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Federal Black Lung Update

Allen R. Prunty
Jackson & Kelly

Mark E. Solomons
Arter & Hadden

FEDERAL BLACK LUNG UPDATE

ALLEN R. PRUNTY*
MARK E. SOLOMONS**

I. INTRODUCTION

The purpose of this article is to update and supplement the comprehensive review of the federal black lung program published in

* Partner, Jackson & Kelly, Charleston, West Virginia. B.A., West Virginia University, 1977; J.D., West Virginia University, 1980.

Mr. Prunty is the administrative manager of the federal black lung division at Jackson & Kelly.

** Partner, Arter & Hadden, Washington, D.C.; B.A., University of Rochester, 1967; J.D., University of Pennsylvania, 1970; L.L.M., George Washington University, 1973.

Mr. Solomons served as appellate counsel to the Department of Labor's coal mine workers' compensation program from 1973 through 1978 and as legislative counsel for the Department of Labor from 1978 through 1980.

the 1989 National Coal Issue.[1] During the past year, several United States Circuit Courts of Appeals have addressed: (1) the scope of interim presumption rebuttal in Department of Labor (DOL) claims filed before April 1, 1980;[2] (2) the burden of proof for establishing entitlement in claims filed after March 31, 1980;[3] and (3) broadening the definition of "coal mine employment" under the federal black lung program.[4] These decisions and other significant issues in black lung litigation are discussed below.

II. Eligibility Criteria For DOL Claims Filed Before April 1, 1980

It was hoped by everyone involved—United States Department of Labor (DOL), claimants and employers—that the Supreme Court's decision in *Pittston Coal Group v. Sebben*[5] would resolve the uncertainty which has plagued the DOL interim presumption[6] throughout the 1980's.[7] While *Pittston Coal Group* completes the presumption *invocation* puzzle,[8] it does not supply any of the pieces missing from the presumption *rebuttal* puzzle; it is still not settled what evidence can be asserted to rebut the DOL interim presump-

1. Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665 (1989).

2. *See id.* at 684-700 for a discussion of the DOL interim presumption, 20 C.F.R. § 727.203 (1989).

3. *See* Prunty & Solomons, *supra* note 1, at 700-13 for a discussion of the eligibility criteria for claims filed after March 31, 1980.

4. "Coal mine employment" is defined at 30 U.S.C. §§ 902(d), 802(h) (1982). *See* Prunty & Solomons, *supra* note 1, at 713-17 for a discussion of coal mine employment issues.

5. 109 S. Ct. 414 (1988). *See* Prunty & Solomons, *supra* note 1, at 687-91, 699-700 for a discussion of *Pittston Coal Group*.

6. 20 C.F.R. § 727.203 (1989).

7. *See* Prunty & Solomons, *supra* note 1, at 677-700 for a discussion of the DOL interim presumption and the Social Security Administration's interim presumption, 20 C.F.R. § 410.490 (1989). *See also* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869 (1981).

8. It is now well-settled that a preponderance of relevant evidence is necessary in order to invoke the DOL interim presumption under any one of the five subsections at 20 C.F.R. section 727.203(a). Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 108 S. Ct. 427 (1987). A miner with less than ten years of coal mine employment may invoke the presumption by proving the existence of pneumoconiosis and proving that the pneumoconiosis is related to coal mine employment. *Pittston Coal Group*, 109 S. Ct. at 419-20 (striking the ten year requirement under section 727.203(a) because it was not necessary for invocation of the section 410.490 interim presumption by a claimant who proved the existence of pneumoconiosis by x-ray, biopsy or autopsy and established that the pneumoconiosis arose out of coal mine employment).

tion. The Court did not address the issue of what evidence will rebut the DOL interim presumption because the respondents in *Pittston Coal Group* conceded the validity of the DOL rebuttal criteria.[9] This concession did not, however, bring to an end the confusion regarding what proof can be asserted to rebut the DOL interim presumption.

Soon after it decided *Pittston Coal Group*, the Supreme Court remanded a case to the United States Court of Appeals for the Seventh Circuit for consideration in accordance with *Pittston Coal Group*. This case, *Taylor v. Peabody Coal Co.*,[10] addressed the validity of rebuttal rules under section 727.203(b). After declining requests by the employer and DOL to re-brief the case in light of *Pittston Coal Group*, the Seventh Circuit issued a decision on remand in *Peabody Coal Co.* on August 28, 1989. The Seventh Circuit held that the Supreme Court's reasoning in *Pittston Coal Group* effectively invalidated the invocation and rebuttal provisions of section 727.203.[11]

In its decision on rehearing, the Seventh Circuit rejected the request for *en banc* review of *Peabody Coal Co.*, and explained its earlier holding:

> We held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid. We did not hold that there is no conceivable circumstances under which HEW rules might allow medical rebuttal.[12]

An appeal from this holding to the Supreme Court has been filed, relying in part on holdings from the Third and Sixth Circuit Courts that the decision in *Pittston Coal Group* does not affect the rebuttal provisions of section 727.203(b).[13]

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9. *See Pittston Coal Group*, 109 S. Ct. at 422-23.

10. 838 F.2d 227 (7th Cir. 1987), *vacated*, 109 S. Ct. 548 (1988).

11. Taylor v. Peabody Coal Co., 892 F.2d 503, 505 (7th Cir. 1989), *petition for cert. filed*, No. 89-1596 (U.S. 1990). In particular, the Seventh Circuit held that medical evidence could not be considered in an interim presumption rebuttal inquiry. *But see* Meyer v. Zeigler Coal Co. 894 F.2d 902 (7th Cir. 1990) (affirming an administrative law judge's finding of rebuttal under 20 C.F.R. § 727.203(b)(2) following a resolution of conflicting medical evidence), *petition for cert. filed*, No. 89-7383 (U.S. 1990).

12. *Peabody Coal Company*, No. 86-2590, slip op. at 2 (7th Cir. Feb. 1, 1990).

13. BethEnergy Mines, Inc. v. Director, Office of Workers' Compensation Programs, and John Pauley, 890 F.2d 1295 (3rd Cir. 1989), Youghiogheny & Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989).

The Court of Appeals for the Sixth Circuit was the first circuit court to address DOL interim presumption rebuttal after the Supreme Court's decision in *Pittston Coal Group*. In *Youghiogheny & Ohio Coal Co. v. Milliken*,[14] the Sixth Circuit rejected the argument that the Part 727 rebuttal provisions "are more restrictive than their HEW Part 410 predecessors because the former allows more evidence to be considered for purposes of rebutting the interim presumption than the latter."[15] The court held that neither its prior decision in *Kyle v. Director, Office of Workers' Compensation Programs*,[16] nor the Supreme Court's decision in *Pittston Coal Group* require consideration of DOL interim presumption claims under the Part 410 rebuttal provisions.[17]

The Seventh Circuit, in its decision on remand in *Peabody Coal Co.*, expressly rejected the Sixth Circuit decision in *Milliken*, and held that a "valid distinction" between DOL's invocation and rebuttal rules cannot be made consistent with the Supreme Court's decision in *Pittston Coal Group*.[18]

The Court of Appeals for the Third Circuit, in *Bethenergy Mines, Inc. v. Director, Office of Workers' Compensation Programs & John Pauley*,[19] held that an administrative law judge cannot apply the Part 410 rebuttal provisions to award benefits in a DOL claim where the evidence proves that the miner's total disability is unrelated to coal mine employment.[20] The court observed that it could affirm the benefit award to the claimant[21] only by finding that even if the employer should prevail based on the law and the facts, benefits must be

14. 866 F.2d 195 (6th Cir. 1989).

15. *Id.* at 199.

16. 819 F.2d 139 (6th Cir. 1987) (requiring application of the HEW Part 410 invocation criteria in claims which fail to qualify for invocation of the DOL interim presumption).

17. 866 F.2d at 199, 202 n.1. The Sixth Circuit noted that Congress clearly directed that *all relevant evidence* be considered in adjudicating DOL interim presumption claims. *Id.* at 202 n.3. *But see* Neace v. Director, Office of Workers' Compensation Programs, 867 F.2d 264 (6th Cir. 1989) (remanding a Part 727 denial for reconsideration under the Part 410 interim presumption).

18. 892 F.2d at 505.

19. 890 F.2d 1295 (3d Cir. 1989) (finding rebuttal of the interim presumption under section 727.203(b)(3)), *petition for cert. filed*, No. 89-1714 (U.S. 1990).

20. *Id.* at 1302.

21. Mr. Pauley was disabled by several medical problems, including arthritis, pulmonary disease, and residuals of a stroke. *Id.* at 1296.

awarded "by reason of the presumptions and limitations on rebuttal."[22] The court declined "to reach such an unjust result."[23] Accordingly, the court held that while the presumption invocation provisions of section 727.203(a) cannot be more restrictive than the invocation criteria at section 410.490, the rebuttal rules of section 727.203(b) are not subject to the "not more restrictive than" language of section 402(f)(2) of the Black Lung Act.[24]

The *Pauley* court recognized that the DOL interim presumption provides for rebuttal with evidence that the miner (1) does not have pneumoconiosis or (2) is not disabled in whole or in part as a result of his occupational exposure, while the interim presumption at section 410.490 does not contain expressly comparable provisions.[25] The court had no trouble approving the availability of additional rebuttal alternatives under the DOL interim presumption: "[E]ven though the Benefits Act has a remedial purpose, it seems perfectly evident that no set of regulations under [the Act] may provide that a claimant who is statutorily barred from recovery may nonetheless recover."[26] The court recognized the obvious: a black lung claim must be denied if it is proven that the compensable disability is not present (i.e., the miner does not have pneumoconiosis or is not disabled in whole or in part because of his occupational exposure).

The *Pauley* court found that the reference to section 410.412(a)(1)[27] in the section 410.490 interim presumption demonstrates an intention "to permit rebuttal by a showing that the claimant's disability did not arise at least in part from coal mine employment."[28] Finally, the court noted that its decision to limit

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22. *Id.* at 1300.

23. *Id.*

24. 30 U.S.C. § 902(f)(2). The Supreme Court in *Pittston Coal Group* relied on this provision to invalidate the invocation rules of section 727.203(a). *Pittston Coal Group*, 109 S. Ct. at 424.

25. *Pauley*, 890 F.2d at 1298.

26. *Id.* at 1300 (citation omitted).

27. Section 410.412 is entitled "'Total disability' defined." Subsection (a)(1) of this regulation states that a miner cannot be considered totally disabled due to pneumoconiosis unless "[h]is *pneumoconiosis* prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." 20 C.F.R. § 410.412(a)(1) (1989) (emphasis added).

