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Modification of Benefits for Claimants under the Federal Black Lung Benefits Program

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MODIFICATION OF BENEFITS FOR CLAIMANTS UNDER THE FEDERAL BLACK LUNG BENEFITS PROGRAM

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I. INTRODUCTION

Prolonged exposure to coal dust has caused hundreds of thousands of coal miners to develop pneumoconiosis, a chronic respiratory and

pulmonary disease commonly referred to as "black lung."¹ The consequences of this deadly disease prompted Congress in 1969 to create a special program for the benefit of black lung sufferers. Due to the progressive nature of this disease, the benefit process allows a claimant to make continued attempts to get benefits even after an initial denial. After a claimant files for benefits and is turned down, or even if s/he receives benefit payments, a process to petition for modification of that decision is available. In addition, the claimant may file a subsequent or duplicate claim and obtain benefits if s/he is able to satisfy the eligibility requirement criteria. This note will give a brief description of the history of the federal black lung program.² In addition, this note details the benefit process that a claimant must go through to pursue a claim for benefits. The focus, however, will be on the steps available after a claim has been denied and the miner continues to suffer from pneumoconiosis, or more importantly, when the claimant's condition worsens.

II. GENERAL HISTORY

A. Overview of the Federal Black Lung Benefits Act

The Federal Black Lung Benefits Act establishes a complex scheme for providing benefits to coal miners and their surviving dependents who become totally disabled, or die, due to pneumoconiosis.³ The federal black lung program is derived from four statutes⁴ and is administered by two federal agencies⁵ through three sets of regula-

1. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 138 (1987).

2. For a more detailed discussion of the history of the Black Lung Benefits Act, see Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989). See also Jonathan P. Nase, *The Surprising Cost of Benefits: The Legislative History of the Federal Black Lung Benefits Program*, 4 J. MIN. L. & POL'Y 277 (1988-89).

3. 30 U.S.C. §§ 901-45 (1988).

4. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1982); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (1972); Title IV of the Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 792 (1969).

5. Title IV is divided into three parts, A, B, and C. Part A contains defi-

tions.⁶ Because the program has been developed through several statutory enactments, different rules govern claims filed during different periods of time.⁷ If a coal miner is found to be eligible for benefits, s/he will receive them, although the source of the funds will vary.⁸

B. Title IV of the Federal Coal Mine Health and Safety Act

Title IV of the Federal Coal Mine Health and Safety Act, enacted in 1969, (Title IV)⁹ established a federal black lung benefits program for coal miners who are totally disabled due to pneumoconiosis and for surviving dependents of miners whose death was due to pneumoconiosis. It provided an irrebuttable presumption of entitlement to benefits under Section 411(c)(3) if the miner had complicated pneumoconiosis, as well as two rebuttable presumptions under Section 411(c)(1) & (2), which were available if the miner had ten or more years of coal mine employment.¹⁰

nitions and a statement of findings and declarations. Part B claims are administered by the Department of Health and Human Services (formally Department of Health, Education and Welfare) through the Social Security Administration, while Part C claims are administered by the Department of Labor. See *infra* note 7 and accompanying text.

6. 20 C.F.R. §§ 410, 718, 727 (1994).

7. Claims filed prior to July 1, 1973, were processed by the Social Security Administration pursuant to regulations promulgated by the Secretary of the Department of Health, Education, and Welfare. When permitted, these "Part B" claims were paid from federal funds. "Part C" claims are those filed on or after July 1, 1973, and are paid by private employers or by a fund to which the employers contribute. They are administered by the Director of the Office of Workers' Compensation Programs pursuant to regulations promulgated by the Secretary of Labor. Part C of the program includes two subparts: claims filed after April 1, 1980, which are governed by permanent criteria, and those filed prior to April 1, 1980, which are governed by the interim regulations. *Mullins Coal Co.*, 484 U.S. at 138.

8. See 20 C.F.R. § 722.126 (1994) ("It is the intent of the Act to insure that every eligible individual who has proven entitlement to benefits for total disability or death due to pneumoconiosis shall be guaranteed such benefits whether or not there is in existence an employer, coal mine operator, or insurance carrier who is or may be adjudicated liable for the payment of such benefits.").

9. Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. §§ 901-62 (1988 & Supp. V 1993)).

10. See 30 U.S.C. § 921(c)(1) - (3) (1988).

Title IV consisted of three parts: A, B, and C. Parts B and C provided for two separate benefits programs¹¹ and were to be temporary, lasting only until December 30, 1976.¹² This two-part structure was a compromise allocating the cost of the black lung benefits program. Accordingly, the federal government “would pick up the lifetime cost of the huge backlog of claims that had accumulated over decades, while the industry would pick up the burden of paying the claims of those still working.”¹³ Parts B and C provided benefits only to miners and their widows. More specifically, benefits were available to two classes: (1) underground coal miners totally disabled by pneumoconiosis arising out of coal mine employment;¹⁴ and (2) widows of underground coal miners, if the miner died from pneumoconiosis before January 1, 1973, or was receiving federal black lung benefits at the time of death.¹⁵

Part B, entitled “Claims for Benefits Filed on or Before December 31, 1972,” was administered by the Department of Health, Education, and Welfare. The Department then delegated responsibility for implementing the program to the Social Security Administration.¹⁶ The Social Security Administration was responsible for processing miners’ claims filed on or before December 31, 1972, as well as widows’ claims filed by December 31, 1972, or six months after the death of the miner if s/he died on or before January 1, 1973.¹⁷

11. Jonathan P. Nase, *The Surprising Cost of Benefits: The Legislative History of the Federal Black Lung Benefits Program*, 4 J. MIN. L. & POL’Y 277, 282 (1988-89).

12. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 422(e)(3), 30 U.S.C. § 932(e)(3) (repealed 1978).

13. S. REP. NO. 743, 92d Cong., 2d Sess. 48 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2336 (views of Sen. Javits and Sen. Taft).

14. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 411(a), 30 U.S.C. § 921(a) (1988).

15. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 414(e), 30 U.S.C. § 924(e) (1988 & Supp. V 1993).

16. Nase, *supra* note 11, at 282-83 (citing HOUSE COMM. ON EDUCATION AND LABOR 13 (Comm. Print 1971); DEP’T OF HEALTH, EDUCATION, AND WELFARE, FIRST ANNUAL REPORT ON PART B OF TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969).

17. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 421(a), 30 U.S.C. § 923(a) (1988).

