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THE FEDERAL BLACK LUNG PROGRAM— THE VIEW FROM THE TOP

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I. INTRODUCTION

The federal black lung program was instituted by Congress in 1969¹ to compensate coal miners and their dependents for totally disabling respiratory and pulmonary impairments arising as a direct consequence of coal mine employment.² From its inception to the present day, the program has been limited in its scope of coverage. It was not intended by Congress to be “a gift of a grateful nation” to disabled miners.³ Additionally, it was not intended to provide compensation to miners experiencing traumatic injuries or to compensate nonrespiratory disorders, as Congress found that state workers’ compensation programs were adequate to provide assistance in dealing with these problems.⁴ However, due to the insidious nature of progressive occupational respiratory disorders such as pneumoconiosis, Congress found that state programs, which were aimed at adjudicating time-definite injuries, often precluded recovery due to the running of statutes of limitation.⁵ The black lung program “was intended to rectify the historical lack of adequate state compensatory schemes for miners suffering from pneumoconiosis.”⁶ Congress passed the Federal Coal Mine Health and Safety Act of 1969 to provide a means of assuring benefits to a considerable number of miners who were inadequately compensated under state law.

This Article will discuss the evidentiary changes brought about by the 1981 amendments to the Act,⁷ and attempt to fully delineate the complex and often time-

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¹ The federal black lung program is the product of four sets of statutes. This program was originally enacted in Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). The program has been amended on three occasions: Black Lung Benefits Amendments of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) [hereinafter referred to as the “1972 amendments”]; Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1977) and Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1977) [hereinafter jointly referred to as the “1978 amendments”]; Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (1981) [hereinafter referred to as the “1981 amendments”].

² 30 U.S.C. § 901(a) (1982).

³ See *Boyd v. Califano*, 479 F. Supp. 846, 848 (W.D. Va. 1978), *aff’d sub nom.* *Boyd v. Harris*, 609 F.2d 505 (4th Cir. 1979).

⁴ S. 2917, 91st Cong., 1st Sess. § 501 (1969) (congressional findings), *reprinted in* HOUSE COMM. ON EDUCATION AND LABOR, LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 at 904 (1977).

⁵ *Id.*

⁶ *Hall v. Harris*, 487 F. Supp. 535, 538 (W.D. Va. 1980).

⁷ See *supra* note 1.

consuming claims process. In discussing these evidentiary changes, the Article will try to avoid a policy discussion of the future adjudication of the statutory and regulatory changes mandated by the 1981 amendments. Such a discussion would be premature and would be inappropriate due to our quasi-judicial roles. Furthermore, it may in effect tie our hands in the disposition of these issues once they become ripe for review. Regarding the claims process, we will set forth the administrative path of a claim and detail the various duties and responsibilities of the levels of administrative review. Previous issues of the West Virginia Law Review have discussed the viewpoints of claimants, operators, and medical experts in the black lung area, and have provided a discussion of the legislative path of the Act and its subsequent amendments.⁸ The reader is invited to review these articles for further background information on the federal black lung program.

II. THE ROLE OF STATUTORY PRESUMPTIONS

A. *Historical Look at the Act's Presumptions*

In order to prevail under the Act,⁹ the claimant is assigned the initial burden of establishing, *inter alia*, the existence of pneumoconiosis, total disability arising from pneumoconiosis, and the fact that such disability arose directly out of employment in the nation's coal mines.¹⁰ To aid a claimant in proving these various elements, Congress has provided specific presumptions in the black lung legislation. These presumptions, generally speaking, operate to shift the burden of producing evidence regarding the presumed facts from the claimant to the party opposing entitlement.¹¹ The availability of these statutory presumptions has not remained constant over the life of the black lung program, and presumptions have appeared and disappeared as Congress has re-examined its conscience in determining the equities of the legislative scheme.

Let us briefly examine the presumptions which have appeared in the Act. Title IV of the original 1969 Act¹² provided three presumptions, two rebuttable and one irrebuttable:

⁸ See Smith & Newman, *The Basics of Federal Black Lung Litigation*, 83 W. VA. L. REV. 763 (1981); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. VA. L. REV. 721 (1981); Lopato, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677 (1983); Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981); Millstone & Codinach, *The Survivors' 25-Year Presumption Under the Black Lung Benefits Reform Act of 1977: A Case for Its Unconstitutionality*, 82 W. VA. L. REV. 1079 (1980).

⁹ All references to administrative regulations in this Article will be to the Department of Labor regulations found at 20 C.F.R. Part 725 (1984).

¹⁰ In a survivor's case, the claimant must also initially establish a legal relationship to the miner and dependency upon the miner. See generally 20 C.F.R. §§ 725.212-.233 (1984).

¹¹ McCORMICK, EVIDENCE 821 (2d ed. 1978).

¹² See *supra* note 1.

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis; and

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be in a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, as the case may be.¹³

The 1972 amendments¹⁴ left these presumptions essentially intact, with certain minor changes. First, Congress eliminated the requirement found in section 402(d),¹⁵ that the miner claiming benefits have been employed in an *underground* coal mine. In this way, the Act's provisions were extended to miners engaged in surface operations as well. Second, the presumption of total disability at the time of death, found in the last phrase of section 411(c)(3), was added. In addition, a fourth rebuttable statutory presumption was enacted:

[I]f a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's . . . claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. . . . The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.¹⁶

The 1977 amendments significantly broadened eligibility for benefits under the Act, and allowed claims denied under the prior law to be reopened for evaluation in light of the newer standards. The fifth and final statutory presumption, this one rebuttable in character, was added.

¹³ 30 U.S.C. § 921(c) (1970), amended by 30 U.S.C. § 921(c) (1982).

¹⁴ See *supra* note 1.

¹⁵ 30 U.S.C. § 902(d) (1970), amended by 30 U.S.C. § 902(d) (1982).

¹⁶ 30 U.S.C. § 921(c)(4) (Supp. II 1972), amended by 30 U.S.C. § 921(c)(4) (1982).

In the case of a miner who dies on or before the date of the enactment of the Black Lung Benefits Reform Act of 1977 [March 1, 1978] who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 412(a)(2), unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evidence as is available with respect to the health of the miner at the time of his or her death.¹⁷

The latest amendments to the Act, which were passed in 1981,¹⁸ signalled a change in Congress' attitude toward entitlement. Major revisions were made in the structure of the black lung program, including the repeal of *three* of the statutory presumptions. The ten- and fifteen-year employment presumptions were not to apply to claims filed after the effective date of the new legislation, and the most recent presumption, linking a miner's death to pneumoconiosis after twenty-five years of coal mine employment, was to cease to be effective 180 days after that date.¹⁹ As can be seen, the 1981 amendments have taken Title IV almost full circle by retaining only two of the three presumptions found in the 1969 Act.

Prior to examining the remaining presumptions, let us first discuss what legal presumptions are and what they are designed to do. As previously noted, a presumption is an assigned procedural device which shifts the burden of producing evidence with regard to the presumed fact.²⁰ This burden of proof or persuasion may be either judicially or legislatively assigned to a specific party.²¹ In the case of the Act, the presumptions were, of course, legislatively assigned.

The quantum of proof necessary to invoke a presumption is generally specified in the language of the presumption itself. Invocation of an irrebuttable presumption ends the inquiry into the presumed fact raised by the presumption. In other words, by triggering the presumption the presumed fact is conclusively established. On the other hand, the invocation of a rebuttable presumption shifts the burden of proof or persuasion to the party opposing entitlement. Thus, the onus is placed on that party to put forward evidence tending to disprove the existence of the presumed fact.²²

Under the Act, unlike Rule 301 of the Federal Rules of Evidence,²³ a presump-

¹⁷ 30 U.S.C. § 921(c)(5) (Supp. II 1978), amended by 30 U.S.C. § 921(c)(5) (1982).

