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# United States Department of Labor v. Triplett: Black Lung Claimants will Continue to Suffer from a Lack of Legal Representation

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**UNITED STATES DEPARTMENT OF LABOR v. TRIPLETT: BLACK LUNG CLAIMANTS WILL CONTINUE TO SUFFER FROM A LACK OF LEGAL REPRESENTATION**

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I. INTRODUCTION

The recent decision of the United States Supreme Court in *United States Department of Labor v. Triplett*<sup>1</sup> will undoubtedly frustrate the efforts of West Virginia coal miners seeking to recover benefits<sup>2</sup> under the federal Black Lung Benefits Act.<sup>3</sup> As a result of this decision, black lung claimants are not likely to find attorneys willing to represent them.<sup>4</sup> This decision overruled the West Virginia Su-

1. 110 S. Ct. 1428 (1990).

2. See *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82, 89-91 (W. Va. 1988), *rev'd*, 110 S. Ct. 1428 (1990).

3. 30 U.S.C. § 901-62 (1988).

4. See *Triplett*, 378 S.E.2d at 89-91.

preme Court of Appeal's holding that the fee limitations imposed by the Department of Labor (DOL) upon those representing black lung claimants were unconstitutional.<sup>5</sup> The West Virginia court found that these fee limitations, as they were applied, effectively denied black lung claimants the "ability to find competent lawyers to represent them."<sup>6</sup>

Justice Neely, writing for the majority of the West Virginia court, noted that the black lung claims process is "procedurally, factually, and legally complex."<sup>7</sup> The grant or denial of benefits often means the difference between life or death, sufficient diet or malnourishment, and minimal medical care or no medical care at all.<sup>8</sup> Forcing a miner to bear the burden of proof with regard to complex issues of law, fact, and medicine is no small burden considering the fact that only one in ten coal miners ever graduate from high school.<sup>9</sup> In addition, responsible coal operators opposing these claims often pay premium prices for experienced counsel.<sup>10</sup> Thus, the potential exists that an unrepresented claimant will be placed at a severe disadvantage.

Both the West Virginia court and the Supreme Court agreed that if the DOL's fee scheme operated in such a manner as to deny claimants the ability to obtain counsel, the scheme would violate the claimants' rights to procedural due process.<sup>11</sup> However, the two courts diverged at this point. The factual record upon which the

5. *Id.* at 93.

6. *Id.*

7. *Id.* at 92.

8. *Black Lung Legislation, 1971-72: Hearing Before the Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92nd Cong., 1st & 2nd Sess. 109 (1985).*

9. Brief for Respondent at 17, *United States Dep't. of Labor v. Triplett*, 110 S. Ct. 1428 (1990) (Nos. 88-1671 & 88-1688) (citing Department of Labor, Employment Standards Administration, *A Sample Survey of All Sources of Both Monetary and Nonmonetary Income of Black Lung Beneficiaries* 14 (1983)).

The typical miner received little formal education; only one in ten graduated from high school. In fact, three-fourths of these miners did not even attend high school. Widow beneficiaries tended to have slightly more education than miner beneficiaries, with 18% being high school graduates. A few widow beneficiaries (4%) attended college. *Id.*

10. A "responsible operator feels . . . he can well afford . . . to spend \$5,000 to \$10,000 to fight a non-paid attorney." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Relations of the House Comm. of Education and Labor, 99th Cong., 1st Sess. 22 (1985)* (Statement of Martin Sheinman, Esquire).

11. *U.S. Dep't. of Labor v. Triplett*, 110 S. Ct. 1428, at 1433.

West Virginia court relied to invalidate the DOL's fee scheme was characterized by the Supreme Court as "blatantly insufficient."<sup>12</sup>

This comment will examine the Supreme Court's holding in the *Triplett* case and the likely effect this holding will have upon future challenges to the DOL's fee regulations.

### A. *Prior Law*

The Black Lung Benefits Act<sup>13</sup> (Act) provides funds to miners who have been totally disabled by black lung. Claimants seeking to recover benefits under this Act are entitled to obtain attorney representation.<sup>14</sup> When a claimant is successful in obtaining benefits, the employer, his insurer, or in some cases, the Black Lung Disability Trust Fund,<sup>15</sup> must pay the claimant's attorney a fee "reasonably commensurate with the necessary work done."<sup>16</sup>

Lawyers and other representatives seeking a fee pursuant to this Act must submit an application for such fees to the appropriate tribunal before whom the services were performed.<sup>17</sup> Consensual agreements between the claimant and his representative as to the

12. *Id.*

13. Black Lung Benefits Act of 1972, 83 Stat. 792 as amended, 30 U.S.C. § 901-62 (1988).

14. *Triplett*, 378 S.E. 2d at 91. "[I]n black lung litigation, it is clear that Congress intended that lawyers be used by claimants because it specifically provides for lawyers, and for payment of a reasonable attorney's fee." *Id.*

15. 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 928(a) (1982)).