28. *Pauley*, 890 F.2d at 1302.

the holding of *Pittston Coal Group* to the invocation criteria of the DOL interim presumption eliminates possible due process problems resulting from a contrary result.[29] These due process problems are bottomed on two propositions: (1) that it is improper to limit the evidence with which an operator may rebut the interim presumption;[30] and (2) prohibiting interim presumption rebuttal by proving the absence of pneumoconiosis or the absence of any relationship between total disability and occupational exposure makes the presumption so unreasonable as to be purely arbitrary and thereby unconstitutional.[31]

Finally, the Court of Appeals for the Fourth Circuit has followed the Seventh Circuit's rationale in *Peabody Coal Co.* and invalidated subsections (b)(3) and (b)(4) of the DOL interim presumption. In *Taylor v. Clinchfield Coal Co.*,[32] the Fourth Circuit held:

> [t]he rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements statutory entitlement may be rebutted, the provisions are more restrictive than those found at § 410.490 and their application violates 30 U.S.C. § 902(f).[33]

The decision in *Clinchfield Coal Co.* included a dissenting opinion by Chief Judge Ervin. Judge Ervin noted the split between the circuits and stated: "[t]o preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me."[34]

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29. *Id.* at 1300 n.7.

30. The Supreme Court relied on the absence of any limitations of an employer's right to submit relevant rebuttal evidence in upholding the constitutionality of the Part C rebuttable presumptions applicable to DOL claims. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 36-37 (1976).

31. Presumptions pass constitutional muster if there is "some rational connection between the fact proved and the ultimate fact presumed." *Mullins Coal*, 108 S. Ct. at 440 n.32 (quoting Mobile, Jackson & K. C. R.R. v. Turnipseed, 219 U.S. 35, 43 (1910)). The constitutionality of the invocation provisions at section 727.203(a) is suspect, but the constitutionality of the DOL interim presumption is preserved by the rebuttal provisions which require the consideration of all relevant evidence and provide for presumption rebuttal by disproving any of the presumed facts. *See* Solomons, *supra* note 7, at 880-83, 885-86, 899-900.

32. 895 F.2d 178 (4th Cir. 1990).

33. *Id.* at 182-83.

34. *Id.* at 184.

The apparent imprudence of both the *Peabody Coal Co.* and *Clinchfield Coal Co.* decisions is vividly demonstrated in a Fourth Circuit decision issued concurrently with *Clinchfield Coal Co.* In *Dayton v. Consolidation Coal Co.*,[35] the Fourth Circuit held that an administrative law judge's decision to deny benefits because the employer had proven that the claimant does not have coal workers' pneumoconiosis, under section 727.203(b)(4), "is superfluous and has no bearing on the case."[36] *Clinchfield Coal Co.* and *Dayton* will most likely be appealed to the Supreme Court.

Several thousand DOL interim presumption claims remain in litigation, even though the last day for filing a claim under section 727.203 was March 31, 1980.[37] It is unfortunate and, for most employers, bewildering that ten years after the last day for filing a DOL interim presumption claim it is still not clear what proof is sufficient to establish whether a claimant is or is not entitled to benefits.[38]

Much of the delay in the development of settled, uniformly applied rules for interim presumption rebuttal can be attributed to the clash of principles and objectives that dictated the course of the federal black lung program in its early years. Contributing to this delay were the differing and as yet unsettled interpretations of various portions of section 727.203.[39]

III. Eligibility Criteria For Claims Files After March 31, 1980

A. Circuit Court Decisions

The most significant entitlement issue under the DOL permanent regulations[40] is the question of disability causation: how much dis-

35. 895 F.2d 173 (4th Cir. 1990).

36. *Id.* at 176 n.1.

37. The DOL's permanent criteria became effective on April 1, 1980. 20 C.F.R. § 718.2 (1989). More than 250,000 claims have been processed under the DOL interim regulations. U.S. Dep't of Labor, MIS # 11 (Sept. 30, 1989).

38. *See* Prunty & Solomons, *supra* note 1, at 691-700 for a discussion of the evolution of the burden of proof for rebuttal of the interim presumption under section 727.203(b).

39. *See* Prunty & Solomons, *supra* note 1, at 667-72, 733, 734.

40. 20 C.F.R. § 718.1-404 (1989).

ability due to coal workers' pneumoconiosis (CWP) must a claimant prove in order to establish entitlement under the Black Lung Act? The Benefits Review Board (BRB) first addressed this issue in a 1988 decision, *Wilburn v. Director, Office of Workers' Compensation Programs*,[41] and held that CWP is compensable under the Black Lung Act *only* if it "is in and of itself, totally disabling."[42] The BRB in *Wilburn* cited to several of its earlier decisions and language in the Federal Register for authority to support its rule.

In *Bonessa v. United States Steel Corp.*,[43] the Third Circuit Court of Appeals rejected the BRB ruling in *Wilburn* and adopted a less restrictive rule for proving total disability due to pneumoconiosis. The court explored the "authority" relied on by the BRB to support the "in and of itself" rule, rejected this authority as not supportive of the *Wilburn* holding, and declared that "[t]he *Wilburn* decision appears to be the genesis of this interpretation of the regulation."[44]

The *Bonessa* court reviewed and distinguished each of the cases cited in *Wilburn*, noting that none of these decisions embraced the "in and of itself" rule. The Federal Register language cited by the BRB to support the *Wilburn* rule provides, in relevant part, that "a totally disabling respiratory or pulmonary impairment shall not by itself be sufficient to establish that the miner's impairment is due to pneumoconiosis."[45] The *Bonessa* court observed that this comment neither stated nor inferred that a miner's total disability must be due solely to pneumoconiosis. Instead, the court interpreted this caveat as "a common sense statement that the disability must be due to pneumoconiosis and not solely to some other respiratory impairment. This is a necessary corollary to the statute's purpose to assist those claimants who become disabled from coal mine employment."[46]

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41. 11 Black Lung Rep. (MB) 1-135 (1988). The BRB's holding in *Wilburn* was clearly presaged in earlier rulings. *See, e.g.*, Gessner v. Director, Office of Workers' Compensation Programs, 11 Black Lung Rep. (MB) 1-1 (1987).

42. *Wilburn*, 11 Black Lung Rep. (MB), at 1-138.

43. 884 F.2d 726 (3d Cir. 1989).

44. *Id.* at 733.

45. *Id.* at 732 (quoting 48 Fed. Reg. 24,275 (1983)).

46. *Id.* at 733 (citing 30 U.S.C. § 901(a) (1982)).

Bonessa adopted a rule which provides for compensation so long as CWP "is a *substantial contributor* to the disability."[47] The court adopted this rule in order to be consistent with the burden of proof for establishing entitlement to benefits for death due to CWP:

> We can perceive no reason why the phrase 'total disability due to pneumoconiosis' should not track the phrase 'death due to pneumoconiosis' which encompasses the situation where pneumoconiosis was a substantial contributor to that death and, thus permit recovery for benefits when pneumoconiosis is a significant contributor to a living miner's disability.[48]

The Eleventh Circuit has also adopted the "substantial contributor" rule.[49]

Three weeks after the Third Circuit issued its decision in *Bonessa*, the Court of Appeals for the Sixth Circuit issued its decision in *Adams v. Director, Office of Workers' Compensation Programs*.[50] The *Adams* court apparently was not advised of the *Bonessa* decision, as the court's opinion does not even mention *Bonessa*. Like the Third Circuit, however, the Sixth Circuit held that the *Wilburn* rule "is an unduly restrictive reading of the statutory and regulatory language 'total disability due to pneumoconiosis' . . . ."[51]

The *Adams* court surveyed the law relevant to the issue of disability causation under the Social Security Administration (SSA) rules for Part B claims and the DOL interim presumption. The SSA regulations require that pneumoconiosis be "the primary reason" for total disability,[52] while the DOL interim presumption compensates CWP, real or presumed, unless it is proven that a miner's total disability was not caused in whole or in part by pneumoconiosis.[53] The court reasoned that both of these "lesser" standards undermine the *Wilburn* rule.[54] The court further noted that the remedial nature

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47. *Id.* at 734 (emphasis added).

48. *Id.* at 733.

49. Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990). *See infra* notes 65-66 and accompanying text for a discussion of *Lollar*.

50. 886 F.2d 818 (6th Cir. 1989).

51. *Id.* at 819.

52. 20 C.F.R. § 410.426(a) (1989).

53. 20 C.F.R. § 727.203(b)(3), *as interpreted by* Gibas v. Saginaw Mining Co., 748 F.2d 1112 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

54. *Adams*, 886 F.2d at 824-25.

of the federal black lung program is inconsistent with the *Wilburn* rule.[55] Having found the *Wilburn* rule "undermined" and "subverted" by these considerations, the Sixth Circuit was guided by its prior interpretation of the burden of proof for rebuttal of the interim presumption under section 727.203(b)(3).

In the Sixth Circuit, therefore, entitlement under the current Part 718 regulations is established by proving the existence of a *totally disabling respiratory impairment* "due 'at least in part' to . . . pneumoconiosis."[56] The court reasoned that this was an appropriate standard for disability causation since it was consistent with the burden of proof for establishing a causal relationship between pneumoconiosis and coal mine employment: section 718.203 requires that before a claim can be awarded, it must be proven that the miner's pneumoconiosis was due at least in part to coal mine employment.[57] The court further noted that under Part 718, the burden of persuasion remains with the claimant to establish that dust exposure contributes to any totally disabling lung condition.[58]

The first court of appeals to address the issue of disability causation under the Part 718 regulations was the Court of Appeals for the Tenth Circuit. In *Mangus v. Director, Office of Workers' Compensation Programs*,[59] the Tenth Circuit specifically rejected a causation rule which requires the claimant to prove that pneumoconiosis is a "significant" or "substantial" cause of total disability.[60] The court declared that the appropriate standard for disability causation under section "718.204(a) is as follows: if the pneumoconiosis is at least a contributing cause, there is a sufficient nexus between the

55. *Id.*

56. *Id.* The court noted, however, that since there was no evidence that Mr. Adams' pneumoconiosis "played only an infinitesimal or de minimus part in his totally disabling respiratory impairment" it was not necessary to determine whether such evidence would support a finding of nonentitlement. *Id.* at 826 n.11. This statement obviously leaves open the door for additional interpretation of the standard.

57. 20 C.F.R. § 718.203(a) (1989). *See infra* notes 87-92 and accompanying text for a discussion of the two different burdens of proof for establishing the existence of CWP.

58. *Adams*, 886 F.2d at 825.

59. 882 F.2d 1527 (10th Cir. 1989).