¹⁸ See *supra* note 1.

¹⁹ 30 U.S.C. § 921 (1982).

²⁰ In *American Coal Co. v. Benefits Review Bd.*, 738 F.2d 387 (10th Cir. 1984), the court of appeals held that Rule 301 of the Federal Rules of Evidence does not control the operation of presumptions for cases arising under the Act. The court held that the federal rules, by their express terms, apply only to proceedings in federal courts and before United States magistrates; they are not intended to apply to administrative hearings such as those held under the Act.

²¹ *NLRB v. Transportation Management Corp.*, 462 U.S. 393 n.7 (1983).

²² See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976).

²³ See *supra* note 20 and accompanying text.

tion is not rebutted merely by the introduction of contrary evidence. Rather, the presumption ceases to have effect only if the language providing for rebuttal is specifically satisfied. The Fifth Circuit has analyzed the question of burden of proof with regard to one such presumption as follows:

The [presumption] shifts to the Secretary or to the mine operator the burden of disproving disability due to pneumoconiosis once the claimant makes the threshold showing that he worked fifteen or more years in the mines and suffers a totally disabling respiratory or pulmonary impairment. The burden on the Secretary or the operator is then to prove by a preponderance of evidence that the claimant does not suffer pneumoconiosis, as defined by the Act, or that the impairment is not connected with his employment in the mines.²⁴

In *Alabama By-products v. Killingsworth*, the Court held that the terms "establish" and "prove" are synonymous.²⁵

B. *The Remaining Presumptions*

Turning to the remaining statutory presumptions, sections 411(c)(1)²⁶ and (c)(3)²⁷ of the Act, we must note that these presumptions have been the subject of considerable litigation and do not seem to have been significantly affected by the 1981 amendments. Section 411(c)(1) provides that, in the case of a miner who has worked for ten or more years in one or more coal mines and is suffering from pneumoconiosis, it is presumed that his pneumoconiosis arose out of his coal mine employment. While a clear distinction could have been drawn between miners working underground and those engaging in surface operations, the Board has held that in view of the absence of legislative history suggesting this distinction, the section 411(c)(1) presumption applies to all coal miners.²⁸ Once the section 411(c)(1) presumption has been invoked, the burden of proof shifts to the party opposing benefit entitlement (typically the employer or the Director) to rebut the presumption regarding the causal relationship of pneumoconiosis to coal mine employment. While rebuttal is difficult, the opposing party may succeed by offering evidence affirmatively linking the miner's pneumoconiosis to some other environmental exposure.

The other remaining presumption, section 411(c)(3),²⁹ provides that a miner is presumed to be totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that he was totally disabled due to pneumoconiosis at the time of this death, if the claimant establishes that the miner is suffering or suffered

²⁴ *United States Steel Corp. v. Gray*, 588 F.2d 1022, 1028 (5th Cir. 1979).

²⁵ *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984).

²⁶ 30 U.S.C. § 921(c)(1) (1982).

²⁷ 30 U.S.C. § 921(c)(3) (1982).

²⁸ *Luker v. Old Ben Coal Co.*, 2 *BLACK LUNG REP.* (MB) 1-304 (1979).

²⁹ 30 U.S.C. § 921(c)(3) (1982).

from complicated pneumoconiosis. This is an irrebuttable presumption, which may be utilized in claims filed by survivors of deceased miners as well as by living miners. Unlike other statutory presumptions included from time to time in the Act, section 411(c)(3) does not require a miner to have worked for a specific number of years in coal mine employment to give rise to the irrebuttable presumption.

Because the section 411(c)(3) presumption provides only that the miner is irrebuttably presumed to be totally disabled, the issue of the etiology of the miner's complicated pneumoconiosis must also be resolved. If the claimant establishes that the miner had ten or more years of coal mine employment, the burden of disproving this causal nexus is placed upon the party opposing entitlement by the ten-year presumption.³⁰ If the claimant fails to establish that the miner had at least ten years of coal mine employment, the burden rests with the claimant to establish the causal nexus.

C. *Establishing Benefits Without Presumptions*

The elimination of three of the five statutory presumptions has placed additional burdens upon claimants for black lung benefits. Without the aid of the deleted presumptions once found at sections 411(c)(2), (c)(4), and (c)(5), and upon the claimant's failure to establish the presence of complicated pneumoconiosis under section 411(c)(3), the claimant must affirmatively establish: (1) that the miner has or had pneumoconiosis, (2) that the miner's pneumoconiosis is either totally disabling or was the cause of the miner's death, and (3) if the miner worked for less than ten years in the nation's coal mines, that the pneumoconiosis arose out of coal mine employment. A failure to prove any of these requisite elements of proof requires a denial of benefits under the Act.

What is pneumoconiosis?³¹ Pneumoconiosis is defined in section 402(d) of the Act as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."³² Pneumoconiosis may thus be either "clinical" (that is, clinically demonstrated by way of autopsy, biopsy, or X-ray) or "presumed" (that is, diagnosed as a chronic respiratory or pulmonary impairment arising out of coal mine employment). In the latter case, if the inhalation of coal dust has caused the miner to develop a chronic respiratory or pulmonary disorder, such as chronic bronchitis or emphysema,

³⁰ 30 U.S.C. § 921(c)(1) (1982).

³¹ The term "pneumoconiosis" literally means an accumulation of "dust in the lungs." The disorder is not limited to coal workers but, rather, generally affects many occupational groups exposed to airborne particulate matter. This Article is concerned only with coal workers' pneumoconiosis, referred to in this Article simply as pneumoconiosis. This disease process has also been referred to as "miner's asthma," "black lung," "silicosis," "CWP," "pneumonoultramicroscopic silicovolcanoconiosis," among other terms.

³² 30 U.S.C. § 902(b) (1982).

it may satisfy the Act's definition of pneumoconiosis even though it may not satisfy a purely medical definition.³³

As noted, the mere establishment of pneumoconiosis arising out of coal mine employment does not entitle the claimant to benefits. Pneumoconiosis, like other diseases, has stages of impairment and affects miners with varying degrees of severity. It is recognized that some miners with an advanced stage of pneumoconiosis may be able to continue to perform heavy manual labor without difficulty, while other miners with relatively slight pneumoconiosis may have severe difficulty in climbing a flight of stairs.³⁴ Thus, under the 1981 amendments to the Act, the claimant must also establish that the miner's pneumoconiosis is totally disabling.

The phrase "total disability" is defined in the Act in terms of work capability from a respiratory or pulmonary standpoint; that is, an ability to engage in gainful employment requiring the skills and abilities comparable to those of the miner's usual coal mine employment.³⁵ A claimant need not prove that the miner is disabled solely due to a respiratory disorder, nor that his respiratory disorder, when weighed with all of the other impairments, is the most severe. Rather, the claimant need only establish that the miner's respiratory disorder is sufficiently severe so as to be an independent cause of the miner's total disability. Thus, a claimant may be awarded benefits for total disability due to pneumoconiosis even though the miner might also be totally disabled by some other non-compensable condition.³⁶ The real test is whether the miner's respiratory impairment is, in and of itself, totally disabling.