16. 20 C.F.R. § 725.366(b).

Any fee . . . shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings and any other information which may be relevant to the amount of fee requested.

*Id.*

17. 20 C.F.R. § 725.366(a).

A representative seeking a fee for services performed on behalf of a claimant shall make application therefor to the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed . . . . The application shall be supported by a complete statement of the extent and character of the necessary work done, and shall indicate the professional status (e.g., attorney, paralegal, law clerk, lay representative or clerical) of the person performing such work, and the customary billing rate for each such person.

amount of fee to be charged are prohibited,<sup>18</sup> and no fee is awarded unless the claimant is successful.<sup>19</sup> However, following the West Virginia court's opinion which declared the DOL's fee scheme unconstitutional, lawyers in West Virginia were free to contract with black lung claimants for contingent fees.<sup>20</sup> Considering the large number of black lung claims filed in West Virginia yearly, the West Virginia court's holding in the *Triplett* case created a significant split of authority.<sup>21</sup>

### B. Facts

In 1978, George R. Triplett, a lawyer whose principal office is located in Randolph County, West Virginia, began representing claimants seeking recovery under the Black Lung Benefits Act.<sup>22</sup> As a former miner, Triplett was well acquainted with black lung and the suffering that accompanied those afflicted with this disease. Triplett was also familiar with the DOL's rules and regulations requiring that all fees be approved by the appropriate tribunal before whom the services were performed.<sup>23</sup> Nevertheless, Triplett requested and received contingent fees from fifteen of his clients.<sup>24</sup> The contingent fee agreements amounted to approximately twenty-five percent of the claimants' accrued awards.<sup>25</sup> Believing that the DOL was contemplating changing its fee regulations, Triplett deposited the amounts received into bank accounts in his name as "attorney on escrow" for the individual claimants.<sup>26</sup> Thus, Triplett's contractual

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18. 20 C.F.R. § 725.365 "No contract or prior agreement for a fee shall be valid." *Id.* See also 33 U.S.C. § 928(c). Anyone receiving an unapproved fee is subject to a fine of \$1,000 or imprisonment for not more than one year or both.

19. See *General Dynamics v. Harrigan*, 848 F.2d 321 (1st Cir.), cert. denied, 488 U.S. 992 (1988).

20. See *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82.

21. No other states have declared the DOL's fee provisions unconstitutional.

22. Appendix C at 45a, *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82 (No. 86-056).

23. *Id.*

24. *Id.*

25. 20 C.F.R. § 725.502. If the claimant is found eligible for benefits, he will receive a lump sum payment representing benefits that have accrued from the onset of the disability to the date of the award. Thereafter, the claimant receives a monthly benefit. *Id.*

26. Appendix C at 50a-51a, *Committee on Legal Ethics v. Triplett*, 378 S.E.2d 82 (No. 86-

agreements for contingent fees and the receipt of these unapproved fees was in direct contravention of the controlling regulations.

*C. Procedural History: Hearings Before the Committee on Legal Ethics of the West Virginia State Bar*

For these violations, charges were brought by the Committee on Legal Ethics of the West Virginia State Bar (Committee).<sup>27</sup> The Committee found Triplett's refusal to abide by the DOL's regulations rendered him in violation of various provisions of the West Virginia Code of Professional Responsibility.<sup>28</sup> Consequently, the Committee recommended that Triplett be suspended from the practice of law for a period of six months.<sup>29</sup> The Committee then sought enforcement of this sanction in the West Virginia Supreme Court of Appeals.<sup>30</sup>

## II. THE MAJORITY OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

The West Virginia court recognized that in order to impose the Committee's recommended sanctions upon Mr. Triplett, the regulations which he was found to have violated would have to pass constitutional muster.<sup>31</sup> The court began its analysis by acknowledging that "the mere denial to a claimant of counsel of his choice (or for that matter, any counsel) does not necessarily imply a denial of due process rights."<sup>32</sup> The West Virginia court then proceeded to follow the analysis used by the Supreme Court in the case of *Walters v. National Ass'n of Radiation Survivors*<sup>33</sup> to determine if the claimants' rights to procedural due process had been violated.

27. *Id.* at 48a.

28. *Id.* at 50a. Triplett was found guilty of violating DR 1- 102(A)(4), (5), and (6) of the Code of Professional Responsibility which provides that a lawyer should not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

29. *Id.* at 50a-51a.

30. *Triplett*, 378 S.E.2d 82.

31. *Id.* at 95.

32. *Id.* at 85.

33. 473 U.S. 305 (1985).