60. *Id.* at 1530-31.

pneumoconiosis and the total disability to satisfy claimant's burden of proof."[61]

The Tenth Circuit justified its decision in *Mangus* by pointing to (1) the remedial nature of the federal black lung program; (2) the "at least in part" requirement for establishing a causal nexus between coal mine employment and pneumoconiosis;[62] (3) previous judicial interpretations of the causation standard under other regulations, such as section 727.203(b)(3) and earlier versions of the Act;[63] and (4) the absence of "clear language in the 1981 amendments or guidance from their legislative history directing us to require a heightened causal relationship between a claimant's pneumoconiosis and his or her total disability."[64]

Significantly, the Tenth Circuit in *Mangus* expressly rejects the "substantial contributor" causation standard formulated by the Third Circuit in the more recent *Bonessa* opinion. Furthermore, both *Bonessa* and the Sixth Circuit in *Adams* require the existence of a totally disabling respiratory or pulmonary impairment; it is not clear whether or not *Mangus* imposes the same requirement. While Mr. Mangus was disabled because of a lung condition (i.e., lung cancer), the Tenth Circuit's decision does not expressly limit entitlement to cases of respiratory disability. *Mangus* may be construed to mean that total disability due to any cause(s) is compensable under the Black Lung Act so long as the disability is due at least in part to CWP.

In any event, there exists a split of authority between the Tenth Circuit, on the one hand, and Third and Eleventh[65] Circuits, on the

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61. *Id.* at 1531-32.

62. *See infra* notes 87-92 for a discussion of the two different burdens of proof for establishing the existence of CWP.

63. *Mangus*, 882 F.2d at 1529. The Part 718 regulations do not contain language comparable to the "in whole or in part" language found at section 727.203(b)(3). *See Adams*, 886 F.2d at 824; *Bonessa*, 884 F.2d at 720; *see also* Prunty & Solomons, *supra* note 1, at 695-98 for a discussion of the evolution of section 727.203(b)(3).

64. *Mangus*, 882 F.2d at 1532. *See infra* notes 76-86 and accompanying text for a discussion of relevant legislative history.

65. In one of the most recent decisions to address the issue of disability causation in current Part 718 claims, the Eleventh Circuit Court of Appeals analyzed the decisions in *Mangus*, *Bonessa*, and *Adams*. Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990). The Eleventh

other, regarding the meaning of disability due to pneumoconiosis in claims filed after March 31, 1980. Arguably, a split also exists between the Sixth Circuit and the Third and Eleventh Circuits on the issue of disability causation. Depending upon the facts in any given case, the substantial contributor test adopted by the Third and Eleventh Circuits may not be any different than the Sixth Circuit's "in part" test. A contribution that is not significant from the Third and Eleventh Circuits' point of view may well be de minimis under the Sixth Circuit's standard or not a necessary contributing cause under the Seventh Circuit's rule.[66]

Since the relevant decisions do not discuss or even acknowledge the other, except for the Eleventh Circuit's decision in *Lollar v. Alabama By-Products Corp.*,[67] it remains to be seen how this apparent split will be resolved, or whether it can be resolved, without an appeal to the Supreme Court.

As noted by the Third Circuit, the disability causation issue presents the only opportunity for judicial interpretation of the entitlement inquiry under the current 718 regulations. The regulations and/or the Black Lung Act provide definitions for "pneumoconiosis"[68] and "total disability."[69] On the other hand, neither Congress nor the Secretary of Labor have defined what is meant by the require-

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Circuit agreed that the Wilburn standard for disability causation "is unduly stringent," and adopted the substantial contributor rule defined by the Third Circuit in *Bonessa*. *Id.* at 1265. The court rejected the decision in *Mangus*, to the extent it "declined to require a 'significant' or 'substantial' causal link." *Id.* The Seventh Circuit, in the most recent decision to address this issue, has held that CWP must be a "necessary contributing cause" to total disability due to a pulmonary or respiratory impairment in order to be compensable. Shelton v. Director, Office of Workers' Compensation Programs, 899 F.2d 690 (7th Cir. 1990).

66. Regarding the Sixth Circuit's *Adams* decision, the Eleventh Circuit observed "that the Sixth Circuit . . ., while not using the terms 'substantial' or 'significant' in its standard, was careful to observe that '[n]othing in this record suggests that Adams' pneumoconiosis played an infinitesimal or de minim[i]s part in his totally disabling respiratory impairment, so we need not consider here whether such a finding . . . would support a denial of benefits under the Act.'" *Lollar*, 893 F.2d at 1265 (citation omitted). The authors agree with the Eleventh Circuit's observation that the *Adams* decision is not necessarily inconsistent with the substantial contributor rule; the same also may be said about the Seventh Circuit's "necessary contributor" rule. *See supra* note 65.

67. 893 F.2d 1258 (11th Cir. 1990).

68. 30 U.S.C. § 902(b) (1982); 20 C.F.R. §§ 718.101-203 (1989); 20 C.F.R. § 725.101(20) (1989).

69. 30 U.S.C. § 902(f)(1) (1982); 20 C.F.R. §§ 718.204, 725.101(21) (1989).

ment that benefits be paid only upon proof of total disability "due to" pneumoconiosis arising out of coal mine employment.[70]

The circuits which have addressed the "due to pneumoconiosis" standard have sought to resolve this issue by searching for analogous principles in other rules and judicial decisions. The Sixth Circuit adopted the "at least in part" rule in order "to impose parallel causation requirements on the relationship between pneumoconiosis and coal mine employment and the relationship between total disability and pneumoconiosis."[71] Likewise, the Tenth Circuit adopted the "at least in part" rule because it is the same standard for proving a causation relationship between coal mine employment and pneumoconiosis under section 718.203(a). The authors suggest that the rationale adopted by the Sixth and Tenth Circuits, in *Adams* and *Mangus* respectively, is tenuous at best.[72]

The Eleventh Circuit, on the other hand, declined to rely on the disease causation standard under section 718.203(a) and, relying on the Third Circuit decision in *Bonessa*, adopted the substantial contributor rule for disability causation.[73] The Third Circuit adopted the substantial contributor rule because it is identical to the rule imposed on claimants seeking benefits for death due to pneumoconiosis.

The decision by the Third and Eleventh Circuits to maintain consistent burdens of proof for both living miner claims and survivor claims promotes fairness in claims adjudication. Moreover, it seems that the legislative history is reasonably consistent with the Third and Eleventh Circuits' decisions. By the same token, the BRB's holding in *Wilburn*, arguably, can be supported by the plain language of the statute[74] and the clear direction of the 1981 amendments to the Black Lung Act: that DOL tighten the eligibility criteria under Part 718.[75]

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70. *See* 30 U.S.C. § 901(a) (1982). *But see infra* notes 76-86 and accompanying text discussing relevant legislative history.

71. *Adams*, 886 F.2d at 825.

72. *See infra* notes 87-100 and accompanying text.

73. *Lollar*, 893 F.2d at 1263-65.

74. *See* 30 U.S.C. §§ 901(a), 902(f)(1)(d) (1982).

75. *See generally* Prunty & Solomons, *supra* note 1, at 700-13.

B. *Legislative History*

There is relevant legislative history addressing what is meant by disability "due to" pneumoconiosis in the Senate Report which accompanied the bill eventually adopted as the 1977 Black Lung Benefits Reform Act. This report states that "[i]t is . . . intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was *significantly* related to or aggravated by the occupational exposure be included in the regulations."[76] The substantial contributor rule seems to be more consistent with this legislative history than the "at least in part" standard adopted by the Sixth and Tenth Circuits.

The Tenth Circuit, in explaining why it adopted the "at least in part" rule, observed that "[t]here is not clear language in the 1981 Amendments or guidance from their Legislative history directing us to require a heightened causal relationship between a claimant's pneumoconiosis and his or her total disability."[77] This statement is inconsistent with the clear purpose of the 1981 amendments.[78]

As noted by Dr. Peter Barth, "[t]he character of the Black Lung Act was changed considerably by the amendments passed in 1981

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76. S. REP. No. 209, 95th Cong., 1st Sess. 13-14 (1977), *reprinted in* STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, 96th Cong., 1st. Sess., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, 616-17 (Comm. Print 1979). This legislative history was relied upon by the BRB in adopting the "significant relationship" test for interim presumption rebuttal under section 727.203(b)(3). *See* Shaw v. Bradford Coal Co., 7 Black Lung Rep. (MB) 1-462 (1984), *rev'd*, Borgeson v. Kaiser Steel Corp., 12 Black Lung Rep. (MB) 1-169 (1989) (en banc). This history was also cited by the Third and Four Circuits in defining the scope of (b)(3) rebuttal under the DOL interim presumption. Carozza v. United States Steel Corp., 727 F.2d 74, 78 n.1 (3d Cir. 1984); Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 124 (4th Cir. 1984). The Fourth Circuit in *Massey* cited this legislative history as specific evidence "indicating that Congress considered and approved of a proof scheme allowing miners to recover even if pneumoconiosis did not in and of itself cause their total disability . . . ." *Id.* at 124.

77. *Mangus*, 882 F.2d at 1531.

78. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Title II, 95 Stat. 1643 (1981). The very purpose of the Part 718 permanent criteria, even before passage of the 1981 amendments, was to end the reign of the interim presumption, pursuant to express Congressional direction that DOL design scientifically correct and fair eligibility criteria. *See* 30 U.S.C. § 902(f)(1)(D) (1982). Inasmuch as Congress wanted and expected more restrictive criteria in the Part 718 rules, and in view of the plain fact that DOL abandoned the "in part" disability causation standard in Part 718 after having used it in the rebuttal provisions of the DOL interim presumption, no traditional rule of construction supports the judicial re-insertion of the obviously abandoned "in part" standard.

. . . . At the very least, the series of steps taken to liberalize the law after 1969 were set back."[79] The 1981 amendments were intended in part to resolve the insolvency of the Black Lung Disability Trust Fund (BLDTF), which had operated at a deficit "since its inception in 1978."[80] In order to achieve this objective, the amendments: 1) doubled the excise tax on coal dedicated to funding the BLDTF; 2) increased the interest paid by responsible operators in reimbursing the BLDTF for interim benefits paid to claimants pending litigation; 3) ended the BLDTF's practice of paying retroactive benefits during claim litigation; 4) changed the formula for calculating benefits; and 5) eliminated five special provisions previously enacted in order to liberalize the federal black lung program at a time when "medical diagnoses were inadequate or not widely available, and poor medical and death records kept."[81] Regarding these five provisions previously enacted to liberalize the program, Congress observed in 1981 that "[t]here [was] no longer sufficient reason to keep these rules in place."[82]

The five liberalizing rules eliminated by the 1981 amendments were: (1) the fifteen-year respiratory disability presumption; (2) the ten-year respiratory disease death presumption; (3) the twenty-five year death presumption, (4) the restriction on the DOL's authority to have x-rays reread by experts certified as "B-readers" for occupational pneumoconiosis; and (5) the provision allowing for the approval of survivor claims based on a showing of total disability due to CWP.[83] Senator Orrin Hatch, summarizing the 1981 amendments, made the following statement:

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79. P. BARTH, THE TRAGEDY OF BLACK LUNG COAL AND FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE 255 (1987); *see also* J. NELSON, BLACK LUNG: A STUDY OF DISABILITY COMPENSATION POLICY FORMATION 148-53 (1985). "The 1981 Legislation was designed to stop the excess fostered by three prior black lung statutes." Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 678 (1983).