Claims filed on or after January 1, 1973, were governed by Part C of Title IV, entitled "Claims for Benefits After December 31, 1972." Federal responsibility for administering Title IV was placed in the Department of Labor. Part C claims were to be filed under the applicable state workers' compensation law,¹⁸ if the Secretary of Labor approved that law.¹⁹ Persons not covered by an approved state law could file a Part C claim with the Department of Labor, which would process the claim following the provisions of the Longshoremen's and Harbor Workers' Compensation Act.²⁰

C. *The Black Lung Benefits Act of 1972*

The first major amendment to Title IV was the Black Lung Benefits Act of 1972 (1972 Amendments).²¹ The 1972 Amendments liberalized provisions for black lung benefits. Some of the most significant changes resulting from this legislation included: (1) expanding the definition of "total disability" under Section 402(f) to include a miner prevented from engaging in gainful employment by pneumoconiosis;²² (2) extending Title IV coverage to surface miners;²³ (3) extending the payment of benefits to survivors of miners who were totally disabled due to pneumoconiosis, regardless of the cause of death;²⁴ (4) providing that no claim can be denied solely on the basis of a negative chest

18. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 421(a), 30 U.S.C. § 931(a) (1988).

19. The 1969 Act set forth several criteria that state laws had to meet to be approved, including the payment of benefits for a miner's total disability or death due to pneumoconiosis; the payment of benefits substantially equivalent to or greater than those paid under Title IV; and the use of substantially equivalent standards for establishing death or disability due to pneumoconiosis. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 421(b), 30 U.S.C. § 931(b)(2) (1988 & Supp. V 1993).

20. Title IV of the Federal Coal Mine Health and Safety Act of 1969, § 422(a), 30 U.S.C. § 932(a) (1988).

21. Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified as amended at 30 U.S.C. § 901 (1988 & Supp. V 1993)).

22. 30 U.S.C. § 902(f) (1988).

23. 30 U.S.C. § 902(d) (1988).

24. 30 U.S.C. § 901 (1988 & Supp. V 1993).

X-ray under Section 413(b),²⁵ and (5) adding a rebuttable presumption under Section 411(c)(4) based on fifteen years of underground coal mine employment and proof of total disability due to a respiratory or pulmonary impairment.²⁶ The 1972 Amendments also gave the Secretary of Health, Education, and Welfare broad authority to establish regulations to reopen all pending and denied claims and to review them under this new legislation. The Social Security Administration soon thereafter enacted a set of liberal interim regulations implementing the 1972 Amendments.²⁷ These regulations applied to Part B claims processed by the Social Security Administration, while Part C claims continued to be adjudicated under more restrictive medical eligibility regulations.

D. The Black Lung Benefits Reform Act of 1977 and The Black Lung Benefits Revenue Act of 1977

The second major amendment to Title IV was the Black Lung Benefits Reform Act of 1977 (Reform Act).²⁸ The Reform Act provided for the automatic review of all claims denied before March 1, 1978, or pending on that date,²⁹ and substantially liberalized the criteria for establishing entitlement to benefits.³⁰ The Reform Act also provided, under Section 402(f)(2), that all claims pending or denied as of March 1, 1978, as well as any new claims filed before March 1, 1980, were to be adjudicated pursuant to criteria no more restrictive than the criteria applicable to a claim filed on June 30, 1973.³¹

In addition, the definition of "miner" was expanded from "any individual who is employed in a coal mine" to "any individual who

25. 30 U.S.C. § 923(b) (1988).

26. 30 U.S.C. § 921 (1988).

27. 20 C.F.R. § 410.490 (1994). *See also* Prunty & Solomons, *supra* note 2, at 678.

28. Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C. and 30 U.S.C.) .

29. 30 U.S.C. § 945(b) (1988).

30. *See Newman v. Director, OWCP*, 745 F.2d 1162 (8th Cir. 1984).

31. 30 U.S.C. § 902(f)(2) (1982) (referring to the criteria enumerated in 20 C.F.R. § 410.490 (1994)). *See Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988).

works . . . in or around a coal mine or coal preparation facility in the extraction or preparation of coal," to the extent s/he has been exposed to coal dust.³² Other key characteristics of the Reform Act were its prohibition of X-ray re-reading in certain instances³³ and its creation of a new entitlement presumption for dependant survivors of miners who died before March 1, 1978, and who had at least twenty-five years of coal mine employment prior to June 30, 1987.³⁴

Concurrent with the passing of the Reform Act, Congress also enacted the Black Lung Benefits Revenue Act of 1977 (Revenue Act of 1977).³⁵ The Revenue Act of 1977 established the Black Lung Disability Trust Fund (Trust Fund),³⁶ which is financed by an excise tax paid by coal mine operators on each ton of coal sold.³⁷ The Trust Fund assumed liability for the payment of benefits for all Part C claims in which the miner's last coal mine employment ended before January 1, 1970, where no responsible operator can be found, and where the Department of Labor initially determined that benefits are due, but the named responsible operator refuses to pay benefits and continues to litigate the claim.³⁸

E. The Black Lung Benefits Amendments of 1981

The most recent amendment to Title IV was the Black Lung Benefits Amendments of 1981 (1981 Amendments).³⁹ The 1981 Amendments make it significantly more difficult to establish eligibility for

32. Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 902(d) (1988).

33. 30 U.S.C. § 923 (1988).

34. 30 U.S.C. § 921 (1988).

35. Pub. L. No. 95-227, § 2, 92 Stat. 11 (1978) (codified as amended at 30 U.S.C. § 934 (1988) and adding 26 U.S.C. § 4121 (1988 & Supp. V 1993)) (codified as amended in scattered sections of 26 U.S.C.).

36. *Id.*

37. 26 U.S.C. § 4121 (1988 & Supp. V 1993).

38. 30 U.S.C. §§ 932(c), 932(j)(2), 934(a) (1988). In those cases where the employer requests a formal hearing and continues to dispute the claimant's entitlement to benefits or its designation as the responsible operator, the Director, Office of Workers' Compensation Program, will make payments for the Trust Fund until the claim is finally adjudicated.

39. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Title II, 95 Stat. 1643 (1981) (codified as amended in scattered sections of 30 U.S.C.).

Black Lung Benefits in claims filed on or after January 1, 1982. The 1981 Amendments eliminated three of the five entitlement presumptions that are based on duration of coal mine employment;⁴⁰ removed the provision entitling survivors to benefits based on the miner's total disability due to pneumoconiosis at the time of death, limiting survivor benefits to claims where it is established that the death was due to pneumoconiosis;⁴¹ and eliminated the provision requiring the Department of Labor to accept a board certified or board eligible radiologist's positive diagnosis of pneumoconiosis where there is other evidence of a pulmonary or respiratory impairment.⁴²

III. THE BENEFITS PROCESS

The Department of Labor has established extensive procedural rules regulating the processing and adjudication of black lung claims.⁴³

40. 30 U.S.C. § 921(c)(2) (1988) (eliminating the ten year presumption); 30 U.S.C. § 921(c)(4) (1988) (eliminating the fifteen year presumption); 30 U.S.C. § 921(c)(5) (1988) (eliminating the twenty-five year presumption).