In *Walters*, the Court followed the test set out in *Mathews v. Eldridge*<sup>34</sup> in reaching its conclusion that the ten dollar fee limitation which was allowed to be paid an attorney or agent representing veterans seeking benefits from the Veterans' Administration (VA) did not violate veterans' rights to procedural due process.<sup>35</sup> In keeping with *Walters*, the court in this case also followed the *Mathews* test.<sup>36</sup>

The *Mathews* test requires that a court weigh three specific interests.<sup>37</sup> First, the court must take into account the private interest that will be affected by the official action.<sup>38</sup> Second, the court is required to consider the risk of an erroneous deprivation under the present system, and the effect additional or substitute procedural safeguards will have on the present system.<sup>39</sup> And third, the court must take into account the government's interest in maintaining the existing system.<sup>40</sup>

However, before applying the *Mathews* test, the West Virginia court attempted to establish the underlying proposition that the present system rendered attorney representation unavailable.<sup>41</sup> Although it did not have the kind of statistical evidence before it that the Supreme Court had available in *Walters*, the West Virginia court asserted that affidavits submitted by several attorneys sufficiently established the proposition that attorneys were unwilling to represent claimants under the present system.<sup>42</sup> The West Virginia court cited the long delay in receiving payment<sup>43</sup> without any provision for in-

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34. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

35. *Walters*, 473 U.S. 305 (1985).

36. *Triplett*, 378 S.E.2d 82.

37. *Mathews*, 424 U.S. at 321.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Triplett*, 378 S.E.2d at 89-91.

42. *Id.* at 92.

43. Seventy-eight percent of the cases heard at the Administrative Law Judge level between October 1, 1983, and August 21, 1984 took in excess of two years to adjudicate. These statistics do not include time for administrative hearings or appeals. *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before the Employment and Housing and Housing Subcommittee of the House Committee on Government Operations*, 99th Cong., 1st Sess. at 41 (1985) (GAO Report HRD-85-

terest, and the shortage of premiums to offset the contingent nature<sup>44</sup> of the work as the two factors which led most attorneys to balk at the idea of representing black lung claimants.<sup>45</sup>

While the regulations purport to compensate for these factors, the West Virginia court surmised that the factual record before it clearly indicated that this was not the case.<sup>46</sup> This finding led the court to recognize that "a law nondiscriminatory on its face may be grossly discriminatory in its operation."<sup>47</sup>

After establishing the central proposition that attorney representation was unavailable to black lung claimants, the court applied the *Mathews* test in order to discern whether or not this deprivation violated the claimants' rights to procedural due process. The court first determined that the black lung claimants' property interests at stake in this case were analogous to the welfare recipients' property interests considered in *Goldberg v. Kelly*.<sup>48</sup> In *Goldberg*, the Supreme Court held that a welfare recipient facing a possible termination of benefits was entitled to be represented by a lawyer.<sup>49</sup> Similarly, since "black lung benefits are awarded only in cases of total disability or death [and] . . . may well provide the only means of subsistence"<sup>50</sup> the West Virginia court decided that the first element of the *Mathews* test weighed in favor of granting black lung claimants free access to counsel.<sup>51</sup>

Secondly, the court found the claimants were likely to be erroneously deprived of their benefits under the present system.<sup>52</sup> Due to the complexity, adversarial nature, and lack of alternative means of representation throughout the black lung claims process, the court believed attorney representation was a virtual necessity.<sup>53</sup> Unlike the

44. *Id.* at 55-56. The overall approval rate from January, 1982 through March, 1988 under the eligibility criteria of the 1981 amendment was 5.8%.

45. *Triplett*, 378 S.E.2d at 91.

46. *Id.* at 89.

47. *Triplett*, 378 S.E.2d at 89 (quoting *Griffin v. Illinois*, 351 U.S. 12, at 17 n.11 (1956)).

48. *Triplett*, 378 S.E.2d at 92.

49. *Goldberg v. Kelly*, 397 U.S. 254, 270-76 (1970).

50. *Triplett*, 378 S.E.2d at 91-92.

51. *Id.* at 93.

52. *Id.* at 92.

53. *Id.*



Veterans Administration proceedings dealt with in *Walters*, where the Supreme Court stated that “surely Congress desired that the [VA] proceedings be as informal and nonadversarial as possible,”<sup>54</sup> the West Virginia court concluded that black lung litigation is free of any “homey claimant-oriented ambiance.”<sup>55</sup>

Finally, the court examined the third interest to be considered under the *Mathews* test, namely, the government’s interest in maintaining the current fee regulations.<sup>56</sup> Since the Disability Trust Fund or a responsible operator will ultimately be liable for a successful claimant’s attorney fees, the court found that the DOL had a real interest in maintaining its current regulations to assure that neither of these sources of funds were overcharged by successful claimants’ attorneys.<sup>57</sup> In addition, the court also found that the DOL had a legitimate interest in protecting claimants from entering into improvident agreements with attorneys which would “needlessly deplete their benefits.”<sup>58</sup> However, the court downplayed this interest by stating that under the present system claimants rarely have an award to share with their attorney.<sup>59</sup>