80. SUBCOMMITTEE ON OVERSIGHT OF THE HOUSE COMM. ON WAYS AND MEANS, 97th Cong., 1st Sess., THE INSOLVENCY PROBLEMS OF THE BLACK LUNG DISABILITY TRUST FUND V (Comm. Print 1981) (hereinafter SUBCOMMITTEE REPORT). For discussion of the development of the 1981 amendments, see P. BARTH, *supra* note 79 at 255-62; Lopatto, *supra* note 78, at 695-702; Prunty & Solomons, *supra* note 1, at 710-13.

81. EXPLANATION OF BLACK LUNG AMENDMENTS OF 1981, *reprinted in* 127 CONG. REC. 31,747 (Dec. 16, 1981).

82. *Id.*

83. *See* Prunty & Solomons, *supra* note 1, at 711-12 for a discussion of the specific amendments.

The Bill also addresses what many regard is the underlying reason for the trust fund's insolvency—namely, the eligibility criteria. This without question has evoked tremendous controversy. Many have contended that the current criteria are simply too loose and that thousands of claimants who are not truly disabled have received benefits. Recent studies by the General Accounting Office have tended to confirm this. In 1980, GAO reported that 88 percent of claims approved by the Social Security Administration were based on inadequate or conflicting medical evidence. This year, GAO has reported that its survey of DOL-approved claims revealed 84% of the cases were based on inadequate or conflicting medical evidence.

However, it is always easier to state the problem than to achieve a complete solution. The Bill, as developed under the guidance of the Department of Labor, reflects a consensus among the interested parties of what eligibility changes are needed to begin restoring this as a disability program, and no longer a pension program.[84]

By eliminating the fifteen-year respirable disease presumption, Congress shifted the burden of proof on the issue of disability due to pneumoconiosis from the employers of long-term coal miners to the claimant.[85] Adoption of an "at least in part" standard for disability causation essentially reinstates a rebuttable presumption of disability causation for miners who have simple pneumoconiosis and are disabled by a lung impairment. In these cases,[86] the miner benefits from an essentially irrebuttable presumption of disability due to pneumoconiosis because medical experts are usually unwilling to state with any medical certainty that a diagnosed lung disease (e.g., coal workers' pneumoconiosis) does not contribute something to the creation of the miner's total disability.

See also Lopatto, *supra* note 78, at 677-78, 694-702. Regarding survivor claims, benefits were limited to claims where it is proven that death was due to pneumoconiosis. Furthermore, the amendments prohibited the award of survivor claims based upon affidavits from persons eligible to share in the benefits award.

84. 127 CONG. REC. 31,977-78 (Dec. 16, 1981) (statement of Sen. Hatch).

85. Under the DOL interim presumption, miners with at least ten years of coal mine employment and proof of a totally disabling respiratory or pulmonary impairment are entitled to a presumption of disability due to pneumoconiosis. 20 C.F.R. § 727.203(a)(4) (1989); *see also id.* §§ 727.203(a)(2),(3) (providing for a presumption of entitlement based on certain lung function test results). Under the DOL's permanent criteria in effect prior to the 1981 amendments, a miner disabled by a pulmonary or respiratory impairment was entitled to a presumption of disability due to pneumoconiosis upon proof at least fifteen years of underground coal mine employment. 20 C.F.R. § 718.305(a) (1989). These regulatory presumptions can be traced to section 411(c)(4) of the Black Lung Act, 30 U.S.C. 921(c)(4) (1982). *See* Prunty & Solomons, *supra* note 1, at 702 n.194 (regarding the use of surface coal mine employment to invoke the fifteen-year presumption).

86. *See infra* note 97 for an example of this type of case.

C. *Analysis Of The "Due To" Requirement*

As noted by the Third Circuit in *Bonessa*, the substantial contributor rule interprets the burden of proving total disability due to pneumoconiosis consistent with the burden of proof imposed on claimants seeking benefits for death due to pneumoconiosis. The substantial contributor rule also is consistent with the causation element of the definition of compensable pneumoconiosis, as this definition relates to pulmonary and respiratory impairment[87] *not due to "clinical pneumoconiosis."*[88] In order for a lung condition other than clinical pneumoconiosis to be compensable under the Act (i.e., to qualify as legal coal workers' pneumoconiosis), it must be "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[89] Clinical pneumoconiosis, on the other hand, is compensable so long as it "arose at least in part out of coal mine employment."[90]

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87. The term "impairment" means only "an alteration of an individual's health status that is assessed by medical means." AMERICAN MEDICAL ASS'N, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 2 (3d ed. 1988). This definition must be distinguished from the meaning of "disability", which is the "alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements." *Id.*

88. Clinical pneumoconiosis is a condition characterized by (i) permanent deposition of substantial amounts of particulate matter in the lungs, usually of occupational or environmental origin, and (ii) tissue reaction to its presence. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1220 (25th ed. 1974). Examples of occupational pneumoconiosis include asbestosis, silicosis, siderosis, (pneumoconiosis due to the inhalation of iron particles, usually seen in welders), byssinosis (pneumoconiosis caused by the inhalation of cotton dust), and the medical disease of CWP. In order for clinical pneumoconiosis to qualify as coal workers' pneumoconiosis under the federal black lung program, a claimant must prove that the pneumoconiosis arose at least in part out of coal mine employment. 20 C.F.R. § 718.203(a) (1989). If a miner with clinical pneumoconiosis establishes at least ten years of coal mine employment, there is a rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. § 921(c)(1) (1989); 20 C.F.R. § 718.203(b).

89. The definition of pneumoconiosis for purposes of the federal black lung program is:

> a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, and anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly relating to, or substantially aggravated by, dust exposure in coal mine employment.

20 C.F.R. § 718.201 (1989).

90. *Id.* § 718.203(a).

The Sixth Circuit, in *Adams*, recognized these alternative disease causation standards[91] and elected to define the disability causation standard consistent with the "at least in part" standard applicable to claims where the existence of clinical pneumoconiosis is proven:

> We therefore hold . . . that in order to qualify for benefits under Part 718, a miner who is found to suffer pneumoconiosis under section 718.202, must affirmatively establish that his total disabling respiratory impairment (as found under section 718.204(c)) was due 'at least in part' to his pneumoconiosis.[92]

The Tenth Circuit adopted essentially the same rationale in *Mangus*.[93] This interpretation of "disability due to pneumoconiosis", however, is not without its problems. First, the interpretation results in a different burden of proof in claims based on alleged total disability due to pneumoconiosis than the burden of proof in claims based on an allegation of *death* due to pneumoconiosis. Secondly, a situation is created where miners with clinical pneumoconiosis and a disabling lung impairment will receive benefits even though their pneumoconiosis is not disabling in and of itself, *and* they would be totally disabled even if they did not have CWP.[94]

It is difficult to justify a rule that imposes on widows and other survivors a greater burden of proof than the burden of proof facing miners seeking benefits for total disability due to black lung disease. The burdens of proof should be equal, or the greater burden placed on living miners who are available to undergo the various objective tests necessary to confirm the severity of their lung impairment and evaluate whether CWP causes or contributes to their disability. The Third Circuit recognized this proposition when it declared:

> We can perceive no reason why the phrase 'total disability due to pneumoconiosis' should not track the phrase 'death due to pneumoconiosis' which encompasses the situation where pneumoconiosis was a substantial contributor to that death and thus, permit recovery for benefits when pneumoconiosis is a significant contributor to a living miner's disability.[95]

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91. *Adams*, 886 F.2d at 822-23 n.4.
92. *Id.* at 825.
93. *Mangus*, 882 F.2d at 1527.
94. *See infra* note 97.
95. *Bonessa*, 884 F.2d at 733.

Neither the Sixth Circuit nor the Tenth Circuit has addressed this issue in their decisions adopting a lesser burden of proof for living miner claims than that facing applicants in death claims.[96]

That the "at least in part" standard for proving disability due to CWP may result in the approval of claims where the contribution by pneumoconiosis to the miner's disability is minimal and essentially meaningless was acknowledged by the Sixth Circuit in *Adams*.[97] The Sixth Circuit left the door open for a solution:

> Nothing in this record suggests that Adams' pneumoconiosis has played only an *infintestimal* or *de mininimus part* in his totally disabling respiratory impairment, so we need not consider here whether such a finding, if supported by substantial evidence, would support a denial of benefits under the Act.[98]

The substantial contributor standard for disability causation is a reasonable rule. It is consistent with the legislative history addressing the issue; it is consistent with the burden of proof in survivor claims; and it is consistent with the burden of proof for disease causation in claims where clinical pneumoconiosis is not proven. It is also considerably less restrictive than the rule set forth by the Social Security Administration in its permanent black lung regulations, which requires that pneumoconiosis be the primary cause of the miner's disability.[99]

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96. The Sixth Circuit cited to the burden of proof in death claims in order to demonstrate that the relevant regulations do not define what is meant by total disability due to pneumoconiosis; the court did not try to reconcile the burden of proof in death claims with its decision to adopt a seemingly lesser burden of proof for living miner claims. *See Adams*, 886 F.2d at 824 n.7.

97. A good example of this type of case is one where the miner currently has simple CWP by chest x-ray, primary lung cancer which is in and of itself totally disabling, and the doctors agree that the lung cancer is due to a long history of tobacco abuse. In this hypothetical case, the objective lung studies show that the claimant's pulmonary impairment prior to the development of lung cancer was minimal, and was insufficient to prevent the miner from performing his usual coal mine work or comparable and gainful work; the doctors agree that some part of this non-disabling impairment can be attributed to simple CWP but most is the result of cigarette smoking. This miner, with his lung cancer and pre-existing lung impairment, part of which is due to CWP, is totally disabled by his current lung dysfunction, some small part of which reasonably may be attributed to simple CWP. This type of case could be approved under an "at least in part" standard for proving disability causation, even though (1) the miner's CWP is not disabling, (2) the miner still would be totally disabled if he did not have CWP, *and* (3) the miner would be fully able to work if he did not have lung cancer.

98. *Adams*, 886 F.2d at 826 n.11 (emphasis added); *see also Lollar*, 893 F.2d at 1265.

99. 20 C.F.R. § 410.426(a) (1989).

A lesser standard than the substantial contributor rule is, in these authors' opinions, unreasonable because it results in a different burden of proof for claimants seeking benefits for disability due to pneumoconiosis than the burden placed on claimants seeking benefits for death due to pneumoconiosis. Moreover, judicial application of the "at least in part" standard in claims filed since January 1, 1982 seems to constitute judicial re-insertion of a rule previously abandoned by DOL at the direction of Congress.[100] It may be that this issue cannot be resolved without an appeal to the Supreme Court.

