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June 29, 2015

Michael Chance, Director
DCMWC/OWCP
U.S. Department of Labor
200 Constitution Ave. NW., Suite N-3520
Washington, DC 20210

Re: Proposed Regulations
RIN No. 1240-AA10

Dear Mr. Chance:

This comment is submitted by Sandra Fogel, Joseph Allman, Anne Megan Davis and Thomas Johnson. Together, we have over 60 years of experience in representing claimants in black lung claims.

We support revising 20 CFR 725.310 to require operators to comply with their obligation to pay black lung benefits previously awarded to a claimant before pursuing modification. Proposed subsection(e)is clearly consistent with the Act, the regulations and case law referenced by the Department. *See also Hanson v. Director, OWCP,* (7th Cir. 1993). Operators should not be able to delay or avoid their obligation. The Trust Fund should not be unnecessarily burdened with carrying the operators' obligation and paying benefits during the modification period.

We support adding the new rule at §725.413 requiring full disclosure of medical information developed in a claim. The requirement of full disclosure is absolutely consistent with and gives effect to the remedial purpose and spirit of the Act. It is especially important that all miners have unbridled access to all medical information regarding their health, given their high risk for developing coal dust-induced lung disease that is progressive, affects their quality of life, and too often is life-threatening. Access to medical data directly affects detection and treatment of occupational lung disease and perhaps other significant health concerns. Non-disclosure has a chilling effect on the central goal of promoting informed medical decisions. Access to medical data also has an enormous impact on a miner's career. It affects decisions on whether to continue working in an overly dusty environment, transfer to a less dusty work area, or stop working as a coal miner and seek other type of employment. Thus, disclosure in the interest of occupational health and safety is essential in facilitating independent decision-making.

In black lung cases, medical reports form the crux of the case. That an operator would conceal the results of a pulmonary examination that negatively affect a miner's health simply because it values defeating a compensation claim over disclosure is immoral and indefensible. Lack of information kills people; having medical records can save lives. The proposed rule clearly

provides that the right to know trumps litigation strategy every time. It promotes a miner's right to control his or her own care and manage his or her health based on information that affects current and future diagnosis, treatment and prognosis. Finally, full disclosure will allow a miner the opportunity to submit additional favorable evidence and enable the district director and administrative law judge to carry out the truth-seeking function of the claims process and evaluate a claim based on a complete and accurate representation of medical facts.

We understand that the proposed disclosure rule does not modify in any way the terms of Rule 26(b)(4)(B) and (C) of the Federal Rules of Civil Procedure. We would oppose any interpretation of the term "medical information" that would include drafts of a medical expert's reports and the communication between the attorney and expert.

We are concerned with the proposed sanctions that may be imposed for failure to disclose medical information as they apply to attorneys for claimants. Often enough, attorneys represent claimants after their claims have been filed and some amount of evidence has been developed. In a number of cases, attorneys begin to represent claimants on modification or in subsequent claims. The attorneys do not usually have access to a complete copy of a claimant's case. Instead, the attorneys receive a stack of loose papers that often have been disassembled or do not include all relevant material. In such situations, the attorneys should never be held liable for any prior non-disclosure. Unless this is made clear in the proposed rule, attorneys may be reluctant to represent miners on modification or in a subsequent claim. Nor would they want to get involved in a matter that may result in a charge of ethical misconduct. Although the Department may believe that the proposed rule already addresses this situation, the general language regarding good cause does not go far enough. Heavy sanctions are being proposed for non-disclosure and, regardless of which sanction is imposed against a claimant, the end result is likely going to be dismissal of the claim. The Department should revise the proposal to relieve claimant attorneys from the threat of sanctions for non-disclosure in cases where the medical information at issue was not made available to the attorney.