After weighing each of the interests considered under the *Mathews* test, the West Virginia court concluded that the DOL’s current regulations did “in fact severely restrict claimants’ ability to find competent lawyers to represent them.”<sup>60</sup> Hence, the court held that the *Mathews* test, as it was applied to the black lung claims process, warranted a different holding from that reached in *Walters*.<sup>61</sup> Unlike the VA’s fee limitations upheld in *Walters*, the DOL’s fee limitations were held to violate the claimants’ rights to procedural due process.<sup>62</sup>

In addition, the court stated its holding had an independent basis for support.<sup>63</sup> The court said it was “fundamentally unfair for the

54. *Walters*, 473 U.S. at 323-24.

55. *Triplett*, 378 S.E.2d at 88.

56. *Id.* at 91-92.

57. *Id.* at 91.

58. *Id.* at 91 (citing *Moore v. Califano*, 471 F.Supp. 146, 149 (1979)).

59. *Triplett*, 378 S.E.2d at 92.

60. *Id.* at 93.

61. *Id.*

62. *Id.*

63. *Id.*

government to confer a right with one hand, and take it away with the other hand.”<sup>64</sup> Since Congress had granted qualified claimants the right to receive black lung benefits, it could not later deny the claimants the procedural safeguards necessary to secure such a right.<sup>65</sup> The West Virginia court viewed the right to obtain counsel as a necessary procedural safeguard.<sup>66</sup>

#### A. *Justice Miller's Dissenting Opinion*<sup>67</sup>

According to the dissent, the failure of the parties to raise the constitutionality of the fee provisions below had provided the court with an inadequate factual record.<sup>68</sup> The dissent stated that the factual record, which consisted of ex parte affidavits, was a “woefully inadequate” basis for the broad sweeping factual conclusions reached by the majority.<sup>69</sup> The dissent concluded that generalized assertions of procedural unfairness were “not the sort of evidence [which would] permit a conclusion that the entire system is operated contrary to its governing regulations.”<sup>70</sup> The dissent held it was the DOL, and not the black lung claimants, who had been deprived of procedural due process.<sup>71</sup> After all, the DOL’s entire fee scheme was declared unconstitutional without the DOL ever having a chance to be heard before the court.<sup>72</sup>

However, since the case did involve an important question of federal law, the DOL was allowed to intervene and file a petition for rehearing.<sup>73</sup>

#### B. *Petition for Rehearing*

In its petition for rehearing, the DOL submitted statistics which showed that in cases resulting in the grant or denial of benefits,

64. *Id.*

65. *Id.*

66. *Id.*

67. Justice McHugh joined in the dissent.

68. *Triplett*, 378 S.E.2d at 98.

69. *Id.*

70. *Id.* at 99 n.2 (quoting *Walters*, 110 S. Ct. at 324 n.11).

71. *Triplett*, 378 S.E.2d at 99.

72. *Id.*

73. *Id.* at 95.

claimants were represented at the Administrative Law Judge (ALJ) level ninety-two percent of the time.<sup>74</sup> Twenty-nine percent of these claimants prevailed as compared to the fraction of clients proceeding pro se who only prevailed 11.6% of the time.<sup>75</sup> The West Virginia court found that these statistics simply reinforced its original holding.<sup>76</sup> A two and one-half times greater success rate for those claimants that were represented was perceived as “constitutionally significant for due process purposes.”<sup>77</sup> Consequently, the DOL’s petition for rehearing was denied.<sup>78</sup>

Both the DOL and the Committee petitioned for certiorari. Both petitions were granted, and the case was argued before the United States Supreme Court on January 16, 1990.<sup>79</sup>

### III. THE SUPREME COURT’S MAJORITY OPINION

#### A. *The Standing Issue*

Justice Scalia delivered the opinion of the Supreme Court which expressly overruled the holding rendered by the West Virginia court in the *Triplett* case.<sup>80</sup> Before turning to the merits of the case, the Court felt it necessary to analyze the standing of the various parties.<sup>81</sup> The West Virginia Committee on Legal Ethics (Committee) was held to have the “classic interest of a government prosecuting agency arguing for the validity of a law upon which its prosecution is based.”<sup>82</sup> The Court then cited its holding in *Bowsher v. Synar*<sup>83</sup> to support its conclusion that since the Committee had standing it was unnecessary to determine whether or not the DOL had standing.<sup>84</sup> On the other hand, the Court did go to some length in discussing

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74. *Id.* at 98.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Triplett*, 110 S. Ct. 1428 (1990).

80. *Id.*

81. *Id.* at 1431.