IV. Issues To Watch

A. Coal Mine Employment Issues

1. Central Repair Shop Employment

The question whether work at a central repair shop located at a site geographically removed from a coal mine or coal preparation facility constitutes coal mine work under the Black Lung Act continues to generate a good deal of litigation.[101] There can be no serious debate that the statutes which define coal mine employment impose a geographical requirement that repair shop employment can qualify as coal mine employment only when the shop is located on an actual coal extraction site or at a coal preparation facility, or *around* or *in the area of* an extraction site or coal preparation facility.[102]

It is easy to determine whether the first alternative is satisfied (i.e., work at the actual geographic location of a coal extraction or preparation site). The more difficult question is what facts and circumstances are necessary in order to establish that a repair shop is located *around* or *in the area of* an extraction or preparation site. It is not clear how far Congress intended this geographic limitation to extend.

What is clear is that the old rule of excluding from the definition of coal mine employment all jobs not performed within the actual geographic boundaries of an extraction or preparation site is no

100. *See supra* notes 78 and 85-86 and accompanying text.
101. *See* Prunty & Solomons, *supra* note 1, at 713-16.
102. *See* 30 U.S.C. §§ 802(h)(2), (i), 902(d) (1982).

longer good law. Three circuit courts of appeals have expressly rejected this inflexible rule.[103] DOL attorneys argue in favor of a function-based analysis which effectively eliminates any inquiry as to the geographic "situs" of the job in question.[104] Courts have rejected this argument, retained the situs test, and held that the situs inquiry involves a fact-dependent analysis by the administrative law judge.[105]

It is difficult to articulate a situs test for coal mine employment which encompasses all of the considerations expressed by the circuit courts in *Director, Office of Workers' Compensation Programs v. Ziegler Coal Co.*,[106] *Baker v. United States Steel Corp.*,[107] and *Director, Office of Workers' Compensation Programs v. Consolidation Coal Co. & William Petracca.*[108] The test which seems to emerge from these decisions involves a step-by-step analysis of the evidence of record.

First, the judge must inquire as to whether the employment in question was in fact performed at an actual coal extraction or coal preparation facility. If this question is answered in the affirmative, the situs test is satisfied and the inquiry ends. If the question is answered in the negative, the trier-of-fact must then review the record for evidence that the work activity in question required frequent contact with a coal extraction or coal preparation facility. If this further inquiry results in an affirmative ruling, making it reasonable to grant the claimant the benefit of the various presumptions of dust exposure,[109] the situs test is satisfied.

If there is insufficient proof that the job in question involved frequent contact with an extraction site or preparation facility, the

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103. Director, Office of Workers' Compensation Programs v. Ziegler Coal Co., 853 F.2d 259 (7th Cir. 1989); Baker v. United States Steel Corp., 867 F.2d 1297 (11th Cir. 1989); Director, Office of Workers' Compensation Programs v. Consolidation Coal Co., 884 F.2d 926 (6th Cir. 1989); *see* Prunty & Solomons, *supra* note 1, at 714-16 (discussing the *Ziegler Coal Co.* and *Baker* decisions).

104. *See Petracca*, 884 F.2d at 930-32; *Ziegler Coal Co.*, 853 F.2d at 834-36.

105. *Ziegler Coal Co.*, 853 F.2d at 535; *Baker*, 867 F.2d at 1300; *Petracca*, 884 F.2d at 935.

106. 853 F.2d 259 (7th Cir. 1989).

107. 867 F.2d 1297 (11th Cir. 1989).

108. 884 F.2d 926 (6th Cir. 1989).

109. *See* 20 C.F.R. §§ 725.202(a), .492(c), .493(a)(6) (1989); *see also* Zimmerman v. J. Robert Balzey, Inc., 10 Black Lung Rep. (MB) 1-75 (1987) (discussing the evidence necessary to rebut these presumptions of dust exposure).

administrative law judge should next search the record for evidence that those who work at the repair shop were regularly exposed to significant quantities of coal mine dust.[110] If this evidence is present, the situs test may be satisfied without further investigation.

The *Petracca* court held, after reviewing the rationale in *Ziegler Coal Co.* and *Baker*, that judges should presume that repair shop employment is coal mine work if the evidence demonstrates that the employer maintained the repair shop in the general vicinity of one or more extraction sites or preparation facilities in order to minimize the cost of transporting disabled equipment, reduce the turnaround time for equipment repairs, and assure the availability of mechanics who can be called to the extraction site or preparation facility on short notice.[111]

Finally, an analysis of the factors relevant to determining whether repair shop work constitutes coal mine employment must be resolved with reference to the remedial nature of the Black Lung Act: all reasonable doubt must be resolved to the benefit of the claimant.[112]

Each of the factors set forth above were considered, in varying degrees, in *Ziegler Coal Co.*, *Baker* and *Petracca*. The Court of Appeals for the Fourth Circuit has been asked to adopt the step-by-step analysis outlined above in a case where the administrative law judge resolved the central shop issue by dismissing the employer and awarding benefits against the BLDTF.[113]

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110. *See generally Ziegler Coal*, 853 F.2d at 531-32, 535; *Baker*, 867 F.2d at 1298, 1300; *Petracca*, 884 F.2d at 932, 935. As noted in the concurring and dissenting opinion in *Petracca*, the physical distance between a repair shop and a coal mine becomes less important as the possibility of harmful dust exposure increases. *Id.* at 935 (Boggs, J., concurring and dissenting).

111. *Petracca*, 884 F.2d at 934-35.

112. *See id.* at 933-35.

113. Director, Office of Workers' Compensation Programs v. Consolidation Coal Co., No. 89-1757 (4th Cir.) (argued Apr. 6, 1990). The administrative law judge in the *Consolidation Coal Co.* case dismissed the employer and held that the BLDTF must pay benefits because DOL had determined that the deceased miner was totally disabled by coal workers' pneumoconiosis. By so holding, the judge did not have to address complex medical issues litigated by the employer. The judge in *Consolidation Coal Co.* relied upon the old fixed-distance standard to dismiss the employer. If the court of appeals vacates this determination, it will have to remand the claim not only for further consideration of the coal mine employment issue but, if the employer is reinstated as a party, consideration of the medical issues of entitlement. This could result in a finding of nonentitlement. The employer in *Consolidation Coal Co.* has argued that such a result would be inconsistent with the decision in

2. Railroad Employment

The BRB held in *Roberson v. Norfolk & W. Ry.*[114] that railroads are liable for federal black lung benefits so long as the employee in question: (1) performed work which is integral to the process of coal production and (2) spent a significant part of his employment at a mine site or coal preparation facility.[115] This decision could increase dramatically the number of claims filed by railroad employees, including those workers involved in track maintenance and railroad car repair. This case is now pending on appeal before the United States Court of Appeals for the Fourth Circuit.[116]

3. Multiple Responsible Operators

The BRB held in *Goddard v. Oglebay Norton Co.*[117] that a claim may not be remanded to the deputy commissioner level for reconsideration of the naming of a responsible operator.[118] According to the BRB, the Secretary of Labor must identify all coal operators who may be liable for the payment of benefits in the same proceeding which determines whether a miner is entitled to benefits.[119] "The regulations contain no express provision requiring the [DOL] to identify all putative responsible operators, and resolve any dispute as to which one is properly responsible for benefits, in one proceeding. We hold, however, that due process, as well as the efficient administration of the Act, compels this result."[120]

The BRB held that remand of a claim from the Office of Administrative Law Judges for further consideration of the responsible

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Baker, which suggests that the situs test should be applied in a manner which most benefits the claimant's case. 867 F.2d at 1300. The employer has urged the court of appeals to construct a situs test for repair shop employment which draws on the common elements of all three of the decisions addressing this issue.

114. 13 Black Lung Rep. (MB) 1-6 (1989).

115. *Id.* at 1-8 to 1-10.

116. Norfolk & W. Ry. Co. v. Roberson, No. 89-2192 (4th Cir.) (argued Apr. 4, 1990).

117. 12 Black Lung Rep. (MB) 1-130 (1988), *rev'd sub nom.* Director, Office of Workers' Compensation Programs v. Oglebay Norton Co., 877 F.2d 1300 (6th Cir. 1989); *see also* Crabtree v. Bethlehem Steel Corp., 7 Black Lung Rep. (MB) 1-354 (1984).

118. *Oglebay Norton Co.*, 12 Black Lung Rep. (MB) at 1-132.

119. *Id. See* 20 C.F.R. §§ 725.410, .412 (1989).

120. *Crabtree*, 7 Black Lung Rep. (MB) at 1-357 (footnote omitted).

operator issue, simply because the DOL failed to name all potential operators the first time around, "would be tantamount to relitigating the claim."[121] According to the BRB, this would be unfair to the claimant who had already established entitlement in the first round of proceedings, because the claimant may lose his case in the next round of adjudication against another operator.[122]

Moreover, the BRB observed that "piecemeal litigation obviously is not compatible with the efficient administration of the Act and expeditious processing of claims."[123] For these reasons, the BRB interpreted section 725.412 as requiring DOL to either resolve the responsible operator issue in a preliminary proceeding or proceed against *all* potential responsible operators at every stage of claims adjudication. DOL has selected the latter alternative, and routinely names multiple responsible operators in cases where the miner worked for more than one coal mine employer after December 31, 1969.

In the *Oglebay Norton Co.* appeal, the Sixth Circuit rejected the BRB's interpretation of section 725.412 for two reasons. First, the court observed that section 725.412 specifically permits identification of a responsible operator at any time during the processing of a claim.[124] Secondly, the court noted that the BRB is not a policy-making agency and its interpretation of section 725.412, which inserts a time limitation for naming a responsible operator, is not entitled to any particular deference.[125] "Rather, the Director's statutory interpretation is the one entitled to judicial deference, since he is the one charged with administration of the [Act]."[126]

In spite of the *Oglebay Norton Co.* decision, it is still routine for the DOL to name multiple responsible operators at the initial stage of claim processing, even if it is clear that one employer is

121. *Id.*
122. *Id.*
123. *Id.*
124. *Oglebay Norton Co.*, 877 F.2d at 1303.
125. *Id.* at 1304.
126. *Id.* (quoting Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278, 1283 (6th Cir. 1987)). The court further noted that transfer of liability to the BLDTF from a responsible operator, simply because the DOL failed to name the correct responsible operator when it first processed the claim, is contrary to congressional intent that the BLDTF be liable for the payment of benefits only where no responsible operator can be identified. *Id.*

the proper chargeable operator. Employers have been successful in convincing some administrative law judges to dismiss secondary responsible operators before these claims proceed to hearing. When these motions to dismiss are not successful, it is not uncommon for the secondary operators to find it necessary to have the miner examined by a physician of their choice. As a result, miners are often forced to undergo multiple examinations and tests because secondary responsible operators feel compelled to develop evidence to protect their interests. It remains to be seen whether the BRB will apply the *Oglebay Norton Co.* decision outside of the Sixth Circuit.