An example of how the presumptions were applied can be seen in *Mullins Coal Co.*, 484 U.S. at 135, where the Court stated that all three of the eligibility conditions are presumed if the claimant was engaged in coal mine employment for at least ten years and if the claimant meets one of four medical requirements: (1) a chest X-ray establishes the presence of pneumoconiosis; (2) ventilatory studies establish the presence of a respiratory or pulmonary disease of a specified severity; (3) blood gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood; or (4) other medical evidence, including the documented opinion of a physician, establishes the presence of a totally disabling respiratory impairment. None of the presumption methods require proof of causation, and only the fourth requires proof of total disability.

The interim presumption may then be rebutted if the evidence establishes that the claimant is doing, or is capable of doing, his usual or comparable work; that his disability did not arise, even in part, out of coal mine employment; or that he does not have pneumoconiosis. Thus, in order to rebut the interim presumption, the employer has the burden of proving that one, if not more, of the three conditions of eligibility is not satisfied. *Id.*

41. 30 U.S.C. §§ 901(a), 922(a) (1988). Survivors' benefits previously were paid whenever a miner was awarded benefits for total disability. 30 U.S.C. §§ 922(a)(3), 932(f) (1988).

42. 30 U.S.C. § 923(b) (1988).

43. See 20 C.F.R. § 725 (1994).

The Black Lung Benefits Act, as amended, provides that black lung claims are to be processed by the Secretary of Labor in accordance with the procedural provisions of the Longshoremen's and Harbor Workers' Compensation Act (Longshore Act).⁴⁴ Section 19 of the Longshore Act sets out the basic claims procedure to be followed in black lung cases.⁴⁵ Black lung benefits claims are to be filed with a district director and thereafter may be appealed to an administrative law judge (ALJ), the Benefits Review Board, the Circuit Court of Appeals, and ultimately to the United States Supreme Court.

A. *The District Director*

The adjudication process begins when the claimant files a Form CM-911⁴⁶ at a Social Security office or at the Department of Labor District Director's⁴⁷ Office. The district director's role is that of a claims administrator who functions to process claims, to develop a record in each claim, and to facilitate the resolution of claims in a timely and fair manner.⁴⁸ For example, after a black lung claim has been filed, the district director may notify the putatively responsible operator of the claim.⁴⁹ The district director also must, when necessary, provide the miner with a complete medical examination and testing.⁵⁰

44. 33 U.S.C. § 901 (1988).

45. 33 U.S.C. § 919 (1988).

46. In the Form CM-911, general information is listed, including the miner's physical characteristics, educational and employment background, age, and dependents.

47. District directors were formerly known as deputy commissioners (20 C.F.R. § 725.101(a)(11) (1994)) and are officials within the Office of Workers' Compensation Programs, United States Department of Labor, with specific responsibilities for the development of evidence and administration of claims under the Longshore Act and the Black Lung Benefits Act. *See* 33 U.S.C. §§ 939, 940 (1988); 20 C.F.R. § 725.101(11) (1994).

48. 33 U.S.C. §§ 919(a) - (c) (1988).

49. 20 C.F.R. §§ 725.412(a) - (b) (1994).

50. 20 C.F.R. § 725.405(b) (1994). *See also* 20 C.F.R. §§ 725.406, 725.407 (1994). Medical evidence constitutes the core of a black lung claim and, therefore, the record will normally contain a number of chest X-rays, pulmonary function studies, blood gas studies, and physicians' reports.

The district director first issues a Notice of Initial Finding wherein s/he concludes that the miner is, or is not, entitled to benefits. If the district director initially determines that the claimant is not entitled to benefits, then a report is included with the Notice of Initial Finding that states the deficiencies in the claim and notifies the claimant of any additional evidence which needs to be submitted. If the district director initially determines that the claimant is entitled to benefits, then the employer may commence to pay the benefits or may dispute the payment and submit evidence.

If the evidence does not support an initial finding of eligibility or a determination of entitlement, the claimant may submit additional evidence or request a hearing before an ALJ.⁵¹ Section 725.409 does not require the district director to provide an additional thirty days of notice of an intent to deny a claim by reason of abandonment, over and above the sixty day notice mandated by Section 725.410(c). A claimant's failure to take any action on the claim within sixty days after an administrative denial will result in a determination by the district director that the claim has been abandoned. If a claim is determined to have been abandoned, a claimant may still file a request for modification of the denial of benefits within one year pursuant to 20 C.F.R. Section 725.310, or file a duplicate claim if a "material change of condition" can be established pursuant to 20 C.F.R. Section 725.309.

Where a claim is disputed, the district director will attempt an informal resolution of the claim and will hold informal conferences, if necessary, to achieve that end.⁵² After the conference, the district director prepares a memorandum which summarizes the proceeding, including those issues of fact on which agreement has been reached and those on which a dispute remains. The district director also recommends a resolution, which appears in the form of an award or denial of benefits.⁵³ The parties then have thirty days in which to respond

51. 20 C.F.R. § 725.410(c) (1994). Dismissal of a claim by abandonment is governed by Section 725.409 in conjunction with Section 725.410.

52. 20 C.F.R. §§ 725.413(b)(2), 725.415, 725.416 (1994). Neither sworn testimony nor stenographic report is taken at the conference. 20 C.F.R. § 725.416(a) (1994).

53. 20 C.F.R. § 725.417(c) (1994).

and may request a formal hearing,⁵⁴ before an administrative law judge,⁵⁵ as an appeal on certain issues.⁵⁶

B. The Administrative Law Judge

If the employer or claimant is dissatisfied with the district director's ruling, a request for a formal hearing may be made. If the request is timely filed, then the District Director will transfer the file to the Office of Administrative Law Judges with a list of the parties and the contested issues. The case is then assigned to an ALJ who schedules the case for a hearing and after conducting a de novo review of the record, issues a Decision and Order setting forth the findings of fact and conclusions of law.⁵⁷ The issues considered by an ALJ at the hearing are generally restricted to those: (1) identified by the district director; (2) raised in writing before the district director; or (3) new issues which were not "reasonably ascertainable" by the parties at the time the claim was before the district director.⁵⁸ When new issues are raised before the ALJ, the ALJ has the discretion to remand the case to the district director, to hear and resolve the new issue, or to refuse to consider the new issue.⁵⁹ Any party who is dissatisfied with the

54. 20 C.F.R. § 725.419(a) (1994) ("Within 30 days after the date of issuance of a proposed decision and order, any party may in writing, request a revision of the proposed decision and order or a hearing. If a hearing is requested, the deputy commissioner shall refer the claim to the office of Administrative Law Judges (See § 725.421).").

55. Hearings are held before an ALJ, pursuant to the procedural requirements of the Administrative Procedures Act, 33 U.S.C. § 919(a) - (d) (1988). 20 C.F.R. Sections 725.450 to -.483 (1994) set out the procedures to be followed at the hearing. Director, OWCP v. Drummond Coal Co., 831 F.2d 240, 241 (11th Cir. 1987).

56. 20 C.F.R. § 725.463 (1994) restricts the issues that may be resolved by the ALJ. Only those issues identified by the district director, who is required to submit to the ALJ in writing the contested and uncontested issues, or those not "reasonably ascertainable" by the parties at the time the claim was before the district director, may be heard by the ALJ.