III. CLASSES OF CLAIMS

Turning from the discussion of substantive issues, let us next examine the claims process. The federal statutory scheme comprises four distinct phases or periods of adjudication. This rather confusing state has resulted from Congress' repeated amendment of the black lung program. "First period" or "Part B" claims include all applications for benefits filed between the passage of the 1969 Act and June 30, 1973 in the case of a living miner. A survivor's claim could be filed as late as December 31, 1973. These claims were initially reviewed under the authority of the Secretary of Health and Human Services (then, the Department of Health, Education and Welfare), and were adjudicated in accordance with the procedures

³³ Many medical definitions of pneumoconiosis require the presence of fibrosis or scarring in the lungs. Thus, in many instances, disorders such as emphysema or bronchitis which arose out of coal mine employment and which have no accompanying fibrosis or scarring would not meet the medical definition of pneumoconiosis. See generally RENZETTI & RICHMAN, CURRENT MEDICAL METHODS IN DIAGNOSING COAL WORKERS' PNEUMOCONIOSIS AND A REVIEW OF THE MEDICAL AND LEGAL DEFINITIONS OF RELATED IMPAIRMENT AND DISABILITY (1983) (report prepared for Dep't of Labor).

³⁴ Spencer v. Winston Mining Co., 1 BLACK LUNG REP. (MB) 1-686 (1978).

³⁵ 30 U.S.C. § 902(f)(1)(A) (1982).

³⁶ Barnette v. Califano, 585 F.2d 698 (4th Cir. 1978).

for determining disability insurance benefit payments found in the Social Security Act.³⁷ If approved, these claims were paid from general federal revenues.³⁸ "First period" claims which were denied by the Department of Health and Human Services, are reviewable by the Department of Labor under a special review mechanism established in 1977 to give claimants the benefit of more liberal eligibility standards.³⁹

"Second period" claims generally include those claims filed from July 1, 1973 to December 31, 1973, and are commonly referred to as "transition period" claims.⁴⁰ This six month transition period was designed to facilitate the transfer of black lung cases, beginning in 1974, from federal administrative agencies to the states under their respective workers' compensation laws.⁴¹ During this period, the primary responsibility for processing and adjudicating claims was transferred from the Department of Health and Human Services to the Department of Labor.⁴² Responsibility for the payment of benefits continued to be borne by the federal treasury until January 1, 1974. At that time, responsible coal operators who had been notified of the pendency of black lung claims would assume liability for benefits.⁴³

"Third period" or "Part C" claims encompass all claims filed from January 1, 1974 to January 1, 1982.⁴⁴ Beginning in 1974, the states were to assume primary responsibility for adjudicating and paying black lung claims by broadening the availability of benefits under workers' compensation. If a state's compensation law did not comply with statutory requirements (and to date, no state law has been approved)⁴⁵ the payments would be made by the responsible operator or the federal treasury.⁴⁶ This payment scheme was later revised under the 1977 amendments. A special Black Lung Disability Trust Fund (Trust Fund) was established, to be financed by a coal severance tax, which would be liable for payment of benefits under Part C in the absence of an identifiable coal operator.⁴⁷

The final classification of claims, "fourth period" claims, includes all claims

³⁷ 42 U.S.C. § 421 (1982) sets forth the method by which disability determinations are made pursuant to the Social Security Act.

³⁸ *Director v. Forsyth Energy, Inc.*, 666 F.2d 1104 (7th Cir. 1982).

³⁹ 30 U.S.C. § 945 (1982).

⁴⁰ 30 U.S.C. § 925 (1982).

⁴¹ 30 U.S.C. § 931(a) (1982).

⁴² 30 U.S.C. § 925(a) (1982).

⁴³ *Id.* See also 20 C.F.R. §§ 725.491-.493 (1984).

⁴⁴ 30 U.S.C. § 931 (1982).

⁴⁵ 20 C.F.R. § 722.152 (1984).

⁴⁶ 30 U.S.C. § 932 (1982).

⁴⁷ 30 U.S.C. § 934 (1982). The 1977 amendments established the Black Lung Disability Trust Fund, the corpus of which is supported principally through an excise tax levied on the sale of coal. The fund is to be used to pay benefits to the claimants where there is no responsible operator required to pay or where the responsible operator is in default. The fund is also used to cover the administrative expenses of the fund itself, and those expenses incurred by the Department of Labor and the Department of Health and Human Services in connection with the Act. *Id.*

filed after January 1, 1982, the effective date of the 1981 amendments. These claims are treated as Part C claims, and are adjudicated by the Department of Labor.⁴⁸ In pursuing these claims, counsel are strongly advised to study the 1981 statutory revisions and the newest regulations respecting claims processing.⁴⁹

IV. THE CLAIMS PROCESS

Who can file a claim? Applications for black lung benefits may be filed by living miners and by others who have established a legal relationship to a deceased miner.⁵⁰ The rules regarding benefits, dependency, and survivorship are technical and, where a legitimate concern exists regarding the eligibility of a party to file a claim, he should consult an attorney or the appropriate officer in the local Social Security Administration District Office.⁵¹ The categories of individuals who may be eligible to file a claim include the miner's surviving or divorced spouse, child, parent, brother or sister, or a dependent, committee, or estate, among others.⁵² Normally, eligibility for benefits is dependent upon the miner's employment record and the miner's medical disability.⁵³ The Act defines the term "miner" as

any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.⁵⁴

The black lung claims process under the 1981 amendments is initiated by the filing of an application for benefits at the local Social Security Administration

⁴⁸ 30 U.S.C. § 931(a) (1982).

⁴⁹ See generally 20 C.F.R. Part 718 (1984).

⁵⁰ 20 C.F.R. § 725.201 (1984).

⁵¹ The SOCIAL SECURITY HANDBOOK, section 112 (6th ed. 1978), describes the local office's role as follows:

THE SOCIAL SECURITY OFFICE is the place where a person can apply for a social security number, check on his or her earnings record, apply for cash benefits, black lung benefits, supplemental security income, and hospital insurance protection, enroll for medical insurance, and get full information about individual and family rights and obligations under the law. There is no charge for the services of the office staff.

Regular visits to 3400 outlying areas are made by the social security office staff to serve people who live at a distance from the city or town in which the office is located. The visits are made to locations called contact stations. A schedule of these visits may be obtained from the nearest social security office. If preferred, a person can telephone the nearest social security office to obtain prompt answers to questions or to apply for benefits.

If necessary, a social security office representative will make a personal visit to the home of anyone who is unable to visit the office because of illness or infirmity.

For the telephone number or address of the nearest social security office, ask at the local post office or look in the telephone directory under "Social Security Administration."

⁵² See 20 C.F.R. § 725.201 (1984).

⁵³ See *supra* text accompanying note 10.

⁵⁴ 30 U.S.C. § 902(d) (1982).

District Office.⁵⁵ The office personnel advise and assist the claimants in completing the applications, and the office often furnishes routine or special assistance in the assembly of evidence and other documentation.⁵⁶ Once the necessary documentation and the assembly of non-medical evidence has been completed, the material is forwarded to the Department of Labor for processing.

A. *The Deputy Commissioner's Role*

The claim is first received by the Labor Department's Office of Workers' Compensation Programs. This office utilizes the services of two levels of "adjudication officers", namely, the deputy commissioners and the administrative law judges. At the Department of Labor, claims processing initially takes place in the Claims Unit of the Branch of Entitlement of the Division of Coal Mine Workers' Compensation, under the general supervision of the Branch Chief.

The claim is initially assigned to a claims examiner, who has the responsibility for the control and maintenance of the case file. After the claims examiner has compiled sufficient information to enable him to make an initial determination of entitlement to benefits and to identify a potentially responsible operator, he must execute a Notice of Filing of Claim for Benefits with the deputy commissioner, and issue a Notice of Initial Determination⁵⁷ to both the claimant and any potentially responsible operator. If the claimant is initially determined to be entitled to benefits, and the identified responsible operator voluntarily agrees to make payment of the benefits without further proceedings, the claims examiner will prepare an Award of Benefits and Order to Pay Benefits based upon the facts stated in the claim form. Once the form is executed by the deputy commissioner, the claims examiner transmits copies of the award and order to all parties. If the claim is initially denied, or if the responsible operator controverts the claimant's right to any or all benefits,⁵⁸ the claims examiner will forward the claim to an informal conference.⁵⁹

The informal conferences are intended to narrow or dispose of the issues contested by the various parties in the case. In keeping with this intention, the parties are not required to be represented by counsel, although they may do so if they desire. Witnesses are not produced during the conference and testimony is not transcribed. At the conclusion of the conference, the deputy commissioner must prepare and issue a memorandum, based upon the file record, summarizing the conference for the record and containing recommendations for disposition.⁶⁰

⁵⁵ 20 C.F.R. § 725.304 (1984).

