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THE FEDERAL BLACK LUNG PROGRAM: ITS EVOLUTION AND CURRENT ISSUES

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I.	INTRODUCTION.....	666
II.	TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969.....	672
	A. <i>The Black Lung Benefits Act of 1972</i>	676
	B. <i>The Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977</i> ...	680
III.	ELIGIBILITY CRITERIA FOR PART C CLAIMS FILED BEFORE APRIL 1, 1980.....	684
	A. <i>Current Standards for Invocation of the DOL Interim Presumption</i>	686
	B. <i>Current Standards for Rebuttal of the DOL Interim Presumption</i>	691
	1. Section 727.203(b)(1) Rebuttal.....	691
	2. Section 727.203(b)(2) Rebuttal.....	692
	3. Section 727.203(b)(3) Rebuttal.....	695
	4. Section 727.203(b)(4) Rebuttal.....	699
IV.	ELIGIBILITY CRITERIA FOR CLAIMS FILED FROM APRIL 1, 1980 THROUGH DECEMBER 31, 1981	700
	A. <i>Presumptions Under Part 718</i>	702
	B. <i>Proving the Existence of Pneumoconiosis Arising Out of Coal Mine Employment</i>	703

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C. <i>Proving Total Disability Due to Pneumoconiosis</i>	704
V. THE 1981 AMENDMENTS	710
VI. ISSUES TO WATCH	713
A. <i>Coal Mine Employment Issues</i>	713
1. Central Repair Shop Employment	714
2. Railroad Employment.....	716
B. <i>The Problem of Multiple Claims</i>	717
1. Merger of Multiple Claims.....	720
2. Definition of Material Change.....	721
3. The <i>Lukman</i> Problem	722
C. <i>Fees for Claimants' Representatives</i>	724
D. <i>Medical Benefits Issues</i>	728
VI. CONCLUSION.....	733

I. INTRODUCTION

After twenty years, thirty billion dollars in costs,¹ and more than one million claims,² the divergent perspectives that have plagued the federal black lung program, and the often incompatible expectations of the groups involved, continue to generate controversy and impede realization of the law's stated purpose: to provide fair, industry-funded workers' compensation benefits for total disability due to coal workers' pneumoconiosis.

Seven years after the start of the federal black lung program, the Congress of the United States together with the President and several federal agencies convened an Interdepartmental Task Force on Occupational Diseases and Workers' Compensation. The then

1. The total cost of the program since its inception easily exceeds \$30 billion. As of December 1987, the Social Security Administration (SSA) had paid over \$16 billion in benefits from general revenues, and the Department of Labor's (DOL) Black Lung Disability Trust Fund (BLDTF) had spent approximately \$10.2 billion. These amounts have increased by at least \$1 billion since the end of 1987. Individual mine owners have probably spent at least \$5 billion to \$6 billion in insurance premiums, self-insured benefit payments, and claims defense costs over the past fifteen years, although no precise figure is obtainable. See ACTUARIAL RISK SERVICES, INC., BLACK LUNG INFORMATION DISTRIBUTION (Feb. 1988).

2. See U.S. DEPT. OF LABOR, *Black Lung Program Claims Status Rep.* (April 10, 1987); *Black Lung Benefits Reform Act, 1976 Hearings on H.R. 10760 and S. 3183 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 7, 184 (1976)* (hereinafter *1976 Oversight Hearings*); U.S. DEPARTMENT OF LABOR, 1988 ANNUAL REPORT 27 (1989) (to be published).

Chairman of the Senate Committee on Labor and Public Welfare predicted that the deliberations of this Task Force would have an indelible effect on the future of the nation's workers' compensation systems.³ The Black Lung Benefits Act, 30 U.S.C. Sections 901-945,⁴ was still relatively new and was the only single industry, single disease compensation law ever attempted. Members of the Task Force looked to the federal black lung program as the laboratory that would generate a good model for future handling of occupational disease claims. This expectation has not been realized.

The Task Force met at the University of Chicago in February 1976. One of the authors of this article, who participated in the conference as chief counsel to the Department of Labor's black lung program, and the federal program's administrator, Nancy Snyder, presented a paper that attempted to explore and understand the federal black lung phenomenon.⁵ The paper, like the federal program itself, was in one sense intensely practical, but in another, it sought to identify the historical and philosophical factors that brought the federal initiative into existence and made the program so difficult to manage. Without realizing it at the time, the paper correctly identified the central reason why the black lung program could never be exemplary.

The most significant factor dooming the program to perpetual controversy was the almost total lack of agreement among inter-

3. *Proceedings of the Interdepartmental Workers' Compensation Task Force Conference on Occupational Diseases and Workers' Compensation Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. v (1976) (hereinafter *Proceedings*).

4. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, as amended by the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150, the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (codified in scattered sections of 15 U.S.C., 26 U.S.C., 29 U.S.C., and 30 U.S.C. (1982)), and Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 312, 313 (codified at 26 U.S.C. § 4121), and Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 1330-446 (codified at 26 U.S.C. § 4121).

5. N. Snyder and M. Solomons, *Black Lung—A Study in Occupational Disease Compensation*, reprinted in *Proceedings*, supra note 3, at 742.

ested parties and constituencies over the program's mission. It was easy enough to package and sell the program as a legitimate response to failure of state workers' compensation systems to respond adequately to victims of black lung disease. But as Dr. Peter Barth has observed, "[N]ot a single serious study of workers' compensation and pneumoconiosis had been undertaken by 1969. As a result, while the widely accepted notion that the system was not working may have been true, it was not documented at all."⁶

Snyder and Solomons in 1976 and Barth in 1987 recognized that from the beginning of the program key players saw it from very different and often conflicting perspectives. For many powerful members of Congress representing coal producing states, the program, from its beginning to at least 1980, may well have been seen as a measure to aid economically depressed areas that had been hard hit by the declining fortunes of the coal industry. The United Mine Workers of America (UMWA), the predominant miners' union, may have shared this perspective to some degree, but also probably saw the program as a vehicle to upgrade inadequate retirement, disability, and death benefits by delivering a special right or benefit in the nature of a pension to long-term miners and their families.⁷

Activist groups called "black lung associations," made up of then dissident UMWA personnel, volunteers who had gone to Southern Appalachia to provide social services to the region's inhabitants, and a few retired miners and miners' widows, saw the program as an obligation owed by the country to coal miners.⁸ For them, the hazardous nature of coal mining was enough to warrant the creation of a new federal entitlement. It is likely that many individual coal miners felt (because they had been led to believe) that the "black lung pension," as it was often called in

6. P. BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* 280 (1987).

7. See, e.g., *1976 Oversight Hearings*, *supra* note 2, at 109, 121-23 (statement of Arnold Miller, President, United Mine Workers of America (UMWA)).

8. See, e.g., *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 Comm. on Education and Labor*, 93d Cong., 1st & 2d Sess. 203-40, 402-06 (1973-1974).

coal mining communities, was something they were entitled to receive wholly apart from scientific proof of any genuine connection between their coal dust exposure and a disabling illness.

The coal industry paid little attention to the program until it was called upon in 1974 to start paying the bill.⁹ Industry's complacency in the early days probably played a significant role in facilitating the excesses of the 1970s. While the industry never denied its obligation to provide adequate workers' compensation benefits to miners with black lung disease, it did finally object strenuously, in Congress as well as in the courthouse, to paying for what seemed to be a federal social program.¹⁰ Singling out this industry, with more than its share of other problems, to bear the cost of a Congressional decision seemed inappropriate. It evoked considerable and perhaps justified hostility among industry leaders toward the federal black lung program. This hostility, in turn, was incorrectly interpreted by many as evidence of the coal industry's insensitivity to the needs of its workers, thus isolating the industry from meaningful participation in the legislative process.

9. Under the Black Lung Benefits Act of 1972, all claims filed from January 1, 1970 to June 30, 1973, if approved, were paid by the SSA from general federal revenues for the duration of the beneficiary's entitlement. 30 U.S.C. § 921(a) (1982). Claims filed between July 1, 1973 and December 31, 1973, if approved, were paid out of general federal revenues by SSA for periods of entitlement prior to December 31, 1973, and thereafter by a mine owner or its insurer, or by DOL if no operator or carrier could be identified. 30 U.S.C. § 925 (1982). Claims filed after December 31, 1973, if approved, were paid by a responsible mine owner or its insurance carrier. 30 U.S.C. § 932-934 (1982). Prior to enactment of the Black Lung Benefits Reform Act of 1977, 92 Stat. 95, and the Black Lung Benefits Revenue Act of 1977, 92 Stat. 11, claims filed after December 31, 1973 in which no responsible operator or insurer could be identified were also paid by DOL from general revenues. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 421, 424, 83 Stat. 792, 795-98 (codified as amended 30 U.S.C. §§ 931-934 (1982)). After enactment of the 1977 amendments, approved claims in which no operator can be identified are paid by the BLDTF. 30 U.S.C. § 934 (1982). The BLDTF is financed by a manufacturers' excise tax on coal and is authorized to borrow repayable advances from the U.S. Treasury when coal tax revenues are inadequate. 26 U.S.C. §§ 4121, 9501 (1982). As of November 31, 1988, the BLDTF owed nearly \$3 billion to the Treasury and continues to require deficit financing. U.S. DEPARTMENT OF TREASURY, STATUS OF BLACK LUNG DISABILITY TRUST FUND (Jan. 18, 1989).

10. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); see also *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund, Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 139-50, 229-48 (1981) (testimony of Carl Bagge, President, National Coal Ass'n; testimony and statements on behalf of the American Mining Congress, and testimony of John Stenmark, Vice President, American Iron and Steel Institute) (hereinafter *1981 Oversight Hearings*).

The insurance industry always viewed the program as just another workers' compensation system. Insurers were concerned mostly with the exceptionally difficult mission of devising a fiscally sound mechanism to insure benefits under a program, the characteristics of which were in perpetual flux according to the ever changing whims of Congress.¹¹ Insurers did not want to shun the program by refusing to provide coverage but, at the same time, they did not fully appreciate the extremes to which Congress would go to ensure that miners would be paid whether or not they had valid workers' compensation claims.

The two administering agencies, the Social Security Administration (SSA) and the U.S. Department of Labor (DOL), did not share a common perspective. SSA first saw the program as a continuation of the agency's disability program for all workers, but after being repeatedly criticized by some members of Congress for denying claims of persons who were not genuinely disabled, SSA finally came to appreciate the fact that its job was simply to approve claims.¹² DOL saw its program as an extension of the agency's responsibilities under the Longshore and Harbor Workers' Compensation Act (Longshore Act).¹³ In keeping with its experience in the administration of workers' compensation programs, the DOL viewed its mission to be one of establishing a fair system for the adversarial litigation of occupational lung disease compensation claims filed by coal miners. The obvious incompatibility between the "pay everybody" philosophy of several (now mostly departed) members of Congress and the incontrovertible obligation of the DOL to provide mine owners with a fair, workers' compensation-like hearing has never been satisfactorily resolved. Sometimes to the dismay of Congress, DOL has historically sought to ensure the integrity of benefit determinations. The agency, to this day, defends claims that it believes should not be paid.

11. See Snyder & Solomons, *supra* note 5, at 764-66; P. BARTH, *supra* note 6, at 176-77.

12. See J. NELSON, JR., *BLACK LUNG: A STUDY OF DISABILITY COMPENSATION POLICY FORMATION* 74-109 (1985).

13. The Longshore and Harbor Workers' Compensation Act, *as amended*, 33 U.S.C. §§ 901-945, 947-950 (1982), establishes a federally administered but employer financed workers' compensation program for persons engaged in maritime employment.

Since 1981, most black lung battles have been waged in the courts. Congress has not lost interest, but its attention has been focused on more pressing national concerns. Further, early intentions of many of the program's most vigorous congressional advocates—to deliver largesse to economically depressed coal mining regions—have been realized. Few members of Congress seem troubled by the more modest program that emerged following DOL's adoption of revised eligibility rules in 1980¹⁴ or by Congress's move toward more scientifically valid entitlement standards in the Black Lung Benefits Amendments of 1981.¹⁵

The plain language of the Black Lung Benefits Act¹⁶ states that its single purpose is to provide adequate compensation on account of total disability or death due to pneumoconiosis.¹⁷ Any intent to do more is not stated in the statute, but must be gleaned from the history of the program. Yet the statute is the primary source of the law. It not only limits the scope of entitlements, but also, for DOL claims, preserves the rights of mine owners and insurers to prove that a miner is not totally disabled by or did not die of occupational lung disease arising out of coal mine employment.¹⁸ As a matter of medical fact, coal dust exposure is not likely, for most miners, to cause significant disability and is quite unlikely to cause death.¹⁹ As a result, mine operators typically mount vig-

14. See 20 C.F.R. Part 718 (1980).

15. Black Lung Benefits Amendments of 1981. Pub. L. No. 97-119, 95 Stat. 1643 (codified in scattered sections of 30 U.S.C. (1982)).

16. 30 U.S.C. §§ 901-945 (1982), originally enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969 (see *supra* note 4 for subsequent history).

17. 30 U.S.C. § 901(a) (1982).

18. DOL's portion of the statute incorporates the claim adjudication procedures set forth in the Longshore and Harbor Workers' Compensation Act (hereinafter Longshore Act), 33 U.S.C. §§ 919-921 incorporated by reference into 30 U.S.C. § 932(a) (1982). Longshore Act procedures afford the parties the right to a trial before an administrative law judge in which the procedural rules of the Administrative Procedure Act apply. 5 U.S.C. § 554 incorporated by reference into 33 U.S.C. § 919(d) (1982). A party dissatisfied with a judge's decision has a right to appeal to the DOL's Benefits Review Board (BRB). 33 U.S.C. § 921(a), (b) (1982). A party dissatisfied with a decision by the BRB may take an appeal to the United States Court of Appeals with jurisdiction over the place where the injury occurred. 33 U.S.C. § 921(c). Both the BRB and the court of appeals must affirm the decision of the judge if it is supported by substantial evidence and in accordance with law. See *O'Keeffe v. Smith, Hinchman & Grylles Assoc.*, 380 U.S. 359 (1968); *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469 (1947).

19. While this statement would be sure to evoke considerable political controversy, its general acceptance in the scientific community seems apparent. See SURGEON GENERAL OF THE UNITED STATES,

orous defenses. However well supported by scientific proof, defense efforts often become strained by the Byzantine maze of statutory provisions, regulations, and judicially created principles that often make the truth of the matter either irrelevant or of ambiguous legal significance. It is these sources of law that reflect the unstated intent of many of the program's congressional advocates: the delivery of economic aid to depressed coal mining regions.

The federal black lung program is the result of an evolutionary process that began in 1969 and continued through congressional amendments in 1972, 1977, and 1981. The history of the program is one of repeated liberalization of the entitlement criteria, with the deliberate purpose of awarding more and more claims, until the program was tightened by DOL's adoption of permanent entitlement regulations in 1980 and congressional adoption of the 1981 amendments. This article traces the evolution of the black lung program, summarizes the changing entitlement criteria, and reviews significant unresolved issues.

II. TITLE IV OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

The federal black lung program originated in Title IV of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act).²⁰ The coal mine health and safety law was largely the result of increased national attention focused on the working conditions of coal miners after the November 20, 1968 explosion of Consolidation Coal Company's No. 9 Mine in Farmington, West Virginia. This tragedy and the subsequent rescue efforts dramatized the dangers facing underground coal miners for millions of Americans who followed the events on television news programs in living rooms across America.

THE HEALTH CONSEQUENCES OF SMOKING, CANCER AND CHRONIC LUNG DISEASE IN THE WORKPLACE 289-313 (1986); A. Renzetti & S. Richman, Current Medical Methods in Diagnosing Coal Workers' Pneumoconiosis and a Review of The Medical and Legal Definitions of Related Impairment and Disability 32-34 (May 13, 1983) (unpublished report prepared for the U.S. DOL, Employment Standards Administration by the Franklin Research Center, a division of the Franklin Institute).

20. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 401-426, 83 Stat. 792-98 (codified as amended in scattered sections of 30 U.S.C.).

Provisions for black lung benefits were not included in the original legislation considered by Congress.²¹ Both houses of Congress, however, adopted a *temporary* program for providing emergency compensation to coal miners totally disabled by *complicated* pneumoconiosis.²² The conference committee which resolved the differences in the bills passed by the House and the Senate dropped the language limiting benefits to miners disabled by complicated pneumoconiosis. The committee extended coverage to cover death and total disability due to any chronic dust disease of the lungs arising out of employment in an underground coal mine.²³ The 1969 Act declares as its purpose, to provide

benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.²⁴

The compelling reason for creating a federal black lung program was perceived failure by the states to compensate miners disabled by lung diseases resulting from coal mine employment.²⁵ It was intended that the program would provide temporary, emergency assistance to deserving coal miners.²⁶ Only underground coal

21. See P. BARTH, *supra* note 6, at 13-14.

22. S. 2917, 91st Cong., 2d Sess. (1969); H.R. 13950, 91st Cong., 2d Sess. § 112 (1969). Complicated pneumoconiosis (progressive massive fibrosis) is an advanced stage of pneumoconiosis which usually occurs on a background of simple pneumoconiosis. This condition is diagnosed by x-ray evidence of simple pneumoconiosis plus larger lesions (nodules) of disease, at least one centimeter in size, usually appearing in the upper portions of the lung. See 30 U.S.C. § 912(c)(3) (1982); W. PARKES, *OCCUPATIONAL LUNG DISORDERS* 197 (2d ed. 1982). Complicated pneumoconiosis is diagnosed by biopsy or autopsy evidence of massive lesions, usually two centimeters or larger. See 30 U.S.C. § 921(c)(3); Kleinerman, Green, Laqueur, Taylor, Hartley, Pratt, Wyatt, Naeye, Wiot, and Lapp, *Pathology Standards for Coal Workers' Pneumoconiosis*, 103 ARCH. PATH. & LAB. MED. 375, 379 (1979). See generally Renzetti & Richman, *supra* note 19, at 19-24. For discussions of the process which resulted in Congressional creation of the federal black lung program, see P. BARTH, *supra* note 6, at 12-29 and J. NELSON, *supra* note 12, at 28-54.

23. An excellent review of the circumstances pertaining to the conference committee's liberalization of the program is found in J. NELSON, *supra* note 12, at 46-51. See also P. BARTH, *supra* note 6, at 24-26.

24. Pub. L. No. 91-173, § 401, 83 Stat. 792 (codified as amended at 30 U.S.C. § 901 (1982)).

25. SUBCOMM. ON OVERSIGHT OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., *THE INSOLVENCY PROBLEMS OF THE BLACK LUNG DISABILITY TRUST FUND 4* (Comm. Print 1981) (hereinafter *SUBCOMMITTEE REPORT*).

26. H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 88-91 (1969), *reprinted in* 1969 U.S. Code Cong. & Admin. News 2578, 2603 (1969).

miners were covered by the first black lung law, and the federal program was scheduled to expire on December 31, 1976.²⁷

Part B, Title IV, of the 1969 Act²⁸ assigned to the Secretary of Health, Education and Welfare (HEW) the responsibility for claims filed before January 1, 1973. These claims were processed by SSA and benefits were paid by SSA from federal funds. Part C, Title IV, of the 1969 Act²⁹ assigned the responsibility for claims filed on or after January 1, 1973 to state workers' compensation programs approved by the Secretary of Labor.³⁰ Where there was no approved state workers' compensation law in place after December 31, 1972, benefits would be paid by underground coal mine operators identified by the Secretary of Labor or, in those instances where a responsible operator was not identified, by the Secretary of Labor from federal funds. Certain provisions of the Longshore Act were incorporated into the 1969 Act to define the adjudicatory process before DOL.³¹ The 1969 Act provided that no Part C benefit payments would be made for any period prior to January 1, 1973, or after December 30, 1976.³² Part B benefits would be paid for life if the claim was originally filed prior to January 1, 1972.³³ Claims filed and awarded during the 1972 transition year would have to be refiled under Part C if the claimant sought continued benefits.³⁴

The 1969 Act created a set of presumptions to assist claimants in establishing entitlement: miners with complicated pneumoco-

27. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 402(d), 422(e), 83 Stat. 742, 793, 796 (codified as amended at 30 U.S.C. §§ 902, 932 (1982)).

28. *Id.* § 411, 83 Stat. 742, 793-95 (codified as amended at 30 U.S.C. § 921 (1982)).

29. *Id.* § 421, 83 Stat. 742, 795-98 (codified as amended at 30 U.S.C. § 931 (1982)).