82. *Id.*

83. *Triplett*, 110 S. Ct. at 1431 (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

whether or not Triplett had standing to assert the rights of the black lung claimants.<sup>85</sup>

In *Warth v. Seldin*, the Supreme Court held that one “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”<sup>86</sup> This is exactly what Triplett was doing in this case. Triplett’s claim to relief was based on the legal rights and interests of the black lung claimants. Triplett contended that if the claimants were being unconstitutionally deprived of their rights to due process under the DOL’s current fee regulations, his violation of these regulations could not support the Committee’s proposed sanction.<sup>87</sup>

The Court stated that Triplett would have ordinarily been denied standing even though the same allegedly illegal act which affected the claimants, the fee provisions in this case, also affected him.<sup>88</sup> However, as the Court noted in *Secretary of State of Maryland v. Joseph H. Munson Co.*,<sup>89</sup> when “enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), third party standing has been held to exist.”<sup>90</sup> Likewise, the Court held Triplett had third party standing since the DOL’s fee provisions effectively precluded him from entering into any contractual relationship with black lung claimants.<sup>91</sup>

The majority also disagreed with Justice Marshall’s view that *ASARCO v. Kadish*<sup>92</sup> rendered the Court’s inquiry into third-party standing inappropriate.<sup>93</sup> In *ASARCO*, the Court held:

When a state court has issued a judgement in a case where the plaintiffs in the original action had no standing to sue under the principle governing federal courts, we may exercise our jurisdiction on certiorari if the judgement of the state court

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85. *Id.* at 1431-32.

86. *Id.* at 1431 (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

87. *Id.* at 1431.

88. *Id.* (citing *United States v. Payner*, 447 U.S. 727, 731-32. (1980)).

89. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 954-58 (1984).

90. *Triplett*, 110 S. Ct. at 1432.

91. *Id.*

92. *ASARCO v. Kadish*, 109 S. Ct. 2037 (1989).

93. *Triplett*, 110 S. Ct. at 1432.

causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.<sup>94</sup>

However, the Court asserted it was questionable whether states had the “power, by granting or denying third-party standing, to create or destroy federal causes of action.”<sup>95</sup> Accordingly, the Court professed to be following “longstanding precedent in ascertaining the third party standing of a respondent in a case arising from state court.”<sup>96</sup>

### B. *The Merits*

There was no disagreement as to the merits of the case.<sup>97</sup> Applying an analysis similar to that applied in *Walters*,<sup>98</sup> the Court held that the DOL’s fee scheme must be upheld.<sup>99</sup> As in *Walters*, the Court began its analysis by noting the “heavy presumption of constitutionality”<sup>100</sup> that should be accorded a “carefully considered decision of a co-equal and representative branch of our Government.”<sup>101</sup> The Court stated that overcoming this presumption of constitutionality would require “an extraordinarily strong showing of probability of error under the present system and the probability that the presence of attorneys would sharply diminish that possibility to warrant a holding that the fee limitation denies claimants due process of law.”<sup>102</sup>

However, unlike the Court in *Walters*, the Court in this case declined to evaluate the first two interests to be considered under the *Mathews* test. Instead the Court singled out the third interest to be considered under the *Mathews* test, namely the government’s interest in upholding the DOL’s present fee scheme.<sup>103</sup> The Court cited three legitimate governmental interests served by the present

94. *ASARCO*, 109 S. Ct. 2037, 2048.

95. *Triplett*, 110 S. Ct. at 1432.

96. *Id.*

97. *Id.* at 1428.

98. *Id.* at 1432.

99. *Id.*

100. *Id.*

101. *Id.* (quoting *Walters*, 473 U.S. 305, 319).

102. *Id.* (quoting *Walters*, 473 U.S. 305, 326).

103. *Id.* (quoting *Triplett*, 110 S. Ct. at 1432/1433).

system. First, the government's regulation of attorney fees paid by claimants themselves serves to protect the claimants from their "improvident contracts, in the interest not only of themselves and their families but of the public."<sup>104</sup> Second, when the fee is to be born by the employer or Disability Trust Fund, the regulations assure that those sources will not be depleted so as to deprive other eligible claimants a source of compensation.<sup>105</sup> Third, the delay in payment of an attorney's fee until a final award is made ensures that the payor will not be subjected to the needless task of obtaining a refund in the case the decision is later reversed.<sup>106</sup>

However, the Court felt it unnecessary to pursue the *Mathews* analysis, which was used in *Walters*, any further. The Court stated that in *Walters* it assumed the VA's fee provisions would deny claimants the ability to obtain an attorney.<sup>107</sup> Only then did the Court apply the *Mathews* test in order to determine whether the unavailability of counsel deprived claimants of their right to due process.<sup>108</sup> Since the unavailability of attorney representation was not apparent from the factual record offered by Triplett, he was required to prove the central proposition which was assumed in *Walters*, specifically, that the DOL's current fee scheme had "made attorneys unavailable at the time [he] violated the Act."<sup>109</sup> The Court stated that such a showing would require the proof of two essential elements: "1) that claimants could not obtain representation, and 2) that this unavailability of attorneys was attributable to the Government's fee regime."<sup>110</sup>

The Court admitted that the above showing would place a large burden upon one challenging the constitutionality of these provisions.<sup>111</sup> In any event, the Court found the evidence offered by Triplett to meet this burden of proof was "blatantly insufficient,"<sup>112</sup>

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104. *Id.* at 1432 (quoting *Yeiser v. Dysart*, 267 U.S. 540, 541 (1925)).

