") addressing the proposed linguistic revisions to §§ 725.601(b) and 725.607(c), the Department supports the revisions by arguing that "[t]he majority of courts to consider the question have agreed with the Director's view that the 20% payment required by [§ 725.607] is itself 'compensation' rather than a penalty." 80 Fed. Reg. 23748.

It is well-established that federal agencies are under a duty to implement regulations that, to the extent possible, are consistent with one another. *See*, e.g., FRRS 6-1577.3 (F.R.R.S. June 2015) (requiring agencies under the purview of the Federal Reserve Regulatory Service to enact regulations that are consistent with each other); SEC Release No. 34-63948 (S.E.C. February 23, 2011) (making revisions to the Securities and Exchange Act regulations to ensure consistency); F.R.B Press Release, 1994 WL 56914 (F.R.B. Feb. 24, 1994) (Federal Reserve Board proposing to enact "changes intended to make the regulation more consistent with the requirements of other regulations"); EPA 99-R-73 (July 8, 1999) (enacting a final rule to the Environmental Protection Act specifically to "eliminate inconsistencies and uncertainties in administrative enforcement proceedings").

In light of the DOL's desire to depart from the concept of regulatory "penalties," it begs the question of precisely what this term means in the context of § 725.310(e)(1)(ii). The primary concern is whether the penalties envisioned by this section are ones other than those already provided by existing regulations, such as §§ 725.601(b), 725.603(b), 725.606(g), 725.607(a), 725.608(a), (b) and (c).

This concern is further bolstered by the fact that § 725.310(e)(1)(ii) provides that "penalties and interest *as are appropriate*" may be imposed upon an operator. The emphasized language could be read as permitting an adjudication officer to impose any extra-regulatory penalty he or she sees fit. This uncertainty and imprecision runs afoul of Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (requiring agencies to draft regulations that are "simple and easy to understand, with the goal of *minimizing the potential for uncertainty* and litigation arising from such uncertainty") (emphasis added); *see also* Administrative Procedure Act, 5 U.S.C. 554(e) (requiring an agency to "remove uncertainty" with respect to the adjudication of claims in which a hearing is to be held).

The DOL's choice to use the phrase "penalties and interest as are appropriate" in proposed 725.310(e)(1)(ii) serves only to provoke additional uncertainty, not minimize it. As such, we respectfully request that the DOL revise this section to (i) replace the word "penalties" with language consistent with the Department's proposed linguistic changes to §§ 725.601(b) and 725.607(c); (ii) state that the only penalties which may imposed upon an operator for violating § 725.310(e) are those currently provided in existing regulations; and (iii) remove the phrase "as are appropriate" from § 725.310(e)(1)(ii) to avoid impermissibly bestowing upon an adjudication officer the discretionary authority to impose extra-regulatory penalties.

§ 725.413 Disclosure of medical information.

The DOL has proposed to implement 20 C.F.R. § 725.413 for the purpose of remedying what it perceives as inequities in the parties' evidence development and submissions. To the extent that proposed § 725.413 is supported by statutory authority, a proposition we contest,[1] the regulation should be revised in at least five respects. First, § 725.413(a)'s definition of "medical information" is ambiguous and imprecise to the point that the parties will be uncertain as to what evidence falls within its gambit. Second, § 725.413(a) is ambiguous as to the form of medical information that must be disclosed pursuant to § 725.413(b). Third, the Department does not address what impact, if any, a "disclosure" pursuant to § 725.413(b) will have on the restrictive evidentiary limitations of § 725.414. Fourth, we respectfully submit that the Department lacks the authority to impose sanctions pursuant to § 725.413(c) on a party or attorney for failure to comply with any regulatory obligation, including § 725.413(b). Fifth, even assuming for the sake of argument that the DOL possesses sanctioning authority, the list of possible sanctions available to an adjudication officer under § 725.413(c) is, by its terms, "not limited to" to the examples espoused in § 725.413(c)(2)(i)-(vi), thereby vesting the officer with unlimited and unlawful sanctioning authority.

1. § 725.413(a) – Definition of "Medical Information"

Proposed § 725.413(a) defines the term "medical information" as "any medical data about the miner that a party develops in connection with a claim for benefits." In this context, the terms "medical information and "medical data" are ambiguous, imprecise, and capable of

[1] *See* 5 U.S.C. § 556(d); *see also* 20 C.F.R. §§ 725.414, 725.456.

unlimited interpretation. As such, the terms do not advance the goals set forth in Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (requiring agencies to enact regulations that are "accessible, consistent, written in plain language, and easy to understand); *see also*; E.O. 12866, 58 FR 51735 (Sept. 30, 1993) (administrative regulations must be "simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.").