⁵⁶ *Id.*

⁵⁷ 20 C.F.R. § 725.410 (1984).

⁵⁸ 20 C.F.R. § 725.413 (1984).

⁵⁹ 20 C.F.R. § 725.416 (1984).

⁶⁰ 20 C.F.R. § 725.417 (1984).

Each party to the claim must respond to the recommendations of the deputy commissioner within thirty days.⁶¹ Any party not replying within this thirty day period is deemed to have accepted the recommendations. No additional conference will be called unless the parties so agree, or unless it is clear that such a conference will result in settlement of the case. If the recommendations are not wholly agreed upon, and one or more issues remain unresolved, any party-in-interest or the deputy commissioner may request a hearing, and the case will then be referred to the chief administrative law judge of the Department of Labor.⁶²

B. *The Role of Administrative Law Judges*

Hearings on claims for benefits are conducted in accordance with the Administrative Procedure Act⁶³ by an administrative law judge, who is assigned to the case by the chief administrative law judge. The parties in attendance at a hearing may present witnesses,⁶⁴ who will testify under oath or affirmation. Furthermore, the testimony of any witness may be taken by deposition or interrogatory according to the rules of practice of the federal district court for the judicial district in which the case is pending.⁶⁵ In addition, witnesses may be subpoenaed by the administrative law judge and are recompensed in much the same manner as witnesses subpoenaed in the courts of the United States.⁶⁶

Payment of witness fees and expenses is the responsibility of the party who subpoenas the witness, but amounts paid by the claimant to witnesses may be recovered from the coal mine operator responsible for benefit payments, if so ordered by the administrative law judge. The hearings are open to the public and are transcribed.⁶⁷ All evidence upon which the administrative law judge relies for the final decision and order must be contained in the transcript of testimony either directly or by appropriate reference.⁶⁸

The Director's standing as a party in black lung cases has been the frequent subject of litigation. In *Krolich Contracting Corp. v. Benefits Review Board*,⁶⁹ the Third Circuit held that "in Black Lung cases, in which the government has a secondary liability in the event an employer does not pay benefits, the Director does have standing to represent the government's interest."⁷⁰ The courts have implicitly

⁶¹ 20 C.F.R. § 725.419 (1984).

⁶² 20 C.F.R. § 725.421 (1984).

⁶³ 5 U.S.C. §§ 551-59 (1982).

⁶⁴ 20 C.F.R. § 725.457 (1984).

⁶⁵ 20 C.F.R. § 725.458 (1984).

⁶⁶ 20 C.F.R. § 725.459 (1984).

⁶⁷ 20 C.F.R. § 725.464 (1984).

⁶⁸ *Id.*

⁶⁹ *Krolich Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685 (3d Cir. 1977).

⁷⁰ *Id.* at 689.

held that the Director has standing both as a petitioner⁷¹ and as a party-in-interest.⁷² Regarding the latter status, the Third Circuit has reasoned that although the Director may have no pecuniary interest in the litigation, the Director has standing "because of his responsibility to ensure the proper enforcement and lawful administration of the black lung benefits program."⁷³ While not a part of the original 1969 Act, section 422(k)⁷⁴ of the 1977 amendments secured the Director's participation as a party.⁷⁵

The issues considered by an administrative law judge at the hearing are generally restricted to those (1) identified by the deputy commissioner, (2) raised in writing before the deputy commissioner, or (3) not "reasonably ascertainable" by the parties at the time the claim was before the deputy commissioner.⁷⁶ The Board has held that:

[f]undamental fairness requires that the parties be advised of the issues to be decided so that they have an opportunity to prepare the necessary arguments, and to provide the appropriate documentation required to meet the burdens of proof or persuasion which an issue presents.⁷⁷

Administrative law judges also have inherent authority to entertain issues concerning whether the claim is ripe for judicial review, such as inquiries as to the proper parties, identity of witnesses, and the claimant's standing to seek benefits. Such authority is necessarily incidental to the effective administration of the regulatory scheme.⁷⁸ The administrative law judge is also given the discretion to accept or reject new issues or to remand the claim to the deputy commissioner for further consideration.⁷⁹ Furthermore, an issue not previously considered may be adjudicated if all parties consent.⁸⁰

Any evidence which has probative force and tends to prove or disprove a material fact is generally admissible in hearings held under the Act.⁸¹ The Supreme Court has held in *Richardson v. Perales*⁸² that medical reports may constitute substantial evidence, provided that certain safeguards are met. The Court ruled:

[A] written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received

⁷¹ *Director v. O'Keeffe*, 545 F.2d 337 (3d Cir. 1976); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14 (3d Cir. 1981).

⁷² *Director v. Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977).

⁷³ *Director v. Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18 (3d Cir. 1982).

⁷⁴ 30 U.S.C. § 932(k) (1982).

⁷⁵ See also 20 C.F.R. § 725.360(a)(5) (1984).

⁷⁶ 20 C.F.R. § 725.463(a) (1984).

⁷⁷ *Dery v. Director*, 6 BLACK LUNG REP. (MB) 1-553, 1-555 (1983).

⁷⁸ *Lewullis v. Lehigh Valley Anthracite, Inc.*, 6 BLACK LUNG REP. (MB) 1-588, 1-591 (1983). (Ramsey, Chief Admin. App. Judge, dissenting).

⁷⁹ *Truitt v. North American Coal Corp.*, 2 BLACK LUNG REP. (MB) 1-199 (1979).

⁸⁰ *Brisko v. Rochester & Pittsburgh Coal Co.*, 4 BENEFITS REVIEW BD. SERV. (MB) 545 (1976).

⁸¹ 20 C.F.R. § 725.461 (1984).

⁸² *Richardson v. Perales*, 402 U.S. 399 (1971).

as evidence in a disability hearing and despite its hearsay character and an absence of cross examination, and despite the presence of opposing direct medical testimony . . . may constitute substantial evidence supportive of a finding when the [party] has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross examination of the physician.⁸³

In *United States Pipe and Foundry Co. v. Webb*,⁸⁴ the Fifth Circuit listed several factors which an administrative law judge may consider when the reliability of a report is challenged. These factors include whether the out-of-court declarants have an interest in the result of the case; whether the opposing party could have obtained the reports before the hearing and could have subpoenaed the declarants; whether the reports are internally consistent on their face; and whether the reports are inherently reliable.⁸⁵ It is also important to remember that strict rules of evidence are generally not applicable at hearings before the administrative law judge, and that photostatic copies of medical reports may be accepted into evidence.⁸⁶ In addition, the administrative law judge is generally not bound by common law or statutory rules of evidence.⁸⁷

The regulations impose numerous restrictions on the submission of evidence to an administrative law judge which was not previously considered by the deputy commissioner. These include prohibitions on the admission of evidence withheld from the deputy commissioner, or submitted by the responsible operator without a good faith effort to develop its evidence before the deputy commissioner.⁸⁸ Furthermore, the admission of evidence which is first offered at the hearing itself, or after the hearing, is strictly limited. Section 725.456(b)(1)⁸⁹ provides that any documentary evidence not submitted to the deputy commissioner must be sent to all other parties at least twenty days before the hearing. Evidence which has not been exchanged in accordance with this regulation may be admitted only with the consent of the parties or upon a showing of good cause for failing to timely exchange the evidence.⁹⁰ When presented with evidence which does not satisfy the section 725.456(b)(1) requirement, the administrative law judge has the option of excluding the evidence or remanding the case to the deputy commissioner for consideration. If an administrative law judge admits evidence pursuant to one of the foregoing exceptions, section 725.456(b)(3) requires that the other party be given thirty days to respond.⁹¹

⁸³ *Id.* at 402.