57. 20 C.F.R. § 725.477 (1994).

58. See 20 C.F.R. §§ 725.463(a)-(b) (1994).

59. 20 C.F.R. § 725.463(b) (1994). See also Callor v. American Coal Co., 4 B.L.R. 1-687 (1982), *aff'd sub nom.* American Coal Co. v. Benefits Review Bd., 738 F.2d 387, (10th Cir. 1984). An issue not previously considered before the district

ALJ's decision may then appeal to the Benefits Review Board (the Board).⁶⁰

C. *The Benefits Review Board*

Review by the Board is properly invoked when the appealing party assigns specific allegations of legal or factual error in the ALJ's decision. Failure to do so precludes review and requires the Board to affirm the decision.⁶¹ The standard of review for the Board in reviewing the granting or denial of benefits is set forth in the Longshore Act, as amended, which states in relevant part that "findings of fact in the decision under review shall be conclusive if supported by the substantial evidence in the record considered as a whole."⁶² Accordingly, the Board is not empowered to engage in a *de novo* review, but is authorized only to determine whether the ALJ's findings of fact and conclusions of law are rational, supported by substantial evidence,⁶³ and in accordance with the law.⁶⁴ Any party who is dissatisfied with the Board's final order may petition for review of that order in the United

director may be adjudicated if the parties consent. Such consent may be inferred where the parties develop evidence and are aware of each other's intent to litigate the issue. *Carpenter v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-784 (1984).

60. The process for appealing a decision of an ALJ to the Board is governed by the Longshore Act, 33 U.S.C. § 921(b) (1988), which has been incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1988). *See generally* *Kalaris v. Donovan*, 697 F.2d 376, 382 (D.C. Cir.), *cert. denied*, 462 U.S. 1119, *reh'g denied*, 463 U.S. 1236 (1983) (the Board performs a review function identical to that which the United States District Courts performed prior to the 1972 Longshore Act Amendments).

61. *Sarf v. Director, OWCP*, 10 B.L.R. 1-119 (1987); *Fish v. Director, OWCP*, 6 B.L.R. 1-107 (1983).

62. 33 U.S.C. § 921(b)(3) (1988). *See* 20 C.F.R. § 802.301 (1994).

63. Substantial evidence has been defined as "more than a mere scintilla," or that quantum of evidence that a "reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

64. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a) (1988); 20 C.F.R. § 802.301 (1994). *See also* *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

States Court of Appeals for the Circuit in which the injury occurred,⁶⁵ and ultimately may petition for writ of certiorari to the United States Supreme Court.

D. Current Black Lung Claim Standards

Black lung benefits are payable to a miner if: (1) the miner is totally disabled;⁶⁶ (2) the disability was caused, at least partially, by

65. 33 U.S.C. § 921(c) (1988); 20 C.F.R. §§ 725.482(a), 802.410(a) (1994).

66. 20 C.F.R. Section 718.204 (1994) provides, in relevant part, the definition of "total disability" and the criteria for establishing total disability in claims filed after March 31, 1980:

- (b) Total disability defined. A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If the irrebuttable presumption described in § 718.304 does not apply, a miner shall be considered totally disabled if pneumoconiosis as defined in § 718.201 prevents or prevented the miner:
 - (1) From performing his or her usual coal mine work; and
 - (2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.
- (c) Criteria. In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4), or (5) of this section shall establish a miner's total disability:
 - (1) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV sub1 test; if, in addition such tests also reveal the values specified in either paragraphs (c)(1)(i) or (ii) or (iii) of this section:
 - (i) Values equal to or less than those listed in Table B3 (Males) or Table B6 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or
 - (ii) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females) in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or
 - (iii) A percentage of 55 or less when the results of the FEV sub1 test are divided by the results of the FVC test (FEV sub1/FVC equal to or less

pneumoconiosis; and (3) the disability arose out of coal mine employment.⁶⁷ For black lung claimants who file claims after December 31, 1981, the only presumptions available are: (1) the irrebuttable entitlement presumption invoked by proving the presence of complicated

-
- than 55%), or
- (2) Arterial blood-gas tests show the values listed in Appendix C to this part, or
 - (3) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure, or
 - (4) Where total disability cannot be established under paragraphs (c)(1), (2), or (c)(3) of this section, or where pulmonary function tests and/or blood-gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) of this section, or
 - (5) In a case involving a deceased miner in which the claim was filed prior to January 1, 1982, where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to establish total (or under § 718.306 partial) disability. On a survivor's claim filed on or after January 1, 1982, but prior to June 30, 1982, where entitlement is sought to be established in accordance with § 718.306, where there is no medical or other relevant evidence, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition shall be sufficient to be based solely upon the affidavits or testimony of the claimants and/or his or her dependents who would be eligible for augmentation of the claimant's benefits if the claim were approved. Except as provided in § 718.305, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (c)(1), (c)(2), (c)(4) and this paragraph shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis.

20 C.F.R. §§ 718.204(b) - (c) (1994).

67. *Mullins Coal Co.*, 484 U.S. at 141 (1987). See also *West v. Director, OWCP*, 896 F.2d 308 (8th Cir. 1990).

pneumoconiosis;⁶⁸ (2) the presumption that a miner's pneumoconiosis is due to coal mine employment once s/he can prove at least ten years of coal mine employment;⁶⁹ and (3) the twenty-five year death presumption in claims filed before July 1, 1982.⁷⁰

After an initial denial of benefits, the door to the claimant is not closed. A claimant who has unsuccessfully pursued a claim for black lung benefits, or even if the claimant has been awarded benefits, may file a petition for modification to have the decision, in effect, reconsidered. In addition, the unsuccessful claimant may file a duplicate claim if s/he can establish the required criteria and more than one year has passed since the denial of benefits.

IV. MODIFICATION

Section 22 of the Longshore Act⁷¹ as incorporated into the Black Lung Act by 30 U.S.C. Section 932(a), provides for the modification or denial of benefits awards.⁷² This section authorizes the district director to review and modify⁷³ a compensation award⁷⁴ either on his or her own initiative or at the request of a party. The district director may then issue a new compensation order on the ground of a change in conditions or because of a mistake in a determination of fact by the

68. 20 C.F.R. § 718.304 (1994).

69. 20 C.F.R. § 718.203 (1994).

70. 20 C.F.R. § 718.306(a) (1994).

71. 33 U.S.C. § 922 (1988).

72. Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1988), makes section 22 of the Longshore Act, 33 U.S.C. § 922 (1988), applicable to black lung claims.