Federal agencies should make regulatory changes to resolve ambiguities, not create them. *See*, e.g., 75 Fed. Res. Bull. 443 (F.R.B. June 1989) (final rule of the Federal Reserve Board to implement amendments intended to resolve regulatory ambiguity); I.R.S. CC:LR-1942 (I.R.S. Nov. 5, 1987) (Internal Revenue Service proposal to "clarif[y] a possible ambiguity in the regulation").[2]

Section 725.413(a)(1) provides four examples of evidence that fall within the definition of medical information, such as a physician's written or testimonial assessment of the miner. However, the list of examples is non-exclusive. *See* § 725.413(a) ("Medical information includes, but is not limited to …"). As such, "medical information" could conceivably include: (i) any identifying information of a miner or his spouse, such as names, Social Security numbers, dates of birth, and addresses[3]; (ii) the miner's height, weight, sex, and age[4]; and (iii) whether and how a miner pays for treatment of any disease or disorder,[5] among others.

Due to § 725.413(a)'s ambiguity, a dissection of the definition for medical information and a listing of conceivable data that must be disclosed are not absurd or unnecessary tasks. To the contrary, this inherent uncertainty could lead an adjudication officer to sanction (*see* § 725.413(c)) a non-disclosing party simply for lack of imagination. *See In the Matter of Cleveland Elec. Illuminationg Co.,* 20 N.R.C. 1181 (Oct. 4, 1984) ("regulatory uncertainty itself

[2] Indeed, the Department recognizes this necessary goal. Its Summary indicates that the purpose underlying its proposed revisions to §§ 725.601(b) and 725.607(c) is to "add[] clarity to the rules." 80 Fed. Reg. 23750.

[3] The Health Insurance Portability and Accountability Act of 1996 (HIPAA) governs the disclosure of "protected *health information*," which includes "all *individually identifiable* health information." 45 CFR § 160.103 (emphasis added). "Individually identifiable health information" is defined as "information that is a subset of health information, *including demographic information* collected from an individual" … "that identifies an individual." *Id.* (emphasis added). Thus, to the extent an adjudication officer finds HIPAA's definition of "health information" informative, all demographic information regarding a claimant would be subject to disclosure under proposed § 725.413(b).

[4] Proposed § 725.413(a)(3) provides that medical information includes: "The results of any test or procedure related to the miner's respiratory or pulmonary condition, *including any information relevant to the test or procedure's administration*." (emphasis added). Section 718.204 which, among other things, defines "total disability" within the meaning of the BLBA, requires that the miner's age, sex and height be used to determine whether the results of pulmonary function tests meet minimum, eligible standards. *See* 20 CFR § 718.204(b)(2)(i)(A)-(B). Receipt of any one of these pieces of information would, therefore, conceivably trigger the disclosure requirements of proposed § 725.413(b).

[5] *See* 45 C.F.R. § 160.103 (providing that "health information" includes "the past, present, or future payment for the provision of health care to an individual").

has costs").[6] For these reasons, proposed § 725.413(a) should be revised to include an exhaustive list of data categories that fall within the definition of "medical information."

2. § 725.413(a), (b) – Form of Medical Information

The ambiguity associated with the definition of "medical information" is compounded by the fact that § 725.413(a) is also ambiguous with respect to the *form* by which the party receives the information – *i.e.*, whether it is written, electronic, or orally-transmitted data. For example, one interpretation is that medical information that is communicated orally to a party would *not* be subject to disclosure under proposed § 725.413(b). That is because § 725.413(b) requires a party to disclose medical information "by sending a *complete copy* of the information" to all other parties "within 30 days *after receipt*." (emphasis added).

As such, proposed § 725.413(b) should be revised to state with specificity the forms of medical information received by a party that require disclosure.

3. § 725.413(b) – Effect on Evidentiary Limitations

Proposed § 725.413(b) requires "each party to disclose medical information the party or the party's agent receives" by serving a copy of the same upon the opposing party. However, the regulation does not state whether or how such disclosure will affect a party's evidentiary limitations.

As the DOL is aware, § 725.414 prescribes very specific limitations on the type and quantity of medical evidence that a party may submit in support of its position. The precise question, then, is what effect, if any, does a party's disclosure under § 725.413(b) have on the limitations of § 725.414? Unfortunately, neither the language of proposed § 725.413 nor the Department's Summary of the proposed regulation addresses this issue. *See* Executive Order 13563, 76 FR 3821 and E.O. 12866, 58 FR 51735 (Sept. 30, 1993).

Questions raised by this omission include:

(i) Does a disclosure of a piece of medical information pursuant to § 725.413(b) "count" against the disclosing party's § 725.414 limitations?

[6] Regulatory ambiguity leads to litigation that imposes significant costs upon the parties and consumes scarce resources of federal agencies. *See*, e.g., *Secretary of Labor (MSHA) v. DQ Fire and Explosion Consultants, Inc.*, 36 FMSHRC 3083, 3087-88, 2014 WL 7642758, at * 4 (Dec. 19, 2014) (where regulatory ambiguity exists, parties must address a "wide variety of factors … including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether [the agency] has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question."). Needless to say, it is in the best interests of all involved, including the agency, that proposed regulations provide certainty and avoid ambiguity.

(ii) With respect to a party receiving a § 725.413(b) disclosure, does the receiving party's submission of that medical evidence to an adjudication officer "count" against such party's § 725.414 limitations?