B. Multiple Claims

1. General Rules and Recent Developments

Large numbers of miners and survivors whose initial claims were denied continue to seek benefits by either filing a new claim[127] with DOL or filing a petition for modification with the appropriate adjudicator. The handling of these claims has proven consistently troublesome, and the difficulties they generate remain largely unresolved.

Section 22 of the Longshore Act[128] provides for the right of any party to seek modification of a prior claim award or denial. In previously denied claims, a right to modification is available if the request is filed within one year after the date on which the claim was denied.[129] It is the BRB's position that *any* action taken by a claimant within one year from the date of a prior denial, which action evidences an intent to reopen or pursue a claim, shall be construed as a request for modification.[130] Accordingly, a new claim application submitted within the modification period is not treated

127. In fiscal year 1989, approximately one-third of the claims filed were refilings by previously denied claimants (excluding claims filed by survivors of miners with previously awarded claims). U.S. DEP'T OF LABOR MONTHLY FISCAL YEAR TO DATE SUMMARY (Sept. 1989).

128. 33 U.S.C. § 922 (1982) incorporated by reference into 30 U.S.C. § 932(a) (1982).

129. 20 C.F.R. § 725.310 (1989). The BRB has held that the modification period begins to run anew after each denial. Garcia v. Director, Office of Workers' Compensation Programs, 12 Black Lung Rep. (MB) 1-24, 1-26 (1988).

130. *See* Searls v. Southern Ohio Coal Co., 11 Black Lung Rep. (MB) 1-161, 1-163 n.3 (1988) (citing Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545, 547 (5th Cir. 1974)). This rule is being contested in Meade v. Glamorgan Coal Co., BRB No. 88-2719 BLA (Ben. Rev. Bd. 1988).

as a new claim, but as a request for modification. A claim application filed more than one year after the final denial of a prior claim is treated as a refiled or "duplicate" claim and is subject to different DOL rules.[131]

There are several important distinctions between modification procedures and the rules governing refiled or "duplicate claims." A modification review revives the claimant's original cause of action and may proceed if the claimant establishes either a change in condition or a mistake of fact.[132] In a black lung claim, preservation of the original cause of action is often of substantial benefit to the claimant. This is so because the applicable medical eligibility criteria are determined solely by the filing date of the claim.[133] Accordingly, if the original claim was subject to the very liberal interim presumption,[134] the interim presumption is still applied in a subsequent modification review. If, however, the claimant's renewed pursuit of benefits cannot be processed as a request for modification, but instead is treated as a new cause of action (i.e., a duplicate claim), the revised eligibility criteria in DOL's Part 718 rules[135] are likely to apply, even though the original claim was subject to the interim rules.[136]

Moreover, and apart from the identity of the applicable eligibility rules, the likelihood of success in a modification review is greater than when filing a duplicate claim. In a modification proceeding, a claimant may secure a complete readjudication on the basis of the evidence previously weighed and rejected,[137] or may supplement favorable evidence to enhance its credibility or respond to defects found

131. Modifications are handled in accordance with 20 C.F.R. § 725.310 (1989). New filings not qualifying for review as petitions for modification are handled under 20 C.F.R. § 725.309 (1989).

132. 20 C.F.R. § 725.310 (1989); *see also* Banks v. Chicago Grain Trimmers Association, 390 U.S. 459, 463-64 (1968). The BRB holds that a mistake of law or a change in applicable law does not satisfy the statutory predicate for readjudication under a modification theory. Donadi v. Director, Office of Workers' Compensation Programs, 12 Black Lung Rep. (MB) 1-166, 1-167 (1989); *aff'd on reh'g*, 13 Black Lung Rep. (MB) 1-24, 1-27 (1989).

133. 20 C.F.R. § 718.2 (1989).

134. *Id.* at § 727.203.

135. *Id.* at §§ 718.1-.404.

136. Spese v. Peabody Coal Co., 11 Black Lung Rep. (MB) 1-174, 1-177 (1988); *see also* Tonelli v. Director, Office of Workers' Compensation Programs, 878 F.2d 1083, 1086-87 (8th Cir. 1989).

137. O'Keeffe v. Aerojet-General Shipyards, Inc., 404 U.S. 254, 255 (1971).

by the original fact-finder. If, for example, the claimant is fortunate enough to have his modification proceeding heard by a more favorably inclined administrative law judge, there is the possibility that an award may be made on the same evidence found inadequate in the first review.

By contrast, a duplicate claim may pass the threshold test for adjudication *only* if the miner proves that there has been a "material change in conditions."[138] The waiver of res judicata contained in the duplicate claim regulations is, therefore, substantially restricted in contrast to the waiver afforded in a modification proceeding.[139] Further, it may be assumed as a matter of construction that the phrase "change in conditions" in section 725.310 (modification) imposes a less onerous test than the phrase "material change in conditions" in section 725.309 (duplicate claim).[140]

2. Update On *Lukman*

In *Lukman v. Director, Office of Workers' Compensation Programs*,[141] the BRB held that only a DOL deputy commissioner has de novo jurisdiction to determine whether a refiler's new submission of evidence establishes a material change in conditions under section 725.309. According to the BRB's reading of the duplicate claim regulation, there is no right to a hearing before an administrative law judge on the issue of whether a material change in conditions has been proven; a dissatisfied claimant's only relief is a direct appeal to the BRB.[142] The BRB holding in *Lukman* was reversed by the Court of Appeals for the Tenth Circuit in February 1990.[143] Responding to the Tenth Circuit's decision, the BRB issued an *en banc*

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138. 20 C.F.R. § 725.309(c),(d) (1989); *Spese*, 11 Black Lung Rep. (MB) at 1-176.

139. The decision of the Supreme Court in Pittston Coal Group v. Sebben, 109 S. Ct. 414, 424 (1988), suggests also that the limited waiver of res judicata for refilers must be strictly construed in accordance with the plain language of 20 C.F.R. § 725.309 (1989).

140. This conclusion may not hold under careful scrutiny, and has not yet been thoroughly tested in litigation.

141. 10 Black Lung Rep. (MB) 1-56 (1987), *aff'd on reh'g*, 11 Black Lung Rep. (MB) 1-71 (1988), *rev'd*, 896 F.2d 1248 (10th Cir. 1990).

142. *See* Prunty and Solomons, *supra* note 1, at 722-24.

143. Lukman v. Director, Office of Workers' Compensation Programs, 896 F.2d 1248 (10th Cir. 1990).

order announcing that it would follow the Tenth Circuit's ruling in all judicial circuits.[144] Several thousand claims are affected by *Lukman* and many of those remain pending at the BRB.

Although the BRB's theory in *Lukman* reflected a good faith effort to dispose of largely frivolous refilings in an administratively convenient fashion, the approach clearly deprived the refiler of the right to an impartial de novo hearing before an administrative law judge. While the hearing in many refiled claims is a waste of energy, the right to a rehearing is so fundamental that the BRB's concern for administrative convenience was easily overcome.

The beginning of the end for the *Lukman* rule was plainly stated by the United States Court of Appeals for the Sixth Circuit in *Pyro Mining Co. v. Slaton*.[145] *Pyro Mining Co.* involved a holding by the BRB that administrative law judges lack jurisdiction to review a deputy commissioner's decision to hold an employer in default for failure to respond in a timely fashion to an initial notice of a miner's claim. The employer and its insurer in *Pyro Mining Co.* claimed that their untimely response to a claim should be excused for good cause. After this plea was rejected by the deputy commissioner, a de novo hearing was requested. The administrative law judge agreed that good cause was established and accepted the employer's late controversion.[146]

On appeal, the BRB held that the deputy commissioner had exclusive jurisdiction to determine the timeliness of an employer's controversion, so the matter presented was not subject to review, de novo or otherwise, by an administrative law judge.[147] Pointing to the Longshore Act[148] and the Secretary of Labor's regulations guaranteeing all parties the right to a de novo hearing on *all* contested

144. Dotson v. Director, Office of Workers' Compensation Programs, No. 88-2541 BLA (Ben. Rev. Bd. 1990) (*en banc*).

145. 879 F.2d 187 (6th Cir. 1989).

146. *Id.* at 188.

147. Slaton v. Pyro Mining Co., 8 Black Lung Rep. (MB) 1-39 (1985), *rev'd sub nom.*, Warner Coal Co. v. Director, Office of Workers' Compensation Programs, 804 F.2d 346 (6th Cir. 1986); *reh'g* Slayton v. Pyro Mining Co., 12 Black Lung Rep. (MB) 1-100 (1988), *rev'd*, 879 F.2d 187 (6th Cir. 1989).

148. 33 U.S.C. § 919(c),(d) (1982) *incorporated by reference into* 30 U.S.C. § 932(a) (1982).

issues of law or fact,[149] the Sixth Circuit reversed the BRB. The Sixth Circuit held that a de novo hearing shall not be denied when a timely request for a hearing is made by any party.[150] The decision by the Court of Appeals for the Seventh Circuit in *Pearce v. Director, Office of Workers' Compensation Programs*[151] is fundamentally in accord.

3. Petitions for Modification

The right to seek modification derives from section 22 of the Longshore Act.[152] Originally, modification could be sought only upon proof of a change in conditions,[153] but amendments in 1934 added "a mistake in a determination of fact" to the available bases upon which modification might be sought.[154] This additional ground was added by Congress to permit the deputy commissioner "to render justice under the act."[155]

Many state workers' compensation laws authorize an administrative reopening of claims to accommodate changed conditions, excusable oversight, a deterioration or improvement in a workers' health, or otherwise in the interest of justice.[156] Under the Black Lung Act, the modification remedy has been employed for less salutary purposes. For example, DOL has regularly asserted the modification procedures in order to correct its administrative errors or oversights, or seek the relitigation of legal questions where the agency failed to prevail in the original proceedings.[157] Neither have the opportunities presented by modification been lost on claimants whose claims have been denied.

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149. 20 C.F.R. §§ 725.450, .451, .455 (1989).

150. *Pyro Mining Co.*, 879 F.2d at 190.

151. 647 F.2d 716 (7th Cir. 1981).

152. 33 U.S.C. § 922 (1982 & Supp. V 1987).

153. Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437 (1927).

154. *See* O'Keeffe v. Aerojet General Shipyards, Inc., 404 U.S. 254, 255 (1971).

155. S. REP. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. REP. No. 1244, 73d Cong., 2d Sess. 4 (1934).

156. A. LARSON, THE LAW OF WORKMAN'S COMPENSATION 81.00-81.50 (1989).

157. *See, e.g.*, Director, Office of Workers' Compensation Programs v. Kaiser Steel Corp., 860 F.2d 377 (10th Cir. 1988); Director, Office of Workers' Compensation Programs v. Peabody Coal Co., 837 F.2d 295 (7th Cir. 1988); Director, Office of Workers' Compensation Programs v. Drummond Coal Co., 831 F.2d 240 (11th Cir. 1987).