73. In this context "modify" means to reconsider the *terms* of an award of benefits.

74. 20 C.F.R. Section 725.310(a) (1994) provides:

Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner [district director] may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

Id.

district director;⁷⁵ forward the claim to an ALJ for hearing; or deny the claim by reason of abandonment.⁷⁶ Initially, modification was only available upon proof of a change in condition,⁷⁷ but amendments to the Longshore Act added “a mistake in a determination of fact” to the available bases upon which modification could be sought.⁷⁸

Modification proceedings may only be initiated⁷⁹ before a district director.⁸⁰ The language of Section 22 of the Longshore Act, which identifies the district director as the only adjudication officer who may modify a decision, is seen by most as a relic from a time when district directors had full adjudicative authority over benefits claims.⁸¹ The 1972 amendment to 33 U.S.C. Section 919⁸² withdrew from the dis-

75. 33 U.S.C. § 922 (1988). See also 20 C.F.R. § 725.310(a) (1994).

76. 20 C.F.R. § 725.310(c) (1994). A claimant's failure to take any action on the claim within sixty (60) days after an administrative denial will result in a determination by the district director that the claim has been abandoned. See 20 C.F.R. § 725.409 (1994) (“[d]enial of a claim by reason of abandonment”).

77. Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, 44 Stat. 1424, 1437 (1927).

78. See *O'Keeffe v. Aerojet-Gen. Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (per curiam).

79. See *Fireman's Fund Ins. Co. v. Bergeron*, 493 F.2d 545, 547 (5th Cir. 1974) (finding that a request for modification need not be formal in nature and any written notice by or on behalf of a claimant, within one year of an administrative denial, evidencing an intention to make a request for modification may constitute a request for modification); *Searls v. Southern Ohio Coal Co.*, 11 B.L.R. 1-161, 1-163 n.3 (1988) (per curiam) (citing *Fireman's Fund*, 493 F.2d at 545) (explaining that the Benefits Review Board has taken the position that any action taken by a claimant within one year from the date of a denial, which evidences an intent to pursue or reopen a claim, shall be considered as a request for modification).

80. The Fourth and Sixth Circuits are the only courts to specifically address this issue, both finding that a petition for modification must be filed with the district director rather than the ALJ. See *Lee v. Consolidation Coal Co.*, 843 F.2d 159, 162 (4th Cir. 1988); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987). See also 20 C.F.R. § 725.310(b) (1994) (“Modification proceedings shall not be initiated before an administrative law judge or the Benefits Review Board.”).

81. See, e.g., *Barthelemy v. J. Ray McDermott & Co.*, 537 F.2d 168, 172-73 (5th Cir. 1976) (citing H.R. REP. No. 1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.S.C.A.N. 4698, 4708).

82. 33 U.S.C. Section 919(d) (1988), as amended in 1972, provides:

trict director the adjudicatory power to conduct hearings and vested that power in administrative law judges in order to satisfy the procedural requirements of the Administrative Procedures Act, thus leaving district directors with principally administrative functions.⁸³ The Benefits Review Board has stressed its view that the district director's role in processing a modification petition is limited to processing the petition for modification and transfer to the Office of Administrative Law Judges under the same procedures applicable to other claims.⁸⁴

In order to comport with congressional intent, the power remaining with the district directors must be construed as limited to that consistent with their retained administrative function: correcting their own factual errors or beginning the claims process anew when conditions have changed. This limiting of the district director's review to his or her own errors in factual determinations is also supported by the structure of the administrative process. When a finding of fact has been initially determined by the district director, then appealed to the ALJ, litigated and determined, it would violate the fundamentals of the administrative process to allow the district director to disregard the ALJ's determination and reinstate his or her own.

A request for modification should first be addressed to the district director who is responsible for the investigation of the basis on which a modification is requested.⁸⁵ Normally, when a losing claimant moves

Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of Section 554 of Title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under Section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the [1972 Amendments], in the district directors with respect to such hearings shall be vested in such hearing examiners. The current code has replaced the wording of hearing examiners with that of administrative law judge.

Id.

83. *Id.*

84. *See* Yates v. Armco Steel Corp., 10 B.L.R. 1-132 (1987) (per curiam); Cornelius v. Drummond Coal Co., 9 B.L.R. 1-40 (1986), *aff'd sub nom.* Director, OWCP v. Drummond Coal Co., 831 F.2d 240 (11th Cir. 1987).

85. *See* Lee v. Consolidation Coal Co., 843 F.2d 159, 162 (4th Cir. 1988) (following the holding in Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278, 1283 (6th Cir. 1987)).

for modification, s/he is required to submit only enough evidence to show that reconsideration is warranted; the claimant is not expected to prove at that point that the judgment s/he wishes to see set aside was mistaken.⁸⁶ The presentation of definite proof of mistake or change in condition is reserved for the hearing. It is enough if the claimant establishes a high enough probability of error to warrant a hearing, at which both parties will be allowed to make a full evidentiary presentation.⁸⁷

Contested issues that are unresolved by the district director may then be referred to the Office of Administrative Law Judges for a hearing.⁸⁸ Thus, such modification orders are also subject, as are original claims, to a review first before an ALJ, then before the Benefits Review Board, and ultimately on petition for review before a federal court of appeals. The district director is specifically empowered⁸⁹ to modify any final decision if there is a mistake of fact or change of condition.

A. *Mistake of Fact*

Section 22 of the Longshore Act, which grants the district director the power to modify prior compensation awards, or the denial thereof, states that such may be done "because of a mistake in a determination of fact by the district director."⁹⁰ Regulations promulgated by the Secretary of Labor do not expressly restrict the scope of the district director's power to review his or her own mistaken factual determinations.⁹¹ Courts in several circuits, however, have interpreted the language of these regulations to be consistent with that of the United States Code, stating that it is well settled that a district director may

86. See *Estate of Kraus v. Commissioner*, 875 F.2d 597, 602 (7th Cir. 1989) ("[T]he evidence is such that a new trial would *probably* produce a new result.") (emphasis added); *Mumford v. Bowen*, 814 F.2d 328, 330 (7th Cir. 1986) ("[T]he new evidence is *likely* to change the outcome.") (emphasis added). See also *Amax Coal Co. v. Franklin*, 957 F.2d 355 (7th Cir. 1992).

87. *Amax Coal Co.*, 957 F.2d at 357.

88. *Id.*

89. See 20 C.F.R. § 725.480 (1994).

90. 33 U.S.C. § 922 (1988).

91. 20 C.F.R. § 725.310(a) (1994) (reviewing "[o]n grounds of a . . . mistake in a determination of fact").

only correct his or her own prior factual errors and not those of any superior adjudicative authorities involved in the agency's determination of a benefits claim.⁹²

The purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."⁹³ Thus, a claimant "may simply allege that the ultimate fact—disability due to pneumoconiosis—was mistakenly decided," and the district director may modify the final order on the claim.⁹⁴ "There is no need for a smoking-gun factual error, changed conditions, or startling new evidence."⁹⁵

B. Change of Condition

For the purposes of the Black Lung Benefits Act, a change in condition refers to a change in the employee's physical condition.⁹⁶ In order for a claimant to establish a change in condition, the deterioration in his or her physical condition does not have to be "great,"⁹⁷ but rather need only be perceivable.⁹⁸ Courts have interpreted the change in condition required for modification proceedings to be considerably

92. In cases arising in the Seventh, Ninth, Tenth, and Eleventh Circuits, those courts have explicitly indicated that a district director may only correct his or her own mistakes of fact and not those made by an administrative law judge. *See* Director, OWCP v. Palmer Coking Coal Co., 867 F.2d 552 (9th Cir. 1989); Director, OWCP v. Peabody Coal Co., 837 F.2d 295, 298 (7th Cir. 1988); Director, OWCP v. Kaiser Steel Corp., 860 F.2d 377, 379 (10th Cir. 1988); Director, OWCP v. Drummond Coal Co., 831 F.2d 240 (11th Cir. 1987). *See generally* Yates v. Armco Steel Corp., 10 B.L.R. 1-132 (1987).