30. *Id.* The December 31, 1972 deadline for filing Part B claims was extended to six months from date of death in the case of a claimant who was a widow filing a claim after the death of her coal miner husband. *Id.* § 414(a), 83 Stat. 742, 795 (codified as amended at 30 U.S.C. § 924 (1982)). Furthermore, SSA did not pay benefits after December 31, 1972 in claims filed after December 31, 1971. *Id.* § 414(b), 83 Stat. 742, 795 (codified as amended at 30 U.S.C. § 924 (1982)). Benefits after December 31, 1972 were paid by the DOL if the miner filed a new claim and it was approved under Part C. *Id.* § 421, 83 Stat. 742, 795-96 (codified as amended at 30 U.S.C. § 931 (1982)).

31. Federal Coal Mine Health and Safety Act of 1969, § 422(a), 83 Stat. 742, 796 (codified as amended at 30 U.S.C. § 932 (1982)).

32. *Id.* § 422(e), 83 Stat. 742, 796 (codified as amended at 30 U.S.C. § 932 (1982)).

33. *Id.* §§ 411, 414, 83 Stat. 742, 793-95 (codified as amended at 30 U.S.C. §§ 921, 924 (1982)).

34. *Id.* § 414(b), 83 Stat. 742, 795 (codified as amended at 30 U.S.C. § 924 (1982)).

niosis were automatically entitled to benefits;³⁵ miners with at least ten years of coal mine employment who proved the presence of a pneumoconiosis were presumed to be suffering from coal workers' pneumoconiosis as defined by the 1969 Act;³⁶ and miners with at least ten years of coal mine employment who died of a respiratory disease were presumed to have died as a result of coal workers' pneumoconiosis.³⁷ Both of the ten year presumptions were rebuttable. The 1969 Act also gave to the Secretary of HEW exclusive authority to devise and promulgate standards and criteria for determining entitlement under Parts B and C, Title IV, of the 1969 Act.³⁸ Congress directed that these regulations be no more restrictive "than those applicable under section 423(d) of Title 42 [the Social Security Act]."³⁹

After the initial round of claim adjudications, SSA came under increasing attack for failing to "benefit countless miners and their survivors who were the intended beneficiaries of the Black Lung program."⁴⁰ Much of this criticism was directed at the denial of claims because of the inability of miners to present x-ray evidence of pneumoconiosis.⁴¹ Critics complained of the "limited medical resources for performing certain types of tests" necessary to evaluate disability due to pneumoconiosis.⁴² It was also argued that the definition of total disability was too restrictive because it required miners to prove their inability to perform *any* substantial, gainful activity.⁴³ Finally, critics complained of the denial of thou-

35. *Id.* § 411(c)(3), 83 Stat. 742, 793 (codified as amended at 30 U.S.C. § 924 (1982)).

36. *Id.* § 411(c)(1), 83 Stat. 742, 793 (codified as amended at 30 U.S.C. § 921 (1982)).

37. *Id.* § 411(c)(2), 83 Stat. 742, 793 (codified as amended at 30 U.S.C. § 921 (1982)).

38. *Id.* §§ 402(f), 411(a), (b), 422(c), (h), 83 Stat. 742, 793-97 (codified as amended at 30 U.S.C. § 902, 921, 932 (1982)). DOL was given the authority to promulgate regulations for naming responsible operators liable for the payment of Part C benefits. *Id.* §§ 422(a), 83 Stat. 742, 796 (codified as amended at 30 U.S.C. § 932 (1982)).

39. *Id.* § 402(f), 83 Stat. 742, 793 (codified as amended at 30 U.S.C. § 902 (1982)).

40. S. REP. No. 743, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2307. Between January 1, 1972 and April 2, 1973 approximately fifty percent of the 357,000 Part B claims filed had been denied. See SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG. 1ST SESS., LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, 1948 (1975).

41. S. REP. No. 743, 92d Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2313-20.

42. *Id.* at 2322.

43. *Id.* at 2320-21.

sands of widows' claims because of lack of evidence of death due to pneumoconiosis.⁴⁴ These criticisms eventually resulted in the 1972 amendments. These amendments liberalized eligibility criteria, extended the scope of coverage, extended by one year the filing deadline under Part B of the program, and extended the life of Part C by five years.

The lengthy minority comments in the House report which accompanied the 1972 amendments characterized the proposed amendments as "discriminatory, ambiguous and irresponsible."⁴⁵ These comments argued that the proposals transformed the federal black lung program into a "federal pension program for miners."⁴⁶ Proponents of the 1972 amendments defended liberalization with the unsubstantiated contention that earlier estimates of the number of disabled miners had been significantly underestimated.⁴⁷

A. *The Black Lung Benefits Act of 1972*⁴⁸

The 1972 amendments to the 1969 Act were originally drafted by the House Committee on Education and Labor "because the committee discovered that [double] orphans of miners eligible for black lung benefits were not eligible as surviving dependents. . . ."⁴⁹ There existed, however, a perception that SSA's forty-nine percent approval rate did not reflect the aims of the program's most avid supporters in Congress.⁵⁰ These members simply wanted more claims paid. To achieve this result, the 1972 amendments changed the law in the following ways:

44. *Id.* at 2318.

45. STAFF OF HOUSE COMM. ON EDUCATION AND LABOR, 96TH CONG., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, 587 (Comm. Print 1979) (hereinafter 1977 LEGISLATIVE HISTORY).

46. *Id.* at 580.

47. S. REP. No. 743, *supra* note 40, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2317-20; see also H.R. REP. No. 460, 92d Cong., 1st Sess. 24 (1971).

48. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified as amended at scattered sections of 30 U.S.C.).

49. 1977 LEGISLATIVE HISTORY, *supra* note 45, at 584.

50. S. REP. No. 743, *supra* note 40, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2307.

1. Coverage was extended to miners who worked in surface coal mining.⁵¹

2. The definition of total disability was changed from the inability to engage in *any* substantial, gainful activity to the inability to “engag[e] in gainful employment requiring the skills and abilities comparable to those [which the miner regularly performed in coal mining] over a substantial period of time.”⁵²

3. A rebuttable presumption of entitlement was added for miners with at least fifteen years of underground coal mine employment and proof of total disability due to a respiratory or pulmonary impairment was added.⁵³

4. Denial of a claim solely on the basis of a negative chest x-ray was prohibited.⁵⁴

5. Payment of benefits was extended to survivors of miners who were totally disabled due to pneumoconiosis, regardless of the cause of death.⁵⁵

6. The filing deadline for Part B claims was extended to December 31, 1973.⁵⁶

7. Termination of benefits paid under Part C of the program was delayed until December 30, 1981.⁵⁷

The most significant aspect of the 1972 amendments is not found in the legislative language adopted; instead, it is found in the lan-

51. Pub. L. No. 92-303, § 4(c), 86 Stat. 150, 154 (amending 30 U.S.C. § 902(d)) (codified as amended at 30 U.S.C. § 902(d) (1982)).

52. *Id.* § 4(a), 86 Stat. 150, 153 (amending 30 U.S.C. § 902(f)) (codified as amended at 30 U.S.C. § 902(f) (1982)).

53. *Id.* § 4(c), 86 Stat. 150, 154 (amending 30 U.S.C. § 921(c)) (codified as amended at 30 U.S.C. § 921 (1982)). See *infra* note 194 regarding the use of surface coal mine employment to invoke the fifteen-year presumption.

54. *Id.* § 4(f), 86 Stat. 150, 154 (amending 30 U.S.C. § 923(b)) (codified as amended at 30 U.S.C. § 923(b) (1982)).

55. *Id.* § 1(b)(1), 86 Stat. 150, 150 (amending 30 U.S.C. §§ 901(a), 922(a)) (codified as amended at 30 U.S.C. § 901 (1982)).

56. *Id.* § 5(3), 86 Stat. 150, 155 (amending 30 U.S.C. § 924(a)) (codified as amended at 30 U.S.C. §§ 924, 931-932, 936 (1982)).

57. *Id.* § 5(4), 86 Stat. 150, 155 (amending 30 U.S.C. § 932(e)) (codified as amended at 30 U.S.C. § 932 (1982)).

guage of the Senate Report accompanying the bill that was eventually adopted. This language was relied on by SSA to write the first "interim presumption."⁵⁸ This regulatory presumption effected a dramatic increase in the number of awarded claims and ultimately had a significant impact on DOL's administration of Part C claims.⁵⁹

The SSA interim presumption regulation (20 C.F.R. Section 410.490) is limited to claims filed before January 1, 1974, and provides for a rebuttable presumption of total disability or death due to pneumoconiosis upon proof of (1) the existence of pneumoconiosis by x-ray, biopsy, or autopsy "and (2) *either* 10 years of coal mine experience *or* proof that the pneumoconiosis was caused by mining employment. . . ."⁶⁰ The presumption can also be invoked by satisfying a table of values for ventilatory function test results⁶¹ and proof of at least ten, or perhaps fifteen years of underground coal mine employment.⁶²

Section 410.490 was designed to expedite SSA's processing and approval of claims.⁶³ It was written to eliminate the agency's backlog of claims, erring on the side of an award.⁶⁴ The regulation was never given official approval by SSA's chief medical officer or any member of his staff.⁶⁵ The general counsel for HEW drafted

58. See 20 C.F.R. § 410.490; see also S. Rep. No. 743, 92d Cong., 2d Sess. 18-19, reprinted in 1972 CODE CONG. & ADMIN. NEWS 2305, 2322-23. DOL adopted its own interim presumption, 20 C.F.R. § 727.203, under authority of the 1977 amendments. See *infra* notes 104-109 and accompanying text.

59. See *infra* notes 118-36 and accompanying text.

60. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 420 (1988).

61. Ventilatory function tests, also called pulmonary function studies, measure the "bellows function of the lungs" (i.e., the lungs' ability to move air in and out). Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. VA. L. REV. 721, 737-39 (1981). Arterial blood gas studies test the lungs' ability to exchange oxygen and carbon dioxide. *Id.* at 741.

62. See *Pittston Coal Group*, 109 S. Ct. at 420. The language of section 410.490(b) is confusing as to the number of years required to invoke the presumption with qualifying pulmonary function study results. See *infra* note 194, explaining when surface coal mine employment may be used to qualify for the interim presumption.

63. *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274-75 (1977) (testimony of Dr. Harold I. Passes, Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA) (hereinafter *1977 House Hearings*).

64. *Id.*

65. *Id.*; see Snyder & Solomons, *supra* note 5, at 882-83.

the interim presumption to increase the speed and frequency of SSA awards without regard to the validity of a claim.⁶⁶ For example, the presumption can be invoked with x-ray, biopsy, or autopsy evidence of simple pneumoconiosis even though it is generally agreed that simple pneumoconiosis seldom causes total disability.⁶⁷ The presumption could also be invoked by pulmonary function studies that reflect essentially normal lung function in coal miners sixty years of age and older.⁶⁸ The Comptroller General of the United States reported that the SSA interim presumption produced large numbers of unsubstantiated awards.⁶⁹

The rebuttal inquiry set forth in the SSA rule is ambiguous. One court observed that the SSA presumption can be rebutted only if the miner is still working or if "other evidence" proves that the miner is able to work.⁷⁰ Another noted that the SSA presumption cannot "be rebutted by medical evidence."⁷¹ Intricate cross-references employed in the SSA presumption could be read to authorize rebuttal if the miner did not have pneumoconiosis or if the disease did not contribute to the miner's disability or death.

We really have no way of knowing what SSA meant by its interim presumption rebuttal provisions, first because the rebuttal provisions were never used in conjunction with medical proof, and second because SSA never explained what it had written. SSA

66. 1977 *House Hearings*, *supra* note 63, at 274.

67. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976); S. REP. No. 411, 91st Cong., 1st Sess. 7 (1969), reprinted in 1969 U.S. CODE CONG. & ADMIN. NEWS; see also Lapp, *supra* note 62, at 736; W.K.C. MORGAN & A. SEATON, OCCUPATIONAL LUNG DISEASES 390 (2d ed. 1984). But see Rasmussen, *Patterns of Physiological Impairment in Coal Workers' Pneumoconiosis*, 200 ANN. N.Y. ACAD. SCI. 455 (1972).

68. 1977 *House Hearings*, *supra* note 63, at 274-75; see P. BARTH, *supra* note 6, at 85-91; 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. 880-83 (1981).

69. See COMPTROLLER GEN. OF THE UNITED STATES REPORT TO THE SENATE COMM. ON HUMAN RESOURCES: PROGRAM TO PAY BLACK LUNG BENEFITS TO COAL MINERS AND THEIR SURVIVORS—IMPROVEMENTS ARE NEEDED 45-46 (1977), reprinted in *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 261, 318-19 (1977) (hereinafter 1977 GAO REPORT).

70. *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 285 (6th Cir. 1983).

71. *Cook v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987).

processed approximately 537,000 claims⁷² under section 410.490; the authors have not found a single reported case in which the presumption was rebutted by medical proof that the miner did not have pneumoconiosis or was not medically disabled by the disease.⁷³ This may reflect the fact that SSA could not, as a political matter, take an adversary posture against claimants. SSA certainly did not defend claims in a traditional sense: any attempt at doing so would have incurred the immediate wrath of the program's friends in Congress. It is most likely that SSA allowed for the possibility of rebuttal to preserve the integrity of its rule, but simply never had any intent to engage in a rebuttal inquiry.⁷⁴

B. *The Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977*

The transfer of claim processing responsibility from SSA to DOL after December 31, 1973 did not go smoothly. Congress was troubled by DOL's administration of the program almost from the start.⁷⁵ Criticisms voiced by certain members of Congress were identical to the complaints which had preceded the 1972 amendments: a low approval rate and slow claims processing resulting in a growing backlog of claims.⁷⁶ DOL attributed these problems to several factors: (1) miners filing under Part B were older and sicker than DOL claimants; (2) lower dust levels in American coal mines were resulting in a lower incidence of pneumoconiosis; (3) a three year statute of limitations for survivor claims and for ap-

72. See 1981 Oversight Hearings, *supra* note 10, at 3 (Statement of Morton Henig, Senior Assoc. Director, Human Resources Division, U.S. GAO).

73. The few instances in which rebuttal of the SSA rule was permitted are cases involving a miner still employed in his regular coal mine job. See, e.g., *Farmer v. Weinberger*, 519 F.2d 627 (6th Cir. 1975). It appears that SSA, on occasion, attempted to rebut § 410.490 solely on the basis of blood gas test results, but the courts rejected these attempts. See *Oliver v. Califano*, 476 F.Supp. 12 (D. Utah 1979); *Mutter v. Weinberger*, 391 F. Supp. 951 (W.D. Va. 1975).

74. See generally COMPTROLLER GEN. OF THE UNITED STATES, LEGISLATION ALLOWS BLACK LUNG BENEFITS TO BE AWARDED WITHOUT ADEQUATE EVIDENCE OF DISABILITY 14 (1980) (hereinafter 1980 GAO REPORT); 1977 GAO REPORT, *supra* note 69, at 319.

75. See *Hearings on H.R. 7, H.R. 8, H.R. 3333 Before the House Committee on Labor Standards of the Committee on Education and Labor*, 94th Cong., 1st Sess. 139-40 (1975) (hereinafter 1975 House Hearing); H.R. REP. No. 770, 94th Cong., 1st Sess. 14 (1975).

76. 1977 GAO REPORT, *supra* note 69, at 7.

plication of the fifteen-year presumption required the denial of otherwise eligible claims; and (4) DOL could not use the SSA interim presumption to determine entitlement, but instead had to consider claims under the more restrictive permanent standards which SSA had applied prior to the 1972 amendments to the 1969 Act.⁷⁷

To redress the problems plaguing Part C of the program, the U.S. General Accounting Office (GAO) recommended deletion of the requirement that living miners must file within three years of their last coal mine employment to be eligible for the fifteen-year presumption, and elimination of the requirement that widows must file within three years of the date of the miner's death.⁷⁸ The Comptroller General also suggested that Congress "should decide whether to amend the act to permit Labor to use SSA's Interim Standards."⁷⁹ This suggestion came with a warning that since the SSA interim presumption was more liberal with regard to younger miners than Congress had intended, care must be taken to insure that DOL develop sufficient medical evidence to substantiate disability, especially in younger miners.⁸⁰ Congress responded by passing the Black Lung Benefits Reform Act of 1977⁸¹ and the Black Lung Benefits Revenue Act of 1977 (collectively, 1977 amendments).⁸² The complex legislative history of the 1977 amendments has been analyzed in other commentaries and will not be reviewed here.⁸³

The 1977 amendments further liberalized the program by (1) extending coverage to additional workers in the mining industry;⁸⁴

77. *Id.* at 315-16, 320-22.

78. *Id.* at 328.

79. *Id.*

80. *Id.*

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

82. Pub. L. No. 95-227, 92 Stat. 11 (1978) (codified as amended in scattered sections of 26 U.S.C. and 30 U.S.C.).

83. See Solomons, *supra* note 68, at 869; P. BARTH, *supra* note 6; J. NELSON, *supra* note 12. A good summary of the 1972 and 1977 amendments is found in a House subcommittee report. See SUBCOMMITTEE REPORT, *supra* note 25.

84. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2, 92 Stat. 95, 95 (1978)

(2) expanding the definition of pneumoconiosis;⁸⁵ (3) prohibiting denial of a claim simply because the miner is still employed or was employed at the time of death;⁸⁶ (4) providing a presumption of entitlement for the dependent survivors of miners who died prior to March 1, 1978 (the effective date of the 1977 amendments) and had at least twenty-five years of coal mine employment before June 30, 1971;⁸⁷ (5) permitting the use of affidavits to establish eligibility in survivor claims where there is no medical evidence to the contrary;⁸⁸ (6) prohibiting DOL from rereading x-rays, except for quality, when there is other evidence of a respiratory or pulmonary impairment and the x-ray is interpreted as positive for pneumoconiosis by a radiologist certified or eligible for certification by the American College of Radiology;⁸⁹ and (8) eliminating the statute of limitations for filing survivor claims and the requirement that a miner must file his claim within three years of the date of last exposure in order to be eligible for the fifteen-year presumption.⁹⁰ Congress also directed DOL to promulgate new permanent eligibility standards for Part C in consultation with the National Institute for Occupational Safety and Health (NIOSH).⁹¹ Criteria applied to claims filed before the effective date of the permanent standards could not be any more restrictive than those provided in the SSA interim presumption.⁹²

(amending 30 U.S.C. § 902(a) to expand the definition of "miner" to include any individual who has worked in or around a coal mine, including coal mine construction and transportation workers to the extent they have been exposed to coal dust) (codified as amended at 30 U.S.C. § 902 (1982)).

85. *Id.* § 2(a), 92 Stat. 95, 95 (adding to the definition of pneumoconiosis any respiratory or pulmonary impairment arising out of coal mine employment) (codified as amended at 30 U.S.C. § 902 (1982)).

86. *Id.* § 2(c), 92 Stat. 95, 95 (codified as amended at 30 U.S.C. § 902(f)) (codified as amended at 30 U.S.C. § 902 (1982)).

87. *Id.* § 3(a), 92 Stat. 96, (codified as amended at 30 U.S.C. § 92(c)) (codified as amended at 30 U.S.C. § 921 (1982)). This presumption was rebuttable only by proving that the miner did not have pneumoconiosis or was not partially disabled by pneumoconiosis at the time of his death.

88. *Id.* § 5, 92 Stat. 95, 97 (codified as amended at 30 U.S.C. § 923(b)) (codified as amended at 30 U.S.C. § 923 (1982)).

89. *Id.*

90. *Id.* §§ 3(b)(4), 7(a)-(h), 92 Stat. 95, 97-99 (codified as amended at 30 U.S.C. § 932(f)) (codified as amended at 30 U.S.C. § 932 (1982)). Claims must now be filed within either three years of a medical determination of disability due to pneumoconiosis which is communicated to a claimant, or March 1, 1981, whichever date is later.

91. *Id.* § 2(c), 92 Stat. 95, 96 (codified as amended at 30 U.S.C. § 902(f)) (codified as amended at 30 U.S.C. § 902 (1982)).

92. *Id.*

The Black Lung Benefits Reform Act also extended medical benefit coverage under Part C to miners receiving Part B benefits,⁹³ provided that Part B benefits shall be reduced by workers' compensation benefits paid only for disability due to occupational pneumoconiosis,⁹⁴ and made the program permanent by eliminating the 1981 termination date for Part C benefits.⁹⁵ Congress directed DOL to review all pending and previously denied claims in accordance with the 1977 amendments; and HEW was required to advise all claimants previously denied under Part B of an opportunity to have their claims reviewed under the 1977 amendments.⁹⁶

The Black Lung Benefits Revenue Act established a federal excise tax on coal sales at a rate of fifty cents per ton on underground mined coal and twenty-five cents per ton on coal from surface or strip mines.⁹⁷ This tax was limited to a maximum of two percent of the sales price, and is dedicated to fund the Black Lung Disability Trust Fund (BLDTF).⁹⁸ Establishment of the BLDTF was intended to shift the liability for Part C of the program to the coal industry, as originally intended in 1969. The BLDTF is responsible for the payment of benefits in claims where the last coal mine employment was before January 1, 1970; where no responsible operator can be found; and where DOL initially determines that a claimant is eligible, but the named responsible operator refuses to pay benefits and continues to litigate the claim.⁹⁹ The

93. *Id.* at § 11, 92 Stat. 95, 101 (codified as amended at 30 U.S.C. § 924a) (codified as amended at 30 U.S.C. § 924a (1982)). This amendment created what is known as medical benefits only (MBO) claims. See 20 C.F.R. § 725.701A (1988).