105. *Triplett*, 110 S. Ct. at 1433.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

even if it was entirely un rebutted.<sup>113</sup> The Court cited the statistics<sup>114</sup> offered by the DOL as evidence that "claimants whose chances of success are high enough to attract contingent fee lawyers have no difficulty finding them."<sup>115</sup> Thus, Triplett failed to establish the central proposition that claimants could not obtain attorney representation under the present system.

According to the Court, Triplett also failed to establish the causal connection between the DOL's fee scheme and the unavailability of attorneys.<sup>116</sup> In finding to the contrary, the West Virginia court cited the delay in receiving payment and the risk of nonrecovery as the two most important reasons why lawyers are unwilling to represent black lung claimants under the present system.<sup>117</sup> Addressing this assertion, the Supreme Court stated "the evidence to support this economic assessment is similar to that for the unavailability of attorneys, small in volume, anecdotal in character, and self interested in motivation."<sup>118</sup> In fact, the Court stated it did not know how the DOL could maintain a system which provided inadequate fees even if it wanted to.<sup>119</sup> The term "reasonable" fee has been interpreted by the courts to compensate both for delay<sup>120</sup> and for the risk of going unpaid.<sup>121</sup> In sum, the Supreme Court felt the evidence relied upon by the West Virginia court did not remotely establish either that the claimants were unable to obtain attorney representation or that the cause of such inability was the DOL's existing fee scheme.<sup>122</sup>

The Supreme Court also rejected the West Virginia court's "independent basis for finding a due process violation."<sup>123</sup> The Court

113. *Id.* "The impressions of three lawyers that the current system has produced 'few' lawyers, or 'fewer qualified attorneys' (whatever that means), and that 'many have left the field, are blatantly insufficient to meet the respondents burden of proof even if entirely un rebutted.'

114. *Id.* "[I]n 1987 claimants were represented by counsel at the ALJ stage in 92% of the cases resulting in grant or denial of benefits."

115. *Triplett*, 110 S. Ct. at 1434.

116. *Id.* at 1434-35.

117. *Triplett*, 378 S.E.2d at 91.

118. *Triplett*, 110 S. Ct. at 1434.

119. *Id.*

120. *Hobbs v. Director, OWCP*, 820 F.2d 1528, 1529 (9th Cir. 1987).

121. *Risden v. Director OWCP*, 11 BRBS 819, 824 (1980).

122. *Triplett*, 110 S. Ct. at 1435.

stated that if the right to counsel were part of the statutory remedy provided by Congress, the denial of the right to counsel would simply violate the statute.<sup>124</sup> A violation of the statute would then make it unnecessary to invoke the Due Process Clause.<sup>125</sup> Furthermore, the Court believed this “independent basis” was not in fact independent of the central proposition that the DOL’s fee scheme had operated in such a way that denied black lung claimants the right to counsel.<sup>126</sup> Since the central proposition that attorney representation was unavailable under the DOL’s present fee scheme was never established, the Court also disposed of the West Virginia court’s alternative holding.<sup>127</sup>

### C. Justice Stevens’ Concurrence

Justice Stevens’ discussion of the merits of this case followed up on his dissent in *Walters*.<sup>128</sup> He reasoned that although the government does have a legitimate interest in regulating fees, these restrictions “may not be so pervasive as to deny the individual the right to consult and retain independent counsel.”<sup>129</sup> Unlike the showing which he felt was made by the individuals in *Walters*, the claimants in this case had failed to establish that the DOL’s regulations had this pervasive effect.<sup>130</sup> Consequently, he agreed that the DOL’s fee scheme was constitutional.

### D. Justice Marshall’s Concurrence

Justice Marshall went a step further to highlight the limited nature of the Court’s holding.<sup>131</sup> After referring to the complexity<sup>132</sup> and adversarial nature<sup>133</sup> of the black lung claims process which he

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.* at 1439.

132. *Id.* at 1438.