93. O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 257 (1971) (per curiam). *See Drummond Coal Co.*, 831 F.2d at 240.

94. *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) ("[T]he statute and regulations give the district director the authority, for one year after the final order on the claim, to simply rethink a prior finding of fact.").

95. *Id.* at 725.

96. *See General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25 n.6 (1st Cir. 1982) (per curiam).

97. *Amax Coal Co. v. Franklin*, 957 F.2d 355, 356 (7th Cir. 1992).

98. *Id.* at 356.

less significant than the material change in condition required after the one year time limit has expired.⁹⁹ Establishing that there has been a change in condition is but the first hurdle in the modification process. The claimant must then show that s/he is now entitled to benefits; that is, that his or her condition has deteriorated to the point where s/he is totally disabled due to pneumoconiosis.¹⁰⁰

In determining whether a claimant has established a change in conditions pursuant to Section 725.310 for modification of a previous denial, the ALJ is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision.¹⁰¹

For a claimant seeking modification of a final order, the basis for such modification can make an important difference. A change in condition, a worsening of the applicant's pneumoconiosis to the point where it is totally disabling, entitles the claimant to benefits from the date of the establishment of the change in physical condition.¹⁰² The correction of a mistake of fact, showing that the claimant had totally disabling black lung disease at the time of the original hearing, entitles him or her to benefits from the date on which s/he became totally disabled, which is some date before the modification petition.¹⁰³

V. SUBSEQUENT/DUPLICATE CLAIMS

If the one year period expires and modification is not available, a claimant may still file a new claim or a duplicate claim if a material change in condition can be established.¹⁰⁴ The Department of Labor's regulations pertaining to the adjudication of duplicate or multiple

99. *Id.* See also *Sahara Coal Co. v. Director, OWCP*, 946 F.2d 554 (7th Cir. 1991); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 721 (1989).

100. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 141 (1987).

101. See *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993) (per curiam).

102. See *Jarka Corp. v. Hughes*, 299 F.2d 534, 536-37 (2d Cir. 1962).

103. *Id.*

104. 20 C.F.R. §§ 725.309(c) - (d) (1994).

claims are set forth at 20 C.F.R. Sections 725.309(c) and (d),¹⁰⁵ as well as 727.103(c).¹⁰⁶ When a claimant files a new claim with new evidence within one year of a final denial, this claim constitutes a timely request for modification of the initial claim and is not treated as a duplicate claim.¹⁰⁷ A claim application filed more than one year after the final denial of a prior claim is treated as a “duplicate” claim

105. 20 C.F.R. § 725.309 (1994) deals with duplicate claims:

- (c) A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act before March 1, 1979, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under part 727 of this subchapter. If an earlier claim subject to review under part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the [district director] determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the district director determines that the later claim is a request for modification and the requirements of § 725.310 are met.
- (d) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the [district director] determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [district director] determines that the later claim is a request for modification and the requirements of § 725.310 are met.

Id.

106. 20 C.F.R. § 727.103(c) (1994) provides that if a claimant requests that the Department of Labor review a previously filed SSA claim, “or if more than one claim has been filed with the Secretary of Labor by the same claimant, such claim shall be merged and processed with the first claim filed with the Department of Labor.” *Id.*

107. *See* Lukman v. Director, OWCP, 896 F.2d 1248 (10th Cir. 1990). *See also* 20 C.F.R. §§ 725.309(c) - (d), 725.310(a) (1994).

and is subject to different regulations than a petition for modification.¹⁰⁸

The black lung procedural regulations provide no alternative procedures for the handling of subsequent claims versus the procedures for an initial benefits application. All claims, whether initial or duplicate, are filed with the Department of Labor.¹⁰⁹ Although there are no distinctions between the procedures for handling initial and duplicate claims, there are important distinctions between modification review standards and those governing duplicate claims to the claimant. A petition for modification revives the claimant's original cause of action, which may be of substantial benefit to the claimant because the applicable medical eligibility criteria are determined solely by the filing date of the claim.¹¹⁰ For example, if the original claim was decided under a liberal interim presumption,¹¹¹ that presumption would have been applied in any subsequent modification review. However, if the claimant's application is treated as a duplicate claim or a new cause of action, the revised eligibility criteria contained in 20 C.F.R. Sections 718.1 to 718.404 are likely to apply, thereby making it more difficult to prove disability.¹¹²

In addition, a modification proceeding allows the claimant to receive a readjudication of his or her claim on the basis of the evidence previously considered and rejected, or the claimant may submit new evidence to supplement the initial fact-finding.¹¹³ A duplicate claim, however, will only be readjudicated if the claimant proves that there has been "a material change in condition."¹¹⁴

108. Modifications are processed in accordance with 20 C.F.R. § 725.310 (1994). Duplicate claims filed more than one year after the prior denial are processed according to 20 C.F.R. § 725.309 (1994).

109. See 20 C.F.R. §§ 725.301 to -311 (1994).

110. 20 C.F.R. § 718.2 (1994). See also 20 C.F.R. § 718.202 (1994).

111. 20 C.F.R. § 727.203 (1994).

112. See *Tonelli v. Director, OWCP*, 878 F.2d 1083, 1086-87 (8th Cir. 1989).

113. See *O'Keefe v. Aerojet-Gen. Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (*per curiam*).

114. 20 C.F.R. §§ 725.309(c) - (d) (1994).

A. Material Change of Condition

After the one year following the final denial of benefits expires, the mistake of fact prong of Section 22 no longer applies and the change in the claimant's condition must be "material" in order for him to file a successful claim under 20 C.F.R. Section 725.309. A material change in condition means either that: (1) the miner did not have black lung disease at the time of the first application but has since contracted it and has become totally disabled by it, or (2) that his or her disease has progressed to the point of becoming totally disabling although it was not disabling at the time of the first application.¹¹⁵ It is not enough that the new application is supported by new evidence of disease or disability, because such evidence might show merely that the original denial was wrong, and would thereby constitute "an impermissible collateral attack on that denial" of benefits.¹¹⁶

The Benefits Review Board, in *Spese v. Peabody Coal Co.*, defined a material change of conditions as "that evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result."¹¹⁷ The Seventh Circuit Court of Appeals in *Sahara Coal Co. v. OWCP*, held that this was a misreading of the regulation and "makes mincemeat of res judicata," stating that the Board had confused a change in the claimant's condi-

115. See *Lukman v. Director, OWCP*, 896 F.2d 1248, 1253 (10th Cir. 1990). See also *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 556 (7th Cir. 1991); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 721 (1989) ("[A] material change may also arise if the miner continues to work after his first claim is denied and continued exposure precipitates diagnosable pneumoconiosis or his disease becomes disabling.").

