



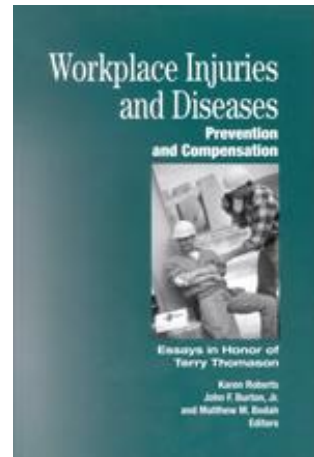
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# Revisiting Black Lung: Can the Feds Deliver Workers' Compensation for Occupational Disease?

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# 10

## Revisiting Black Lung

### Can the Feds Deliver Workers' Compensation for Occupational Disease?

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With only a few exceptions, American workers are protected from work-caused injuries and diseases under state—not federal—workers' compensation laws. As a result, it is an oddity to find a specified category of private sector workers covered under a federal workers' compensation program, and solely for one grouping of diseases. Since there are strongly held positions on the desirability of having the federal government play a dominant role in compensation for other occupational diseases, the track record of such a program can serve as an indicator of how successful such a new approach might be. The central focus of this chapter is the Black Lung Program, created to compensate workers for occupational disease due to coal dust exposure. In this chapter I first describe the history and the development of the law, and then give some emphasis to the benefits that the program has delivered. I also consider the challenges of federalizing a program that had been administered previously, solely by the states. I conclude by attempting to lay out some lessons that the program has provided us.

The origins of my interest in this subject can be traced to the early 1970s. Although the Coal Mine Health and Safety Act that created the Black Lung Program was enacted in 1969, it was actually the passage of the Occupation Safety and Health Act (OSHA) of 1970 that led me to this subject area. Section 27 of the 1970 law created the National Commission on State Workmen's Compensation Laws to evaluate and make recommendations on a host of issues related to those laws. While the commission's final report assessed a variety of issues, including those

that the OSHA statute expressly mandated, one issue that was barely considered was that of compensation for occupational disease. As a result, I considered that a necessary trail to follow.

The second factor that led in this direction also followed from the work of the commission. One of the central themes in the life of the commission was the future role, if any, of the federal government in workers' compensation programs. A steady drumbeat of those opposed to federal involvement was that the three programs for which the federal government had responsibility were, at best, no better than the state programs. Like so much in this field, it was difficult to separate fact from self-interest, conventional wisdom, and rumor.

I conducted several studies relating to occupational disease that led me to conclude that the states were doing an ineffective job of compensating afflicted workers, or their survivors, for most diseases.<sup>1</sup> While the temptation was strong to suggest that this be left to the federal government to remedy, it seemed irresponsible to do so without first examining an existing federal program to compensate victims of occupational disease. The result of that was my examination of the federal Black Lung Program, which left me wary of recommending that the state programs for occupational disease be scrapped.<sup>2</sup> If neither the state programs nor the federal Black Lung Program were delivering benefits well to workers with occupational diseases, what other alternatives existed? Several things about the tort experience as found in the asbestos debacle or in the Federal Employers Liability Act as it applied to railroad employees offered little hope that this was the appropriate route to take in place of workers' compensation. In the absence of any more general approaches to occupational disease compensation, it may be that the various state and federal programs should be reexamined to determine whether the more recent experience appears to be more promising.

The Black Lung experience is not the only source of learning on federal involvement in occupational disease compensation. A new federal program for occupational disease compensation recently has been created, the Energy Employees Occupational Illness Compensation Program Act of 2000. As its name indicates, this legislation targets a highly specific group of workers. However, it is probably too soon to evaluate at this point, particularly since the portion assigned to the Department of Energy (subsection D) has experienced some serious delays in its implementation.

## A BRIEF HISTORY OF THE LAW

On November 20, 1968, an explosion occurred in a large mine in Farmington, West Virginia. After an extraordinary amount of media coverage of the attempt to rescue miners trapped therein, the mine was sealed 10 days after the blast, entombing 78 men. This tragedy led Congress to pass the Coal Mine Health and Safety legislation, which President Nixon signed 13 months later. The law aimed to improve the safety conditions in America's coal mines, and the bulk of the law is directed that way. However, at the urging of some powerful members of Congress from the coal-producing states, particularly West Virginia and Kentucky, a Title IV was inserted to provide "black lung benefits" to miners with the disease.

As the statute was initially enacted, it can be separated into three distinct portions. First, claims for old cases that met certain criteria were to be paid. In some instances, these cases emanated from miners or survivors of miners who had stopped working in coal mining many years before. These claims were to be paid out of U.S. Treasury funds. Secondly, compensation was to be paid for persons who became disabled or died more recently, and where claims were to be filed in the period after the old cases had had time to make their claims. These claims were to be paid initially by the U.S. government, with their liability to be shifted to coal mine operators. Finally, eligibility for benefits under the federal law would expire in several years, subject to certification by the U.S. Department of Labor that the state programs met specified standards, allowing the states to again assume sole responsibility to administer their workers' compensation programs. Table 10.1 provides a summary of the most significant developments under the law.