133. *Id.*



believed made these proceedings qualitatively different from the VA proceedings,<sup>134</sup> Marshall concluded that attorneys were necessary to properly assert a claimant's rights under the Black Lung Benefits Act.<sup>135</sup>

But, he agreed with the majority's holding that the West Virginia court had based its findings upon an inadequate factual record.<sup>136</sup> He felt the record did raise legitimate concerns and suspicions that black lung claimants were unable to obtain attorney representation, and that this unavailability was attributable to the DOL's fee regulations.<sup>137</sup> However, in his mind, these concerns and suspicions were not enough to justify the West Virginia court's holding in this case.<sup>138</sup> Justice Marshall did state that the Supreme Court's holding in this case should not be viewed as a bar upon future challenges to the DOL's fee structure.<sup>139</sup> In dicta, he indicated that such a challenge may ultimately succeed if supported by a more fully developed factual record.<sup>140</sup>

### E. Analysis

*Triplett*, like *Walters*, reiterated the heavy presumption of constitutionality and deference which should be accorded a decision made by a co-equal branch of our government.<sup>141</sup> The Court agreed with *Walters*,<sup>142</sup> that the days of *Lochner*,<sup>143</sup> where courts supplanted its judgement for that of the legislature's, are gone.<sup>144</sup> In this case the Court adhered to this principle when it upheld the DOL's current fee structure.<sup>145</sup>

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134. *Id.* at 1439.

135. *Id.* at 1438.

136. *Id.* at 1439.

137. *Id.* at 1439-40.

138. *Id.*

139. *Id.* at 1439.

140. *Id.*

141. *Triplett*, 110 S. Ct. 1432.

142. *Walters*, 473 U.S. at 323.

143. *Lochner v. New York*, 198 U.S. 45, 61 (1905).

144. *Walters*, 473 U.S. at 323.

145. *Triplett*, 110 S. Ct. at 1432.

The Court in *Triplett* also made it clear that *Walters* set no bright line standards for judging the constitutionality of a law which may limit a claimant's access to counsel. As the Court stated in *Walters*, "due process is a flexible concept that the process required by the Clause with respect to the termination of a protected interest will vary depending upon the importance attached to the particular interest and the particular circumstances under which the deprivation may occur."<sup>146</sup>

In addition, the *Triplett* decision stands for the proposition that the Court will not attempt to balance the interest considered under the *Mathews* test, as it did in *Walters*,<sup>147</sup> until the challenger can produce adequate factual evidence to prove he was deprived of a procedure which he believes he was entitled to receive.<sup>148</sup> The constitutionality of this deprivation will then be determined by balancing the interests considered under the *Mathews* test.

Since *Triplett* failed to produce adequate factual evidence that black lung claimants were effectively denied the ability to obtain counsel, the Court was not compelled to expressly state the relative weights it would assign to each of the interests considered under the *Mathews* test.<sup>149</sup> However, the Court did express what conclusion it would reach under the *Mathews* test if it were presented with an adequate factual record.<sup>150</sup>

In *Walters*, the Court assumed the ten dollar fee limitation would deny claimants the ability to obtain counsel, but the limitations were still upheld because the Court concluded that attorneys were not an essential part of the process.<sup>151</sup> In the *Triplett* case, the same ultimate conclusion was reached, albeit by a circuitous route.<sup>152</sup> In rejecting the West Virginia court's alternative holding, the Court stated "it seems to us this adds nothing to the prior analysis except the assertion that the right to counsel, besides being constitutionally re-

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146. *Walters*, 473 U.S. at 320.

147. *Walters*, 473 U.S. 305 (1985).

148. *Triplett*, 110 S. Ct. at 1433.

149. *Id.* at 1433-35.

150. *Id.* at 1435.

151. *Walters*, 473 U.S. at 334.

152. *Triplett*, 110 S. Ct. at 1435.

quired (as we have earlier assumed) was part of the statutory "remedy" prescribed by Congress."<sup>153</sup> Implicit within the Court's parenthetical notation is the Court's conclusion that the interests of the claimants would be held to outweigh those of the DOL if the DOL's fee scheme precluded claimants from obtaining attorney representation.<sup>154</sup> All that was left for Triplett to prove was what was assumed in the *Walters* case—that the DOL's fee scheme effectively denied claimants the ability to obtain counsel.<sup>155</sup>

If in reaching this conclusion, the Court simply assumed the relative weights accorded the various interests under the *Mathews* test by the West Virginia court to be correct, its reliance may be misplaced. In its brief to the Supreme Court, the DOL presented statistics which may indicate that the West Virginia court assigned greater weight than was due to claimants' property interests at stake.<sup>156</sup> The statistics submitted by the DOL showed that over ninety percent of the black lung beneficiaries' households received social security benefits.<sup>157</sup> In addition, thirty-one percent also received union pensions.<sup>158</sup> The DOL also highlighted the fact that miners are awarded benefits if they are unable to work jobs associated with the mining industry or engage in other comparable work.<sup>159</sup> It would seem the DOL is correct in arguing "this is a less stringent test of disability than in *Mathews*, where the benefits were available only for inability to do any substantial gainful work in the national economy."<sup>160</sup> It appears that the West Virginia court certainly overlooked this evidence when it stated that black lung benefits "may well provide the only means of subsistence."<sup>161</sup> Since the Supreme Court did not express the relative weights to be accorded each of the interests

153. *Id.*

154. *See id.*

155. *Id.*

156. Brief for Petitioner at 45, *United States Dep't. of Labor v. Triplett*, 110 S. Ct. 1428 (1990) (Nos. 88-1671 & 88-1688).