94. *Id.* at § 4, 92 Stat. 95, 97 (codified as amended at 30 U.S.C. § 922(b)) (codified as amended at 30 U.S.C. § 922 (1982)).

95. *Id.* §§ 3(b), 7(a)-(h), 92 Stat. 95, 97-100 (codified as amended at 30 U.S.C. § 932(e)) (codified as amended at 30 U.S.C. § 932 (1982)).

96. *Id.* § 15, 92 Stat. 95, 103 (codified as amended at 30 U.S.C. § 945) (codified as amended at 30 U.S.C. § 945 (1982)).

97. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2, 92 Stat. 11 (1978) (codified as amended at 30 U.S.C. § 934 and adding 26 U.S.C. § 4121) (codified as amended in scattered sections of 26 U.S.C.(1982)).

98. *Id.*

99. 30 U.S.C. §§ 934(a), 932(c), (j)(2) (1982). Prior to adoption of the 1981 amendments, the BLDTF paid prospective and retroactive benefits upon a finding of entitlement. Since January 1, 1982, the BLDTF pays only prospective benefits if an initial finding of entitlement is contested by the responsible operator. See *infra* note 252 and accompanying text.

Black Lung Benefits Revenue Act also authorized DOL to impose penalties up to \$1,000 per day on operators who fail to secure payment of their liability with adequate insurance coverage.¹⁰⁰

DOL promulgated extensive regulations as a result of the 1977 amendments. These regulations govern procedural matters,¹⁰¹ and provide interim eligibility criteria for claims filed prior to April 1, 1980¹⁰² and permanent eligibility criteria for claims filed on and after April 1, 1980.¹⁰³

III. ELIGIBILITY CRITERIA FOR PART C CLAIMS FILED BEFORE APRIL 1, 1980

The Black Lung Benefits Reform Act of 1977 directed the Secretary of Labor to review all pending and denied Part C claims under criteria which "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973."¹⁰⁴ A claim filed on June 30, 1973 was subject to the SSA interim presumption. In response to this mandate, the Secretary of Labor adopted the Part 727 regulations providing for an interim presumption applicable to Part C claims.¹⁰⁵ This rebuttable presumption, "promulgated

100. Black Lung Reform Act of 1977, Pub. L. No. 95-239, § 8, 92 Stat. 95, 100 (1978) (codified as amended at 30 U.S.C. § 933) (codified as amended at 30 U.S.C. § 933 (1982)).

101. 20 C.F.R. Part 725, reprinted in 43 Fed. Reg. 36,772-818 (1978).

102. *Id.* Part 727, reprinted in 43 Fed. Reg. 36,818-831 (1978).

103. *Id.* Part 718, reprinted in 45 Fed. Reg. 13,678-712 (1980) (as amended at 48 Fed. Reg. 24,272-294 (1983)).

104. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95, 95-96 (1978) (amending 30 U.S.C. § 902(f)) (codified as amended at 30 U.S.C. § 902 (1982)).

105. The DOL interim presumption provides the following:

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—
	FEV ₁ MVV
67" or less	2.3 92

as a result of congressional dissatisfaction with Labor's low claims approval rate, is substantially similar to the SSA interim pre-

68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more.....	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO ₂	Arterial pCO ₂ equal to or less than (mmHg.)
30 or below.....	70
31	69
32	68
33	67
34	66
35	65
36	64
37	63
38	62
39	61
40-45	60
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter, as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.*

Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

20 C.F.R. § 727.203 (1988).

sumption.”¹⁰⁶ The two interim presumptions are different, however, in two significant ways.

First, the DOL presumption cannot be invoked in claims where the miner has less than ten years of coal mine employment. The SSA presumption can be invoked by a miner with less than ten years of coal mine employment but with x-ray, biopsy, or autopsy proof of pneumoconiosis and proof that the pneumoconiosis arose out of coal mine employment.¹⁰⁷ Second, the DOL presumption can be rebutted by the following evidence: (1) proof that the miner is still working, or was working at the time of his death; (2) proof that the miner is capable, or was capable at his death, of performing his usual coal mine work or a comparable job; (3) proof that the miner’s disability or death did not arise in whole or in part out of pneumoconiosis; or (4) proof that the miner did not have pneumoconiosis. The SSA presumption is clearly rebuttable only if the miner continues to perform his usual coal mine work.¹⁰⁸ Other grounds for rebuttal are ambiguous.¹⁰⁹ The rules for invocation and rebuttal of the DOL interim presumption have been extensively litigated. The current rules are summarized below.

A. *Current Standards for Invocation of the DOL Interim Presumption*

The DOL interim presumption provides for invocation with proof of at least ten years of coal mine employment and evidence which satisfies any one of the five categories of evidence listed at section 727.203(a).¹¹⁰ The trier-of-fact must separately weigh all of the evidence relevant to invocation in each category and invoke

106. *Mullins Coal Co. v. Director, Office of Workers’ Compensation Programs*, 108 S. Ct. 427, 437 (1987), *reh’g denied*, 108 S. Ct. 787 (1988).

107. The DOL presumption can be invoked in two ways not available under the SSA presumption: arterial blood gas test results and medical opinion evidence. Invocation of the SSA presumption is limited to x-ray, biopsy, and autopsy evidence of pneumoconiosis and ventilatory test results. Blood gas results can be used under Part 410 to prove total disability. *See* 20 C.F.R. Part 410, App. (1988).

108. 20 C.F.R. § 410.490(c)(i).

109. *Id.* § 410.490(c)(2); *see also supra* notes 70-74 and accompanying text.

110. *See supra* note 105. The fifth alternative is available only in death claims when there is no medical evidence. 20 C.F.R. § 727.203(a)(5).

the presumption only when the qualifying and non-qualifying¹¹¹ evidence is in equipoise¹¹² or the qualifying evidence is entitled to greater weight. The Supreme Court has held that while one piece of qualifying evidence may be sufficient to invoke the presumption, the presumption is not necessarily invoked by a single piece of qualifying evidence.¹¹³ In so holding, the Court reversed a ruling by the Fourth Circuit Court of Appeals that the DOL interim presumption must be invoked whenever a claimant presents a single item of qualifying evidence.¹¹⁴

Once the DOL presumption is properly invoked under any one of the five categories of evidence, the burden shifts to the employer to rebut the presumption under subsection (b) of the regulation. Accordingly, it is of no consequence if the trier-of-fact erroneously invokes or refuses to invoke the DOL presumption under one subsection, so long as the presumption is properly invoked under another one of the available categories.¹¹⁵

The Supreme Court recently invalidated the requirement that a claimant prove at least ten years of coal mine employment in order to be eligible for the DOL interim presumption. The Court

111. "Qualifying" evidence is evidence which satisfies any one of the presumption invocation criteria. In order for qualifying evidence to support invocation of the interim presumption, the evidence must satisfy the applicable quality standards. 20 C.F.R. § 727.206(a). For evidence received into the record prior to the effective date of the permanent Part 718 regulations (*i.e.*, April 1, 1980), the applicable quality criteria are those provided by 20 C.F.R. Part 410; evidence received after April 1, 1980 is subject to the Part 718 quality criteria. *Sgro v. Rochester and Pittsburgh Coal Co.*, 4 Black Lung Rep. (MB) 1-370, 373-74 (1981).

112. The "true doubt" rule applies to weighing evidence to determine whether a presumption is invoked. The rule requires invocation of a presumption where the record contains equally probative but contradictory sets of evidence, and selection of one body of evidence would invoke the presumption while selection of the other would resolve the issue against the claimant. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 Black Lung Rep. (MB) 1-378, 1-384 (1983); *Provance v. U.S. Steel Corp.*, 1 Black Lung Rep. (MB) 1-483 (1978) (true doubt rule is not applicable to weighing evidence to determine if a presumption is rebutted).

113. *Mullins Coal Co.*, 108 S. Ct. at 436-38.

114. *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 436 (4th Cir. 1986) (en banc); *see also Prater v. Hite Preparation Co.*, 829 F.2d 1363 (6th Cir. 1987); *Cook v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1182 (7th Cir. 1987). *Contra*, *Engle v. Director, Office of Workers' Compensation Programs*, 792 F.2d 63, 64 n.1 (6th Cir. 1986); *Revak v. National Mines Corp.*, 808 F.2d 996, 1000-02 (3d Cir. 1986).

115. *Cox v. Director, Office of Workers' Compensation Programs*, 5 Black Lung Rep. (MB) 1-525 (1982).

found, in *Pittston Coal Group v. Sebben*,¹¹⁶ that DOL's ten year requirement violates section 402(f)(2) of the Black Lung Benefits Reform Act, which directed the Secretary of Labor to review all claims filed before the adoption of new permanent regulations under criteria no more restrictive than those provided in the SSA interim presumption.¹¹⁷ The Supreme Court, in striking the ten-year provision, rejected an argument by the Secretary of Labor and private petitioners¹¹⁸ that the congressional reference to "criteria" in section 402(f)(2) refers only to the medical criteria used to define and evaluate total disability, not the evidentiary rules applied in the processing of claims.¹¹⁹ The Court acknowledged

116. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

117. See *supra* note 92 and accompanying text.

118. *Pittston Coal Group* began in the U.S. District Court for the Southern District of Iowa as a suit for class certification and a writ of mandamus to compel the Secretary of Labor to reopen all Part C claims previously denied under the DOL interim presumption because of less than ten years of coal mine employment, and to readjudicate these claims in accordance with the more liberal provisions of the SSA rules. The district court dismissed the complaint for lack of jurisdiction. *Sebben v. Brock*, 815 F.2d 475, 477 (8th Cir. 1987). *Sebben* and three other putative class representatives appealed to the Eighth Circuit. On March 25, 1987, the Eighth Circuit reversed the district court's dismissal of the case, and directed the district court to grant the writ and certify the class. *Id.* No representatives of the coal or insurance industries were aware of the suit prior to issuance of the Eighth Circuit's opinion. Four mine operators, the Pittston Coal Group, Island Creek Coal Company, Consolidation Coal Company and Barnes & Tucker Company, together with two black lung insurance carriers, Old Republic Insurance Company and the Pennsylvania National Insurance Group, filed motions to intervene on rehearing as indispensable parties. These motions were granted by the Eighth Circuit. After rehearing was denied, the private parties as a group petitioned for a writ of certiorari to the Supreme Court. The Solicitor General of the United States acting on behalf of the Secretary of Labor also filed a petition for certiorari. Both of these petitions were granted along with the Solicitor General's petition in a related case decided by the Fourth Circuit Court of Appeals. *Pittston Coal Group v. Sebben*, 108 S. Ct. 1011; *Director of Workers' Compensation Programs v. Broyles*, 108 S. Ct. 1288.

119. Throughout the litigation of *Sebben* and *Pittston Coal Group* DOL maintained that the interim presumption was comprised of two parts, "interim evidentiary rules" and "disability evaluation criteria." See S. REP. NO. 743, 92d Cong., 2d Sess. 18-19, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2305, 2322-23. DOL strictly construed this early congressional description of the composition of the SSA presumption, and when DOL was directed in section 402(f)(2) of the 1969 Act (30 U.S.C. § 902(f)(2) (1982)) to adopt criteria no more restrictive than SSA's criteria, it felt that only the medical "criteria" and not the collateral rules of evidence in the SSA rule were to apply. No overwhelming support for this theory can be gleaned from congressional materials, but there is some support for this proposition in scattered statements throughout the legislative history of the 1978 amendments. See *Pittston Coal Group*, 109 S. Ct. at 430-37 (Stevens, J., dissenting). It is likely that advocates for application of the SSA rule in DOL claims had no clear understanding of the mechanics of the SSA presumption, but instead favored its continued use only because it would increase the rate of approval of DOL claims. In rejecting DOL's argument in this regard, the five member Supreme Court majority apparently concluded that, if given a choice, Congress would have opted for a more extensive definition of "criteria," at least including a reference to the invocation provisions of the SSA presumption. *Id.* at 421.

that the petitioners' argument "has considerable merit,"¹²⁰ but refused to defer to this argument because the ten-year requirement denies short term miners with pneumoconiosis the benefits of the DOL interim presumption. According to the Court, such a result "finds no support in the statute."¹²¹

The Court split five to four on the issue of whether the DOL ten-year requirement violates section 402(f)(2).¹²² Justice Stevens, joined by Chief Justice Rehnquist and Justices White and O'Connor, filed a strong dissent on this point. Justice Stevens set forth three reasons for his agreement with DOL's position that the ten-year requirement was not prohibited by Congress. First, he argued that a scrivener's error apparently resulted in the unintentional deletion of the ten-year requirement in the SSA interim presumption.¹²³ Second, he noted that legislative history supports the Secretary of Labor's interpretation of section 402(f)(2).¹²⁴ And finally, he observed that "[a]ll available data plainly demonstrate that . . . miners with fewer than 10 years of underground employment sometimes contract simple pneumoconiosis, [but] they rarely, if ever, develop disabling cases of the disease."¹²⁵ The majority opinion acknowledged that "disabling pneumoconiosis rarely manifests itself in miners with fewer than 10 years of coal mine experience,"¹²⁶ but refused to approve the DOL interim presumption because "[i]n our view, the statute simply will not bear the meaning the Secretary has adopted."¹²⁷

The majority in *Pittston Coal Group* also acknowledged that legislative history supported petitioners' position that medical cri-

120. *Pittston Coal Group*, 109 S. Ct. at 420.

121. *Id.* at 422.

122. All nine Justices agreed that mandamus does not lie to force DOL to reopen and readjudicate claims previously denied under the DOL interim presumption because of less than ten years of coal mine employment. In ordering the reopening of such, the Eighth Circuit analogized DOL black lung claims to Social Security general disability claims, noting that such SSA claims are not subject to the traditional rule of *res judicata*. The Supreme Court found no equivalence between DOL black lung claims and SSA disability claims in this regard, and held that strict principles of *res judicata* clearly apply in Part C black lung claims. *Id.* at 425.

123. *Id.* at 426 (Stevens, J., dissenting).

124. *Id.* at 430-37.

125. *Id.* at 437; see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 1, 7 (1976).

126. *Id.* at 422.

127. *Id.* at 420.

teria were the focus of the House and Senate debates on the 1977 amendments. Justice Scalia, writing for the majority, refused to be guided by the legislative history, noting that statutes may have effects which are not explicitly mentioned in their legislative history, "and the text of the present statute plainly embraces criteria of more general application [and does not refer only to medical criteria]." ¹²⁸ Finally, the majority rejected the dissent's argument that the SSA presumption was intended to include a ten-year requirement, deleted by a scrivener's error. Justice Scalia observed that no one had invited the Court to rewrite the SSA interim presumption, and he asserted that revision of the regulation as suggested by the dissent would create a new redundancy in the regulation. ¹²⁹

Pittston Coal Group does not require adjudication of Part C claims under the SSA interim presumption. ¹³⁰ Instead, the Supreme Court's decision prohibits denial of the DOL interim presumption to claimants with less than ten years of coal mine employment who can prove the presence of coal workers' pneumoconiosis. ¹³¹ This holding is based on the simple proposition that because the SSA interim presumption was available in claims with less than ten years of coal mine employment, the DOL presumption likewise must be available to short term miners.

The Supreme Court in *Pittston Coal Group* refers to section 410.490, the SSA interim presumption, only as a "benchmark"

128. *Id.* at 421.

129. *Id.* at 423.

130. The Supreme Court's decision holds the DOL rule invalid only insofar as it absolutely precludes short term miners from utilization of the DOL presumption. The Supreme Court, like all other federal courts, may only test the validity of an agency rule. The job of revising a rule to conform with the Supreme Court's opinion is the responsibility of the agency. 30 U.S.C. § 936(a) (1982). *See also* Whiteman v. Boyle Land & Fuel Coal Co., 11 Black Lung Rep. (MB) 1-99 (1988) (en banc).

131. Under the SSA rule, the short term miner who is able to establish the presence of pneumoconiosis by x-ray evidence must also prove that his pneumoconiosis arose out of coal mine employment, before the interim presumption may be invoked. 20 C.F.R. § 410.490(b)(2) (1988). Under the SSA rule a miner who worked for more than ten years may still not be able to invoke the interim presumption on the basis of positive x-ray evidence if other evidence persuasively shows that the pneumoconiosis did not arise out of coal mine employment. *Id.* Arguably, the SSA rule places a greater burden on the claimant than does the DOL rule in this regard. Under the DOL rule, proof of disease causation is not necessary to invoke the interim presumption. *See* Soloe v. Director, Office of Workers' Compensation Programs, 10 Black Lung Rep. (MB) 1-125 (1987).

for evaluating the validity of the DOL interim presumption;¹³² the Court does not direct that section 410.490 be applied to Part C claims. Part 727 of the regulations is still applicable to Part C claims filed before April 1, 1980, except that a claimant need not prove at least ten years of coal mine employment in order to invoke the interim presumption with x-ray, biopsy, or autopsy proof of coal workers' pneumoconiosis. Once the DOL presumption is invoked, the burden of persuasion rests with the claim defendant to prove, by a preponderance of the evidence, that the presumption has been rebutted under 20 C.F.R. section 727.203(b).¹³³

B. *Current Standards for Rebuttal of the DOL Interim Presumption*

The DOL interim presumption can be rebutted in a living miner's¹³⁴ claim by proof that (1) the miner is still performing his usual coal mine work, (2) the miner is not totally disabled from performing his usual coal mine work or comparable and gainful work, (3) the miner's total disability is not due in whole or in part to his pneumoconiosis, or (4) the miner does not have pneumoconiosis.¹³⁵ Each of these rebuttal rules, particularly the middle two (sections 727.203(b)(2) and (b)(3)), have been extensively litigated. This litigation has resulted in inconsistent standards of proof under rules (b)(2) and (b)(3) pertaining to the presence of total disability and causation of total disability. The standards of proof under subsections (b)(1) and (b)(4) have remained fairly constant.

1. Section 727.203(b)(1) Rebuttal

Continued coal mine employment by a living miner or coal mine employment by a deceased miner at the time of his death may be sufficient to rebut the DOL presumption under section 727.203(b)(1). The Act limits (b)(1) rebuttal by providing that proof

132. *Pittston Coal Group*, 109 S. Ct. at 420.

133. *The Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989).

134. The same rebuttal provisions available in a living miner's claim are available in a survivor's claim.

135. 20 C.F.R. § 727.203(b)(1)-(4) (1988); see *supra* note 105.

of continued coal mine employment at the time of death shall not be conclusive evidence that the miner was not disabled; and that continued employment of a living miner is not conclusive evidence that the miner is not totally disabled if there are changed circumstances of employment indicative of reduced ability to perform usual coal mine work.¹³⁶ "Usual coal mine work" is the most recent coal mine job which the miner performed regularly and over a substantial period of time.¹³⁷

The presumption can also be rebutted under (b)(1) by proving that the miner is gainfully employed at a job requiring skills, ability, and physical exertion comparable to those required by his former coal mine work.¹³⁸ Only the Third Circuit Court of Appeals requires that the analysis of comparable work place a strong emphasis on the comparability of compensation. The Third Circuit has held that when an applicant's current earnings are less than those of his fellow workers in the mines there is strong evidence that his present work is not "comparable."¹³⁹

The first DOL rebuttal alternative imposes a relatively straightforward burden of proof. Few claims involve this rule, however, as most miners are retired from gainful employment and seek federal black lung benefits to supplement their retirement income.

2. Section 727.203(b)(2) Rebuttal

Perhaps the most controversial of the four DOL rebuttal provisions is subsection (b)(2). Rebuttal is permitted under this pro-

136. 30 U.S.C. § 902(f)(1)(B) and 20 C.F.R. § 727.205. A living miner must be working at time of his hearing in order for (b)(1) rebuttal to be available. *Coffey v. Director, Office of Workers' Compensation Programs*, 5 Black Lung Rep. (MB) 1-404 (1982); *Parks v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 182 (1986). The test for changed circumstances in coal mine employment incorporates three factors: (i) reassignment to an area of the coal mine having a lower concentration of dust; (ii) performing a job which requires less rigorous work; or (iii) a change of employment so as to result "in the receipt of substantially less pay." H.R. REP. NO. 131, 95th Cong., 2d Sess. 11 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 237, 247.