The case for a federal black lung benefits program partially rested on the argument that the states were not providing compensation benefits to coal miners who suffered from this condition. At the time, there was little evidence to demonstrate how frequently states were granting compensation benefits to miners disabled by respiratory illnesses caused by their employment. Supporters of a federal black lung benefits program did not differentiate between the states as to those that were doing a more conscientious job of providing compensation in a manner consistent with their laws. The case for a federal program clearly left unresolved a number of questions, including whether the states were

**Table 10.1 Historic Developments, Black Lung Program**

Year	Measure	Significance
1969	CMHSA enacted. Part B established in SSA. Part C established in USDOL.	Creates Black Lung Program.
1972	Law amended.	Extends Part B program by 18 months. Part C program life extended from 1976 to 1981. Federally funded benefits under Part C to end in 1973.
1977	Law amended and Black Lung Revenue Act enacted.	Interim standards imposed on Part C program. Termination of Part C program is dropped. Creates Superfund-like arrangement.
1980	Ronald Reagan elected.	New administration.
1981	Black Lung Benefits Act and Black Lung Benefits Revenue Act of 1981 enacted.	Benefit standards tightened. Coal excise tax increased. Insurers escape potentially high liabilities.
1985	COBRA enacted.	Excise tax increased as a temporary measure.
1987	PL100-203.	Period of temporary excise tax increase extended to 2013.
1988	<i>Pittston Coal Group et al. v. Sebben et al.</i> 488 U.S. 105 (1988).	Trust fund and employers dodge potentially large liability.
1997	USDOL propounds new regulations.	Proposes tighter administration and relaxation of some standards.
2000	New regulations promulgated.	

NOTE: CMHSA = Coal Mine Health and Safety Act; SSA = Social Security Administration; USDOL = U.S. Department of Labor; COBRA = Consolidated Omnibus Budget Reconciliation Act.

enabling workers with other forms of occupational diseases to receive compensation benefits. And the case in favor of enactment of Title IV was advanced vigorously on the grounds that it would be a very inexpensive draw on the federal budget. Advocates for enactment argued that it would likely be a relatively inexpensive program for the coal mine companies, who found themselves in an industry that was in secular and very serious decline, particularly in the underground sector.

Title IV largely consisted of two parts. For claims filed on or before December 31, 1971, the program, Part B, was to be administered by the Social Security Administration (SSA). The goal was straightforward enough: benefits, funded by the U.S. Treasury, were to be provided for persons who were totally disabled due to pneumoconiosis, or to dependent survivors of miners who had died from that disease. The hope was that in the first two years of the program, all the old cases would be compensated, leaving the newly developing cases for Part C of the program. The latter was to be the U.S. Department of Labor's (USDOL's) responsibility beginning in 1973. That agency was to certify that the states were meeting certain minimum standards, and that the new cases of sickened miners then would be administered by the states. As such, the Part B portion of the program would fade out of existence, as benefit determinations would cease after the initial two years, and as a result of the attrition of beneficiaries through aging and passing on. The expectation was that through attrition, Part C would become superfluous as states would administer their workers' compensation law and accept the coverage of mine workers with pneumoconiosis.

This phasing out of a federal role was linked to a timetable that proved to be wholly unrealistic. The hope was that the "old" claims would be dealt with under Part B, and that all of those claims would have been filed by Dec. 31, 1971. The transition year, 1972, was to have claims paid by SSA only until the end of the year and then handed over to USDOL. After December 31, 1972, the benefits were to be paid by coal mine operators under the USDOL's Part C program, or through the federally certified state workers' compensation programs. In essence, the plan was for those who filed a claim in the transition year to be paid after Dec. 31, 1972, in the same manner as were those who filed a claim after that date.

For those "new" claims filed in 1972 and later, where benefits were not paid under a federally certified state law or by a coal mine operator,

federal general revenues were to be used to pay benefits. The expectation by some was that the Coal Mine Health and Safety Act would lead to a sharp reduction in the incidence of black lung disease. That expectation relied upon the various health and safety provisions that were the *raison d'être* of the 1969 law. The hope was that this would enable federal involvement in these cases to cease by the end of 1976, aside from simply continuing to pay benefits under the Part B program. Indeed, benefit payments made under the Part C program, whether from a mine operator or paid by USDOL, would no longer be required after that time. Thus, the plan was that the liability of mine operators was to be a temporary one, aside from any state law benefits.