⁸⁴ *United States Pipe & Foundry Co. v. Webb*, 595 F.2d 264 (5th Cir. 1979).

⁸⁵ *Id.* at 270.

⁸⁶ *Sullivan v. Youghioghney & Ohio Coal Co.*, 1 *BLACK LUNG REP.* (MB) 1-972 (1978).

⁸⁷ 20 C.F.R. § 725.455 (1984); *American Coal Co. v. Benefits Review Bd.*, 738 F.2d 387 (10th Cir. 1984); *Blawat v. Youghioghney & Ohio Coal Co.*, 6 *BLACK LUNG REP.* (MB) 1-511 (1983).

⁸⁸ 20 C.F.R. § 725.414(e)(1)-(2); 725.456(d). *See generally* *Adams v. Island Creek Coal Co.*, 6 *BLACK LUNG REP.* (MB) 1-677 (1983); *Scott v. Bethlehem Steel Corp.*, 6 *BLACK LUNG REP.* (MB) 1-760 (1984).

⁸⁹ 20 C.F.R. § 725.456(b)(1) (1984).

⁹⁰ *Thomas v. Freeman United Coal Mining Co.*, 6 *BLACK LUNG REP.* (MB) 1-739 (1984).

⁹¹ *Horn v. Jewell Ridge Coal Co.*, 6 *BLACK LUNG REP.* (MB) 1-933 (1984).

Posthearing evidence also presents several procedural problems. Section 725.456(b)(3)⁹² of the regulations requires that, where late evidence is admitted, the record must be left open for at least thirty days after the hearing "to permit the parties to take such action as each considers appropriate in response to such evidence."⁹³ A party also may move, pursuant to section 725.458, for the admission of a posthearing deposition.⁹⁴ In *Lee v. Drummond Coal Co.*,⁹⁵ the Board set forth the parameters for approving such a request:

A party who seeks admission of such evidence, either at the hearing or on appeal from a denial of permission, bears the burden of establishing the necessity for the evidence. The proffered evidence should be probative, and not merely cumulative. Furthermore, the proponent must establish that reasonable steps were taken to secure the evidence before the hearing, or that the evidence was unknown or unavailable at any earlier time. Finally, the evidence must be reasonably necessary to insuring the opportunity for a fair hearing. *See generally, Taylor v. Director*, 2 BLR 1-356 (1979); *Strozier v. United States Pipe & Foundry Co.*, 2 BLR 1-87 (1979); *Kislak v. Rochester & Pittsburgh Coal Co.*, 2 BLR 1-249 (1979). Establishment of these factors is required to substantiate either the need for the post hearing deposition or the abuse of the administrative law judge's discretion in denying permission.⁹⁶

The right to a full and fair hearing is extended to each party.⁹⁷ This right is assured by section 556(d) of the Administrative Procedure Act,⁹⁸ which provides in pertinent part that:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts.⁹⁹

While the conduct of a hearing is within the sound discretion of the administrative law judge,¹⁰⁰ the judge is obliged, above all, to ensure that all parties have the opportunity to fully present their case by way of argument, proof, and cross-examination of the witnesses.¹⁰¹ Full performance of these functions will avoid prejudice and unfairness to the parties and, most importantly, will leave the parties with a positive sense that each has had his day in court.¹⁰²

The administrative law judge's decision and order¹⁰³ must conform to the Administrative Procedure Act, which requires that every adjudicatory decision be

⁹² 20 C.F.R. § 725.456(b)(3) (1984).

⁹³ *Baggett v. Island Creek Coal Co.*, 6 BLACK LUNG REP. (MB) 1-1311 (1984).

⁹⁴ 20 C.F.R. § 725.458 (1984).

⁹⁵ *Lee v. Drummond Coal Co.*, 6 BLACK LUNG REP. (MB) 1-544 (1983).

⁹⁶ *Id.* at 1-547, 1-548.

⁹⁷ 20 C.F.R. § 725.452(b) (1984).

⁹⁸ 5 U.S.C. § 556(d) (1982).

⁹⁹ *Id.*

¹⁰⁰ 20 C.F.R. § 725.455(c) (1984).

¹⁰¹ 20 C.F.R. § 725.455(b) (1984).

¹⁰² *Laughlin v. Director*, 1 BLACK LUNG REP. (MB) 1-488 (1978).

accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. . . ."¹⁰⁴ Under the Administrative Procedure Act, the judge also has the duty to fully examine and explain the record. In *Rasel v. Bethlehem Mines Corp.*,¹⁰⁵ the Board held:

Unless the hearing officer has analyzed all evidence and has sufficiently explained the weight he has given to the evidence of record, to say that his decision is supported by substantial evidence approaches an abdication of our duty to scrutinize the record as a whole to determine whether the conclusions reached are rational. *Arnold v. Secretary of H.E.W.*, 567 F.2d 258 (4th Cir. 1977). Neither can we fairly decide the issue of "substantial evidence" without some indication from the factfinder as to the basis for his acceptance of certain evidence and rejection of other evidence which appears equally credible. *Litwaitis v. Mathews*, 427 F.Supp. 458 (E.D. Pa. 1976). In addition, disclosure of the underlying reasoning of an administrative decision facilitates review in other ways. It informs the parties and the reviewing authority of the grounds for disposition of the case. It exposes and deters arbitrary administrative actions. It prevents both the adjudication officer and the reviewing authority from exceeding their respective responsibilities and jurisdictions. *Flav-O-Rich, Inc. v. N.L.R.B.*, 531 F.2d 358 (6th Cir. 1976). Reasons must be given as to the weight attached to the evidence so that the parties have an opportunity to present evidence which can rebut those reasons and so that the reviewing authority can deal adequately with the evidence. *Stump v. Mathews*, 442 F. Supp. 457 (D. Del. 1977). In summary, we must know what the decision means before the duty becomes ours to say whether it is right or wrong. *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954).¹⁰⁶

In addition, the administrative law judge is required to provide an appropriate statutory and regulatory basis for his conclusions and that the decision and order contain an analysis of the evidence with regard to each of the relevant statutory and regulatory sections.

In general, the parties to a dispute must establish their requisite burden of proof or persuasion by a "preponderance of the evidence." The "preponderance" standard refers to that quantum of evidence which is superior or more persuasive in the judgment of the administrative law judge.¹⁰⁷ In *Addington v. Texas*,¹⁰⁸ the Supreme Court commented on the applicability of the preponderance of the evidence standard in like cases:

At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.¹⁰⁹

¹⁰⁴ 5 U.S.C. § 557(c)(3)(A) (1982).

¹⁰⁵ *Rasel v. Bethlehem Mines Corp.*, 1 BLACK LUNG REP. (MB) 1-918 (1978).

¹⁰⁶ *Id.* at 1-920.

¹⁰⁷ *Cf. Sharpless v. Califano*, 585 F.2d 664 (4th Cir. 1978).

¹⁰⁸ *Addington v. Texas*, 441 U.S. 418 (1979).

¹⁰⁹ *Id.* at 423.