(iii) If a party has submitted the full complement of evidence permitted by § 725.414 prior to an adverse party's § 725.413(b) disclosure, is that party thereafter prohibited from submitting the disclosure to the adjudication officer?

(iv) Does an adjudication officer have the authority to take judicial notice of a § 725.413(b) disclosure in cases where the disclosure is neither designated nor submitted by a party into the record?

For the foregoing reasons, proposed § 725.413 should be revised to include language that specifically addresses a disclosure's implications on § 725.414.

4. § 725.413(c) – Imposition of Sanctions

Proposed § 725.413(c) states that "[a]t the request of any party or on his or her own motion, an adjudication officer may impose sanctions on any party or his or her representative who fails to timely disclose medical information in compliance with this section." Section 725.413(c) goes on to list the criteria for determining an appropriate sanction and a non-exhaustive list of possible sanctions that may be imposed. *See* § 725.413(c)(1)-(2).

The DOL has sanctioning authority only if, and to the extent, such authority is granted it by Congressional approval. *See* Administrative Procedure Act, at 5 U.S.C. § 558(b) (stating that "[a] sanction may not be imposed or a substantive rule or order issued *except within jurisdiction delegated to the agency and as authorized by law.*") (emphasis added). Because no such authority has been bestowed upon the Department, proposed § 725.413(c) and its subparts should be stricken.

With respect to agency proceedings conducted pursuant to the BLBA, Congress has never vested the DOL with contempt powers. *See* 33 U.S.C. § 927(b); 20 C.F.R. § 725.351(c); 20 C.F.R § 802.103(b); *AZ Intl v. Phillips,* 179 F.3d 1187, 1192 n.5 (9th Cir. 1999) (only courts of law are empowered to punish contempt committed before an administrative tribunal); s*ee also* Bernard Schwartz, *A. Decade of Administrative Law: 1987-1996,* 32 Tulsa L.J. 493, 512 (1997) ("Contempt power is limited to courts and may not be conferred upon administrative agencies.").

As such, the District Director, administrative law judges, and judges of the Benefits Review Board are not Article III judges with the power to sanction parties. *See Schmit v. ITT Federal Electrical Intl,* 986 F.2d 1103, 1109-10 (7th Cir. 1993); *Gibas v. Saginaw Mining Co.,* 748 F.2d 1112, 1117 (6th Cir. 1984) (essential attributes of judicial power are not vested in the Benefits Review Board including the power to hold an individual for contempt and the power to

have its orders enforced); *see generally Temporary Emp't Serv. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 460-61 (5th Cir. 2001) (granting "expansive adjudicative powers to LHWCA administrative tribunals could violate Article III").

Indeed, Congress has specifically reserved sanctioning authority in BLBA proceedings to federal district courts (*see* 33 U.S.C. § 927(b)); therefore, proposed § 725.413(c) violates the separation of powers by usurping the authority of Article III judges.

Moreover, *existing* regulations applicable to proceedings under the BLBA explicitly confer sanction authority to the federal district courts. The provisions at 20 C.F.R. § 725.351(c) state as follows:

> If any person in proceedings before an adjudication officer disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the district director, or the administrative law judge responsible for the adjudication of the claim, shall certify the facts to the Federal district court having jurisdiction in the place in which he or she is sitting (or to the U.S. District Court for the District of Columbia if he or she is sitting in the District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same condition as if the doing of the forbidden act had occurred with reference to the process or in the presence of the court.

20 C.F.R. § 725.351(c) (incorporating 33 U.S.C. § 927(b)); *see also* 20 C.F.R § 802.103 (same, with respect to proceedings before the Benefits Review Board).

That the Department lacks the power to impose sanctions upon a party's failure to comply with § 725.413(b) is reflected by the complete absence of legal authority cited in its Summary of proposed § 725.413(c). *See* 80 Fed. Reg. 23747; *see also* 5 U.S.C. § 553(b) (requiring that agency notices of proposed rulemaking contain "reference to the legal authority under which the rule is proposed").

For the foregoing reasons, proposed § 725.413(c) and its subparts should be stricken in their entirety.

5. Section 725.413(c)(2)(i)-(vi) – Available Sanctions

Section 725.413(c)(2)(i)-(vi) provides several examples of sanctions that may be imposed for a violation of § 725.413(b). However, by its terms, the adjudication officer's sanctioning authority is "not limited to" these examples. 20 C.F.R. 725.413(c); *see also* Summary, 80 Fed. Reg. 23747 ("The sanctions listed [in § 725.413(c)] are not exclusive"). This, of course, leaves a party and its counsel with uncertainty as to the nature and extent of sanctions that may be imposed upon them if, for example, they fail to disclose "medical information" by mere oversight or negligence. This is contrary to the express limitations imposed upon the DOL by Executive Order 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993), requiring agencies to further "the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." Therefore, proposed § 725.413(c)(2) should be stricken in its entirety.

Conclusion:

We very much appreciate the opportunity to submit the foregoing comments. Thank you in advance for the Department's consideration of our suggested revisions.

Best regards,

Will A. Smith

cc: John A. Smyth, III
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