137. *Uhl v. Consolidation Coal Co.*, 10 Black Lung Rep. (MB) 1-72, 73 n.1 (1987) (quoting *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 Black Lung Rep. (MB) 1-534 (1982)).

138. *Parks*, 9 Black Lung Rep. (MB) at 1-83 (holding that the physical exertion required by the miner's current job need not be identical to that required by his former coal mine work).

139. *Echo v. Director, Office of Workers' Compensation Programs*, 744 F.2d 327 (3d Cir. 1984).

vision if it is demonstrated that the miner is physically able to perform coal mine or comparable work. The miner's inability to work must be due to a physical, functional impairment¹⁴⁰ and not merely to old age¹⁴¹ or the unavailability of a job.¹⁴²

Courts have dramatically changed the interpretation of subsection (b)(2) first adopted by the DOL Benefits Review Board (BRB) in 1980. The BRB originally held that (b)(2) rebuttal was accomplished when the evidence proved that a miner is not prevented from performing his usual coal mine work by a respiratory or pulmonary impairment.¹⁴³ This standard was applied to thousands of claims and approved by the circuit courts for more than five years.¹⁴⁴ It was predicated upon regulatory cross-references in the DOL rule¹⁴⁵ and the principle that only respiratory or pulmonary disability is properly compensable under the Act. In 1985 and 1986, two circuit courts stated, in dicta, that (b)(2) rebuttal is not available where the miner is totally disabled by any condition.¹⁴⁶ In 1987, the Fourth Circuit specifically overruled the BRB's (b)(2) interpretation and held that (b)(2) rebuttal is not available where the miner is, or was at the time of death, "totally disabled for *whatever reason*."¹⁴⁷ The Sixth Circuit has adopted

140. *Ramey v. Kentland Elkhorn Coal Co.*, 755 F.2d 485, 490 (6th Cir. 1985).

141. *Kolesar v. The Youghiogheny & Ohio Coal Co.*, 760 F.2d 728, 730 (6th Cir. 1985).

142. *Ramey*, 755 F.2d at 490.

143. See, e.g., *Saclick v. Rushton Mining Co.*, 6 Black Lung Rep. (MB) 1-930 (1984); *Lyons v. Amax Coal Co.*, 4 Black Lung Rep. (MB) 1-285 (1981); *Skaggs v. Cannelton Indus., Inc.*, 3 Black Lung Rep. (MB) 1-434 (1981); *Sykes v. Itmann Coal Co.*, 2 Black Lung Rep. (MB) 1-1089 (1980); *Johnson v. Cannelton Indus., Inc.*, 2 Black Lung Rep. (MB) 1-1081 (1980).

144. E.g., *Director, Office of Workers' Compensation Programs v. Beatrice Pocahontas Coal Co.*, 698 F.2d 680, 682 (4th Cir. 1983) (approving (b)(2) rebuttal by medical evidence establishing the absence of any totally disabling respiratory or pulmonary impairment); *Layman v. Cannelton Indus., Inc.*, No. 86-3513 (4th Cir. Oct. 23, 1986), 9 Black Lung Rep. (MB) 2-151 (1986) (holding that disability caused other than by respiratory or pulmonary ailments is not relevant to the (b)(2) rebuttal inquiry); *Case v. Director, Office of Workers' Compensation Programs*, No. 85-3660 (6th Cir. 1986) (unpublished) (holding that proof that a miner does not have a totally disabling pulmonary or respiratory impairment is sufficient to establish that the claimant is able to perform his usual coal mine work; thereby proving (b)(2) rebuttal); see also *Kolesar*, 760 F.2d at 730 (ruling that total disability resulting from a miner's advanced age does not preclude (b)(2) rebuttal).

145. 20 C.F.R. § 727.203(b), incorporating 20 C.F.R. § 410.412(a)(1), incorporating 20 C.F.R. §§ 410.420-426.

146. *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 158 n.5 (3d Cir. 1986); *Ramey*, 755 F.2d at 486 n.3, 490 n.7.

147. *Sykes v. Director, Office of Workers' Compensation Programs*, 812 F.2d 890, 894 (4th Cir. 1987) (reversing a finding of (b)(2) rebuttal based on proof of no respiratory or pulmonary disability).

the same rule.¹⁴⁸ In these cases the courts held that once it is proven that the miner is totally disabled, the question of rebuttal must be limited to determining the cause of total disability under section 727.203(b)(3). Rebuttal under subsection (b)(4)—proving the absence of pneumoconiosis—may also be available in claims where the miner is totally disabled.

The alternate approach to (b)(2) rebuttal (proving a miner's ability to perform comparable and gainful non-coal mine work) has not been asserted in litigation with the frequency of the first (b)(2) alternative. The first significant BRB decision to address this topic was decided under the Part 410 permanent regulations which were applicable to Part C claims prior to adoption of the DOL interim presumption.¹⁴⁹ The BRB later relied on this case, observing that section 727.203(b)(2) refers to the definition of total disability under the Part 410 regulations, and adopted what is known as the "*Fletcher* rule."¹⁵⁰

The *Fletcher* rule requires the party opposing entitlement under the second (b)(2) alternative to identify the type and location of employment which is reasonably available to the miner. This employment must be within the immediate area of the miner's home and require skills and abilities comparable to the miner's former coal mine employment.¹⁵¹ The *Fletcher* rule is applicable to (b)(2) rebuttal only where the party opposing entitlement attempts to prove that the miner is able to perform comparable and gainful work;¹⁵² the rule has no application where (b)(2) rebuttal is based on proof that the miner is able to perform his usual coal mine work.¹⁵³

148. *Roberts v. Benefits Review Board*, 822 F.2d 636 (6th Cir. 1987) (miner was disabled by a stroke); *York v. Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987) (reversing a finding of rebuttal based on no respiratory or pulmonary disability).

149. *Fletcher v. Central Appalachian Coal Co.*, 1 Black Lung Rep. (MB) 1-785, *reconsidered*, 1 Black Lung Rep. (MB) 1-980 (1978).

150. *Sturnick v. Consolidation Coal Co.*, 2 Black Lung Rep. (MB) 1-972 (1980).

151. *Fletcher*, 1 Black Lung Rep. (MB) at 1-789 to 790; *Sturnick*, 2 Black Lung Rep. (MB) at 1-978; *Lewis v. Pittsburgh & Midway Coal Co.*, 6 Black Lung Rep. (MB) 1-643 (1983).

152. Under *Fletcher* and 20 C.F.R. § 410.412, the party opposing entitlement had to prove both no medical disability and no vocational disability.

153. *Sturnick*, 2 Black Lung Rep. (MB) at 1-972 to 978; *Chach v. Harmar Coal Co.*, 6 Black

Most coal miners seeking black lung benefits have reached retirement age and are suffering from a variety of ailments which often render them unable to perform their usual coal mine work. Consequently, (b)(2) rebuttal, once the most used rebuttal method, is no longer available in most DOL interim presumption claims because circuit court decisions prohibit its use when the miner is totally disabled by any condition or combination of conditions. Decisions limiting (b)(2) rebuttal to cases involving no disability from any condition have further liberalized the program and resulted in the awarding of benefits to claimants who do not suffer from any significant lung disorder. Many administrative law judges refuse to reopen the record in cases that have been denied under the old (b)(2) rule, appealed, and remanded for reconsideration under the revised rule. In many of these cases claim defendants who had relied on (b)(2) as interpreted by the BRB and circuit courts prior to 1987 are often left without competent rebuttal evidence.¹⁵⁴

3. Section 727.203(b)(3) Rebuttal

Rebuttal is permitted under subsection (b)(3) if it is demonstrated that the miner's total disability did not arise in whole or in part out of coal mine employment. The rebuttal test imposed by the "in whole or in part" language at section 727.203(b)(3) has been changed three times by the BRB as a result of claims litigation. The BRB found, in *Jones v. The New River Co.*,¹⁵⁵ that this language permitted the award of benefits to miners who are only partially disabled due to pneumoconiosis. The BRB declared that "[t]his is not in keeping with the Act, which requires that

Lung Rep. (MB) 1-493 (1983); *Taft v. Alabama By-Products Corp.*, 733 F.2d 1518 (11th Cir. 1984); *Ramey*, 755 F.2d 485; *Beatrice Pocahontas Coal*, 698 F.2d 680. Proof that continued exposure to coal mine dust is contraindicated does not establish the existence of total disability under Part C of the 1969 Act, as amended. See *Senick v. Keystone Coal Mining Co.*, 5 Black Lung Rep. (MB) 1-395 (1982); *Hatcher v. Consolidation Coal Co.*, 5 Black Lung Rep. (MB) 1-132, 143 n.6 (1982).

154. Employers routinely rely on the change of legal standards to request that the record be reopened for parties to develop evidence addressing the new rebuttal rule. See *Tackett v. Benefits Review Board*, 806 F.2d 640 (6th Cir. 1986). Rulings on these motions have been inconsistent, and this issue will have to be resolved through the appeals process.

155. *Jones v. The New River Co.*, 3 Black Lung Rep. (MB) 1-199 (1981).

total disability be due to pneumoconiosis.”¹⁵⁶ The BRB held in *Jones* that (b)(3) rebuttal is accomplished when it is proven that the miner’s pneumoconiosis “is not in and of itself totally disabling.”¹⁵⁷

The *Jones* decision was reversed by several circuit courts of appeals.¹⁵⁸ The BRB continued to apply subsection (b)(3) without the “in whole or in part” language in those circuits where the court of appeals had not ruled to the contrary.¹⁵⁹ Moreover, in those circuits where the court of appeals had reversed *Jones*, the BRB interpreted the “in whole or in part” language as imposing the traditional workers’ compensation test of “significant relationship” for determining whether (b)(3) rebuttal was accomplished.¹⁶⁰ In 1985, the BRB announced in *Borgeson v. Kaiser Steel Corp.*¹⁶¹ that it would no longer follow *Jones* in circuits which had not overruled *Jones*, but would apply the significant relationship test in all claims.

The significant relationship test, under section 727.203(b)(3), provides for rebuttal where the party opposing entitlement proves that a miner’s occupational exposure in coal mine employment has not aggravated a preexisting or non-work-related condition to the point of total disability.¹⁶² The BRB explains that application of the significant relationship test is necessary to avoid the effective elimination of section 727.203(b)(3) “as a viable rebuttal method.”¹⁶³ To hold otherwise, according to the BRB, would preclude rebuttal in cases where dust exposure in coal mine employ-

156. *Id.* at 1-208 (citing 30 U.S.C. §§ 902(a), (f)(1)).

157. *Id.* at 1-209.

158. *Carozza v. U. S. Steel Corp.* 727 F.2d 74 (3d Cir. 1984); *Alabama By-Products v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

159. *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).

160. *Id.*

161. *Borgeson v. Kaiser Steel Corp.*, 8 Black Lung Rep. (MB) 1-312 (1985) (en banc), *rev’d*, 12 Black Lung Rep. (MB) 1-169 (1989) (en banc); *see also Biggs v. Consolidation Coal Co.*, 8 Black Lung Rep. (MB) 1-317, 322 n.8 (1985).

162. *See Massey*, 736 F.2d at 124; *Carozza*, 727 F.2d at 78 n.1; *Shaw*, 7 Black Lung Rep. (MB) at 1-466; *Borgeson*, 8 Black Lung Rep. (MB) at 1-316.

163. *Shaw*, 7 Black Lung Rep. (MB) at 1-466.

ment is an “insignificant or minimal” factor contributing to total disability.¹⁶⁴

Three reasons were cited by the BRB for adopting the significant relationship test. First, legislative history of the 1977 amendments supports imposition of this test.¹⁶⁵ Second, the test is consistent with DOL’s regulatory definition of pneumoconiosis.¹⁶⁶ Last, imposition of this test is consistent with the Third and Fourth Circuit decisions overruling *Jones*.¹⁶⁷ In spite of these reasons the significant relationship test has been abandoned by the BRB.

The BRB’s most recent change in the (b)(3) rebuttal standard comes from its decision to overrule *Borgeson*.¹⁶⁸ The BRB has acquiesced to circuit court decisions which require that “the party opposing entitlement must rule out any relationship between the miner’s disability and coal mine employment.”¹⁶⁹ In so holding, the BRB has adopted a rule which precludes (b)(3) rebuttal where pneumoconiosis is nothing more than an incidental diagnosis nei-

164. *Id.*

165. The Senate Report, which accompanied the legislation eventually adopted as the 1977 Black Lung Benefits Reform Act, 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.” S. REP. No. 95-209, 95th Cong. 1st Sess. 13-14 (1977), reprinted in 1977 LEGISLATIVE HISTORY, *supra* note 45, at 616-17 (1979).

166. Pneumoconiosis is defined as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.” 20 C.F.R. § 727.202 (1988). “For the purpose of this definition, a disease ‘arising out of coal mine employment’ includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significantly related to, or aggravated by*, dust exposure in coal mine employment.” *Id.* (emphasis added). The comments accompanying this regulation note that traditional workers’ compensation law often recognizes that a proper basis for awarding benefits exists when a pre-existing condition is aggravated to the point of disability by work-related injury or condition. 43 Fed. Reg. 36,825 (1978).

167. In its decision overruling *Jones*, the Third Circuit Court of Appeals noted that “[u]nder traditional workers’ compensation law, compensation is proper where a work-related injury aggravates a pre-existing or non-work-related condition to the point of compensable disability, even if the work-related condition in and of itself is not compensable.” *Carozza*, 727 F.2d at 78 n.1. The *Carozza* court also quoted the same Senate Report relied on by the BRB in adopting the significant relationship test. *Id.* The Fourth Circuit Court also cited this Senate Report. *Massey*, 736 F.2d at 124. Moreover, the Fourth Circuit defined the employer’s (b)(3) rebuttal burden, in claims where “the combined effects of several diseases disable the miner,” as one of proving “that the miner’s primary condition, whether it be emphysema or some other pulmonary disease, was not aggravated to the point of total disability by prolonged exposure to coal dust.” *Id.*

168. *Borgeson v. Kaiser Steel Corp.*, 12 Black Lung Rep. (MB) 1-169 (1989) (en banc).

169. *Id.* at 1-173.

ther causing not contributing significantly to a miner's total disability. Rebuttal under subsection (b)(3) is virtually impossible under the rule out standard in cases where pneumoconiosis and total disability are present, as physicians are often unable to state with any medical certainty that *any* diagnosed condition does not play at least an insignificant role in causing or contributing to total disability.

With the elimination of (b)(2) rebuttal based on proof of no respiratory or pulmonary disability, an issue has developed as to whether proof of no respiratory or pulmonary disability can establish (b)(3) rebuttal. The proponents of this rationale contend that pneumoconiosis causes disability only by impairing lung function, so proof of the absence of respiratory or pulmonary disability effectively eliminates pneumoconiosis as a factor contributing to disability. The BRB has held that a medical opinion of no pulmonary or respiratory impairment "supports a finding of rebuttal under subsection (b)(3), since the absence of a pulmonary impairment precludes pneumoconiosis as a cause of total disability."¹⁷⁰ This rationale is consistent with at least one unpublished decision by the Fourth Circuit Court of Appeals¹⁷¹ and a published Seventh Circuit decision.¹⁷² It has been questioned as an absolute rule by the Sixth Circuit Court of Appeals.¹⁷³ The issue remains unsettled. It is likely that the BRB will continue to hold that proof of no lung impairment is sufficient to establish (b)(3) rebuttal. The BRB objects to the current definition of (b)(2) rebuttal because it allows benefits to be awarded for non-respiratory disability.¹⁷⁴

170. *Marcum v. Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. (MB) 1-23, 25 (1987) (citations omitted).

171. *Lester Burdette v. Benefits Review Board*, No. 85-2290 (4th Cir. June 22, 1987) (unpublished) (affirming a finding of nonentitlement under subsection (b)(2) by referring to subsection (b)(3) and relying on evidence that the claimant had only minimal respiratory impairment and was disabled only by a condition unrelated to coal mine employment).

172. *Wetherill v. Director, Office of Workers' Compensation Programs*, 812 F.2d 376, 380 (7th Cir. 1987).

173. *Warman v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 259 (6th Cir. 1988).

174. *See Lucas v. Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. (MB) 1-61, 64 n.2 (1988); *Justice v. Island Creek Coal Co.*, 11 Black Lung Rep. (MB) 1-91, 93 n.1 (1988).

4. Section 727.203(b)(4) Rebuttal

Rebuttal of the DOL interim presumption may be accomplished under subsection (b)(4) by proving the absence of pneumoconiosis.¹⁷⁵ Rebuttal under (b)(4) cannot be accomplished by a single negative x-ray, but may be accomplished by overwhelmingly negative x-rays.¹⁷⁶ Persuasive negative x-rays combined with strong medical opinion evidence may also rebut under subsection (b)(4).¹⁷⁷

The continued availability of (b)(3) and (b)(4) rebuttal is now being challenged in light of the Supreme Court's decision in *Pittston Coal Group*.¹⁷⁸ This challenge is based on an argument that since the Supreme Court found the ten-year requirement in the DOL interim presumption to be more restrictive than the SSA interim presumption (and thereby to violate section 402(f)(2) of the Black Lung Benefits Reform Act), any rebuttal alternatives under the DOL presumption which were not available under the SSA presumption likewise violate section 402(f)(2). (The SSA presumption has no express equivalent to (b)(3) and (b)(4) rebuttal.) The Supreme Court was presented with this question by the *Pittston Coal Group* petitioners but elected not to address the issue

175. *Biggs*, 8 Black Lung Rep. (MB) 1-317. The regulatory definition of pneumoconiosis includes the medical disease, which is diagnosed by x-ray, biopsy, or autopsy, as well as any other chronic lung disease which causes a pulmonary or respiratory impairment and is "significantly related to, or aggravated by, dust exposure in coal mine employment." 20 C.F.R. § 727.202. In *Biggs*, the BRB declined to follow a previous decision holding that disability resulting from conditions aggravated by coal dust exposure do not constitute coal workers' pneumoconiosis. See *Ovies v. Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. (MB) 1-610 (1981), *vacated*, 681 F.2d 815 (4th Cir. 1982). See generally *infra* note 201 and accompanying text.

176. *Knutson v. Peabody Coal Co.*, 782 F.2d 97, 101 (7th Cir. 1986); see also *Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 427 (4th Cir. 1986) (en banc); *Bray v. Director, Office of Workers' Compensation Programs*, 6 Black Lung Rep. (MB) 1-400 (1983). But see *Mullins Coal Co.*, 108 S. Ct. at 435-39 (1987); *Pavesi v. Director, Office of Workers' Compensation Programs*, 758 F.2d 956, 965 (3d Cir. 1985).

177. See *Conn v. White Deer Coal Co.*, 862 F.2d 591, 597, 12 Black Lung Rep. (MB) 2-75, 84 (6th Cir. 1988); *Orange v. Island Creek Coal Co.*, 786 F.2d 724 (6th Cir. 1988); *Long v. Itmann Coal Co.*, No. 84-1865, 10 Black Lung Rep. (MB) 2-145 (4th Cir. 1987). The BRB has held that invocation of the DOL interim presumption with proof of pneumoconiosis under subsection (a)(1) necessarily precludes (b)(4) rebuttal. E.g., *Buckley v. Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. (MB) 1-37, 38 (1988) (relying on dicta of the Supreme Court in *Mullins Coal Co.*, 108 S.Ct. 427 (1987)). This issue is currently pending before the U.S. Court of Appeals for the Fourth Circuit in *Consolidation Coal Co. v. Kerns*, No. 89-1047.

178. See *supra* notes 116-133 and accompanying text.

because the respondents conceded the validity of DOL rebuttal criteria.¹⁷⁹ This issue will have to be addressed at the circuit court level,¹⁸⁰ or perhaps by the Supreme Court, before the current challenge to the validity of (b)(3) and (b)(4) rebuttal will be settled. It is unlikely that (b)(3) and (b)(4) rebuttal will be eliminated since to do so would invalidate the underlying presumption by denying due process of law to claim defendants.¹⁸¹ There is little, if any, justification for a presumption that requires payment of employer-funded benefits solely on account of a miner's non-occupationally related health problems.