Some critics charged that Part B was not a workers' compensation program because it had characteristics that were different from all the state programs. For example, benefits for living miners was paid solely for total disability (comparable to Social Security Disability Insurance), once benefits began, they were expected to be paid for a lifetime, and benefit amounts were not linked to the worker's earnings. By contrast, all workers' compensation programs in the states (and all other jurisdictions that I know), pay benefits also for partial disability, compensation for temporary disability appears to be the cornerstone of all other programs, and benefits are almost always linked to the worker's preinjury earnings level.

Another feature that seemed to differentiate the federal program was that benefits were awarded based on the date that the claim was filed, not on the date when total disability or death occurred. Since the payments were considered to be workers' compensation benefits, any Social Security disability benefits were offset against the Part B payments, as were unemployment insurance, state workers' compensation, and temporary disability insurance benefits. Benefit levels were tied to the federal employee pay scale so that benefit payments (new and continuing) were adjusted (upward) annually in line with the federal pay schedule.

Upon enactment of the law, claims for benefits from workers or survivors poured into local SSA offices. A variety of coal worker organizations worked at spurring the submission of claims, and since benefits were to begin for successful claimants from the date of filing, any delays meant foregone income. In the first year of the program, about one-quarter of a million claims were filed. Although 350,000 claims

were filed by the end of December 1971, new claims continued to flow in at the rate of about 1,500 per week. Clearly, coal mine operators could foresee a massive liability awaiting them. Moreover, despite the unexpectedly large volume of claims by Dec. 31, 1971, it was also apparent that not all of the “old” cases had been filed; indeed, some were for death or disability that had occurred many years previously. SSA moved with extraordinary speed on the claims submitted, but much to the disappointment of the program’s supporters, about half of the claims were denied compensation. These three factors, the potentially ruinous outlook for some mine operators, the continuing inflow of old cases—many of which were based on employment in the mines that ended before 1970—and SSA’s denial rate led those who supported the 1969 enactment to push to amend the law in 1972.

The 1972 amendments extended the Part B program for an additional 18 months. This would enable more of those with “old cases” to file claims under the Part B program. The Part C program, which was to have ceased at the end of 1976, was to be maintained until December 31, 1981. This gave the states more time to amend their laws and change their practices so as to achieve certification by USDOL. It would also extend the period for which claims for newly developed illnesses or fatalities would be eligible for benefits that would be paid out of federal funds. After December 31, 1981, it was envisioned that the payments under Part C were to end. A new transition period was mandated, from July 1, 1973, to December 31, 1974. Under the 1972 amendments, claims filed prior to July 1, 1973, that were approved would receive lifetime benefits; those filed from July 1, 1973, to December 31, 1973, were to receive federally funded benefits till December 31, 1973, and then become the responsibility of the mine operators. Any claims filed after December 31, 1973, were to be the responsibility of the employers.

The hearings that led to the 1972 amendments along with the modifications caused SSA to grasp the message that Congress was conveying and substantially liberalize the standards for compensability. However, when USDOL was handed the administrative baton on July 1, 1973, a variety of disasters befell the agency. First, the agency was overwhelmed by large numbers of old claims from the transition period and from post-July 1. Second, the states did not respond as had been forecast with the result that successful state certification never material-



ized. The states did not enact legislation to enable them to be certified by USDOL, absolving the federal government from turning over the administration and funding to the states. Additionally, unlike the Part B program which used federal funds, USDOL was now responsible for identifying responsible payers, a litigious and lengthy process. Indeed, in most cases no responsible operator could be identified and made liable, so USDOL was the payer of last resort.

USDOL was not the only party that found the law difficult, and it received considerable heat for the way it carried out its responsibilities. The law's most ardent supporters were frustrated with the Labor Department as well, eventually resulting in amending the law again, this time in 1977. For a number of reasons, delays of several years in adjudicating claims meant that applicants were not learning of the resolution of their claims. Worse, for the law's advocates, fewer than 8 percent of claims were approved for benefits where a decision had been rendered. By the time of the 1977 amendments to the law, about 125,000 claims had been filed with USDOL, 6,000 received awards, and 70,000 claims were denied.<sup>3</sup> In sharp contrast, to that date SSA had achieved an approval rate of 70 percent. The difference was that the standards USDOL used for compensability were based on the agency's best efforts at compliance with a statute that was vague at best.

The 1977 amendments enabled USDOL to set its own medical standards for determining compensability. Until those standards were finalized, however, temporary standards were to be used and here the amendments imposed very strict guidance. The labor department's interim standards were to be no more restrictive than the ones used by SSA under the Part B program after the 1972 amendments (which achieved the nearly 80 percent acceptance rate). In addition to lowering the standards for finding the presence of the disease, evidentiary requirements on the claimants were reduced, the notion of total disability was broadened, and the occupational qualifications were expanded. Previously denied claims were to be reviewed once again for entitlement by USDOL, as were previously denied Part B claims, and claimants could provide new evidence if they chose to do so.