116. *Sahara Coal Co.*, 946 F.2d at 556. In his original application for benefits, the miner had presented no evidence at all and his claim was therefore denied. He reapplied after the first denial became final and now presents substantial evidence of pneumoconiosis. If the evidence shows not that his condition has deteriorated since the initial application, but merely that he should not have been denied benefits, the claimant has failed to demonstrate a material change in his condition. He is merely attempting to relitigate his original claim, which is prohibited by the regulations. *Id.*

117. *Spese v. Peabody Coal Co.*, 11 B.L.R. 1-174, 1-176 (1988) (per curiam), *dismissed with prejudice*, No. 88-3309 (7th Cir. Feb. 6, 1989).

tion with the presentation of newly discovered evidence that might justify reopening the case under the modification provision of 20 C.F.R. Section 725.310.¹¹⁸ Accordingly, the Benefits Review Board has held that the Seventh Circuit's decision in *Sahara Coal Co.*, regarding the standard for establishing a material change in condition under the duplicate claim provisions of 20 C.F.R. Section 725.309(d), will apply only to cases arising within that circuit.¹¹⁹ For cases in other jurisdictions, the Board will continue to apply the definition established in *Spese*.¹²⁰

B. Duplicate Claims Processing

A duplicate or subsequent claim for benefits that is filed more than one year after the denial of the initial claim must be treated similarly to any other claim.¹²¹ The Seventh Circuit Court of Appeals in *Lukman* stated that a district director must simultaneously determine whether "(1) there has been a material change in condition, and (2) whether the claimant is entitled to benefits."¹²² After the district director's determination, a claimant is entitled to a de novo hearing before an ALJ to determine both issues.¹²³ Subsequently, review on the merits of the ALJ's decision by the Board and the appropriate court of appeals is also available.¹²⁴

A material change in condition, which is deterioration sufficient to entitle the claimant to benefits, is a factual question for the administrative law judge, not the Benefits Review Board, to resolve.¹²⁵ The making of factual determinations is the responsibility of the ALJ.¹²⁶ If, after having established that s/he is now totally disabled by pneumoconiosis, the claimant also establishes that his or her present condi-

118. *Sahara Coal Co.*, 946 F.2d at 556.

119. *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24, 1-27 (1992) (per curiam).

120. *Id.*

121. *Lukman v. Director*, OWCP, 896 F.2d 1248, 1254 (10th Cir. 1990).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1253.

126. *Shelton v. Old Ben Coal Co.*, 933 F.2d 504, 506 (7th Cir. 1991).

tion is substantially worse than it was at the first application for benefits, then the claimant is entitled to an award of benefits. But, if the claimant's condition is only slightly worse at present, s/he needs to show that s/he missed the disability threshold in the initial benefits determination so that even a slight worsening could be, and is, a material change in condition.¹²⁷

The ALJ must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. This determination by the ALJ is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the ALJ finds that the claimant has established a material change in condition, the claimant is entitled to have his or her new claim considered on the merits. When considering a duplicate claim on the merits, the ALJ must consider and weigh the evidence filed with both the prior claim and the new claim.¹²⁸

C. Duplicate Survivor Claims

When there are two survivors' claims filed by the same claimant, and the previous claim has been denied, the subsequent claim must also be denied on the basis of the earlier claim unless the subsequent claim is filed within one year of the last denial of the earlier claim.¹²⁹ The material change in condition language of Section 725.309 is not applicable to duplicate survivors' claims, which may only be considered if the subsequent claim satisfies Section 725.310, i.e., the duplicate claim is filed within one year of the previous denial,

127. *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 558 (7th Cir. 1991) ("[U]nless such proof is required, finality would be out the window. Some deterioration is to be expected in virtually every case, so if that were all that had to be shown, disappointed claimants could file successive application in virtually all cases.").

128. The Board will apply this standard in all circuits except the Seventh, which applies the standard set forth by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co.*

129. The claim must be considered a petition for modification governed by 20 C.F.R. Section 725.310 (1994).

thereby constituting a request for modification. These regulations apply a strict rule of *res judicata* in survivors' claims and permit no reopening if a duplicate survivor's claim is not a request for modification.¹³⁰

D. Merger of Claims

Without a timely request for modification, a previously denied claim may not be reopened.¹³¹ Accordingly, the Board has held that where a material change in condition is established, the subsequent claim is then considered a new and viable claim, and the filing date of the subsequent claim determines which substantive regulations apply.¹³² A claimant, however, would prefer, and it has been argued,¹³³ that the regulations and presumptions that governed the initial claim should also be determinative of the duplicate claim. The reasoning is clear. Those claims filed during the period when the eligibility criteria were more liberal would allow the claimant to more easily recover, while the criteria currently governing entitlement to benefits are much more strict making it more difficult to prove disability due to pneumoconiosis. However, the Board rejected this theory and instead held that Section 725.309(c) precludes a merger of finally denied claims with newly filed claims after the one year modification period has expired.¹³⁴

130. 20 C.F.R. §§ 725.309(c), (d) (1994). See *Clark v. Director, OWCP*, 9 B.L.R. 1-205 (1986) (per curiam), *rev'd on other grounds*, 838 F.2d 197 (6th Cir. 1988).

131. *Pittston Coal Group v. Sebben*, 488 U.S. 105, 122 (1988).

132. See *Spese v. Peabody Coal Co.*, 11 B.L.R. 1-174, 1-176 (1988) (per curiam), *dismissed with prejudice*, No. 88-3309 (7th Cir. Feb 6, 1989).