IV. ELIGIBILITY CRITERIA FOR CLAIMS FILED FROM APRIL 1, 1980 THROUGH DECEMBER 31, 1981

The Black Lung Benefits Reform Act of 1977 not only directed the Secretary of Labor to adopt an interim presumption similar to the SSA presumption, but also directed the Secretary to establish, in consultation with the Director of NIOSH, "*criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners as defined in [section 402(f)(1)(A)].*"¹⁸² DOL's permanent criteria were published on February 29, 1980, became effective on April 1, 1980,¹⁸³ and remained in force until January

179. *Pittston Coal Group*, 109 S. Ct. at 423-24.

180. One circuit court has refused to accept the argument that the *Pittston Coal Group* decision limits DOL interim presumption rebuttal to the options available under the SSA presumption. *Youghieny & Ohio Coal*, 866 F.2d 195; see also *McKendree v. Consolidation Coal Co.*, No. 88-2949 (4th Cir. 1989) (unpublished) (affirming a finding of nonentitlement based on (b)(3) rebuttal of the DOL interim presumption). This issue is now being considered by the Seventh Circuit Court of Appeals in a case remanded by the Supreme Court for consideration in light of *Pittston Coal Group*. *Taylor v. Peabody Coal Co.*, 838 F.2d 227 (7th Cir. 1988), *vacated*, 109 S. Ct. 548 (1988).

181. The substantive due process argument on this issue is predicated on the theory that the SSA presumption, if it does not allow (b)(3) or (b)(4) rebuttal, does not meet the longstanding test of reasonableness applied by the Supreme Court. See *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910); see generally *Turner Elkhorn Mining*, 428 U.S. 1 (upholding the constitutionality of the statutory black lung presumptions). Under this test, a presumption is invalid if the presumed facts are not reasonably related to the facts proven. It is not reasonable to presume that a miner's lung disease was caused by coal mine employment if the employer is precluded from proving otherwise. It can also be argued that principles of procedural due process would be violated if application of the SSA rule effectively deprives claim defendants of any real opportunity to have relevant rebuttal evidence considered.

182. 30 U.S.C. § 402(f)(1)(D) (1978) (emphasis added).

183. 45 Fed. Reg. 13,678-712 (1980).

1, 1982, the effective date of the 1981 amendments. (A second set of permanent regulations was published in 1983 as a result of the 1981 amendments.)¹⁸⁴ Subpart B of Part 718 provides quality criteria for the development of medical evidence.¹⁸⁵ Subparts C and D set forth the entitlement criteria.¹⁸⁶

There are four significant differences between DOL's permanent criteria (20 C.F.R. Part 718) and interim regulations. First, DOL did not continue its interim presumption under the Part 718 regulations. Second, medical evidence of simple pneumoconiosis, alone, is not sufficient under Part 718 to establish entitlement while it may be sufficient under Part 727 (20 C.F.R. section 727.203(a)(1)) to invoke a rebuttable presumption of total disability due to pneumoconiosis. Third, the ventilatory function tables under Part 718 accurately reflect a level of significant lung impairment by taking into account a miner's sex, age and height. The Part 727 ventilatory function values often represent normal or near normal lung function for older miners and short miners.¹⁸⁷ Fourth, the trier-of-fact cannot segregate his evaluation of evidence under Part 718 to each individual category of medical evidence under section 718.204(c), independent of his evaluation of the other evidence of record, when the record contains conflicting evidence on the issue of total disability. Under section 727.203(a) the trier-of-fact must separately review each category of evidence.

184. 48 Fed. Reg. 24,288 (1983) (codified at 20 C.F.R. Part 718) (1988).

185. 20 C.F.R. §§ 718.101-718.107 (1988). Additional quality criteria are found in Appendix A (x-rays) and Appendix B (ventilatory function tests) of Part 718. The quality standards are quite extensive; many involve housekeeping details, reporting requirements, and other minutiae pertaining only to physicians and laboratories that perform examinations and tests for DOL. The BRB has held that the Part 718 quality criteria are internal policy standards which guide DOL in developing its own medical evidence. *Budash v. Bethlehem Mines Corp.*, 9 Black Lung Rep. (MB) 1-48 (1986), *aff'd on reh'g*, 9 Black Lung Rep. (MB) 1-104 (1986) (en banc). The BRB held in *Budash* that while judges may consider the Part 718 quality standards in weighing medical evidence, the standards are not mandatory. The Third Circuit has held that a judge may rely on evidence which does not comply with the quality standards, but the judge must explain why such evidence is credited. *Director, Office of Workers' Compensation Programs v. Mangifest*, 826 F.2d 1318 (3d Cir. 1987). The Third Circuit characterized the Part 718 quality criteria for physicians' reports as guidelines for determining whether a medical opinion regarding a miner's pulmonary health is documented and reasoned. *Id.*

186. 20 C.F.R. §§ 718.201-307 (1988).

187. See *supra* notes 68-69 and accompanying text.

The Part 718 criteria reflect extensive efforts by DOL to comply with the congressional directive to promulgate criteria which accurately reflect total disability due to black lung disease. Proposed regulations were published on April 25, 1978,¹⁸⁸ and five days of public hearings were held in three different cities (Washington, D.C., Charleston, West Virginia, and Pikeville, Kentucky).¹⁸⁹ Written comments and testimony were received from representatives of the coal industry, the UMWA, claimants' representatives, the medical community, and NIOSH. The proposed regulations were then revised, published on February 29, 1980, and made effective April 1, 1980.¹⁹⁰

A. *Presumptions Under Part 718*

The only presumptions available to claimants who filed a claim between April 1, 1980 and January 1, 1982 are the statutory presumptions provided at section 411(c) of the Black Lung Benefits Reform Act of 1977.¹⁹¹ In such a claim, a presumption of entitlement can be invoked by proving (1) the presence of complicated pneumoconiosis;¹⁹² (2) at least twenty-five years of coal mine employment prior to June 30, 1971, and death of the miner on or before March 1, 1978;¹⁹³ or (3) at least fifteen years of underground coal mine employment¹⁹⁴ and total disability due to a respiratory or pulmonary impairment.¹⁹⁵ The complicated pneumoconiosis presumption is not rebuttable; the twenty-five-year death presumption can be rebutted by proving that the miner was not even partially disabled due to pneumoconiosis at the time of death, or by proving

188. 43 Fed. Reg. 17,722-773 (1978).

189. See 45 Fed. Reg. 13,678.

190. *Id.*, as amended at 48 Fed. Reg. 24,288.

191. 30 U.S.C. § 921(c) (1979).

192. See 20 C.F.R. §§ 718.204(b), 718.205(b)(3), 718.304 (1988).

193. See *id.* §§ 718.205(b)(4), 718.304.

194. In order for surface coal mine work to support invocation of the fifteen-year presumption, the claimant must show that environmental conditions at the surface mine in question were "substantially similar to those in an underground mine." *Luker v. Old Ben Coal Co.*, 2 Black Lung Rep. (MB) 1-304 (1979), *vacated on other grounds sub nom. Old Ben Coal Co. v. Luker*, 826 F.2d 688 (7th Cir. 1987); *McGinnis v. Freeman United Coal Mining Co.*, 10 Black Lung Rep. (MB) 1-4 (1987). An above-ground worker at an underground coal mine does not have to show comparability of environmental conditions. *Alexander v. Freeman United Coal Mining Co.*, 2 Black Lung Rep. (MB) 1-497 (1979).

195. See 20 C.F.R. §§ 718.205(b)(4), 718.305(a) (1988).

that the miner did not have pneumoconiosis; and the fifteen-year presumption can be rebutted by proving the absence of pneumoconiosis or that the miner's "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine."¹⁹⁶

Claimants who prove at least ten years of coal mine employment and the presence of pneumoconiosis are entitled, under the 718 regulations, to a rebuttable presumption that their pneumoconiosis arose out of coal mine employment.¹⁹⁷ Finally, in survivors' claims filed prior to January 1, 1982, there is a rebuttable presumption of death due to pneumoconiosis when the decedent worked as a coal miner for at least ten years and died from a respiratory disease, or death was due to multiple causes including a respiratory disease and it is not possible to determine the extent to which the respiratory disease contributed to death.¹⁹⁸

With the exception of the statutory presumptions provided at section 411(c) of the Black Lung Benefits Reform Act, the Part 718 regulations require that a claimant prove, by a preponderance of the evidence, (1) the presence of pneumoconiosis (2) arising out of coal mine employment and (3) total disability due to pneumoconiosis. In claims filed by living miners, lay evidence alone is insufficient to establish any of the elements necessary for a finding of entitlement.¹⁹⁹

B. *Proving the Existence of Pneumoconiosis Arising Out of Coal Mine Employment*

The definition of pneumoconiosis under Part 718 is no different from the definition under the interim criteria.²⁰⁰ This definition

196. *Id.* § 718.305(a). The BRB has held that rebuttal of this presumption must be based on the same kind of evidence required under § 727.203(b)(3). *Tanner v. Freeman United Coal Co.*, 10 Black Lung Rep. (MB) 1-85, 88 (1987). See *supra* notes 155-74 and accompanying text regarding (b)(3) rebuttal.

197. 20 C.F.R. §§ 718.203(b), 718.302 (1988).

198. *Id.* § 718.303 (1988). The complicated pneumoconiosis and fifteen-year presumptions are also applicable in death claims. *Id.* § 718.205(b)(3), (4). Furthermore, death will be considered due to pneumoconiosis where it resulted from multiple causes, including pneumoconiosis, and it is not possible to determine the exact cause of death or the extent to which pneumoconiosis contributed. *Id.* § 718.205(b)(2) (1988).

199. *Tucker v. Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 1-35 (1987).

200. Compare 20 C.F.R. §§ 718.201 and 727.202. Both regulations define pneumoconiosis as a

has been criticized for being overly broad because of its inclusion of conditions which are "significantly aggravated by" coal mine employment.²⁰¹ It is unlikely that the definition will ever be tightened, however, since it was not changed by the 1981 amendments.²⁰² Claimants can prove the existence of pneumoconiosis by x-ray, biopsy, autopsy, or reasoned medical opinion evidence.²⁰³ Proving that pneumoconiosis arose out of coal mine employment, in cases where a presumption is not invoked, must be based on "competent medical evidence."²⁰⁴

C. *Proving Total Disability Due to Pneumoconiosis*

Section 718.204(c) provides the criteria for establishing total disability in claims filed after March 31, 1980.²⁰⁵ This regulation

chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.

201. *Proposed Revisions of 20 C.F.R. 718, Standards for Determining Coal Miners' Total Disability or Death Due to Pneumoconiosis*, Hearings Before the Department of Labor, June 14-21, 1978, at 162-63 (testimony of Dr. Ben V. Branscomb); see also COMPTROLLER GEN. OF THE UNITED STATES, LEGISLATION AUTHORIZED BENEFITS WITHOUT ADEQUATE EVIDENCE OF BLACK LUNG OR DISABILITY 20-21, 24 (1982) (hereinafter 1982 GAO REPORT).

202. See *infra* notes 231-61 and accompanying text for discussion of the 1981 amendments.

203. 20 C.F.R. § 718.202 (1988).

204. *Id.* at § 718.203(c) (1988).

205. Section 718.204 in relevant part provides the following definition of "total disability" and criteria for determining total disability:

(b) *Total disability defined.* A miner shall be considered totally disabled if the irrebuttable presumption in § 718.304 applies. If the irrebuttable presumption described in § 718.304 does not apply, a miner shall be considered totally disabled if pneumoconiosis as defined in § 718.201 prevents or prevented the miner:

(1) From performing his or her usual coal mine work; and

(2) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

(c) *Criteria.* In the absence of contrary probative evidence, evidence which meets the standards of either paragraph (1), (2), (3), (4) or (5) of this subsection shall establish a miner's total disability:

(1) Pulmonary function tests showing values equal to or less than those listed in Table B1 (Males) or Table B2 (Females) in Appendix B to this part for an individual of the miner's age, sex, and height for the FEV₁ test; if, in addition, such tests also reveal the values specified in either subparagraphs (i)(i) or (ii) or (iii) of this paragraph:

(i) Values equal to or less than those listed in Table B3 (Males) or Table B4 (Females) in Appendix B of this part, for an individual of the miner's age, sex, and height for the FVC test, or

(ii) Values equal to or less than those listed in Table B5 (Males) or Table B6 (Females)

lists four categories of medical evidence and provides that evidence which satisfies any one of these categories shall establish total disability "[i]n the absence of contrary probative evidence."²⁰⁶ The fifth category provides for a finding of total disability based on lay evidence in a survivor's claim where there is no medical or other relevant evidence regarding disability.

The first category of evidence listed at section 718.204(c) is pulmonary function test (PFT) results²⁰⁷ which must be compared to tables provided in Appendix B of Part 718. The PFT tables in Appendix B of Part 718 reflect DOL's efforts to adopt criteria for total disability which accurately reflect significant lung dysfunction. The table values reflect performance on ventilatory function testing at sixty percent of the predicted normal values based on the sex, age and height of the miner.²⁰⁸ The PFT table at section 727.203(a)(2) does not take into consideration sex or age, and does not provide values for miners less than sixty-seven inches tall or more than seventy-three inches tall. The interim presumption table was soundly criticized for including values which are normal or

in Appendix B to this part, for an individual of the miner's age, sex, and height for the MVV test, or

(iii) A percentage of 55 or less when the results of the FEV₁ test are divided by the results of the FVC test (FEV₁/FVC equal to or less than 55%), or

(2) Arterial blood-gas tests show the values listed in Appendix C to this part, or

(3) The miner has pneumoconiosis and has been shown by the medical evidence to be suffering from cor pulmonale with right sided congestive heart failure, or

(4) Where total disability cannot be established under paragraphs (c)(1), (c)(2) or (c)(3) of this section, or where pulmonary function tests and/or blood-gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment as described in paragraph (b) of this section, or

(5) In the case of a claim filed by the survivor of a miner, where there is no medical or other relevant evidence, the affidavits of persons knowledgeable of the miner's physical condition shall be sufficient to establish total disability.

20 C.F.R. § 718.204(b)-(c) (1988).

206. *Id.*

207. See Lapp, *supra* note 61, at 736-41.

208. Many different calculations and tables are used to predict normal performance on a pulmonary function test. DOL selected the Knudson study for predicting normal ventilatory function test results. The Knudson study is the only study which provides separate predicted normals for women. See 45 Fed. Reg. 13,711 (1980). DOL noted that there are approximately one thousand women working in American coal mines. *Id.* Moreover, the Knudson study was performed with equipment and methods which are very similar to the evidentiary quality criteria incorporated in the Part 718 criteria. *Id.*

near normal for miners age sixty and above.²⁰⁹ On the other hand, valid PFTs yielding results which satisfy the Part 718 tables document the presence of significant lung dysfunction.²¹⁰ The same cannot be said for arterial blood gas tests yielding values which satisfy the Part 718 tables.

The second section 718.204(c) category refers to arterial blood gas (ABG) results²¹¹ which must be compared with tables provided in Appendix C of Part 718. There are two differences between the Part 718 and Part 727 ABG tables. The permanent criteria of Part 718 provide three tables in an effort to make some correction for the effect of increasing altitude on blood gas values. (The partial pressure of oxygen (pO_2) in room air decreases as altitude increases.) The DOL interim presumption of Part 727 contains no altitude adjustment. Secondly, the 718 tables are more comprehensive, providing qualifying values for a pCO_2 result down to 25 mmHg and up to 50 mmHg, while the interim presumption table ranges from a low pCO_2 of 30 mmHg to a high of 45 mmHg. The altitude adjustment is significant; the wider range of the Part 718 tables is not.

The significance of the altitude adjustment is lessened because DOL decided to utilize only three altitude levels, distinguishing tests performed at laboratories up to 2,999 feet above sea level from those performed between 3,000 and 5,999, and those performed at 6,000 or more feet above sea level. Many commentators suggested that this approach was inadequate. DOL acknowledges that the Part 718 ABG tables reflect a "compromise, which takes into account the effect of altitude without becoming overly complicated."²¹² A more sensitive altitude adjustment has been adopted in West Virginia for state workers' compensation occupational pneumoconiosis claims.²¹³

209. See Solomons, *supra* note 68, at 880-83.

210. Pulmonary function studies are accurate in reflecting ventilatory function only if the patient exerts maximal effort in performing the test. See 20 C.F.R. Part 718, App. B at 724-25 (1988); *Revnack v. Director, Office of Workers' Compensation Programs*, 7 Black Lung Rep. (MB) 1-771 (1985).

211. See Lapp, *supra* note 61, at 741-43.

212. 45 Fed. Reg. 13,712 (1980).

213. In West Virginia, a baseline altitude of 600 feet above sea level has been adopted. This is

The Part 718 ABG tables do not take age into consideration. DOL acknowledges that blood gas values vary with age, but it did not provide for an age adjustment under Part 718 out of concern that the tables would be too complicated.²¹⁴ It follows, therefore, that while the blood gas tables under the Part 718 regulations are more comprehensive and more reliable than the Part 727 standards, in terms of demonstrating lung impairment, the Part 718 ABG tables do not consistently reflect significant lung impairment as reliably as the Part 718 PFT tables. For this reason, Appendix C of Part 718 provides that the blood gas values under Part 718 "are indicative of impairment only. They do not establish a degree of disability except as provided in §§ 718.204(c)(2) and 718.305(a), (c) of this subchapter, nor do they establish standards for determining normal alveolar gas exchange values for any particularly individual."²¹⁵ In other words, ABG tests yielding values which qualify under the relevant Part 718 table do not demonstrate total disability when the record contains relevant evidence that the miner is not totally disabled. When there is evidence in the record that the miner is not totally disabled, qualifying blood gas values are indicative only of impaired lung function, not total disability.

The third category of proof of total disability provided at section 718.204(c) is one not available under DOL's interim presumption: evidence of pneumoconiosis and cor pulmonale²¹⁶ with

the average altitude of Charleston, West Virginia (the state capital). For each 300 feet, or fraction thereof, that a laboratory is above the altitude of Charleston, the West Virginia rule requires the addition of 1 mmHg to the reported pO₂ value. 85 W. Va. C.S.R. § 20.8.6(b) (1986). The West Virginia regulation notes that the relationship between barometric pressure (which decreases as altitude increases) and measured pO₂ "is approximately linear up to . . . 4000 feet" above sea level so long as the patient is breathing room air. *Id.* See generally J. E. COTES, LUNG FUNCTION, 460-61, 463-65 (4th ed. 1979).

214. 45 Fed. Reg. 13,712 (1980). This is hardly acceptable given the complex pulmonary function tables adopted as part of the permanent criteria. It would appear that DOL kept the blood gas tables simple because of the inherent unreliability of blood gas tests as evidence of disability due to lung disease. See American Thoracic Society, *Evaluation of Impairment-Disability Secondary to Respiratory Disorders*, 133 AM. REV. OF RESPIRATORY DISEASES 1205-09 (June 1986); AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 114 (3d ed. 1988). See *Hucker v. Consolidation Coal Co.*, 9 Black Lung Rep. (MB) 1-137 (1986) (en banc) (approving consideration of age in evaluating blood gas evidence).

215. 20 C.F.R. Part 718, App. C (1988).

216. Cor pulmonale is right-sided heart disease which is caused by severe lung dysfunction. THE MERCK MANUAL 416 (13th ed. 1977).

right sided heart failure. Evidence satisfying this category is rare in current claims litigation. Evidence under the fourth category at section 718.204(c) (reasoned and documented medical opinions) is, on the other hand, probably the most common proof asserted in litigated claims.

Both Parts 718 and 727 provide for proving respiratory or pulmonary disability with a reasoned and documented medical opinion. The relevant regulations are worded differently.²¹⁷ The BRB, however, has interpreted both regulations as permitting the trier-of-fact to credit as reasoned and documented a medical opinion based on history, symptoms and physical examination without reference to objective test results.²¹⁸ Many factors are considered by administrative law judges in resolving conflicting medical opinions. These include the professional qualifications of physicians in question,²¹⁹ the recency of the evidence,²²⁰ and the comprehensiveness of the evidence.²²¹ Credibility determinations made by the trier-of-fact are not disturbed on appeal so long as they are rational, supported by substantial evidence, and consistent with the applicable law.²²²

Finally, section 718.204(c) provides for proving total disability in a survivor's claim filed before January 1, 1982 on the basis of lay evidence from "persons knowledgeable of the miner's physical condition."²²³ This alternative is available only when there is no medical or other relevant evidence in the record.²²⁴

217. Compare 20 C.F.R. §§ 718.204(c)(4) and 727.203(a)(4) (1988).

218. *Fields v. Island Creek Coal Co.*, 10 Black Lung Rep. (MB) 1-19 (1987) (citing *Gomola v. Manor Mining & Contracting Corp.*, 2 Black Lung Rep. (MB) 1-130 (1979)). *But see* 1982 GAO REPORT, *supra* note 201, at 19, 24-25 (recommending that DOL require findings of total disability to be supported by objective test results).