An exception to this "preponderance of the evidence" rule involves conflicting evidence which is found to be equally probative, that is, where a "true doubt" exists as to which set of facts is more credible.¹¹⁰ In such an instance, the humanitarian purpose of the Act permits the administrative law judge to resolve the conflict in the claimant's favor.¹¹¹

Within twenty days after the official termination of the hearing, the administrative law judge must prepare a final decision and order with respect to the claim either making an award of benefits to the claimant or rejecting the claim.¹¹² The decision and order is delivered to the deputy commissioner having original jurisdiction, along with the transcript of the hearing and other documents or pleadings filed with the judge, and a copy of the decision and order is served upon the representatives of all parties to the case.¹¹³

C. *The Board's Role*

Any party who is dissatisfied with the administrative law judge's decision and order may appeal to the Benefits Review Board if an appeal is filed within thirty days of the date the decision and order is submitted to the deputy commissioner.¹¹⁴ The Board, presently composed of four administrative appeals judges appointed by the Secretary of Labor,¹¹⁵ is an independent quasi-judicial body,¹¹⁶ with exclusive jurisdiction to consider and decide appeals raising substantial questions of law or fact, taken by any party from decisions and orders relating to claims arising under the Act. In addition, the jurisdiction of the Board includes cases arising under the Longshoremen's and Harbor Workers' Compensation Act,¹¹⁷ the Defense Base Act,¹¹⁸ the District of Columbia Workmen's Compensation Act,¹¹⁹ the Outer Continental Shelf Lands Act,¹²⁰ the Nonappropriated Fund Instrumentalities Act,¹²¹ and the War Hazards Compensation Act.¹²²

¹¹⁰ *Wheatley v. Alder*, 407 F.2d 307 (D.C. Cir. 1968).

¹¹¹ *Palmer Coking Coal Co. v. Director*, 720 F.2d 1054 (9th Cir. 1983).

¹¹² 20 C.F.R. § 725.476 (1984).

¹¹³ 20 C.F.R. § 725.478 (1984).

¹¹⁴ 20 C.F.R. § 725.479(a) (1984); *Trent Coal, Inc. v. Day*, 739 F.2d 116 (3d Cir. 1984); *see also* 20 C.F.R. §§ 725.481, 802.201 (1984).

¹¹⁵ The permanent membership of the Board was increased from three to five by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984). In addition, the chief administrative appeals judge is authorized to appoint as many as four temporary members if necessary to handle the case load. *Id.*

¹¹⁶ *See* 20 C.F.R. § 801.103 (1984).

¹¹⁷ 33 U.S.C. §§ 901-50 (1982).

¹¹⁸ 42 U.S.C. §§ 1651-54 (1982).

¹¹⁹ 36 D.C. CODE §§ 501-04 (1973).

¹²⁰ 43 U.S.C. §§ 1331-43 (1982).

¹²¹ 5 U.S.C. §§ 8171-73 (1982).

¹²² 42 U.S.C. §§ 1701-17 (1982).

Prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act,¹²³ deputy commissioners were charged with the entire adjudication process for claims arising under the Act.¹²⁴ Deputy commissioners conducted hearings, developed claims, and administered the technical features of the program. The 1972 amendments left the initial informal resolution of claims to the deputy commissioners, but transferred the formal adjudication process to the Office of Administrative Law Judges and the Benefits Review Board, both of which were created by these amendments. The 1972 amendments also removed the federal district courts from the black lung adjudication process for claims filed under Part C of the Act, and provided that the courts of appeals would serve as the point of initial federal judicial intervention.¹²⁵

The Board was created by an Act of Congress. Section 21(b)(1) of the Longshoremen's and Harbor workers' Compensation Act provides:

There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.¹²⁶

Thus, the Board differs from many other "quasi-judicial" bodies in that it was created by statute rather than by regulation. The Secretary of Labor has no authority to oversee the Board's decision-making process, nor is it empowered to review decisions and orders rendered by the Board, although the Board relies very much on the Department of Labor for its effective day-to-day operations. The Secretary is authorized, however, to promulgate rules and regulations appropriate for effective operation of the Benefits Review Board.¹²⁷ The Board has authority to adjudicate "private rights" in resolving entitlement issues,¹²⁸ to interpret the Act and its implementing regulations, and to resolve issues concerning the validity of regulations promulgated by the Secretary of Labor.¹²⁹ The Board does not have the power to subpoena witnesses or to punish for contempt,¹³⁰ and the Board must resort to an appropriate district court to have its orders enforced.¹³¹ The Board can be

¹²³ Pub. L. No. 92-576, 86 Stat. 1261 (1972) (codified in scattered sections of 33 U.S.C. (1982)).

¹²⁴ Deputy commissioners are regional officials charged with the day-to-day administration of the Act. 33 U.S.C. §§ 939-40 (1976).

¹²⁵ The district courts would review the deputy commissioners' decisions to see if the findings of fact were supported by "substantial evidence," and to determine de novo if the conclusions of law were "in accordance with law." See *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951).

¹²⁶ 33 U.S.C. § 921(b)(1) (1982). See *supra* note 115 for a discussion of the recent change in the Board's membership.

¹²⁷ 33 U.S.C. § 939 (1982); 20 C.F.R. § 801.104 (1984).

¹²⁸ For a general discussion of administrative authority under the Act, see *Crowell v. Benson*, 285 U.S. 22 (1932).

¹²⁹ *Carozza v. United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984).

¹³⁰ 33 U.S.C. § 927 (1982).

¹³¹ 33 U.S.C. § 921(d) (1982).

a party to an appeal from one of its own orders,¹³² but usually declines to do so because of the presence of adverse parties in the proceedings.¹³³ The Board is not an Article III court, and its administrative appeals judges are inferior officers of the United States.¹³⁴

The Board's review authority is governed by section 21(b)(3) of the Longshoremen's and Harbor Workers' Compensation Act,¹³⁵ which provides: "The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this [Act] and the extensions thereof."¹³⁶ Thus, in reviewing an administrative law judge's decision and order, the Board's role is narrowly circumscribed. The judge's decision and order must be affirmed if it is supported by substantial evidence, is not irrational, and is in accordance with law.¹³⁷ The term "substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³⁸ The substantial evidence test is less rigorous than the burden of proof in a jury trial.¹³⁹

In reviewing the findings of the administrative law judge, the Board cannot and will not reweigh the evidence, but may inquire only into the existence of evidence to support the findings.¹⁴⁰ Thus, the Board may not set aside an inference of a judge because it finds the opposite one more reasonable, or because it questions its factual basis.¹⁴¹ Furthermore, questions of witness credibility are for the administrative law judge as the trier-of-fact, and the Board must respect his evaluation of all testimony, including that of medical witnesses.¹⁴² Finally, in reviewing a decision and order of an administrative law judge, the Board's duty is not that of strict interpretation, but rather to affirm decisions of less than ideal clarity where the judge's reasoning may be reasonably discerned.¹⁴³ In resolving a case on appeal, the Board may affirm, reverse, remand, vacate, modify, dismiss, or perform a com-

¹³² 20 C.F.R. § 801.402 (1982).

¹³³ See *McCord v. Benefits Review Bd.*, 514 F.2d 198 (D.C. Cir. 1975); *Oil, Chemical & Atomic Workers' Int'l Union v. O.S.H.R.C.*, 671 F.2d 643 (D.C. Cir.) (per curiam), *cert. denied*, 459 U.S. 905 (1982).

¹³⁴ *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 103 S. Ct. 3088 (1983); see also U.S. CONST. art. II, § 2.

¹³⁵ 33 U.S.C. § 921(b)(3) (1982).

¹³⁶ *Id.*; see also 20 C.F.R. § 802.301 (1984).

¹³⁷ *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

¹³⁸ *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

¹³⁹ *Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969).

¹⁴⁰ *South Chicago Coal & Dock Co. v. Bassett*, 104 F.2d 522 (7th Cir. 1939), *aff'd*, 309 U.S. 251 (1940).