In addition to greatly expanding the opportunity to obtain benefits, the termination date for the Part C program was dropped, essentially making the program a permanent one. Further, Congress needed to fix the financing problem that had resulted from the huge inflow of claims

under Part C, along with USDOL's inability to successfully assess liability against private coal companies in so many of the successful claims. The result was a separate piece of legislation, the Black Lung Revenue Act of 1977, which took a Superfund-like approach to financing benefits.<sup>4</sup> A tonnage tax was levied on coal extracting companies to support a federal trust fund that would pay benefits in one of three instances. First, for a compensable claim where a responsible operator could not be identified, the fund would pay the appropriate benefits. Second, the fund would pay if the successful claimant had last worked in the mines prior to January 1, 1970. Finally, the fund would pay benefits in cases where a responsible operator did not begin to make payments in a timely manner, though the fund would then seek reimbursement from the business.

Despite the issuance and application of the more liberal, interim rules, many claims were denied. While USDOL promulgated its interim rules in a manner that it believed was no more strict than those it was obliged not to exceed, this led to court challenges by claimants denied benefits under the interim rules. A critical issue was one of the presumptions in USDOL rules that could be invoked by a claimant if the worker had at least 10 years of employment in coal mining. Four separate U.S. Circuit Courts found the requirement that there must be at least 10 years of employment before the presumption in the claimant's favor could be invoked to be unacceptably restrictive, and ordered that USDOL reopen over 94,000 cases. Had these cases been found to be successful, the costs could have exceeded \$13 billion, imposing a burden both on the trust fund and on employers and their insurers. Strikingly, the Supreme Court found that the application of this key presumption had been more restrictive than the interim standards were to allow, but that the 94,000 cases would not have to be reopened.<sup>5</sup> Instead, the decision required reconsideration only of the small number of denied applications (6,000–7,000 claims) that had sought a judicial review at the time of the denial.

Three things led to another major turning point in the program in 1980–1981. First, USDOL issued the new regulations for the program, no longer tied to the liberal standards of the interim rules. Second, a new administration was elected in 1980. It was evident that it would not continue the more inclusive type of program that had evolved under both the SSA standards and the interim ones that USDOL employed after the

1977 amendments. Third, by 1981 many claims had been determined to be compensable. The new administration sought to tighten standards under the law. The law's most ardent supporters could consider that their war had been won and that few older miners with respiratory illnesses (or survivors) had not received compensation. In 1981, the laws were amended by enactment of the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981. The result was legislation that emerged from compromises between the law's defenders and those who believed that it had been overly generous in the awarding of benefits. Reflecting this compromise, while some standards for benefit eligibility were toughened, claims that had been filed before the effective date were to be evaluated under the criteria that were in place previously.

The new amendments also made accommodations to most of the interested parties, including the insurance industry, which was relieved of having to pay benefits for some of about 10,000 cases that would now become the responsibility of the trust fund. At the time the 1981 amendments were passed, the trust fund was already indebted to the U.S. Treasury by over \$1.5 billion. To remedy that, the amendments increased the excise tax on the coal extraction industry. The tax was again increased (as a temporary, 10-year measure) in 1985 in the Consolidated Omnibus Budget Reconciliation Act of 1985, which also placed a 5-year moratorium on the interest charges due to the Treasury. In 1987, PL 100-203 extended the temporary tax rates that had been set in 1985 through 2013.

In 1997, USDOL announced changes that it sought to make in its regulations. One of the goals was to improve the efficiency of claims adjudication. Another aim was to reduce some of the difficulty that some applicants faced in having their claims found to be compensable. The final regulations were announced in December 2000 and then were subjected to serious challenge in the court. Widely varying estimates were made about the impact of the changes on employer and trust fund costs and on the incidence of successful claiming that would be expected to occur.

## BENEFITS AND BENEFICIARIES

Compensation for benefits under the federal program varies only with the presence of and number, if any, of dependents. As of 2003, the compensation of a primary beneficiary was \$534 per month, or \$801 per month for a primary beneficiary and one dependent. (The amounts are the same in the Part B and Part C programs.) The maximum monthly benefit was \$1,069 for a primary beneficiary and three dependents. Federal black lung benefits are considerably lower than those payable in state workers' compensation programs, though the state claims appear to be more difficult to win. A sample of state workers' compensation benefits is shown here for illustrative purposes, drawing on those states that have had the largest number of federal claimants. The following were the maximum weekly benefits under state workers' compensation laws for total disability in 2003:

Alabama	\$569
Illinois	\$1,004
Kentucky	\$571
Pennsylvania	\$675
Virginia	\$681
West Virginia	\$527

The state benefits rates assume total disability, and unlike the federal benefits, are not payable for a lifetime, typically. Moreover, the monthly federal benefit rates are adjusted annually to reflect changes in average price levels. Medical benefits for treatment of the compensable condition are paid fully, theoretically, in each system.