219. *Price v. Peabody Coal Co.*, 7 Black Lung Rep. (MB) 1-671 (1985) (a judge may assign more weight to a physician's report because of the physician's superior qualifications).

220. *Wetzel v. Director, Office of Workers' Compensation Programs*, 8 Black Lung Rep. (MB) 1-139 (1985) (the most recent evidence may be accorded greater weight than older evidence).

221. *Id.* (a judge may favorably credit medical opinions which are better supported by objective evidence of record or rendered by the miner's attending physician); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 Black Lung Rep. (MB) 1-378 (1983) (a judge may discredit the opinion of a physician who is not aware of the physical requirements of the miner's usual coal mine work).

222. *Rowan v. Lewis Coal and Coke Co.*, 12 Black Lung Rep. (MB) 1-31 (1988) (citing 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 921(b)(3), and *Smith, Hinchman*, 380 U.S. at 359).

223. 20 C.F.R. § 718.204(c)(5) (1988).

224. *Id.*

A source of great confusion during the transition from the DOL interim presumption to the permanent criteria resulted from the practice under Part 727 of reviewing independently each separate category of evidence (e.g., x-ray evidence, PFT results, ABG studies, and medical opinion evidence). Section 718.204(c) provides, instead, that evidence which satisfies any one of the specific categories establishes total disability *only* when there is no contrary probative evidence of record. When there is conflicting evidence on the issue of total disability, all relevant evidence (medical and other, like and unlike) must be weighed together, with the burden of proof always on the claimant to establish total disability by a preponderance of the evidence.²²⁵

If total disability is proved under section 718.204(c) in a claim filed between April 1, 1980 and December 31, 1981, and there is evidence of at least fifteen years of underground coal mine employment,²²⁶ it is presumed that the claimant's total disability is due to pneumoconiosis.²²⁷ Where this presumption is not invoked, the claimant must prove that his total disability is due to coal workers' pneumoconiosis. The proof on this point must establish that the miner's pneumoconiosis is in and of itself totally disabling.²²⁸ This element of entitlement is separate and distinct from the claimant's burden of proving that his pneumoconiosis arose out of coal mine employment.²²⁹ Entitlement is not established where the evidence proves the presence of pneumoconiosis arising out of coal mine employment and the existence of total disability,

225. *Freeman United Coal*, 10 Black Lung Rep. (MB) 1-85; *Fields v. Island Creek Coal Co.*, 10 Black Lung Rep. (MB) 1-19 (1987); *Rafferty v. Jones & Langhlin Steel Corp.*, 9 Black Lung Rep. (MB) 1-231 (1987); *Mazgaj v. Valley Camp Coal Co.*, 9 Black Lung Rep. (MB) 1-201 (1986) (en banc); *Shedlock v. Bethlehem Mines Corp.*, 9 Black Lung Rep. (MB) 1-195 (1986), *aff'd on reh'g*, 9 Black Lung Rep. (MB) 1-236 (1986) (en banc); *Hucker*, 9 Black Lung Rep. (MB) 1-137; *Gee v. W.G. Moore & Sons*, 9 Black Lung Rep. (MB) 1-4 (1986) (en banc).

226. *See supra* note 194 (regarding use of surface coal mine employment to invoke the fifteen-year presumption).

227. 20 C.F.R. 718.305 (1988); 30 U.S.C. § 921(a)(4) (1982).

228. *Wilburn v. Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. (MB) 1-135 (1988).

229. *Bethlehem Mines*, 9 Black Lung Rep. (MB) 1-195; *Gessner v. Director, Office of Workers' Compensation Programs*, 11 Black Lung Rep. (MB) 1-1 (1987).

but there is no affirmative showing or presumption that pneumoconiosis caused the proven total disability.²³⁰

V. THE 1981 AMENDMENTS

The GAO has characterized the first set of Part 718 criteria as “more realistic measures for determining if a miner was totally disabled . . . and [having] the effect of lowering the claims approval rate.”²³¹ The report criticized these regulations, however, for still allowing benefits to be provided to miners and to the survivors of miners not totally disabled by pneumoconiosis.²³² This criticism focused on the legislative language which authorizes the use of presumptions, affidavits, and inconclusive or conflicting medical evidence to support an award of benefits.²³³ By late 1980, there existed a strong sentiment that something must be done to tighten the eligibility criteria, particularly since the BLDTF had a deficit of nearly \$1 billion by the end of fiscal year 1980.²³⁴

The insolvency of the BLDTF was addressed in a report published by the Subcommittee on Oversight of the House Committee on Ways and Means in July 1981.²³⁵ The subcommittee noted that the BLDTF had operated at a deficit “since its inception in 1978.”²³⁶ A deficit of \$2 billion was projected by the end of fiscal year 1982;²³⁷ and a deficit of \$9.2 billion by 1995.²³⁸ The subcommittee held hearings on the deficit problem in June and September 1981, during which the GAO reported the results of its ongoing monitoring of the program. Congressman Charles Rangel, chairman of the House subcommittee, observed that GAO strongly implied that the root of the deficit was the “legislative standards” gov-

230. *Id.*

231. 1982 GAO REPORT, *supra* note 201, at 9.

232. *Id.*

233. *Id.*

234. See SUBCOMMITTEE REPORT, *supra* note 25, at 28. For the period July 1973 through June 1981, the BLDTF had paid \$1.93 billion in benefits and SSA had paid over \$9 billion in benefits. See 1982 GAO REPORT, *supra* note 201, at 7.

235. SUBCOMMITTEE REPORT, *supra* note 25.

236. *Id.* at v.

237. *Id.*

238. *Id.* at 29.

erning the program, and not the administrative procedures employed by DOL to implement the program.²³⁹

The legislation adopted by the House Committee on Ways and Means increased the excise tax dedicated to fund the BLDTF and made some other minor changes on the revenue side of the black lung program.²⁴⁰ This bill did not change the statutory entitlement criteria. The legislation passed by the Senate, however, included significant changes in entitlement criteria as well as an increase in the excise tax.²⁴¹ An amended version of the Senate bill was passed by Congress, signed by President Reagan on December 29, 1981, and became effective January 1, 1982.²⁴²

Significant aspects of the 1981 amendments include elimination of the fifteen-year respiratory disability presumption²⁴³ and the ten-year respiratory disease death presumption.²⁴⁴ The twenty-five-year death presumption was phased out over a six-month period²⁴⁵ and survivor benefits were limited to claims where it is proven that death was due to pneumoconiosis.²⁴⁶ In survivor claims, affidavits from persons eligible to share benefits if the claim is awarded were prohibited as proof of entitlement.²⁴⁷ Additionally, liability for certain claims previously denied but later awarded as a result of the 1977 amendments was transferred from individual responsible operators to the BLDTF.²⁴⁸

239. *Problems Relating to the Insolvency of The Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess. 18 (1981)* (remarks by Rep. Rangel) (hereinafter *1981 Hearings*).

240. See Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 695 (1983).

241. *Id.*

242. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Title II, 95 Stat. 1643 (1981), and Black Lung Revenue Act of 1981, Pub. L. No. 97-119, Title I, 95 Stat. 1635 (1981).

243. Pub. L. No. 97-119, Title II, § 202(b)(1), 95 Stat. 1643, 1644 (1981) (amending 30 U.S.C. § 921(c)).

244. *Id.* (codified as amended at 30 U.S.C. § 921(c)).

245. *Id.* (codified as amended at 30 U.S.C. § 921(c)).

246. *Id.* § 203(a)(1)-(4), (d), 95 Stat. 1643, 1644 (codified as amended at 30 U.S.C. §§ 901(a), 922(a)). Survivor benefits had previously been paid whenever a miner was awarded benefits for total disability. 30 U.S.C. §§ 922(a)(3), 932(f) (1976).

247. *Id.* § 202(b)(1)(C), 95 Stat. 1643, 1643 (codified as amended at 30 U.S.C. § 923(b)).

248. *Id.* Title I, § 104(b)(3)-(5), Title II, §§ 203(a)(6), (b), 204, 205(a), (b), 95 Stat. 1639, 1644-45 (codified as amended at 30 U.S.C. §§ 902(j), 932(c) and 26 U.S.C. § 9501(d)(7)).

The 1981 amendments also authorize DOL to have x-rays re-read by "B" readers;²⁴⁹ provide for excess earnings reduction of Part C benefits in accordance with the Social Security Act;²⁵⁰ change the formula for calculating benefits;²⁵¹ end the BLDTF's practice of paying retroactive benefits during claim litigation;²⁵² increase the interest paid by responsible operators in reimbursing the BLDTF for prospective benefits paid to claimants pending litigation;²⁵³ and double the excise tax on coal dedicated to funding the BLDTF.²⁵⁴

Amended Part 718 regulations were published for comment on May 25, 1982²⁵⁵ and promulgated on May 31, 1983.²⁵⁶ The standards for entitlement under these regulations are essentially the same as those in effect for claims filed between April 1, 1980 and December 31, 1981,²⁵⁷ except for elimination of three statutory presumptions and limitation of survivor benefits to claims where pneumoconiosis caused the miner's death or was a significant factor contributing to death.²⁵⁸

The only presumptions available to claimants who file a claim after December 31, 1981 are (1) the irrebuttable presumption of entitlement invoked by proving the presence of complicated pneumoconiosis;²⁵⁹ (2) the twenty-five year death presumption in claims filed before July 1, 1982;²⁶⁰ and (3) the presumption that a miner's pneumoconiosis is due to coal mine employment upon proof of at least ten years of coal mine employment.²⁶¹ The BRB decisions discussed in the previous section of this article provide the current

249. *Id.* Title II, §§ 202(a), (c), 95 Stat. 1643 (codified as amended at 30 U.S.C. § 923(b)).

250. *Id.* §§ 203(a)(1)(3), (d) (codified as amended at 30 U.S.C. § 932(g)).

251. *Id.* (codified as amended at 30 U.S.C. § 922(a)).

252. *Id.* Title I, § 103(a), 95 Stat. 1636 (codified as amended at 26 U.S.C. § 9501); *see supra* note 99 and accompanying text.

253. *Id.* §§ 104(a)(1), (2), (b)(6), 95 Stat. 1639 (codified as amended at 30 U.S.C. § 934(b)(5)).

254. *Id.* at § 102(a), 95 Stat. 1635 (codified as amended at 26 U.S.C. § 4121(e)). The tax increase is temporary, and is scheduled to terminate automatically when the current deficit is eliminated or on January 1, 2014, whichever comes first. *See* 26 U.S.C. § 4121(e)(2) (1982).

255. 47 Fed. Reg. 22,674-681 (1982).

256. 48 Fed. Reg. 24,272-294 (1983) (codified at 20 C.F.R. Part 718).

257. *See supra* notes 182-230 and accompanying text.

258. *See* 20 C.F.R. §§ 718.205(b), 718.303(c), 718.305(e), 718.306(a), 718.205(c) (1988).

259. *Id.* § 718.304 (1988).

260. *Id.* § 718.306(a) (1988).

261. *Id.* § 718.203 (1988).

judicial interpretation of these regulations. There are currently no circuit court decisions that depart significantly from the BRB's holdings.

VI. ISSUES TO WATCH

A. *Coal Mine Employment Issues*

Prior to adoption of the 1977 amendments, eligibility for federal black lung benefits was limited to employees who worked "in a coal mine."²⁶² The 1977 amendments expanded the definition of "miner" to include individuals who worked in or around a coal mine or coal preparation facility, and those employed in coal mine construction or coal transportation so long as they were exposed to coal dust because of their employment.²⁶³ The BRB has adopted a three prong test for determining whether employment constitutes coal mine employment under the 1969 Act, as amended. This test inquires as to the *status* of the coal, the *function* of the employment, and the *situs* of the employment.²⁶⁴ The courts of appeals generally have required that a claimant satisfy only the situs and function tests in order to qualify as a miner under the Black Lung Benefits Reform Act.²⁶⁵

262. 30 U.S.C. §§ 902(d), 802(h) (1982).

263. Pub. L. No. 95-239, § 2(b), 92 Stat. 95, 95 (1978) (amending 30 U.S.C. § 902(d)); *see also* 20 C.F.R. §§ 725.101(a)(26), 725.202(a) (1988). A "coal mine" is defined by the Federal Coal Mine Health and Safety Act as

an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(2) (1982). Coal preparation is defined as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." *Id.* § 802(h)(2)(i); *see also* 20 C.F.R. §§ 725.101(a)(22), (25) (1988); Seltzer v. Director, Office of Workers' Compensation Programs, 7 Black Lung Rep. (MB) 1-912 (1985).

264. Whisman v. Director, Office of Workers' Compensation Programs, 8 Black Lung Rep. (MB) 1-96 (1985).

265. *See* Director, Office of Workers' Compensation Programs v. Ziegler Coal Co., 853 F.2d 529 (7th Cir. 1988); Collins v. Director, Office of Workers' Compensation Programs, 795 F.2d 368 (4th Cir. 1986); Foreman v. Director, Office of Workers' Compensation Programs, 794 F.2d 569 (11th Cir. 1986); Epsilon v. Director, Office of Workers' Compensation Programs, 794 F.2d 935 (4th Cir. 1986); Southard v. Director, Office of Workers' Compensation Programs, 732 F.2d 66 (6th Cir. 1984); Hon v. Director, Office of Workers' Compensation Programs, 699 F.2d 441 (8th Cir. 1983). These circuit courts have neither adopted nor rejected the "stream of commerce" (or status of the coal) test.

The Third Circuit Court has expressly rejected the status of the coal test.²⁶⁶

The status test is satisfied when it is shown that the coal with which the miner worked was in the course of being mined or processed, and had not yet become a finished product in the stream of commerce.²⁶⁷ The function test requires proof that the employment in question was integral to the extraction, production or preparation of coal.²⁶⁸ Finally, under the situs test, the claimant must show that the work in question was performed in or around a coal mine or coal preparation facility.²⁶⁹

1. Central Repair Shop Employment

Whether work at a central repair shop which is not located on a coal mine site or at a coal preparation facility is coal mine employment under the Black Lung Benefits Reform Act is a matter of current controversy. The BRB has held that work at a central repair

266. The Third Circuit Court of Appeals believes that the status test is "subsumed within the 'function' test." *Stroh v. Director, Office of Workers' Compensation Programs*, 810 F.2d 61, 64 (3rd Cir. 1987); see also *Hanna v. Director, Office of Workers' Compensation Programs*, 860 F.2d 88 (3d Cir. 1988). The Seventh Circuit has suggested that the function test is not applicable to transportation workers. See *Mitchell v. Director, Office of Workers' Compensation Programs*, 855 F.2d 485 (7th Cir. 1988). The Seventh Circuit suggests, in dicta, that transportation workers may not need to prove that their employment is integral to the extraction, production or preparation of coal in order to be entitled to federal black lung benefits, and that they need to prove only that they were exposed to coal dust as the result of their employment. *Id.* at 489. The court decided, however, not to address the question of whether the function of employment test applies to transportation workers because of its interest in maintaining uniformity of rulings by the various circuit courts of appeals. *Id.* The court's suggestion that Congress did not intend that transportation workers must satisfy a function of employment test is based on statutory language stating that coal mine construction and transportation workers who work in or around coal mines qualify as miners "to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. § 902(d) (1982). It is more likely, however, that Congress added this language merely to underscore a requirement that construction and transportation workers must be exposed to coal dust in order to be classified as miners entitled to federal black lung benefits.

267. The crucial inquiry for the status of the coal test is whether the coal is "in condition for delivery to distributors and consumers." *Price v. Peabody Coal Co.*, 7 Black Lung Rep. (MB) 1-671, 674 (1985) (quoting *Southard*, 732 F.2d at 69); see also *Cole v. Director, Office of Workers' Compensation Programs*, 6 Black Lung Rep. (MB) 1-1042 (1983). Once coal is ready for delivery to a distributor or the ultimate consumer it is within the stream of commerce and no longer covered by the Black Lung Benefits Reform Act of 1977, as amended.

268. *Seltzer*, 7 Black Lung Rep. (MB) at 1-913.

269. In order to satisfy the situs test, it must be shown that the miner's duties required that a substantial portion of the average workday or week be spent at a coal mine site or coal preparation facility. *Bower v. Amigo Smokeless Coal Co.*, 2 Black Lung Rep. (MB) 1-729 (1979).

shop not located on a coal mine site or at a coal preparation facility does not constitute coal mine employment because it does not satisfy the situs requirement.²⁷⁰ In these situations, liability for payment of benefits is assigned to an earlier employer with whom the miner had coal mine employment, or to the BLDTF where the miner's last coal mine employment was before January 1, 1970.

The Seventh Circuit Court of Appeals recently addressed the central shop issue in *Director v. Ziegler Coal Co.*²⁷¹ There DOL argued that a central shop employee who worked one and one-half miles from the nearest coal mine qualified as a miner within the meaning of the Act because the work he performed was integral to the extraction, production, and preparation of coal. The circuit court rejected this argument, holding that the statutory definition of coal mine employment and "a common sense approach to [this] provision indicate that the situs requirement demands more than a mere functional inquiry."²⁷² The court held that the geographic distance between a coal mine or coal preparation site and a repair shop is an important part of determining whether the situs test is satisfied.²⁷³

The Court of Appeals for the Eleventh Circuit has held, however, that work at a central repair shop located one mile from the closest coal mine is coal mine employment because it is performed "around" a coal mine.²⁷⁴ This decision does not reject the situs test nor does it disagree with the Seventh Circuit decision in *Ziegler Coal*. Instead, the Eleventh Circuit Court adopted the Seventh Circuit's statement that "an inflexible fixed-distance rule" is inappropriate in determining whether the situs requirement has been satisfied.²⁷⁵ According to the Eleventh Circuit, a flexible interpretation of the situs test is necessary when a conservative application of the test will result in the denial of a claim, while a more limited application is appropriate

270. *Seibert v. Consolidation Coal Co.*, 7 Black Lung Rep. (MB) 1-42 (1984); see also *Duffy v. Director, Office of Workers' Compensation Programs*, 6 Black Lung Rep. (MB) 1-655 (1983).

271. *Ziegler Coal*, 853 F.2d 529 (7th Cir. 1988). This issue is currently pending before the Sixth Circuit in the case of *Director, Office of Workers' Compensation Programs v. Consolidation Coal Co.*, No. 88-3667 (6th Cir.) (appeal filed April 19, 1988).

272. *Ziegler Coal*, 853 F.2d at 535.

273. *Id.* at 536-37.

274. *Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 1299 (11th Cir. 1989).

275. *Id.* at 1300.

when the issue is whether benefits will be paid by the BLDTF or by a mine operator.²⁷⁶ It remains to be seen whether this inconsistent rationale will be accepted by other circuit courts. The central shop issue is being considered by the Courts of Appeals for the Fourth and Sixth Circuits.²⁷⁷

2. Railroad Employment

Another important issue in litigation is whether railroad workers may be eligible as "miners" to receive federal black lung benefits payable by their former employers. The railroad industry contends that its employees were not intended to be covered by the 1969 Act, as amended, and that the Federal Employers' Liability Act (FELA)²⁷⁸ provides the appropriate remedy for occupational lung diseases suffered by railroad workers. To support the argument that Congress did not intend its workers to be covered under the black lung program, the railroad industry points to language in a 1977 Senate report and remarks by Senator Randolph, the floor manager of the Senate bill to amend the 1969 Act and its 1972 amendments in 1977.²⁷⁹ This issue is pending at the BRB in *Roberson v. Norfolk & Western Railway Co.*²⁸⁰ A finding that railroad employees are eligible for benefits under the federal black lung program, and that railroad employers are liable for the payment of such benefits, will extend

276. The court noted that "[i]n *Ziegler Coal*, the issue was not whether the claimant was entitled to benefits, but rather whether the benefits which had previously been approved should be paid from the Black Lung Disability Trust Fund or by the mine operator." *Id.*

277. *Director, Office of Workers' Compensation Programs v. Consolidation Coal Co.*, No. 89-1757 (4th Cir.); *Director, Office of Workers' Compensation Programs v. Consolidation Coal Co.*, No. 88-3667 (6th Cir.).

278. 45 U.S.C. §§ 51-60 (1982).

279. Senate Report No. 95-209 states that the definition of a miner in the 1977 amendments "does not contemplate inclusion of those workers employed by a railroad, trucking company or barge line unless the company also operates a coal mine." S. Rep. No. 95-209, 95th Cong., 1st Sess. 604, 624 (1977), reprinted in 1977 LEGISLATIVE HISTORY, *supra* note 45, at 623-24. Senator Randolph made an identical comment during debates on the Senate floor. See 123 CONG. REC. 24,239 (July 21, 1977), reprinted in 1977 LEGISLATIVE HISTORY, *supra* note 45, at 668.