¹⁴¹ *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947).

¹⁴² *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

¹⁴³ *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974); *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511 (11th Cir. 1984).

mination of these dispositions.¹⁴⁴ With the exception of a remand, the Board's decision and order is appealable to the appropriate United States Court of Appeals.¹⁴⁵ Generally, an order remanding a case to an administrative law judge for further consideration has been held to be interlocutory in nature, and accordingly is nonappealable.¹⁴⁶

As noted above, the parties to a case may be represented by counsel. Where the party is represented by counsel, the Board will limit its inquiry to an examination of those issues directly raised on appeal.¹⁴⁷ Furthermore, the Board will not usually consider on appeal issues which have not been raised before the administrative law judge.¹⁴⁸ The Board has, however, created four general exceptions to these rules. First, the Board will consider an issue for the first time on appeal where a pertinent statute has been overlooked.¹⁴⁹ Second, where an issue is raised for the first time on appeal, and supports the administrative law judge's decision and order, the Board will permit its consideration.¹⁵⁰ Third, the Board will consider an error in the administrative law judge's decision and order which is basic to the proper administration of the Act or to the rendering of justice.¹⁵¹ And fourth, review is proper where, as the Supreme Court held, "there have been judicial interpretations of existing law after the decision below and pending appeal—interpretations which if applied might have materially altered the result."¹⁵² The Board believes that members of the bar who hold themselves out as qualified to undertake the litigation of black lung cases are capable of adequately representing their clients' interests and that, absent an allegation by a party that counsel is incompetent, the Board must assume that counsel has limited his contentions for tactical reasons.

In addition to the requirement that issues must be properly and specifically raised to be considered, the Board has also held that these issues must be adequately briefed. Unless the party identifies errors and fully briefs its allegation in light of the relevant law and evidence, the Board has no basis upon which to review the administrative law judge's findings. In *Fish v. Director*,¹⁵³ the Board held:

The adequacy of any argument depends on the circumstances of the particular case. An argument framed in terms of the decision below, however, is a threshold requirement for Board review.

¹⁴⁴ 20 C.F.R. § 802.401-406 (1984).

¹⁴⁵ 20 C.F.R. § 802.406 (1984); *see Hon v. Director*, 699 F.2d 441 (8th Cir. 1983).

¹⁴⁶ *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967), *cert. denied*, 390 U.S. 964 (1968); *Pauls v. Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972).

¹⁴⁷ *Slinker v. Peabody Coal Co.*, 6 BLACK LUNG REP. (MB) 1-456 (1983).

¹⁴⁸ *Taylor v. 3D Coal Co.*, 3 BLACK LUNG REP. (MB) 1-350 (1981).

¹⁴⁹ *See Walker Mfg. Co. v. Dickerson, Inc.*, 560 F.2d 1184, 1187 n.2 (4th Cir. 1977); *Free v. Director*, 6 BLACK LUNG REP. (MB) 1-450 (1983).

¹⁵⁰ *See King v. Tennessee Consolidated Coal Co.*, 6 BLACK LUNG REP. (MB) 1-87 (1983).

¹⁵¹ *See Shelton v. Washington Post Co.*, 7 BENEFITS REVIEW BD. SERV. (MB) 54 (1977).

¹⁵² *Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941).

¹⁵³ *Fish v. Director*, 6 BLACK LUNG REP. (MB) 1-107 (1983).

In this case, claimant's counsel has failed to meet this threshold. Counsel's summation of favorable evidence is not, of itself, an indictment of the administrative law judge's decision to reject that evidence. Although the administrative law judge discussed this evidence, counsel does not identify a single error in her refusal to find claimant entitled to benefits. Consequently, the Board has no substantial issue to review.¹⁵⁴

These restrictive rules do not apply to cases where the claimant appeals *pro se*. In such cases, a letter requesting an appeal is sufficient to invoke the Board's consideration. The scope of review in such cases is limited to whether the decision and order below was supported by substantial evidence and accords with law.¹⁵⁵

The Board's review of a case on appeal is based upon a closed record, and the Board is not empowered to undertake a *de novo* adjudication of the claim.¹⁵⁶ To do so would upset the carefully allocated division of power between administrative law judges as triers-of-fact and the Board as a review tribunal.¹⁵⁷ If evidence, not considered by the administrative law judge, becomes available during the time that an appeal is pending before the Board, the party is free, however, to seek modification before the administrative law judge or the deputy commissioner.¹⁵⁸ The Board's action is placed in abeyance until the modification process is resolved.

The Board issues a written decision and order as soon as possible after completion of review proceedings.¹⁵⁹ A decision and order rendered by the Board becomes final sixty days after issuance unless an appeal is filed within that period or a timely request for reconsideration by the Board has been made.¹⁶⁰ Decisions of the Board are available for public inspection at the permanent location of the Board in Washington, D.C., and selected opinions are published in loose-leaf services titled "Benefits Review Board Service" and "Black Lung Reporter."

Within ten days from the filing of the Board's decision and order, any party of record may request reconsideration.¹⁶¹ The Board has held that it will not consider issues raised for the first time on reconsideration, unless the issues involve an error by the Board.¹⁶² A request for reconsideration must be in writing, setting forth the reasons for the request, and including any documentation pertinent to

¹⁵⁴ *Id.* at 1-109.

¹⁵⁵ *Antonio v. Bethlehem Mines Corp.*, 6 BLACK LUNG REP. (MB) 1-702 (1983).

¹⁵⁶ 20 C.F.R. § 802.301 (1984).

¹⁵⁷ *Director v. Rowe*, 710 F.2d 251 (6th Cir. 1983); *Peabody Coal Co. v. Benefits Review Bd.*, 560 F.2d 797 (7th Cir. 1977).

¹⁵⁸ 20 C.F.R. § 725.480 (1984); *Curry v. Beatrice Pocahontas Co.*, 3 BLACK LUNG REP. (MB) 1-306 (1981); *Craig v. United Church of Christ, Commission For Racial Justice*, 3 BLACK LUNG REP. (MB) 1-300 (1981); *see also* 33 U.S.C. § 922 (1982).

¹⁵⁹ 20 C.F.R. § 802.403 (1984).

¹⁶⁰ 20 C.F.R. § 802.406 (1984).

¹⁶¹ 20 C.F.R. § 802.407 (1984).

¹⁶² *Micheletto v. Peabody Coal Co.*, 4 BLACK LUNG REP. (MB) 1-758 (1982).

the request. The request must be sent or delivered in person to the clerk of the Board and served on all parties of record.¹⁶³ The Board will review all requests for reconsideration and grant or deny them in its discretion.¹⁶⁴

Any party adversely affected by a decision and order of the Board may appeal the case, within sixty days of the filing of the decision, to the appropriate United States Court of Appeals.¹⁶⁵ Unless an appeal from the Board's decision is timely, or the matter is remanded by the Board,¹⁶⁶ the record, together with a transcript of oral proceedings, briefs, or documents filed with the Board, and a copy of the Board's decision and order will be returned to the deputy commissioner for filing.¹⁶⁷

D. *New Twists*

In addition to the deletion of three of the five statutory presumptions, the 1981 amendments provide other noteworthy changes. For example, a major revision has been made in the government's use of rereadings of X-ray evidence. Prior to the 1977 amendments to the Act, the government had the authority to have a claimant's X-ray evidence reread for verification of whether the images reproduced on the film constituted pneumoconiosis.¹⁶⁸ Congressman Hechler, who drafted the provision of section 413(b) prohibiting X-ray rereadings in the 1977 amendments, stated that his intention was to introduce "an amendment that will stop this indiscriminate re-reading of X-rays. . . ."¹⁶⁹ In *Tobias v. Republic Steel Corp.*,¹⁷⁰ the Board held that section 413(b) effectively prohibited the government for utilizing radiologists to reinterpret X-rays, previously read as positive for the presence of pneumoconiosis, when the threshold requirements of the section had been met.¹⁷¹

The administrative law judge, in weighing the X-ray evidence of record, was thus prohibited from considering any rereading obtained by the government in violation of section 413(b) of the Act, except to determine the quality of the X-ray. The 1981 amendments deleted this portion of section 413(b) and so permit the government to reread X-ray interpretations for claims filed after January 1, 1982.¹⁷² Thus, once again the Act has gone full circle.