USDOL is not able to provide a single estimate of the number of successful miner claimants over the life of the program. It can report, however, the number of beneficiaries with "active claims" in a year. Active claims (under Part C) include any of the following: those being paid from the trust fund or by responsible mine operators, cases in interim pay status, those where offsets are taken and those that have been suspended temporarily. In terms of the number of beneficiaries, both primary and total (where total includes both primary and dependent beneficiaries), the program is rapidly receding. Table 10.2 shows that the Part C program has contracted from its high point in 1983, when

**Table 10.2 Black Lung Beneficiaries, Part C Program, Selective Years**

	1980	1983	1988	1993	1998	2003
Miners	52,922	64,181	54,920	40,866	27,340	14,733
Widows	26,739	35,178	41,607	44,103	41,585	32,615
Total <sup>a</sup>	139,073	166,043	150,123	123,213	94,488	61,162

<sup>a</sup> Total includes all primary and dependent beneficiaries and excludes medical-benefit-only claims.

SOURCE: Unpublished and published annual reports, USDOL.

over 64,000 miners were receiving benefits.<sup>6</sup> Not surprisingly, the Part B program has had a very substantial decline in the number of its beneficiaries, particularly miners, as can be seen in Table 10.3. The data demonstrate how much the Part B benefits provided financial support to an older miner population, many of whom had stopped working before the law was enacted. SSA estimates that 97 percent of the miners and widows were age 65 and over in 2001.

One of the more contentious issues over the life of the program has been its utilization. When the law was first proposed, and in its early years, the numbers of potential (successful) applicants for benefits were greatly underestimated. In 1970, the first full year of the program, coal mining employed only 132,000 workers. While that number had been declining for several decades, 15 years earlier, only 169,000 persons were employed in coal mining. (Clearly, a number of those employed in 1955 were also employed in 1970.) About 350,000 claims (some from survivors) were filed within the first two years of the Part B program. It appears that more (former) miners were drawing Part B benefits in 1974

**Table 10.3 Black Lung Beneficiaries, Part B Program, Selective Years**

	1974	1979	1985	1990	1995	2001
Miners	169,097	129,558	77,836	45,643	24,573	9,779
Widows	134,700	146,527	138,328	118,705	91,517	55,412
Total <sup>a</sup>	487,216	419,948	294,846	210,678	143,011	79,518

<sup>a</sup> Total includes all primary and dependent beneficiaries.

SOURCE: SSA (2002).

**Table 10.4 Part C Claims, Adjudication, Initial Level, FY 2001<sup>a</sup>**

Findings	Number decided	Approval rate (%)
Trust fund approved	80	9.6
Trust fund denied	757	
Responsible operator approved	283	8.0
Responsible operator denied	3,269	
Total approved	363	8.3
Total denied	4,026	
Total findings	4,389	

<sup>a</sup>Includes reconsidered claims.

SOURCE: USDOL (2001).

than were employed in the mines at the time or within any recent years. It is evident that a very large proportion of persons who ever worked in coal mining applied for and in many cases received benefits from either the Part B or the Part C programs. While this attests to the liberality of the compensability standards of the law, at least during its first decade, it also suggests that respiratory illness in coal miners was widespread.

Table 10.4 shows the results of Part C claims decided in fiscal year 2001, the most recent year for which these data are available from the Labor Department. While almost 4,300 Part C claims were decided that year, only 363 (8.3 percent) were approved that year. Clearly, the level of activity in terms of new claims has slowed down substantially from earlier years. It seems likely that the most recent changes in regulations will lead to a higher rate of claim acceptances, and this in turn may generate some increase in claiming.

## TRUST FUND EXPENSES

Though the volume of new claims decisions and acceptances is small relative to previous years, the program's continuing expenses are not trivial. As shown in Table 10.5, expenditures by the trust fund for the Part C program in fiscal year 2001 were approximately \$1 billion,

**Table 10.5 Black Lung Benefits Program Obligations, FY 2001,  
Part C (\$, 000)**

Total obligations	1,016,994
Total benefits	396,928
Income benefits	336,813
Medical benefits	60,116
Administrative costs	52,252
Interest charges	567,814
Coal tax revenues	522,200
Repayable advances from the Treasury Department	505,000
Cumulative trust fund debt	7,253,557

SOURCE: USDOL (2001).

including the interest charges to the fund for current and previous borrowing from the Treasury Department. Strikingly, though the number of recipients has been declining over the previous 10 years, obligations have increased, albeit slowly. The reason for this is that despite the decline (in nominal dollars) in expenditures for indemnity and medical benefits, the increase in interest charges has more than offset this. Since tax revenue from coal mining was about one-half of that amount, the fund needed to borrow another \$500 million in FY 2001. The result is that the fund is indebted to the Treasury by about \$7.3 billion. Note that this does not include payments made during the year by mine operators under the Part C program for new and continuing beneficiaries. Expenditures for the Part B program in 2001 continued to decline, falling to \$470 million for the year (SSA 2002). Note also the relatively small proportion of total benefits that went for medical benefits. It reflects several things, including the limited ability to treat such respiratory conditions, and the absence of certain costly medical procedures that other illnesses and injuries would require.