As noted previously,[158] modification is a particularly significant remedy if the claim was originally filed prior to expiration of the interim presumption. In this setting, a claimant may continue to seek modification of repeated denials while he or she continues to work in the mines or until more favorable medical evidence is obtained. Since respiratory functions deteriorate naturally as a person ages,[159] and the interim presumption does not account for this fairly significant factor,[160] this strategy can benefit the claimant by presenting a picture of apparently deteriorating health as repeated modifications slowly pass through the adjudicatory system. Additionally, the liberalization of current entitlement criteria by the appellate courts[161] also provides incentive to keep a claim alive through repeated modification requests.[162]

Many previously denied claimants are engaged in the pursuit of second or third petitions for modification, and it is anticipated that these efforts will produce considerable litigation in years to come.

C. Attorneys' Fees

The alleged unavailability of competent counsel to represent federal black lung claimants is a matter of continuing concern and controversy. Although Part 718 eligibility criteria have been liberalized by recent judicial decisions,[163] it is still often stated by plaintiffs' attorneys in coal mining regions that the representation of

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158. *See supra* notes 132-140 and accompanying text.

159. *See Miller*, PULMONARY FUNCTION TESTS IN CLINICAL AND OCCUPATIONAL LUNG DISEASE, 39-40 (1986).

160. *See* Prunty & Solomons, *supra* note 1, at 705-06. *Compare* 20 C.F.R. § 727.203(a)(2) (1989) (interim presumption invocation values for ventilatory tests not adjusted for age) *with* 20 C.F.R. Part 718, app. B (permanent criteria adjusted to reflect the significance of aging).

161. *See supra* notes 10-75 and accompanying text.

162. There is some question whether a new legal theory of eligibility or misjudgments by claimant's counsel will support a modification claim. In Longshore Act cases, the courts have generally held that these reasons cannot sustain a petition for modification. *See* Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775, 780 (11th Cir. 1985); American Bridge Div., United States Steel Corp. v. Director, Office of Workers' Compensation, 679 F.2d 81, 83 n.6 (5th Cir. 1982); General Dynamics Corp. v. Director, Office of Workers' Compensation Programs, 673 F.2d 23, 26 (1st Cir. 1982). No similar limitation has been announced in black lung claims and, as a practical matter, the BRB and circuit courts in black lung claims generally apply the law in effect at the time of adjudication.

163. *See supra* notes 43-75 and accompanying text.

black lung claimants is more trouble than it is worth. On the other hand, DOL has reported that a study of recent administrative law judges' decisions revealed "that in 92% of cases resulting in an award or denial of benefits, the claimants had attorneys."[164]

The availability of counsel for claimants is now, and always has been, dictated to a great extent by considerations of just compensation for the attorneys. When benefit awards were easily obtained and the black lung plaintiffs' bar prospered, Congress expressed concern that claimants' attorneys were reaping windfall fees for very little work. Legislative proposals were introduced to restrict the availability of federal benefits for the payment of fees to claimants' attorneys.[165]

Circumstances today have changed. The representation of claimant's has become much less attractive because of more restrictive eligibility criteria, increased involvement of mine operators in claims litigation, the relatively slow pace of adjudications and a declining volume of filings, DOL's policies barring the award of a fee in denied claims,[166] and regulations invalidating contingent fee contracts.[167] Under current circumstances, it is not possible for a claimant's representative to make up for the lost volume of black lung cases by unilaterally increasing the amount of fee awards or finding new bases for fee compensation. It is true, therefore, that many attorneys who previously did this work will no longer accept new cases, while others, who might have done so in the past, do not enter the market.

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164. *See* Petition for Writ of Certiorari, United States Dep't of Labor v. Triplett, No. 88-1671, at 10 (U.S. 1989). The same study also noted that an award was two and one-half times more likely if the claimant was represented by counsel. This may reflect the proposition that attorneys refuse weaker cases, but is also due, in some degree, to the probability that a represented claimant is more likely to prevail than a pro se claimant. In the authors' experience, fewer claimants are represented by counsel today than was the case during the early 1980s.

165. H.R. 8835, 93d Cong., 1st Sess. (1973); H.R. 8838, 93d Cong., 1st Sess. (1973); *see also Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 before the General Subcomm. on Labor of the House of Representatives Comm. on Education and Labor*, 93d Cong., 1st and 2d Sess. (1973-74).

166. The policy was recently restated by the BRB. *See* Broughton v. Director, Office of Workers' Compensation Programs, 13 Black Lung Rep. (MB) 1-35, 1-36 (1989).

167. 20 C.F.R. § 725.365 (1989).

It is difficult to quantify the significance of these developments. If DOL data are correct, there appears to be no change in the representation of claimants before administrative law judges.[168] Not even anecdotal evidence has been advanced to demonstrate that worthy claims go uncompensated for lack of willing counsel. There is no doubt, however, that a claimant is more likely to prevail before an administrative law judge if the claimant is represented by counsel—partly because of the complexity of the law and regulations, and partly because of counsel's superior access to sources of evidence.

Many claimants who are represented before the Office of Administrative Law Judges are abandoned by their counsel if the claim is denied and an appeal to the BRB is pursued. The majority of pro se claimants are probably better off without counsel in BRB proceedings. In an appeal where the claimant is represented by counsel, the BRB will consider only those issues raised by counsel in briefing.[169] In a pro se appeal, the BRB's experienced legal staff will review the judge's decision and the record and will act to correct any error of fact or law (procedural or substantive) that can be identified.[170] The claimant is not even required to file a pleading to obtain such a review.[171] The claimant is disadvantaged in this setting only when success in the appeal must turn upon the making of new law or modification of existing precedent. By contrast, in the courts of appeals, a pro se claimant/appellant is seriously handicapped by the lack of counsel.

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168. An informal study conducted by the DOL Solicitor's Office in 1975 showed that eleven percent of claimants were unrepresented in administrative law judge proceedings at that time. Compare this with the recent study showing that in 92% of claims resulting in an award or denial by an ALJ, the claimant was represented by counsel. *See supra* note 164 and accompanying text. Arguably, a represented claimant is more likely to proceed to the administrative law judge level than is an unrepresented claimant, but this assumption cannot be validated. Those claims which are denied by a deputy commissioner are likely to be weak and may have been denied previously (i.e., duplicate claims). These are the types of cases that attorneys are least likely to accept because these cases are the ones least likely to produce a benefit award and thus a fee award for the attorney. In this fashion, the system operates to weed out perfunctory or highly questionable claims and minimize the impact of such claims on the adjudicatory system.

169. *See* Sarf v. Director, Office of Workers' Compensation Programs, 10 Black Lung Rep. (MB) 1-119, 1-121 (1987); Slinker v. Peabody Coal Co., 6 Black Lung Rep. (MB) 1-465, 1-466 (1983).

170. McFall v. Jewell Ridge Coal Co., 12 Black Lung Rep. (MB) 1-176, 1-177 (1989).

171. *Id.*

Whatever the situation may be, the impetus for change is on the horizon. The event most likely to subject DOL policies to careful scrutiny is the Supreme Court's decision in *United States Dep't of Labor v. Triplett*.[172] In *Triplett*, the West Virginia Supreme Court of Appeals dismissed disciplinary charges brought by the Committee on Legal Ethics of the West Virginia State Bar against an attorney who received, without approval, contingent fees from claimants in successful federal claims.[173] A divided panel held that the disciplinary charges could not be sustained because the "system" for awarding fees to claimants' attorneys in the federal program denied claimants their right to adequate representation by counsel and thereby deprived claimants of their property without due process of law.[174] In essence, the West Virginia court permitted Triplett to assert the rights of black lung claimants in defense of the disciplinary charges. Finding the federal black lung attorney fee system unconstitutional, the West Virginia court reasoned that Triplett could not be disciplined for failure to follow its governing rules.[175]

In a unanimous decision, the United States Supreme Court reversed the West Virginia court. Justice Scalia, writing for the Court, observed that the record was totally inadequate to prove that claimants could not obtain adequate representation or that any such inability was caused by DOL's "system."[176] The disposition of this case will certainly focus attention on the issue, and this attention may produce some alterations which will make the representation of claimants more attractive.[177]

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172. Committee on Legal Ethics of the W. Va. State Bar v. Triplett, 378 S.E.2d 82 (W.Va. 1988), *rev'd sub nom.* United States Dep't of Labor v. Triplett, 58 U.S.L.W. 4389 (1990); *see* Prunty & Solomons, *supra* note 1, at 726-27.

173. *Triplett*, 378 S.E.2d at 95. The Committee on Legal Ethics also filed a petition for certiorari that was granted and consolidated with the DOL appeal. United States Dep't of Labor v. Triplett, 110 S. Ct. 48 (1989).

174. *Triplett*, 378 S.E.2d at 93.

175. *Id.* at 95.

176. *Triplett*, 58 U.S.L.W. at 4390-91. In a separate opinion, Justice Marshall, joined by Justice Brennan, noted that if a case could be made on these accounts, a Constitutional challenge might succeed. *Id.* at 4393-94 (Marshall, J., concurring).

177. It is surprising that lawyers representing black lung claimants have not directly challenged DOL's prohibition against fee awards in losing cases, or the rule absolutely invalidating contingent fee arrangements. It is not beyond possibility that the courts of appeals would be receptive to such

D. DOL As A Collection Agency

With its declining volume of claims, DOL has recently committed significant resources to the collection of debts owed or allegedly owed to the Black Lung Disability Trust Fund (BLDTF). Most of the activity in this area has focused on two categories of liability: benefit overpayments made to claimants and interest on payments made by and previously reimbursed to the BLDTF by a miner operator or its insurer.

Overpayment claims arise in several ways. As a general rule, benefit payments in an approved claim are payable from the month of a miner's filing, or in the case of a survivor's claim, from the month of the miner's death or January 1, 1974, whichever is later.[178] Benefits payable are, however, subject to an offset for state or federal workers' compensation awards for disability or death due to pneumoconiosis[179] or, in certain circumstances, earnings from alternative employment or self-employment paid to the primary beneficiary.[180] Benefit payments are also subject to adjustment in light of a variety of changes in the status of a primary beneficiary or benefit augmentee.[181]

Responding to congressional pressure, DOL routinely commenced the payment of benefits from the BLDTF within thirty days following the first determination of a claimant's eligibility and concurrently made a lump sum payment to the claimant reflecting all past due benefits from the month of filing or death.[182] These payments are called "interim" payments, and are made with the ex-

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challenges, nor is it clear that the statute cannot accommodate an arrangement in which the unsuccessful claim defendant pays a reasonable lodestar fee and the claimant pays the rest under an approved and fair contingent fee contract. *See* Venegas v. Mitchell, 110 S. Ct. 1679 (1990).