280. *Roberson v. Norfolk & W.R. Co.*, No. 87-235 (BRB). No circuit court has specifically addressed the issue of railroad employment. The Sixth Circuit rejected the railroad industry's position, in dicta, in a case ruling that federal district courts lack the subject matter jurisdiction to prohibit extension of the federal black lung program to railroad employees, former railroad employees, and railroads. *Louisville and Nashville R. Co. v. Donovan*, 713 F.2d 1243 (6th Cir. 1983), *cert denied*, 466 U.S. 936 (1984).

the scope of the program by creating a whole new class of claims against uninsured employers: employers who believed that FELA provided the appropriate remedy for their employees who suffer work related injuries or disease.

Other responsible operator issues are also in litigation. These include whether time off work because of a labor strike can be used to establish the one year of coal mine employment necessary to identify an employer as a responsible operator,²⁸¹ and whether claims can be remanded by an administrative law judge to the deputy commissioner for identification of a second responsible operator after dismissal of the first named operator.²⁸²

B. *The Problem of Multiple Claims*

Approximately one-third of the claim applications filed with DOL are submitted by individuals who have previously filed one or more claims under the 1969 Act, as amended.²⁸³ It is not uncommon to see older claims originally filed during the 1970s in which three or more applications have been submitted. In most cases involving multiple filings, the new filing follows a denial of an earlier claim. In some, the new filing seems to reflect an expression of frustration or confusion by the claimant who has a previously filed claim still pending. In these cases, the claimant typically has been unable to obtain a final decision from the agency over a fairly long period of time and is simply trying to generate some action.

The inclination to file multiple applications has been stimulated, and the problems these applications present exacerbated, by the 1972 and 1977 statutory amendments, as well as by the split in program

281. See *Tackett v. Cargo Mining Co.*, No. 88-3531 (6th Cir. 1989) (unpublished decision holding that time off work during a labor strike cannot be counted as coal mine employment).

282. The BRB has held that a claim may not be remanded to the deputy commissioner level for reconsideration of the naming of a responsible operator. *Goddard v. Oglebay Norton Co.*, 12 Black Lung Rep. (MB) 1-130 (1988); *Crabtree v. Bethlehem Steel Corp.*, 7 Black Lung Rep. (MB) 1-354 (1984). The Board has directed DOL to resolve the operator issues "in a preliminary proceeding (citation omitted) and/or [to] proceed against all putative responsible operators at every stage of the claims adjudication." *Crabtree*, 7 Black Lung Rep. (MB) at 1-357. DOL has selected the latter alternative and routinely names multiple responsible operators in cases where the miner worked for more than one coal mining company after December 31, 1969.

283. See U.S. DEPARTMENT OF LABOR, REPORT NO. MIS8B (Sept. 30, 1988).

jurisdiction between SSA and DOL. In the Black Lung Benefits Act of 1972, Congress directed SSA to reopen and readjudicate all previously denied claims under greatly liberalized eligibility criteria (including the SSA interim presumption).²⁸⁴ Also, SSA black lung claims are subject to consideration under rules of procedure contained in the Social Security Act.²⁸⁵ Under these rules,²⁸⁶ denials are not necessarily final and binding on the claimant.²⁸⁷

In the Black Lung Benefits Reform Act of 1977, Congress again waived finality, this time for all claims originally filed with either SSA or DOL.²⁸⁸ Tens of thousands of repeatedly denied claims were ultimately approved after implementation of the 1977 amendments.²⁸⁹ Given this history, it is not surprising that many unsuccessful claimants keep trying to obtain an award.

Several critical features of the DOL's program have, however, complicated this strategy. First, DOL's claims procedures are not derived from the Social Security Act. DOL's procedures are set forth in the adversary litigation provisions of the Longshore Act.²⁹⁰ The Longshore Act does not permit the reopening of claims in perpetuity. Instead, it permits a previously denied claimant to file a petition for modification (reopening) only if the petition is filed within one year from the date of the final denial of a claim.²⁹¹ If the petition is timely, the claimant must first establish either a change in conditions or a mistake in a determination of fact in order to obtain

284. Pub. L. No. 92-304, 92d Cong., 2d Sess., § 6, 86 Stat. 156 (1972).

285. 42 U.S.C. § 405 (1982).

286. *Id.*, incorporated by reference into 30 U.S.C. § 423(b) (1982).

287. *See* Bowen v. City of New York, 476 U.S. 467 (1986).

288. 30 U.S.C. § 945 (1982). Previously denied SSA claimants were given the option of electing review by SSA on the basis of the evidence previously submitted or electing review by DOL on the basis of the old evidence and any supplementary support obtained by the claimant. If a claimant elected SSA review and the claim was again denied by SSA, it was then sent on to DOL for yet an additional round of review. 30 U.S.C. § 945(a) (1982). Previously denied claims originally filed with DOL were automatically reopened and reviewed by that agency. 30 U.S.C. § 945(b) (1982). A claimant who had been denied by both SSA and DOL prior to March 1, 1978 could obtain review of both claims in sequence. 20 C.F.R. § 725.309(e) (1988).

289. *See* 1981 Oversight Hearings, *supra* note 10, at 186; J. NELSON, *supra* note 12, at 133-34.

290. *See supra* note 18.

291. 33 U.S.C. § 922 (1982), incorporated by reference into 30 U.S.C. § 932(a) (1982); *see also* 20 C.F.R. § 725.310 (1988).

readjudication.²⁹² Absent a timely request for modification, a previously denied DOL claim may not be reopened.²⁹³

In its black lung regulations, however, DOL has moderated the impact of an absolute rule of *res judicata* for a limited class of claimants. These rules provide generally that a duplicate claim filed by any claimant during the pendency of an earlier filed claim will simply merge with the earlier claim, thus losing any independent identity.²⁹⁴ If the later claim is filed more than one year after the final denial of an earlier claim, the later claim may, if it was filed by a living miner, be adjudicated on its merits if the miner is able to show a "material" change in conditions.²⁹⁵ These regulations apply a strict rule of *res judicata* in survivors' claims and permit no reopening if a duplicate survivor's claim is filed more than one year after the final denial of an earlier claim filed by the same survivor.²⁹⁶ The rationale supporting a distinction between living miner and survivor claims is that a living miner's condition may worsen, thus justifying a new look at the claim, while a survivor who refiles can only seek a blanket waiver of *res judicata* to justify further consideration. Nothing that is relevant to entitlement can change once the miner has died.

The most significant problem to be confronted by a refiler who is able to meet the requirements of 20 C.F.R. section 725.309(c) or (d), by showing a material change in conditions, is that the later claim most likely will be adjudicated under the Part 718 eligibility rules.²⁹⁷ If the earlier claim was considered under the interim presumption and the claimant was unable to meet the minimal requirements of the interim eligibility rules, there is little likelihood that the more demanding requirements of Part 718 can be met.

292. *O'Keeffe v. Aerojet—General Shipyards*, 404 U.S. 254, 255 (1972).

293. *Pittston Coal Group*, 109 S. Ct. at 424.

294. 20 C.F.R. §§ 725.309(c), (d) (1988).

295. *Id.*

296. *Id.*; see *Clark v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 1-205 (1986), *rev'd on other grounds*, 838 F.2d 197 (6th Cir. 1988).

297. See *Spese v. Peabody Coal Co.*, 11 Black Lung Rep. (MB) 1-174, 177 (1988); *Eccher v. Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 1-1 (1987).

1. Merger of Multiple Claims

Like most black lung matters, the duplicate claim rules, while relatively simple and logical, have spawned considerable litigation. The key issues remain largely unsettled at this time. The most potentially disruptive question has been presented in *Spese v. Peabody Coal Co.*²⁹⁸ In *Spese*, the miner filed a claim in 1976 that was finally denied under the DOL interim presumption in 1979. He filed an entirely new claim in late 1981. *Spese* did not challenge the finality of the 1979 denial, but contended instead that his 1981 claim reactivated his 1976 claim under the language of 20 C.F.R. section 725.309(c).

The underlying premise of *Spese's* theory is that the interim presumption applies in perpetuity if a claimant was, at any time, able to utilize the rule. The BRB rejected this theory, holding that the plain language of section 725.309(c) precludes a merger of finally denied claims with newly filed claims after the one year modification period has expired. The BRB noted that new claims are subject to the eligibility criteria applicable on their date of filing.²⁹⁹ The claimant's argument in *Spese* may now be foreclosed by the Supreme Court's application, in *Pittston Coal Group*, of a strict res judicata principle to finally denied black lung claims. *Spese's* argument to the contrary proposes an obvious finesse of the Supreme Court's unanimous holding in *Pittston Coal Group*. The issue is still in litigation.³⁰⁰

298. 11 Black Lung Rep. (MB) at 1-174.

299. *Id.* at 1-177.

300. Yet another attack on the finality of interim presumption denials is predicated on the allegation that denial letters sent by DOL were complex and thus unintelligible to uneducated coal miners. Proponents of this theory claim that the letters violated recipients' constitutional rights to adequate notice of their opportunity to be heard. The theory is somewhat farfetched and was rejected by the BRB in *Stephens v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 1-227 (1987), *aff'd on other grounds*, No. 87-3817 (4th Cir. 1988) (unpublished). Litigation of this question is, however, ongoing. Most recently, the plaintiffs in *Pittston Coal Group v. Sebben* sought to amend their complaint at the district court after remand by the Supreme Court. See *supra* notes 116-133 and accompanying text for a discussion of *Pittston Coal Group*. The proposed amendments asserted, among other things, that claims had been improperly denied because the DOL did not send notices of denial via certified mail, as required by law. The district court rejected this condition and denied the motion to amend. *Sebben v. Brock*, No. 85-589-A (S.D. Iowa May 31, 1989).

2. Definition of Material Change

Disruptive litigation has also developed over the “material change in condition” prerequisite imposed on a refiler. The meaning of the term itself has been controversial. The current BRB rule permits a finding of a material change on the basis of new evidence demonstrating “a reasonable possibility that it [the new evidence] would change the prior administrative result.”³⁰¹ The BRB’s current definition is not likely to prove very helpful as these claims are litigated, nor is it precise enough to square with relevant statutory limitations.

The modification provisions of section 22 of the Longshore Act³⁰² permit readjudication if, within a year from a prior denial, the claimant proves a mistake of fact or a change in conditions. In effect, section 22 permits any party to require a readjudication of any or all facts decided by an administrative law judge. After the year expires, the “mistake” prong of section 22 can no longer apply and the change in condition must be “material” in order for a black lung claimant to succeed under 20 C.F.R. section 725.309. Within the practical confines of a previously denied black lung claim, the only change that can logically be material occurs where the miner has occupational lung disease arising out of his mining exposure that was not totally disabling at the time of initial adjudication, and his disease has progressed to total disability by the time of the later filing. A material change may also arise if the miner continues to work after his first claim is denied and continued exposure precipitates diagnosable pneumoconiosis or his disease becomes disabling.

It seems, however, that the BRB’s definition of “material change” encompasses a far broader range of possibilities that might permit a miner simply to relitigate a previously decided issue, not because there has been a material change, but because the claimant has found more favorable or more persuasive expert witnesses. For example, if in the first round of adjudication the miner’s chest x-rays are negative and pneumoconiosis is not otherwise diagnosed, the new filing should, logically, be barred unless the miner has continued or

301. *Spese*, 11 Black Lung Rep. (MB) at 1-176.

302. 33 U.S.C. § 922 (1982).

has returned to dusty coal mine work. If the miner did not have pneumoconiosis at the first adjudication and did not return to work in a dusty environment, any new proof of the presence of the disease would be gratuitous, perhaps tending to show that the original evidence relied upon was mistaken, but not showing a material change in the miner's condition.³⁰³

If the clearly drawn distinction between a modification proceeding (in which a mistake can be corrected) and a duplicate claim filing (in which a true material change must be demonstrated) is to have any meaning, new proof that simply relates back to the old claim should be unavailing. It is not clear that the current BRB formulation observes this distinction. These matters will be extensively litigated.

3. The *Lukman* Problem

A more immediate problem has resulted from the BRB's decision in *Lukman v. Director, Office of Workers' Compensation Programs*.³⁰⁴ In *Lukman*, the BRB held that a claimant seeking to pursue a duplicate claim must convince a DOL deputy commissioner that a material change in condition has been established. If a claimant fails to convince this administrative claims processor, according to the BRB, there is no right to have the matter tried before an administrative law judge. Instead, the dissatisfied claimant's only option is to file an appeal with the BRB, which then reviews the deputy commissioner's findings to determine whether they are supported by substantial evidence.³⁰⁵

In reaching this conclusion, the BRB gave a literal reading to the language of 20 C.F.R. section 725.309(d), which appears to invest the deputy commissioner with exclusive authority to determine

303. Simple pneumoconiosis does not progress without further exposure to coal mine dust. W.K.C. MORGAN & A. SEATON, *supra* note 67, at 390-91. It follows, therefore, that if simple pneumoconiosis is not present when a miner leaves coal mining employment, the disease will not suddenly develop in later years without additional occupational exposure.

304. 10 Black Lung Rep. (MB) 1-56 (1987), *aff'd on reh'g*, 11 Black Lung Rep. (MB) 1-71 (1988), *petition for review filed*, No. 88-1733 (10th Cir. 1988); *see also Eccher*, 10 Black Lung Rep. (MB) 1-1.

305. *Lukman*, 11 Black Lung Rep. (MB) at 1-74.

whether to permit a duplicate claim to proceed to an adjudication on the merits. The BRB felt that a literal and exclusionary reading of the reference to “deputy commissioner” in the regulations would be the most efficient way to handle refiled claims, as it would keep frivolous duplicate claims out of the perpetually overworked Office of Administrative Law Judges.

It is highly questionable whether *Lukman* will be upheld by the circuit courts. The BRB’s logic, which at first glance has some appeal, falters on the premise that all refilings are likely to be frivolous. It is more likely that most refilings will be debatable and thus a proper subject for formal litigation before an administrative law judge. More importantly, it is difficult to square the BRB’s holding with applicable statutory language. Sections 19(c) and (d) of the Longshore Act³⁰⁶ clearly provide that a party who disagrees with the findings of a deputy commissioner is entitled on demand to a formal hearing. Indeed, any party’s right to a hearing upon timely request has been considered a cornerstone principle of the Longshore Act for over sixty years.³⁰⁷ Furthermore, DOL’s regulations emphasize the right to a hearing on timely demand in several different provisions.³⁰⁸

Courts will probably find it difficult to sustain the BRB’s approach in *Lukman*. Hundreds, if not a thousand or more claimants have already had refiled claims rejected by deputy commissioners and have pursued appeals to the BRB. Given the “substantial evidence” standard of review at the BRB, appealing most of these cases will be a fruitless exercise. For those claimants who persevere (many have had claims pending for ten years or longer) the right to a hearing should be forthcoming eventually.

The multiple claims problem is itself a direct consequence of the program’s inconsistencies. Miners, like everyone else, expect fair and equal treatment from their government. Because the federal black lung program discriminates among claimants so significantly, de-

306. 33 U.S.C. §§ 919(c), (d) (1982), incorporated by reference into 30 U.S.C. § 932(a) (1982).

307. See *Crowell v. Benson*, 285 U.S. 37, 47-49 (1932); see also, *Pearce v. Director, Office of Workers’ Compensation Programs*, 647 F.2d 716, 724-25 (7th Cir. 1981).

308. 20 C.F.R. §§ 725.419(d), 725.450, 725.451 (1988).

pending solely on the date on which the claim was filed, the disparate treatment of otherwise similarly situated claimants must seem inexplicable to those who cannot obtain an award. Presumably, there is a strong sense that this unfair treatment will be corrected if the unsuccessful claimant keeps on trying.

C. *Fees for Claimants' Representatives*

Claimants' representatives in federal black lung cases are entitled by statute and regulation to a reasonable fee for services rendered and reimbursement of expenses incurred.³⁰⁹ The regulations prohibit payment of any fees not approved by "the deputy commissioner, administrative law judge, or appropriate appellate tribunal, as the case may be, before whom the services were performed."³¹⁰ A representative seeking a fee for services rendered and reimbursement of expenses must submit a fee petition to the appropriate arbiter, with a copy to all parties including the claimant.³¹¹ Fees and expenses payable to attorneys who represent claimants are assessed against

309. Section 28 of the Longshore Act, 33 U.S.C. § 928 (1982), provides the statutory authority for a fee award to a claimant's attorney. This statute is incorporated into the federal black lung program by § 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a) (1982). Regulations regarding payment of a representative's fees under Part C of the 1969 Act as amended are set forth at 20 C.F.R. §§ 725.360-367 (1988). Unlike section 28 of the Longshore Act, which limits fee awards to licensed attorneys, *see Todd Shipyards Corp. v. Director, Office of Workers' Compensation Programs*, 545 F.2d 1176 (9th Cir. 1976), the black lung regulations permit the award of a representative fee to persons other than attorneys (i.e., lay representatives). 20 C.F.R. §§ 725.362, 725.363 (1988).

310. 20 C.F.R. § 725.366(a) (1988).

311. Failure to comply with the requirements of § 725.366(a) will result in rejection of a fee request. *Cavote v. Director, Office of Workers' Compensation Programs*, 2 Black Lung Rep. (MB) 1-1052 (1980). The regulation provides, in relevant part, that

[t]he application shall be filed and served upon the claimant and all other parties within the time limits allowed by the [appropriate arbiter]. . . . The application shall be supported by a complete statement of the extent and character of necessary work done, and shall indicate the professional status . . . of the person performing such work, and the customary billing rate for each such person. The application shall also include a listing of reasonable unreimbursed expenses, including those for travel, incurred by the representative or an employee of the representative in establishing the claimant's case. Any fee requested under this paragraph shall also contain a description of any fee requested, charged, or received for services rendered to the claimant before any State or Federal court or agency in connection with a related matter.

20 C.F.R. § 725.366(a) (1988).

the responsible operator liable for payment of benefits.³¹² If no responsible operator is identified, liability for attorney fees and expenses rests with the BLDTF in cases which are initially denied by DOL if benefits are subsequently awarded against the BLDTF.³¹³ Fees and expenses awarded to lay representatives must be paid by the claimant.³¹⁴

The only permissible fees are those approved by the appropriate adjudication officer in claims where benefits are awarded to the claimant.³¹⁵ Contingent fees and otherwise stipulated or contracted fees are not permitted.³¹⁶ Instead, the adjudicating officer has the

312. Responsible operators are liable for attorney fees only when a claimant is found entitled to benefits and only for services rendered and expenses incurred after the operator received notice of potential liability and declined to pay compensation, or subsequent to the expiration of a thirty-day period after notice of potential liability, whichever occurs first. 30 U.S.C. § 928(a), as incorporated by 33 U.S.C. § 932(a) (1982); 20 C.F.R. § 725.367; O'Quinn v. The Pittston Co., 4 Black Lung Rep. (MB) 1-25 (1981). The claimant is liable for services rendered prior to commencement of the responsible operator's liability. *Id.*

313. The Secretary of Labor originally took the position that attorney fees could not be assessed against the BLDTF absent specific statutory authority. See 20 C.F.R. § 725.367, Comments. The Secretary later dropped this position, and it is now well settled that the BLDTF is liable for attorney fees and expenses in cases where DOL finds a claimant not entitled to benefits, but where the claim is subsequently awarded against the BLDTF. See *Graham v. Director, Office of Workers' Compensation Programs*, 10 Black Lung Rep. (MB) 1-30 (1987) (citing *Director, Office of Workers' Compensation Programs v. Poyner*, 810 F.2d 99 (6th Cir. 1987)); *Ackison v. Director, Office of Workers' Compensation Programs*, 8 Black Lung Rep. (MB) 1-353 (1985); *Billingsley v. Director, Office of Workers' Compensation Programs*, 2 Black Lung Rep. (MB) 1-854, 857 (1980); *Blagg v. Director, Office of Workers' Compensation Programs*, 2 Black Lung Rep. (MB) 1-1075 (1980); but see *Director, Office of Workers' Compensation Programs v. Simmons*, 706 F.2d 481 (4th Cir. 1983) (holding that the BLDTF's liability for attorney fees commences within thirty days after written notice of potential liability, *i.e.*, the date of claim filing, whether or not initial medical development is complete and the initial finding of entitlement has been issued). Legal services rendered where DOL never contests liability or before commencement of the BLDTF's liability are the claimant's responsibility and may be assessed as a lien against benefits awarded to the claimant. 20 C.F.R. § 725.365 (1988); see generally *Graham*, 10 Black Lung Rep. (MB) 1-30; *Fultz v. Director, Office of Workers' Compensation Programs*, 4 Black Lung Rep. (MB) 1-696 (1982).