## **SOME LESSONS IN RETROSPECT FROM THE BLACK LUNG EXPERIENCE**

What lessons can be drawn from the experience of a program that is almost 35 years old? The issue may be more than one of academic interest. The Energy Employees Occupational Illness Compensation Program Act (EEOICPA) is a new federal, occupational disease program. It may not be the last time that the federal government seeks to replace or augment portions of the states' workers' compensation laws.

### **Breadth versus Depth in Benefits**

The Black Lung Program is a prototype of those transfer payment programs where government opts for extremely broad coverage (in this instance with respect to the nature of the health condition), but very modest amounts for beneficiaries. Though state workers' compensation programs can scarcely be characterized as generous in their benefits, they appear to be absolutely munificent compared to the federal standard.<sup>7</sup> Any new transfer payment program may face some trade-off between coverage and benefit adequacy that is the result of implicit budget constraints. At the birth of this program, its supporters understated the potential number of benefits applicants. Once the legislation was enacted, a widespread effort to generate applications began, and the numbers of applicants—and eventually beneficiaries—swelled. Yet despite the changes enacted during the program, little effort was made by program advocates to increase the basic level of benefit.

### **Problems with Multiple Agency Delivery**

The Black Lung Program can be analyzed as two distinct ones. Though the Part B (SSA) and Part C (USDOL) components of the law were quite clearly delineated, they both were responsible for providing benefits for black lung disease to coal mine workers or their survivors. As a result, for several years the standards for compensability were markedly different in the two agencies. This created enormous problems for those responsible for the less liberally administered program, in seeking to mollify those who were denied benefits. Thereafter, the more liberal standards applied by one agency were essentially imposed



on the other, only to change again. The observation that multiple agency administration was problematic is hardly one that required over 30 years of program experience. However, it may have been lost on those who created the Energy Employees Occupational Illness Compensation Program Act of 2000. A few years into the life of that program, a variety of groups called for the Department of Energy to relinquish its role under Part D and transfer the administration of that portion of the law to the Department of Labor. Recall also that in 1997 the administration of the Part B program was transferred from SSA to USDOL.

### **State Workers' Compensation Programs Still Have Difficulty with Coal Workers' Pneumoconiosis**

The original plan for this law was to turn it over to the states after the federal government certified the adequacy of the state laws. That proved to be one of the many missteps taken by the law. For all purposes, the states did not rush in to do so as had been forecast. The result is that USDOL is still responsible for determining both compensability and liability under the law. There does not appear to be any statutory bar on a worker's successfully winning compensation in the state systems. And since benefit levels tend to be higher in the state programs, one would expect that most applicants would seek benefits there. Data are lacking on the numbers of workers who have successfully gained benefits in the states, but there are reasons to believe that gaining them is difficult. First, the number of workers with federally derived benefits who are also obtaining state benefits appears to be minuscule. USDOL has reported that only 4 percent of the total cohort of Black Lung Program beneficiaries have an offset of their federal awards. Additionally, USDOL provides SSA with a listing of Part C beneficiaries in order to apply the SSDI offset.<sup>8</sup> The annual amount of the offset savings to SSA was less than \$400,000. Data from the states reinforces the view that the states are not paying many new black lung claims. In at least one state, Kentucky, the law was tightened in 1996, and although it appears to have been liberalized in 2002, for all purposes, virtually no new beneficiaries are being compensated. Until 1996, Kentucky may have been the most liberal of the states with regard to compensating this disease.

## **Defining the Disease**

Historically, many jurisdictions worldwide and in the various states have “scheduled” diseases that would be compensable in their systems. By defining the conditions that would be compensable, at least under certain conditions, these laws reduced the difficulty in administering them. The Coal Mine Health and Safety Act followed that model, though it did so inadequately. Prior to its enactment in 1969, there was no disease known as black lung. (History now has it that this was a legislatively created disease.) The law’s supporters and their representatives led the miners to expect federal compensation for any respiratory ailment. Clearly, that magnified the potential scope of coverage and included a wide range of medical conditions. Certainly, the proponents of the law aimed to cover as broad a range of conditions as they could. Those who sought to limit the range of compensable conditions defined the disease as disabling or even “complicated” coal workers’ pneumoconiosis. Those who administered the law had to determine its intent in the absence of a well-defined, legislative-targeted disease condition. The various measures to amend the law and to force SSA and USDOL to review claims that had been denied were a product of this difference in perception about the coverage of the law. The issue continues to characterize the program. Two weeks before the close of the Clinton administration, USDOL promulgated final rules to revise its regulations of the law. (The original proposed rules changes were put forward in 1997.) Among other changes, the regulations expanded the definition of the disease.