157. *Id.*

158. *Id.*

159. *See* 30 U.S.C. § 902(f)(1)(A).

160. Brief for Petitioner at 45, *United States Dep't. of Labor v. Triplett*, 110 S. Ct. 1428 (1990) (Nos. 88-1671 & 88-1688).

161. *Triplett*, 378 S.F.2d at 93.

under the *Mathews* test, it is not clear whether it considered these statistics.

The Court's decision in the *Triplett* case does leave room for speculation as to how each of these questions will be answered when the Court is presented with an adequate factual record.<sup>162</sup> For example, since Triplett could not prove that attorney representation was unavailable under the present system and that this unavailability was attributable to the DOL's current fee scheme, the Court's assumption that claimants were constitutionally entitled to representation by counsel may have been made simply to avoid superfluous analysis. In the absence of concrete proof of some harm suffered, the Court's adherence to justiciability requirements may have led it to the conclusion that a constitutional pronouncement in this area would be an imprudent choice.

As Justice Marshall stated, the Court should have been aware that a detailed factual record was needed before the Court could properly evaluate a challenge to this entire regulatory scheme.<sup>163</sup> In keeping with the idea that the Court should not issue multifarious pronouncements,<sup>164</sup> Marshall was correct in asserting that the petitions for certiorari should not have been granted in the first place, or that they should have been dismissed as improvidently granted when the insufficiency of the record was exposed.<sup>165</sup>

Consequently, the precedential value of the *Triplett* decision may lie more in its discussion of *ASARCO v. Kadish* than in its holding on the merits.<sup>166</sup> In *ASARCO* the Court concluded that the respondent taxpayers would not have had standing if the Arizona court had applied the federal standing requirements.<sup>167</sup> But state courts are not bound by the constraints imposed by Article III of the Constitution and other federal justiciability requirements.<sup>168</sup> This is so

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162. See *Triplett*, 110 S. Ct. at 1439. The Court stated that its holding "in no way precludes a future challenge to the department's implementation of the Act, founded on a more developed factual record." *Id.*

163. *Id.* at 1439 n.3.

164. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

165. *Triplett*, 110 S. Ct. 1439 n.3.

166. See *Triplett*, 110 S. Ct. 1428.

167. *ASARCO v. Kadish*, 109 S. Ct. 2037, 2045 (1989).

168. *Id.*

even when the state court is deciding an issue of federal law.<sup>169</sup> If the Court in *ASARCO* would have vacated the state court's judgment because the respondents lacked standing to bring suit, this would have rendered "nugatory the entire proceedings in the state courts."<sup>170</sup> In effect, this would require state courts to adhere to federal standing requirements anytime they wished to issue a binding decision concerning a question of federal law.<sup>171</sup>

A literal reading of *ASARCO* provides that as long as the party petitioning for review meets the federal standing requirements, it is irrelevant whether or not the respondent has standing.<sup>172</sup> Indeed this is exactly how Justice Marshall read *ASARCO*.<sup>173</sup> Extending the *ASARCO* reasoning to this case, Marshall seems correct in concluding that the majority's inquiry into Triplett's standing was unwarranted since he was not the party petitioning a federal court for review. However, a majority of the Court still finds it necessary to examine a respondent's standing in a case arising from state court if the respondent is attempting to assert the rights of another.

#### IV. CONCLUSION

As Justice Marshall stated, the *Triplett* decision should not be seen as a bar upon future challenges to the DOL's fee structure. Apparently all that will be needed for a successful challenge is an adequate factual record which confirms that attorneys are unwilling to represent black lung claimants because of the present fee scheme imposed by the DOL. However, this factual record does not appear to be forthcoming anytime in the near future. For one reason or another, the government simply does not keep such statistics. Further assistance in this area will probably have to come from an independent agency.

In the meantime, black lung claimants will continue to suffer.

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169. *Id.*

170. *Id.* at 2047.

171. *Id.*

172. See *id.* at 2048-49.

173. *Triplett*, 110 S.Ct. at 1436-38/7

Undoubtedly, many will be deprived of benefits they otherwise might have recovered had they been afforded the opportunity to retain counsel. Indeed this is a mockery of justice for the Legislature to pass a piece of token legislation supposedly designed to provide black lung claimants with benefits while failing to provide the means necessary to procure these benefits.<sup>174</sup>

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<sup>174</sup> See *Allen v. State Human Rights Comm'n*, 324 S.E.2d 99, at 121 (1984).  
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