314. *Madrak v. Director, Office of Workers' Compensation Programs*, 7 Black Lung Rep. (MB) 1-559, 561 (1984) (citing *Harrison v. Liberty Mutual Ins. Co.*, 3 Black Lung Rep. (MB) 1-596, 597 (1981)). Fees payable to lay representatives cannot be assessed as a lien against benefits awarded to the claimant. 20 C.F.R. § 725.365 (1988).

315. See *Thompson v. Potashnick Const. Co.*, 812 F.2d 574, 577 (9th Cir. 1987); *Davis v. U.S. Department of Labor*, 646 F.2d 609, 613 (D.C. Cir. 1980); *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 419 (5th Cir. 1981); *Clark v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 1-211 (1986) (citing *Wilhelm v. Seattle Stevedore Co.*, 15 Ben. Rev. Bd. Serv. (MB) 432 (1983) and *Director, Office of Workers' Compensation Programs v. Hemingway Transport, Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 73 (1978)).

316. *Wells v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 1-63 (1986); *Williamson v. Director, Office of Workers' Compensation Programs*, 1 Black Lung Rep. (MB) 1-1005 (1978).

discretion to determine what is a reasonable fee for necessary services, in accordance with 20 C.F.R. section 725.366(b), and this determination will not be disturbed on appeal unless it is shown to be arbitrary, capricious, an abuse of discretion, or contrary to the applicable law.³¹⁷ Attorneys who receive unapproved fees may be subject to criminal penalties and sanctions for unethical conduct.³¹⁸ In West Virginia, however, a charge of unethical conduct for accepting unapproved fees cannot be sustained as the state's highest court has declared that the federal black lung attorney fee regulations are unconstitutional and void.³¹⁹

The West Virginia Supreme Court of Appeals dismissed ethics charges brought against an attorney who had received from successful black lung claimants twenty-five percent of accrued benefits under a contingent fee agreement between the lawyer and his clients. The attorney did not seek DOL approval of this arrangement, did not seek additional fees from DOL, and deposited the fees he received into an escrow account in anticipation of DOL changing its regulations to allow contingent fee arrangements. The West Virginia court held that DOL's attorney fee system "denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain representation by competent counsel in the highly adversarial process of black lung litigation."³²⁰

317. *Lenig v. Director, Office of Workers' Compensation Programs*, 9 Black Lung Rep. (MB) 1-147 (1986) (citing *Marcum v. Director, Office of Workers' Compensation Programs*, 2 Black Lung Rep. (MB) 1-894 (1980)).

318. Section 28(e) of the Longshore Act, 30 U.S.C. § 928(e) (1982), provides for criminal penalties of a fine of not more than \$1,000 or imprisonment for not more than one year or both, for each violation of the statute. See *Hensley v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1054 (D.C. Cir. 1982); *Committee of Professional Ethics and Conduct of Iowa State Bar Ass'n v. Christophers*, 348 N.W.2d 227 (1984) (Supreme Court of Iowa suspended indefinitely the law license of an attorney who received unauthorized attorney fees from black lung claimants). *But see United States v. Carter*, No. 83-5169 (4th Cir. April 15, 1985) (unpublished) (holding that Longshore Act provisions for criminal penalties for receiving unauthorized fees are not incorporated into federal black lung legislation).

319. *Committee on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988), *petition for cert filed sub nom.*, *U.S. Dept of Labor v. Triplett*, 57 U.S.L.W. 3706 (1989).

320. *Triplett*, 378 S.E.2d at 95. The court pointed to long delays in the payment of attorney fees, without any provision for interest, and the "lack of premiums to offset the contingent nature of the work" as the factors keeping attorneys from accepting black lung cases. *Id.*, at 91. *But see McKee v. Director, Office of Workers' Compensation Programs*, 6 Black Lung Rep. (MB) 1-233 (1983) (holding that the risk of loss factor is considered in setting an appropriate hourly rate for attorneys representing black lung claimants).

The West Virginia court found that “the total regulatory scheme [providing for attorney fees in black lung cases] is unconstitutionally applied”³²¹ because it effectively “discourages lawyers from representing black lung claimants so that many claimants, with cases of at least arguable merit, are unable to find counsel to represent them.”³²² The court observed that the complex and adversarial nature of the federal black lung program subjects claimants without attorneys to “a baffling and frustrating experience.”³²³ The court suggested that adoption of a system providing for either a stipulated contingent fee percentage or a contingent multiplier for calculating attorney fees may encourage representation of black lung claimants by competent counsel.³²⁴

The West Virginia Supreme Court of Appeals decision underscores a very real and widespread problem: unavailability of counsel to represent claimants in federal black lung cases. The court was correct in its observation that more and more claimants are forced to represent themselves in hearings before administrative law judges and on appeal to the BRB and circuit courts of appeals. The result is repeated continuances of scheduled hearings, delays in submission of cases for decision on appeal, and an impeded litigation process as judges and appellate tribunals must take care to insure that unrepresented claimants have a fair opportunity to present their cases.³²⁵

Although it is true that DOL procedures make it difficult for claimants’ attorneys to collect fees, the cause of this problem is more complex. For many years claimants’ attorneys were not required to mount a substantial effort to obtain awards for their clients because of the liberal entitlement criteria, particularly the interim presump-

321. *Triplett*, 378 S.E.2d at 89.

322. *Id.*

323. *Id.* at 88.

324. *Id.* at 93-95.

325. An administrative law judge “has ample authority to protect the rights of the unrepresented claimant and is required to do so.” 20 C.F.R. § 725.456, Comments and Discussion, *reprinted at* 43 Fed. Reg. 36,798 (1978). A *pro se* appeal to the BRB is treated as raising the issue of whether the judge’s decision and order are supported by substantial evidence and are consistent with the applicable law. *Fetterman v. Director, Office of Workers’ Compensation Programs*, 7 Black Lung Rep. (MB) 1-688 (1985); *Isbell v. Director, Office of Workers’ Compensation Programs*, 4 Black Lung Rep. (MB) 1-180 (1981).

tions. Now that claimants must prove entitlement on the basis of persuasive medical evidence under Part 718, the representation of federal black lung claimants is a far less attractive prospect. The successful pursuit of a Part 718 claim very simply requires much more effort than was the case under the SSA and DOL interim presumptions. Since DOL does not permit claimants' attorneys to collect a fee if benefits are not awarded,³²⁶ and since the Black Lung Benefits Reform Act of 1977, as amended, prohibits contingent fees even if an award is made, whatever incentive attorneys may have had to take the cases of federal claimants has largely disappeared. A solution to this problem will require adoption of regulatory changes, and perhaps statutory amendments, to make legal representation of federal black lung claimants less onerous.

D. *Medical Benefits Issues*

Workers' compensation laws in all fifty states and the District of Columbia³²⁷ have traditionally imposed upon employers the obligation to pay the reasonable cost of medical care necessitated by an employee's occupationally related injury or disease. The original black lung benefits provisions of the Federal Coal Mine Health and Safety Act of 1969 did not incorporate any such provision. Although there is no reference to the matter in congressional materials, it was no doubt thought that the medical needs of totally disabled miners would be addressed by the federal Medicare and Medicaid programs, UMW contract provisions, or by state workers' compensation laws.

In the 1972 amendments, medical benefit provisions were added to Part C but not Part B of the 1969 Act.³²⁸ This was accomplished by incorporating the Longshore Act's medical benefits provision into

326. Neither the Black Lung Benefits Reform Act of 1977, as amended, nor DOL regulations expressly prohibit an award of attorney fees to counsel for an unsuccessful claimant. The rule establishing this prohibition primarily reflects DOL and BRB policy. No claimant's attorney has challenged this policy in the circuit courts, even though there are serious questions as to its validity.

327. See U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1987, at 24 (1987).

328. See H.R. CONF. REP. NO. 1048, 92d Cong., 2d Sess. 9, reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 2338, 2341.

Part C.³²⁹ On its own accord, DOL in 1973 published regulations permitting any SSA/Part B beneficiary to file a new Part C claim with DOL for whatever additional benefits might be obtained under Part C provisions, including medical benefits.³³⁰ Probably because Part B beneficiaries had their medical bills paid by Medicare, Medicaid, union health and welfare funds, or under state workers' compensation laws, only a small number of medical benefit claims were filed under DOL's 1973 rules.³³¹

In the course of deliberations on the 1977 amendments, the House of Representatives proposed to add a provision requiring SSA to notify all living miners receiving benefits under Part B that they could file a new Part C claim with DOL for medical benefits only (MBO claims).³³² Claims for medical benefits only would be adjudicated under the DOL interim presumption and, if awarded, these benefits would be paid by the responsible mine owner.³³³ The Senate agreed to this provision in conference, and it was included in the Black Lung Benefits Reform Act of 1977.³³⁴

No particular reason was ever given for providing this additional benefit to Part B beneficiaries; no need for it was either identified or investigated by Congress. Notices were sent out by SSA in May 1978, and by June 1981 over 116,000 MBO claims had been filed.³³⁵ Of these, approximately 100,000 were potential liabilities of the BLDTF; the rest were assigned to individual responsible mine owners.³³⁶ Local and national labor unions representing coal miners played a substantial role in encouraging medical benefit filings, as treatment costs paid under the federal program were costs saved by the unions' health and retirement funds.

329. Pub. L. No. 92-303, § 5(4), 86 Stat. 155; 33 U.S.C. § 907, *incorporated by reference into* 30 U.S.C. § 932(a) (1982).

330. 38 Fed. Reg. 26,045 (1973). The regulation was held valid in *National Independent Coal Operators Ass'n v. Brennan*, 372 F.Supp. 16 (D.D.C.), *aff'd*, 419 U.S. 955 (1974).

331. Snyder & Solomons, *supra* note 5, at 769-70.

332. H.R. 4544, 95th Cong., 1st Sess § 11 (1977); *see supra* note 93 and accompanying text.

333. H.R. CONF. REP. NO. 864, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 308, 312.

334. Pub. L. No. 95-239, § 11, 92 Stat. 101 (codified at 30 U.S.C. § 924a (1978)).

335. *See* 1981 *Hearings*, *supra* note 239, at 186.

336. *Id.*

Pneumoconiosis is not curable and for non-smoking miners there is no recognized treatment.³³⁷ Even for cigarette smoking miners with pneumoconiosis, the treatment is generally considered to be for the effects of tobacco abuse rather than for pneumoconiosis.³³⁸ Miners with complicated pneumoconiosis, or progressive massive fibrosis, may require extensive medical care, and this advanced stage of the disease may cause right side heart disease and related congestive heart failure.³³⁹ Complicated pneumoconiosis is, however, quite rare.³⁴⁰ In a study of 300 black lung benefit claimants, Drs. William Anderson and Emory Lane found that respiratory symptoms (*i.e.*, symptoms likely to merit treatment) reported by these claimants could be attributed to conditions other than occupationally related lung disease in ninety-eight percent of the cases.³⁴¹

The medical benefit program has, like most other aspects of the black lung program, generated litigation. The DOL wrote regulations for medical benefit claims³⁴² and, bending to direct political pressure, required the automatic award of medical benefits to all Part B claimants if liability was to be assigned to the BLDTF.³⁴³ In these cases, no effort was made to validate the Part B award in any way. In cases involving potential liability of mine operators, the agency rules also require an automatic award pending the operator's exercise of its right to controvert the claim.³⁴⁴

If an operator elects to controvert an MBO claim, the only question presented in the initial proceeding is whether the miner is totally disabled due to pneumoconiosis within the adjudicatory framework of the interim presumption. If medical bills are submitted during

337. See Ulmer, Baving & Reichel, *Physiopathological Considerations in the Treatment of Coal Workers' Pneumoconiosis*, 200 ANNALS OF THE N.Y. ACAD. OF SCI. 633 (1972); W.K.C. MORGAN & A. SEATON, *supra* note 67, at 429.

338. Penman & O'Neill, *Recognition and Management of Complications of Coal Workers' Pneumoconiosis*, 200 ANNALS OF THE N.Y. ACAD. OF SCI. 643-46 (1972).

339. *Id.*

340. See 1981 *Hearings*, *supra* note 239, at 32 (statement of J. Donald Millar, M.D., Director, NIOSH).

341. Anderson & Lane, *Radiologic Evidence of Disease in Miners Seeking "Black Lung" Benefits*, 200 ANNALS OF THE N.Y. ACAD. OF SCI. 506-07 (1972).

342. 20 C.F.R. §§ 725.701-707 (1988).

343. 20 C.F.R. § 725.701A(a)(2) (1988).

344. *Id.*

this initial phase, they are paid by the BLDTF and then submitted to the operator for reimbursement if the miner's underlying eligibility is established.³⁴⁵ If the miner's underlying eligibility is established, the operator may accept or contest the individual medical treatment bills paid by the BLDTF.³⁴⁶ While the vast majority of public and private health care insurers today employ sophisticated medical cost containment and bill audit programs, the DOL, having no expertise in these matters, is an exception. The Longshore Act authorizes DOL to adopt medical cost containment and audit procedures,³⁴⁷ but the agency has shown no real interest in doing so.

After an employer is finally adjudicated as responsible for medical treatment costs, bills are submitted directly by the medical care provider to the operator or its insurance carrier.³⁴⁸ If non-emergency hospitalization is required, or if medical hardware is prescribed (e.g., home oxygen equipment), the employer's prior approval must be obtained.³⁴⁹ If disputes arise over an employer's responsibility for payment of particular bills, the hearings and appeals procedures prescribed for indemnity claims are available, although the deputy commissioner is obligated to make an effort to resolve these disputes informally.³⁵⁰

Individual claim adjudications involving an employer's liability to pay particular medical bills present a unique set of difficulties. Many employers and insurers concede a miner's underlying eligibility for medical benefits without litigation in MBO claims. The separate litigation of a miner's general entitlement is a moot exercise in many cases since there are often no actual liabilities in dispute. Also, most employers and insurers are willing to accept liability for the treatment of occupationally related disease, for which they are required to pay under state workers' compensation laws or private pension plans. For these reasons, it is common for employers to reserve

345. See *Lute v. Split Vein Coal Co.*, 11 Black Lung Rep. (MB) 1-82 (1987).

346. *Id.*; see also, *Connors v. Amax Coal Co.*, 858 F.2d 1226 (7th Cir. 1988); *Connors v. Tremont Mining Co.*, 835 F.2d 1028 (3d Cir. 1988).

347. 33 U.S.C. § 907(g) (1982).

348. 20 C.F.R. § 725.704 (1988).

349. *Id.* § 725.705.

350. *Id.* § 725.707.

judgment on paying MBO claims until bills for treatment are actually submitted for payment.

The compensability of a particular medical bill is often difficult to determine. There are no presumptions or other special rules of evidence applicable to a claim involving medical bills. The burden of proof is, therefore, on the claimant or medical care provider to establish that the treatment rendered was necessary, reasonable, and for black lung disease. Relevant agency rules provide coverage of pulmonary conditions that are "ancillary" to the miner's pneumoconiosis and "palliative measures useful only to prevent pain and discomfort associated with a miner's pneumoconiosis or attendant disability."³⁵¹ No additional guidance is provided by agency rules. Health care providers, claimants, and employers are left guessing whether a particular treatment is or is not sufficiently connected to pneumoconiosis to warrant coverage.

There are no published decisions in this area and, for the most part, responsible health care providers have no interest in attempting to expand the scope of federal black lung medical coverage when other, clearly more appropriate health care insurance is available. The absence of effective cost containment rules, however, encourages some few providers to submit bills for payment under the black lung program in the first instance. When bills are contested, the factual problems presented can be very complex. If a miner suffers from pneumoconiosis and, for example, severe chronic obstructive pulmonary disease due to smoking, or severe cardiovascular disease causing respiratory symptoms, the parties must ask expert witnesses to attempt a differential diagnosis. Making such a diagnosis may be simple, or difficult, depending upon the facts of any given case. These kinds of questions will continue to be litigated.

As a general matter, black lung medical coverage duplicates other medical coverages for the vast majority of miners. In a 1983 survey conducted for DOL, data showed that ninety-two percent of black lung beneficiaries also qualify for some form of social security coverage, virtually all of which coverages include medical care pro-

351. *Id.* § 725.701(b), (c).

grams.³⁵² Thirty percent are covered by private pension and welfare benefit programs, and others are covered under an array of private and public benefit schemes.³⁵³ Whether there ever was a need for the black lung program to provide medical benefits remains an unanswered question.

VI. CONCLUSION

Although the future of the federal black lung initiative may be less turbulent than its past, the present is still very much a product of the clash of principles and objectives that dictated the course of the program in its earlier years. It is difficult to give a capsule summary of this clash of principles. At the risk of being overly simplistic, it seems fair to say that the clash arises, fundamentally, from the fact that during its early years the program could be characterized as the only privately funded federal social welfare program in America. Since Congress could not have enacted an explicit program of this nature (there is some question whether our Constitution would permit Congress to do so), it simply called the subject of the legislation black lung disease, couched the obligation imposed on private parties in workers' compensation terminology, and left it to the agency adjudicators, the parties, and the courts to provide a politically and legally acceptable result. It has not been possible, however, to reconcile the conflicting concerns and expectations of the groups involved.

Congress, the BRB, federal courts of appeals, and DOL have infused considerable rationality to the day-to-day operations of the program, and have instilled a measure of predictability in the disposition of claims and program issues. This predictability is tolerable, if not comfortable, for the coal industry. Claimants, on the other hand, are surely dissatisfied with the fact that black lung benefits are no longer virtually automatic. But the fact of the matter is that miners who are truly victims of pneumoconiosis will be com-

352. U.S. DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, A SAMPLE SURVEY OF ALL SOURCES OF BOTH MONETARY AND NON-MONETARY INCOME OF BLACK LUNG BENEFICIARIES, Table I (1983).

353. *Id.*

pensated, along with a fair number of those who are not totally disabled due to black lung disease. The eligibility rules remain over-inclusive,³⁵⁴ but not nearly to the extent that they were when the interim presumptions applied.

Whatever the future holds, looking back it is difficult to extract intellectually satisfying lessons from the past twenty years. The expectations of the Interdepartmental Task Force in 1976,³⁵⁵ that the black lung program would be a prototype for further federal efforts to address the needs of a broader spectrum of occupational disease victims, have not been realized. No feature of the program seems a particularly good model for any new initiative in this area. Denied claimants cannot understand why their neighbors who filed claims a few months earlier received prompt awards, while their own claims are caught up in litigation for years and ultimately denied. There is no satisfactory explanation to give these people. Moreover, the program has been plagued by fraud and abuse. There have been investigations, and indictments, and convictions of agency personnel, claimant's representatives, and medical care providers.³⁵⁶ The program has been infected by an undercurrent of "petty corruption."³⁵⁷ If anything, the program is the most often cited example of why Congress should leave occupational disease compensation to the individual states.³⁵⁸

The federal black lung program is unique. While it has generated and will continue to generate interesting and complex issues for the courts, it is an object lesson in the problems that are inevitable when an effort is made to require the direct private funding of a social welfare program. It is also an object lesson in the difficulties that are inevitable when Congress is less than candid. Dr. Barth states, "[W]ith the benefit of hindsight, the program must be considered

354. 1982 GAO REPORT, *supra* note 201, at 24 & n.1; *see generally* Renzetti & Richman, *supra* note 19.

355. *See supra* notes 3, 5 and accompanying text.

356. *See, e.g.*, U.S. DEPARTMENT OF LABOR SEMI-ANNUAL REPORT OF THE INSPECTOR GENERAL (1982).

357. *See* J. NELSON, *supra* note 12, at 107-108.

358. *See, e.g.*, P. BARTH, *supra* note 6, at 284; *Hearings on the Occupational Disease Compensation Act of 1983 Before the Subcomm. on Labor Standards of the Comm. on Education and Labor, House of Representatives, 98th Cong., 1st Sess. 381 (1983) (testimony of Leslie Check, Vice President, Crum and Forster Insurance Co.)*.

as a burden on the integrity of the Congress.”³⁵⁹ Much of this is in the past, however, and while the ongoing cost of the program and the huge deficit of the BLDTF will remain troublesome into the future, the program is winding down. Fewer claims are being filed and fewer approved since DOL promulgated its permanent regulations in 1980 and Congress adopted the 1981 amendments. Many state workers’ compensation programs now provide richer and more easily obtained recoveries for black lung victims.

In conclusion, there seems to be general agreement that the federal black lung experience provides no roadmap for assisting those who suffer from other occupational diseases or the victims of industrial displacement caused by changes in our national economy. In the interests of good government and fairness to all groups of workers and employers alike, the black lung phenomenon should not be repeated.

359. P. BARTH, *supra* note 6, at 283.