The “Desk Book” of the administrative law judges points out that the disease is both medical and legal, with the former being “merely a small subset of the afflictions compensable under the Act.”<sup>9</sup> It continues, “a medical diagnosis of no pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis.”<sup>10</sup>

## **Presumptions Carry Both Advantages and Disadvantages**

The statute and the regulations for Black Lung Program benefits include a number of presumptions. Presumptions are placed into laws as a way to ease or shift the burden of proof in a claim for benefits. There are several reasons why the use of presumptions can be helpful to all

parties in adjudicating workers' compensation claims for nontraumatic conditions. The major virtue of using them is that it eliminates the need to litigate the same (or broadly similar) issues repeatedly. As a result, outcomes are more predictable, and they can be derived more expeditiously and with lower transaction costs. For example, expert witnesses need not be used repeatedly in disputes over the same set of questions. Large numbers of claims can be moved through the adjudication process more rapidly in the presence of presumptions. Additionally, they reduce the likelihood that "individual justice" will result in opposite outcomes in cases with the same or similar fact conditions. The party to whom the burden of proof has been shifted can overcome rebuttable presumptions. Irrebuttable presumptions cannot be overcome and, therefore, affect more than the matter of who bears the burden of proof.

The use of presumptions for occupational disease is more commonly found in other jurisdictions than in the U.S. states, where individual justice seems to be the norm and where litigation and attorney representation are not unusual. The major downside with the use of presumptions is that they can be used as a device to manipulate the ease or difficulty in receiving compensation. Perhaps this is simply to note the obvious, i.e., presumptions that are consistent with the overall intent of the law, that are in line with medical science, and that bring greater equity are to be preferred to those that do not.

The Black Lung Law, originally and in amendments and in regulations, made extensive use of presumptions. As an example, the 1969 statute established that "if a miner who is suffering or suffered from pneumoconiosis was employed for 10 years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment."<sup>11</sup> Since the worker still had to prove that there had been 10 years' employment in coal mines and that he had pneumoconiosis, those burdens of proof remained with the claimant. However, if the worker was able to establish those arguments, it became the defense's burden to prove that the illness arose out of any other employment or nonemployment exposure. And if the worker could not show that 10 years had been worked in coal mining, it did not prevent the worker from seeking to establish that his condition arose out of his exposure in coal mining. Clearly, that would have made it more difficult to win compensation benefits. Perhaps this is simply to note the very obvious, that is, presumptions that are consistent with the overall intent

of the law, that are in line with medical science, and that bring greater equity are to be preferred to those that do not.

As much as anything else, presumptions were used to raise or lower rates of successful filing under the law, and they remain most susceptible to being used to loosen or tighten eligibility, regardless of the scientific merits. Congress, in particular, was responsible for this continuing effort to tweak the standards, at least for the first dozen years of the law. However, we can find a similar type of manipulation that has occurred in the states. Kentucky has witnessed a number of law changes that aimed to raise or lower the success rate in the filing of state black lung claims. In 1996, eligibility under the law was tightened in response to a concern about the cost of such claims. In 2002, the law was liberalized because the 1996 amendments were found to be excessively restrictive. The 2002 amendments have been reported to still leave virtually no claimants eligible for benefits and consideration is being given to loosening the standards further. As was the case in the federal arena, the standard does not appear to be motivated by science and medicine as it is for the number or the rate of successful claim filing.

### **Inconsistent Offsets of Benefits**

This entire chapter could be written around the issue of offsets under the law. Suffice it to say that there have been a host of complications, indicating that a simple generalization of the treatment of the issue is not possible. Over time, the law regarding offsets has been changed several times. The Part B program operates with different rules than does Part C. Further, offsets have and have not been applied to earnings (for the totally disabled miners but not for widows), or depending upon the date that a claim was filed, to SSDI, and to state workers' compensation benefits (for respiratory diseases and/or for occupational injuries or illnesses). As an example of a further complication, at least one state (Pennsylvania) paid benefits to miners with dust diseases out of general revenues, raising the issue of whether or not this was a (offsetable) workers' compensation benefit.<sup>12</sup> It is difficult to establish how well the offsets are monitored, though they are likely most carefully monitored where a mine operator or insurer would be able to reduce payments due to the presence of multiple income sources. USDOL provides SSA with information on Part C beneficiaries on a monthly basis, and SSA reports

that it offsets less than \$400,000 a month from its SSDI payments. As noted earlier, fewer than 4 percent of Part C beneficiaries are affected by the offset taken by USDOL for the payment of state workers' compensation benefits. The "offset story" reveals how difficult it can be to overlay a federal program onto an existing state program, made more complex by an attempt to legislate different criteria for conditions arising in previous years (Part B-SSA) and for current and future ones (Part C-USDOL).