133. *Id.*

134. *Id.* The Department of Labor's regulations do provide for the merger of duplicate claims with the first earlier claim filed in some instances, the effect being that the later claim loses its procedural identity. In order for a subsequent claim to be merged with a prior claim pursuant to Section 725.309(c), the prior claim must still be subject to Part 727 review. The Eighth Circuit Court of Appeals stated its belief that merger is available only when a previously denied claim, reopened for review under Part 727, and a second claim are pending at the same time. *Tonelli v. Director, OWCP*, 878 F.2d 1083, 1087 (8th Cir. 1989). Once a claim reviewed under Part 727 has been finally denied, even due to abandonment, it cannot be revived merely by filing a subsequent claim. The general rule as stated by the Board in *Chadwick v. Island Creek Coal Co.*, is that duplicate claims filed under Part C of the Black Lung Benefits Act merge

VI. RES JUDICATA

It is often stated numerous times that the doctrine of res judicata generally has no application in the context of black lung claims.¹³⁵ The purpose of 20 C.F.R. Section 725.309(d) is to provide relief from the principles of res judicata and finality to a miner whose condition worsens over time.¹³⁶ The waiver of res judicata contained in the duplicate claim regulations is, however, more restricted in contrast to the waiver afforded in a modification proceeding based on the substantially narrower scope allowing review of the previously denied claim. A second application for black lung benefits, filed after the first application was ultimately denied, may be granted *only* if there has been "a material change in conditions."¹³⁷ Otherwise that first denial, having become final, bars a subsequent application for benefits.¹³⁸

The power to modify final judgments under Section 22 of the Longshore Act has repeatedly been interpreted as an exception to the principles of finality and res judicata that normally prevent relitigation

with:

- (1) Previous claims filed under Part B of the Act, which are pending or were denied, and in which the claimant has elected review under Section 435 of the Act (20 C.F.R. § 725.309(c) (1994));
- (2) Previous claims, pending or denied, which were filed under Part C of the Act before March 1, 1978, and which are subject to automatic review under Section 435 of the Act (20 C.F.R. § 725.309(c) (1994)); and
- (3) Previous claims filed under Part C of the Act after March 1, 1978, only if the previous claim is still pending (less than one year has elapsed since the previous administrative denial (20 C.F.R. § 725.309(d) (1994)).

Chadwick, 7 B.L.R. 1-883, 1-893 (1985), *aff'd on recon. en banc*, 8 B.L.R. 1-447 (1986) (per curiam). *See also* *Bates v. Director, OWCP*, 7 B.L.R. 1-113 (1984) (per curiam). The Seventh Circuit, however, has rejected the Board's merger analysis as stated in *Chadwick*. *Old Ben Coal Co. v. Luker*, 826 F.2d 688 (7th Cir. 1987).

135. *See* *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-65 (1968) (holding that the Longshore Act's modification provision displaces *res judicata*). *See also* *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam).

136. *See* *Lukman v. OWCP*, 896 F.2d 1248, 1253 (10th Cir. 1990).

137. 20 C.F.R. § 725.309(d) (1994) (emphasis added).

138. *Lukman*, 896 F.2d at 1253-54.

of a case.¹³⁹ To achieve the intent of Congress, the regulations adopted from Section 22 have been interpreted as allowing the parties¹⁴⁰ to request modification of *any* decision issued by the district director. Such an interpretation is based on the fact that the condition of the miner may change, in view of the progressive nature of pneumoconiosis, or that a mistake in fact could be discovered as the district director considers new evidence in the procedure. Furthermore, the modification process remains available throughout appellate proceedings.¹⁴¹

The Benefits Review Board held in *Garcia v. Director, OWCP*,¹⁴² that the regulatory scheme providing for continued availability of modification proceedings within one year following any denial by the district director,¹⁴³ is applicable even after the district director has considered modification once. The Board stated that the adjudicative actions to be taken by the district director under Section 725.310(c) at the conclusion of modification proceedings all provide subsequent opportunities to seek modification of that action.¹⁴⁴

In *Garcia*, the Board justified its position on indefinite modification petitions by stating that the regulations provide "for continued availability of modification proceedings within one year following a denial by the [district director] even after the [district director] has

139. See *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993) (holding that the "principle of finality" does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits). See also *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-65 (1968) (holding that Longshore Act's modification provision displaces *res judicata*).

140. The district director, on his or her own motion, may also request the modification.

141. See *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam). See generally *Director, OWCP v. Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988).

142. 12 B.L.R. 1-24 (1988)

143. The one year period for modification under 20 C.F.R. § 725.310(a) (1994) begins to run anew from the date of each denial issued by the district director. *Garcia v. Director, OWCP*, 12 B.L.R. 1-24, 1-26 (1988). The Benefits Review Board reaffirmed its holding in *Garcia*, that the one year modification period provided for in Section 725.310 runs from the date of the issuance of the last denial of the claim in the administrative process, even after the district director has considered modification once.

144. See 20 C.F.R. §§ 725.310(c), 725.409(b), 725.418(a), 725.419(d), 725.421 (1994).

considered modification once,” and by citing its own prior decisions asserting that “[f]urther justification for this conclusion is the rule that a party may request modification of the denial of a claim by the administrative law judge within one year after the conclusion of appellate proceedings.”¹⁴⁵

Since the decision in *Garcia*, however, it has been stated¹⁴⁶ that the Board’s holding, which would allow endless modification attempts, was unsupported by the plain language of Section 725.310(a),¹⁴⁷ which states that a modification request must be filed within one year of the “denial of a *claim*,”¹⁴⁸ and not within one year of the denial of subsequent modification requests. A “claim” is defined as a “written assertion of benefits under [Section] 415 or Part C of title IV of the Act. . . .”¹⁴⁹ Accordingly, the Handbook states that modification requests are not “claims” within the meaning of the Black Lung Act, as such requests are intended to permit the reconsideration of the “terms of an award or denial of benefits.”¹⁵⁰ Instead, finding there is no statutory or regulatory authority for the conclusion that a modification request is a distinct claim for benefits under the Act, the Handbook states that the language of section 725.310(a)¹⁵¹ permits reconsideration “at any time before one year after the denial of a claim” and not within one year after the denial of subsequent modification requests.¹⁵²

VII. CONCLUSION

A quarter of a century ago, Congress passed landmark legislation in an attempt to eliminate the loss of life, illness, and serious injury that were routine in the mining industry. The Federal Black Lung Ben-

145. *Garcia*, 12 B.L.R. 1-24 (1988).

146. SEENA K. FOSTER, *THE CURRENT ANALYSIS: A DESKBOOK OF THE BLACK LUNG BENEFITS ACT A6-765* (1992).

147. 20 C.F.R. § 725.310(a) (1994).

148. FOSTER, *supra* note 146, at A6-765 (emphasis added).

149. 20 C.F.R. § 725.101(16) (1994).

150. 20 C.F.R. § 725.310(a) (1994).

151. 20 C.F.R. § 725.310(a) (1994).

152. *Id.*

efits Program has withstood legislative amendment since its beginning in the Federal Coal Mine Health and Safety Act of 1969. Since this inception, the program has undergone significant changes, particularly in the area of eligibility requirements. The program, however, has generated considerable controversy and has been described as “the classic case of a program that has gotten out of control.”¹⁵³ While some people view the benefits eligibility requirements as overly inclusive, others think that the program has yet to fulfill its stated purpose of providing fair and adequate compensation benefits to miners who become totally disabled due to pneumoconiosis. The backlog of cases and the restrictive eligibility requirements frustrate black lung claimants and serve to perpetuate the negative view of the program. However, at the very least, the provisions for modification petitions and duplicate claims offer a glimmer of hope to a denied claimant, especially those whose condition worsens over time.

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153. NASE, *supra* note 2, at 278-79.