We support revising §725.414(a)(1) for the purpose of clarifying that a physician's supplemental report is part of the physician's initial report and does not constitute a second report in the claim. This concept is not new. In a number of unpublished cases, the Benefits Review Board has consistently agreed with the Director's position and held that a supplemental report in which the physician reviews and comments on additional record evidence that was not available when the original report was prepared is part of and completes the physician's report. *See, e.g., C.L.H. v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA (Oct. 31, 2007)(unpub.); *W.S. v. Patsy Jane Coal Corp.*, BRB No. 07-0625 BLA (Apr. 30, 2008)(unpub.).

What is not clear is how a physician's report in a modification proceeding should be treated when the physician also wrote a report that was submitted as evidence in the original claim. There is confusion over whether the modification report is a continuation of the report in the original claim or counts as one of the permitted reports. The current evidence limitations rule does not specifically address the matter; neither does the proposed amendment. The issue is occurring more frequently, and judges tend to rule differently on how the modification report may be designated. The fact that parties may backfill evidence on modification so that they have

the maximum number of reports allowed in the original claim and can add the one additional report allowed on modification adds to the confusion. *Rose v. Buffalo Mining Co.*, 23 BLR 1-221 (2007). In cases where reports on modification are allowed into evidence as supplemental reports, the operators, who have the resources to develop limitless evidence, are able to submit three affirmative medical reports and up to three rebuttal reports. This practice destroys the effect of limiting the amount of evidence on modification to one affirmative and one rebuttal medical report under §725.310. It also thwarts the Department's goal of ensuring "that claimant and the responsible operator have an equal opportunity to present the highest quality evidence to the factfinder." 65 Fed. Reg. 79920, 79976 (Dec. 20, 2000). We urge the Department to take the opportunity to clarify its position regarding the designation of a modification report in situations where the author of the report wrote a report in the original claim.

The Department discusses a proposed change to §725.414(a)(3)(iii), but the language in the proposed regulation appears identical to that in the current rule. In any event, we cannot support the Department's proposed revision that would allow the Director to submit evidence, up to the limit allowed for an operator, in claims where the identified responsible operator ceases to defend the claim or where all potentially liable operators are dismissed, without further clarification. Without question, the Director should be able to defend an unmeritorious claim in this situation, provided the claimant received a proposed decision and order denying benefits. Our concern is that the Director might submit medical evidence that had been developed by the previously identified operator(s), which is unacceptable for a few reasons. First, in a claim where the district director issued a proposed decision and order awarding benefits, challenging the claim at the hearing stage would be unreasonable and irrational. Public policy and the image of the Department as a neutral party whose role is to process claims and issue initial eligibility determinations weigh against it. An award by the district director is typically based on the opinion of the DOL examining physician. If the Director decides to continue challenging an award initiated by a dismissed or unavailable operator, is DOL going to use the operator's evidence to impeach its own doctor? That seems ridiculous. Second, the decision to defend any claim, awarded or not, presents a conflict of interest for the Department because of all the routine communications between the claims examiner and the unwitting claimant while the claim was being processed at the district director's office. These eventually could be used against the claimant to defeat the claim. Third, the Director should not be able to rely on the opinions of expert witnesses hired by a dismissed or unavailable operator, because those physicians virtually always have an opinion that is contrary to the Act, the regulations and the science. We would ask the Department to clarify how it plans to implement the proposed rule and consider and address these concerns.

Finally, although the Department did not open §725.414(a)(4) for discussion, we believe that a stronger rule is required to clarify the medical records that are admissible as hospital and treatment records. Too often, the current rule is abused by operators who submit hundreds and even thousands of pages of medical records that are unrelated to cardiopulmonary disease. Some judges require parties to index or summarize medical records that are over a certain number of pages, but it is not a practical solution, especially when the rule limits the admissibility of such records. It drives up the time that has to be spent on a claim as well as the cost of litigation. Because the operator's witnesses review and comment on the irrelevant records, a claimant is

forced to have his or her experts do the same. The stated purpose of the 2015 proposed regulations is to address and resolve procedural issues that have arisen in claims administration and adjudication. If the goal is to minimize uncertainty and litigation arising from such uncertainty, this rule merits review and revision.

Respectfully submitted,

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