### **The Challenge of Finding Responsible Operators**

About one in five approved claims become the responsibility of the trust fund. Unlike the earliest years of the program, when some miners had not worked for several years, there is less of a catch-up now, and less reason for the mine operator to have disappeared from the scene. There is little doubt that USDOL is aiming to have successful claimants become the responsibility of the employers or their insurers, and not that of the already indebted trust fund. Here are simply two kinds of problems that emerge when the responsible operator approach is used. Consider a claim where a miner submits a successful claim for benefits. Suppose that subsequently, the mine operator who was initially liable for benefits is shown to be not responsible and another operator is then identified as "responsible." The timing is likely to be such that no defense of the claim by the subsequently identified operator is practically possible. (The courts have held that once a claimant is successful in claiming a benefit, USDOL cannot assess liability against a newly named mine operator.)<sup>13</sup> That would lead to a potential liability of the trust fund. To prevent that, USDOL might name several employers as a "potentially liable operator." That can result in multiple defenses being prepared to defeat the claim, including the need for multiple, duplicative medical examinations. Or consider the requirement that mine operators are required to be insured for federal black lung claims. (Approval for self-insurance is permitted under the law.) But not all responsible operators are coal mine operators—the law provides considerable latitude over coverage, occupationally. Thus, some employers may be found to be "responsible operators," yet uninsured for federal benefits, though they are in compliance with respect to coverage under state workers' compensation laws.

## Can a Federal Workers' Compensation Program Be Shut Down?

Although some people argue that a federal government program is not likely ever to shut down, the Black Lung Program appears headed in that direction. Clearly, the Part B portion has experienced a huge decline in numbers of beneficiaries, and the Part C section is far smaller today than it has been. Moreover, there is no evidence that all the states have stepped up efforts to find and compensate victims of coal workers' pneumoconiosis. Some may argue that 31 years after the enactment of the Black Lung provisions, the federal government has decided that it is prepared to tackle another situation where it appeared that the states were not compensating victims of occupational disease. Again, the law creates separate, though less parallel responsibilities for two agencies in the EEOICPA of 2000. Again, it has picked a specific group of workers, and identified certain diseases to receive special treatment and benefits. As was the case with black lung, supporters of the EEOICPA of 2000 argued that state workers' compensation laws had not been providing justifiable benefits to a specific group of workers. And as was the case with black lung three decades ago, it has not taken long for bipartisan criticisms of the administration of the law to emerge, requiring amendments because of a lack of movement on benefits being delivered to workers or survivors.<sup>14</sup>

### Notes

1. In particular, see Barth and Hunt (1980).
2. Barth (1987). Sources for some of the history that follows can be found in this study.
3. The Black Lung Benefits Reform Act of 1977 (PL 95-239) was actually signed into law on March 1, 1978.
4. PL95-227 was signed into law early in 1978.
5. *Pittston Coal Group et al. v. Sebben et al.* 488 U.S. 105 (1988).
6. The highest year for the number of all beneficiaries was 1982, but the high point for the number of miners receiving Part C benefits was 1983.
7. The basic, no dependent benefit was set at 50 percent of the entitlement due to a totally disabled federal employee at the GS-2, step 1 level, under the Federal Employees' Compensation Act.
8. Offsets are discussed later in the chapter. Such provisions exist in laws to limit the degree to which recipients might receive benefits from multiple sources. Off-

sets can have several aims including limiting payer costs and limiting excessive benefit amounts.

9. USDOL, Office of Administrative Law Judges, “Judges Benchbook of the Black Lung Benefits Act, August 2001,” Chap. 16, Sec III a (1). Also, see *Richardson v. Director, OWCP*, 94 F. 3d 164 (1996).
10. From *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819 (4th Cir. 1995).
11. Section 411 (c)(1).
12. *Director v. Eastern Associated Coal Corp.*, 54 F. 3d 141 (1995).
13. *Director, OWCP v. Trace Fork Coal Co.*, 67 F. 3d 503 (1995).
14. See Congressional Record—Senate, June 16, 2004, pp. 6837–6847, and S. 2400 June 7, 2004, Amendments to Title XXXVI of the Floyd D. Spence National Defense Authorization Act for FY 2001 (Bunning Amendments).

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