178. 20 C.F.R. § 725.503 (1989). Benefits may be paid beginning prior to the date of claim filing, but no earlier than January 1, 1974, if the evidence establishes the onset of total disability prior to the date of filing. *See* Director, Office of Workers' Compensation Programs v. Rochester & Pittsburgh Coal Co., 678 F.2d 17 (3d Cir. 1982); Kuhar v. Bethlehem Mines Corp., 5 Black Lung Rep. (MB) 1-765 (1983).

179. 20 C.F.R. § 725.533 (1989).

180. *Id.* § 725.536.

181. *Id.* §§ 725.201-.233, 725.533.

182. *See id.* § 725.522. The lump sum payment of retroactive benefits was ended by the 1981 amendments. Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119 § 103(a), 95 Stat. 1636 (codified as amended at 26 U.S.C. § 9501 (1982)).

pectation that they will be recovered from the responsible mine operator or insurer after a final determination of eligibility.

DOL procedures leading to an initial award are often ex parte. If the mine operator, after having the opportunity to defend the claim, ultimately prevails in establishing the claimant's ineligibility, the BLDTF is left with a substantial overpayment. In other cases, eligible claimants fail to timely report benefit awards under state programs or changes in the status of an augmentee and are overcompensated for some discrete period of time. Such payments are also deemed overpayments.[183]

DOL is authorized to collect overpayments from claimants by either reducing future payments[184] or, if no future payments are due, by recouping overpaid amounts in an administrative action brought against a claimant.[185] DOL must waive overpaid amounts if specified criteria are established.[186]

During the last few years, DOL has embarked upon an aggressive effort to recoup overpayments. In most cases, claimants were notified in writing that "interim" payments made to them prior to final adjudication would have to be repaid if their claim was ultimately denied. A finally denied claimant who did not heed, or who was unable to heed the repayment warning, may be faced with substantial overpayment liabilities.[187] While many claimants may be judgment proof, DOL apparently believes that many are able to make repayment. The ongoing collection effort by DOL, and to a lesser extent coal mine operators and their insurers, has produced considerable litigation involving: 1) claims for recovery, and 2) additional refilings and requests for modification in order to forestall recovery efforts.

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183. *See* 20 C.F.R. § 725.540(a) (1989).

184. *Id.* § 725.540(c).

185. *Id.* § 725.544.

186. *Id.* §§ 725.541-.543. A mine operator seeking the recovery of an overpayment is not similarly required to waive its right to recovery. *Id.* § 725.547.

187. Overpaid amounts that are waived by DOL or an operator may be construed by the Internal Revenue Service to be reportable and taxable as ordinary income. *See* 26 U.S.C. § 61(a)(12) (1982). Properly paid benefits are exempt from federal income taxes. *See* 30 U.S.C. § 922(c) (1982).

DOL's efforts to recover interest payments from operators and insurers are also vigorously pursued. In monthly benefit claims, it is often the case that the employer or carrier waited until the issuance of a final determination of the claimants' eligibility to directly commence monthly benefit payments and/or reimburse the BLDTF for back benefits paid. In these circumstances interest will usually be awarded by the administrative law judge in favor of the BLDTF, and the award of interest is final and binding.[188]

The employer's liability for interest on indemnity benefits is well settled by statute and causes little litigation except when DOL waits too long to commence recovery efforts. Although the issue has not yet been decided by the BRB or a circuit court, it appears that the Black Lung Act imposes a six year statute of limitations on DOL's recovery efforts and that this statute of limitation begins to run on the date on which the operator's liability is finally determined.[189]

DOL is also attempting to collect interest on medical benefits paid by the BLTDF and reimbursed by a mine operator. These efforts have already produced considerable litigation.[190] These cases typically arise in claims for "medical benefits only" (MBO claims) filed by a miner also entitled to receive indemnity benefits from the Social Security Administration under Part B of the Act.[191] In these cases, entitlement to covered health care benefits is determined in a two step process. First, a medical benefits claimant must establish entitlement to monthly indemnity benefits, even though no money is actually payable on such entitlement. The right to receive health care benefits under the black lung program is fixed if the miner first proves total disability due to pneumoconiosis in accordance with the

188. 20 C.F.R. § 725.608 (1989). The rate of interest charged is established by statute and varies from year to year. *Id.* § 725.608(c). Prejudgment interest is prohibited in black lung claims. *See, e.g.*, Stapleton v. Westmoreland Coal Co., 785 F.2d 424, 427 (4th Cir. 1986), *rev'd on other grounds*, Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987).

189. 30 U.S.C. § 424(b)(4)(B) (1982); 20 C.F.R. § 725.603(d) (1989). This issue is currently pending before the BRB in Director, Office of Workers' Compensation Programs v. Carbon Fuel, No. 89-3351 BLA (Ben. Rev. Bd. 1989).

190. Several cases have been consolidated for review by the Office of Administrative Law Judges. Bailey v. Island Creek Coal Co., No. 89-1779 BLA (1989).

191. *See* discussion in Prunty & Solomons, *supra* note 1, at 728-33.

eligibility rules contained in the interim presumption.[192] Then, if and when medical care is provided for the treatment of the miner's pneumoconiosis, billings for this care are submitted to DOL or the mine operator, either of which has the right to contest particular bills on one or more of several grounds (e.g., the treatment was not reasonable or necessary, or the treatment was not for pneumoconiosis).[193]

Most MBO claims were filed between 1978 and 1981. Again bending to political pressure, DOL simply entered an ex parte award in every claim filed without validating or adjudicating the original SSA entitlement determination.[194] At this point, DOL commenced the payment of medical bills and later notified a mine operator or insurer of its potential liability. Because no specific liability attached to the finding of basic entitlement and because employers could contest individual billings, many operators and carriers conceded first stage liability. After this concession of liability DOL was obligated to terminate interim medical benefit payments made from the BLDTF and redirect the providers to the operator or carrier for payment. At the same time, DOL would seek reimbursement for the billings it had already paid. Operators and carriers would not, however, reimburse the BLDTF without first having an opportunity to audit the bills.

DOL often informed willing operators and carriers that copies of the medical bills paid by the BLDTF, and supporting documentation, could not be promptly provided. The bills paid by the BLDTF could not be promptly provided because DOL did not operate the medical bill payment system but instead contracted it to various nongovernmental third parties. This system has produced enormous inefficiencies, and operators have often waited five years or more to receive proof of their health care liabilities from DOL.

Although each medical bill for which DOL seeks reimbursement is, in effect, a separate claim for benefits subject to dispute and

192. 20 C.F.R. § 725.701A (1989); *see also* Lute v. Split Vein Coal Co., 11 Black Lung Rep. (MB) 1-82 (1987).

193. 20 C.F.R. § 725.701A (1989).

194. *See* 20 C.F.R. § 725.701A(a)(2) (1989).

litigation, it is common that no good defense is reasonably possible because of the significant delays between the time treatment was rendered and paid for by the BLDTF and the operator's first opportunity to see the billings.[195] In fact, many miners are deceased by the time bills and documentation are submitted by DOL to the employer or insurer.

Handicapped as they were by DOL's treatment of these matters,[196] and because of an initial reluctance to interfere in the determinations of treating physicians, employers and carriers commonly paid without dispute whatever DOL billed. (This practice has waned in recent years.) In the majority of cases, medical benefit billings paid by the BLDTF were paid within thirty days from the receipt of copies of the billing invoices; that is, from the operator's or carrier's point of view, within thirty days of notice of the claim.[197]

Recently, DOL has assessed against operators and insurers prejudgment interest from the date the medical bills were paid by the BLDTF. Because bills often date back to the late 1970s, the interest claimed by DOL may be fairly significant, especially if the miner was in the throes of a terminal or serious illness requiring extensive medical attention. In many instances, employers and insurers are refusing to pay the prejudgment interest. These cases will be litigated over the next several years.

DOL's role as a collection agency will likely continue. In fiscal year 1989, revenues received by the BLDTF slightly exceeded all

195. The Longshore Act requires prior notice of treatment to the employer, the filing of relevant treatment reports by the provider, and affords the employer the right to decline approval on appropriate grounds. 33 U.S.C. § 907 (1982), incorporated by reference into 30 U.S.C. § 932(a) (1982); 20 C.F.R. §§ 725.705-.706 (1989). DOL has routinely, if not invariably, ignored this statute and its own rules in this regard, further complicating the agency's efforts to obtain recovery.

196. DOL's contractors, by all appearances, made no real effort to audit or control billings. Several health care providers took advantage of this uncontrolled and non-cost contained system, and some of these providers have been investigated, indicted and convicted of criminal activity in this connection. The lack of any reasonable cost or quality control has made black lung billing of health care costs a most attractive alternative for less than honest providers.

197. *See* 20 C.F.R. § 725.412-.413 (1989). In the vast majority of cases, the original award of medical benefits did not also direct the payment of interest on medical billings. In the absence of a determination of such liability at the appropriate time, there is some question concerning the applicability of the six year statute of limitations on the pursuit of a debt owed to the BLDTF.

payouts.[198] At the same time, however, the BLDTF continues to carry a $3.05 billion indebtedness to the United States Treasury, and this debt will again accrue interest in 1991.[199] So long as this debt pressure remains (it will surely remain well into the twenty-first century), DOL will continue to pursue all arguable sources of revenue.

V. Conclusion

The federal black lung program continues to evolve. The volume of filings is in decline, the frequency of awards has declined since the days of the interim presumption, and the huge volume of claims litigation experienced in the 1980s will not be repeated. The program is by no means over, but it is shrinking.

While the courts of appeals have recently acted to significantly improve a claimant's prospects for obtaining benefits under the permanent medical criteria, and while there will be more opportunities to continue moving in this direction on the margins of DOL's eligibility rules, the program can no longer be viewed as an economic aid program for mining communities or as a federal entitlement vehicle for retired miners and their families.[200]

For years, the program has served as a source of employment for countless doctors, lawyers, government employees and others, but this too is becoming a thing of the past. It is hoped that what will emerge from the program's evolution is a better and more just system where all arguably deserving black lung victims are properly and promptly compensated by their employers without unnecessary litigation. Such a system would be in keeping with the salutary principles of workers' compensation law. In keeping with this vision, persons who have no legitimate claims will not file, and lawyers, on all sides, will abandon the gamesmanship that has characterized federal black lung litigation for years.

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198. U.S. Dep't of Labor Status of Funds Report (1989).

199. *Id.*; *see also* Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10-503, 101 Stat. 1330-446 (amending 26 U.S.C. § 4121).

200. *See* 127 Cong. Rec. 31,977-98 (Dec. 16, 1981) (statement of Sen. Hatch); P. Barth, *supra* note 79, at 275-84; J. Nelson, *supra* note 79, at 154-57.

Perhaps this vision naively ignores the "real politic" of the federal black lung program, and perhaps it erroneously assumes that the currently dormant political forces which shaped the program in the past will not be reactivated. But whatever happens, the authors believe that this vision is attainable and that it would be a just conclusion to the rocky history of the federal black lung program.