Congress has also restricted the amount of excess earnings a benefit recipient could earn without penalty of offset. Under the pre-1981 amendments, only state

¹⁶³ 20 C.F.R. § 802.408 (1984).

¹⁶⁴ 20 C.F.R. § 802.409 (1984).

¹⁶⁵ 20 C.F.R. § 802.410(a) (1984).

¹⁶⁶ See 20 C.F.R. § 802.405 (1984).

¹⁶⁷ 20 C.F.R. § 802.403(b) (1984).

¹⁶⁸ See generally S. REP. No. 94-1254, 94th Cong., 2d Sess. 9 (1976); H.R. REP. No. 95-151, 95th Cong., 1st Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 237.

¹⁶⁹ HOUSE COMM. ON EDUCATION AND LABOR, *supra* note 4, at 236, 278.

¹⁷⁰ *Tobias v. Republic Steel Corp.*, 2 BLACK LUNG REP. (MB) 1-1277 (1981).

¹⁷¹ See also *Free v. Director*, 6 BLACK LUNG REP. (MB) 1-450 (1981).

¹⁷² 30 U.S.C. § 923(b) (1982).

benefits that were concurrent with federal black lung benefits were to offset the federal payment.¹⁷³ Under the 1981 amendments, claims will now be reduced by the amount by which such benefits would be reduced on account of excess earnings under section 203(b) of the Social Security Act.¹⁷⁴

The 1981 amendments also provided that claims denied prior to March 1, 1978, and subsequently allowed under section 435 of the 1977 amendments,¹⁷⁵ would be paid for by the Trust Fund.¹⁷⁶ The Trust Fund would also reimburse either the operator or black lung liability insurer for the amounts already paid for these claims.¹⁷⁷ "Denied" claims under this section include: (1) those denied by the Social Security Administration; (2) those in which the claimant was notified by the Department of Labor of an administrative or informal denial by March 1, 1977, but the claimant failed to take certain prescribed actions; and (3) those denied under the law in effect prior to the enactment of the 1977 amendments following a formal hearing or administrative or judicial review proceedings.¹⁷⁸ The Board has held that the 1981 amendments place no burden on the Director to establish the *nonexistence* of such a denial.¹⁷⁹ Indeed, the Board has stated that such a burden would be impossible to meet.¹⁸⁰ Rather, the Department of Labor's regulations implementing the 1981 amendments provide a discovery mechanism whereby the Director is required to "review each claim which is or may be affected by the provisions of section 205 of the Black Lung Benefits Amendments of 1981."¹⁸¹ Any party of record may request such review and determinations are to be made on an expedited basis.¹⁸² This portion of the 1981 amendments will potentially affect over 10,000 claims, and will transfer liability for payment of benefits from the potential individual operator or an insurance carrier to the Trust Fund.¹⁸³

Another significant feature of the most recent amendments involves the deletion of section 411(c)(2).¹⁸⁴ This rebuttable presumption, as noted earlier, provided that a miner's death was presumed to be due to pneumoconiosis arising out of coal mine employment where the deceased miner had had ten or more years of coal mine employment, and the miner's death was due to a *respiratory* disease.

¹⁷³ 30 U.S.C. § 932(g) (1982); *Stewart v. Harman Mining Corp.*, 5 BLACK LUNG REP. (MB) 1-54 (1983).

¹⁷⁴ 42 U.S.C. § 403(b) (1982).

¹⁷⁵ 30 U.S.C. § 945 (1982).

¹⁷⁶ 30 U.S.C. § 902(i) (1982). *See supra* note 20.

¹⁷⁷ 26 U.S.C. § 9501(d)(7) (1982); *see also* National Indep. Coal Operators Ass'n, Inc. v. Old Republic Ins. Co., 544 F. Supp. 520 (W.D. Va. 1982).

¹⁷⁸ 30 U.S.C. § 902(i) (1982); *see also* 20 C.F.R. § 725.496(b) (1984).

¹⁷⁹ *Bartley v. L & M Coal Co.*, 7 BLACK LUNG REP. (MB) 1-243 (1984).

¹⁸⁰ *Id.*

¹⁸¹ 20 C.F.R. § 725.497(b) (1984).

¹⁸² *Id.*

¹⁸³ For a further discussion regarding the effect of section 435, *see* Lopato, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 696-99 (1983).

¹⁸⁴ 30 U.S.C. § 921(c)(2) (1972), *amended by* 30 U.S.C. § 921(c)(2) (1982).

The party opposing entitlement could rebut the section 411(c)(2) presumption by showing that there is no reasonable possibility that pneumoconiosis caused the miner's death. As noted, the 1981 amendments repealed this presumption prospectively. Senator Hatch, a force behind the removal of the presumption, stated that the survivors of a miner will be compensated if:

complications of pneumoconiosis have caused a miner's death or where pneumoconiosis was a substantially contributing factor to that death. For example, pneumoconiosis may have been a substantially contributing cause of death in a case where the principal cause of death was pneumonia. Of course, survivors would not be eligible for benefits in those situations where death was caused by traumatic injury or an unrelated medical condition.¹⁸⁵

No case law has yet been developed pursuant to the change.¹⁸⁶

Finally, the use of affidavits¹⁸⁷ in a survivor's case has been restricted by the 1981 amendments. Under the 1977 legislation, where the case contained no medical evidence the affidavit of any person (including an affidavit by an interested party such as the miner's wife or children) could provide substantial evidence to establish the severity of a miner's respiratory condition and the cause and nature of his disorder.¹⁸⁸ The 1981 amendments limited the affidavit evidence sufficient to establish entitlement in such cases to persons not eligible for benefits under claims filed on or after January 1, 1982, the effective date of the 1981 amendments.¹⁸⁹

V. CONCLUSION

The major effect of the 1981 amendments to Title IV of the Act has been to return to the evidentiary format set forth in the original program. This evidentiary realignment has, once again, placed the burden of proving the existence of total disability due to pneumoconiosis on the claimant, except in those cases where the claimant can establish complicated pneumoconiosis. While the claims process has remained largely unaffected by the 1981 amendments, the process of bringing a claim, from the application for benefits to the final administrative steps, remains complex and often time-consuming. No remedies are offered to adjust this process. It is suggested that the claims process, while costly in terms of time and effort, offers to all parties the opportunity to present their case, call their witnesses, offer their exhibits, and appeal the adjudicator's findings of fact and conclusions of law. Although this system of justice may be slow, the system is effective in resolving the complex issues commonly encountered in occupational disease programs.

¹⁸⁵ 127 CONG. REC. S. 5494 (daily ed. Dec. 16, 1981) (statements of Sen. Hatch).

¹⁸⁶ 20 C.F.R. §§ 718.205(c), 718.303(c) (1984).

¹⁸⁷ The Board has also included sworn hearing testimony within the term "affidavit." *Hunt v. Director*, 5 BLACK LUNG REP. (MB) 1-66 (1982).

¹⁸⁸ 30 U.S.C. § 923(b) (Supp. II 1978), amended by 30 U.S.C. § 923(b) (1982); 20 C.F.R. § 727.203(a)(5) (1978).

¹⁸⁹ 30 U.S.C. § 923(b) (1982).

