Volume 83
Issue 4 *Issue 4, The National Coal Issue*

Article 9

June 1981

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THE BLACK LUNG BENEFITS ACT: AN OPERATOR'S PERSPECTIVE

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INTRODUCTION

More than ten years have now passed since the enactment of the first federal statute providing compensation for "black lung disease." Title IV of the Federal Coal Mine Health and Safety Act of 1969[1] became effective on December 31, 1969, and established a complicated system for the compensation of coal miners who were totally disabled as a result of coal workers' pneumoconiosis, and of survivors of miners who died as a result of the disease.

From these modest beginnings in 1969, the federal black lung program has grown both in scope and complexity to the point where a district court judge in the District of Columbia recently dismissed, as non-justiciable, a lawsuit alleging a number of irregularities in the administration of the program. In support of its decision, the court cited the fact that the effort needed to fully investigate and remedy the abuses identified would "overly strain the resources and abilities of the judiciary."[2]

The present state of affairs surrounding the black lung benefits program not only impedes the ability of district courts to consider comprehensive challenges to the overall administration of the program, but also the ability of a practicing attorney to defend an operator against questionable benefit claims. The confusion can be traced to basic conceptual ambiguities in the purposes of the program, which have resulted from conflicts between a desire for both administrative expediency and precision in the claims determination process.

The purposes of this article are to (1) briefly summarize the legislative, regulatory and administrative developments which

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[1] P.L. No. 91-173, 83 Stat. 792 (codified at 30 U.S.C. §§ 901-936 (1970)).

[2] National Coal Assoc. v. Marshall, 510 F. Supp. 803 (D.D.C. 1981), *appeal docketed*, No. 81-1565 (D.C. Cir. 1981).

have resulted in the present federal black lung program, and to enumerate the situations in which these conceptual ambiguities present themselves as problems in the defense of a federal black lung claim, and (2) suggest a framework for the analysis and litigation of black lung claims which responds to both legitimate administrative concerns and the ethical duty to present an aggressive defense on behalf of a potentially liable coal mine operator. It is intended to be a practical guide to preparing a defense to a federal black lung claim. A more detailed analysis of the esoteric legal issues presented during that defense is presented elsewhere in this symposium.

I. THE DEVELOPMENT OF THE FEDERAL BLACK LUNG PROGRAM

The foundation for the present state of confusion in the administration and litigation of federal black lung claims was laid in 1969 with the original passage of Title IV, which created two categories of claims. Those claims filed prior to December 31, 1972, were to be considered under Part B and, if approved, paid by the Secretary of Health, Education and Welfare out of monies appropriated from the general revenues.[3] Claims after January 1, 1973, were to be filed under an approved state workmen's compensation law. If no such law had been approved for the miner's state, the claims was to be filed with the Department of Labor and paid, if approved, by the coal miner operator which employed the miner.[4]

The Secretary of Health, Education and Welfare was given the authority to promulgate regulations regarding the determination and adjudication of claims,[5] but Congress took the first steps toward limiting the precision of claims adjudication by establishing three statutory presumptions designed, presumably, to ease administration of the program.[6] The first created a rebuttable presumption, upon a showing that a miner had pneumoconiosis and ten years of coal mine employment, that his

[3] 30 U.S.C. §§ 921-924 (1970). Part A of Title IV sets forth a declaration of Congressional intent and definitions applicable to both Part B and Part C. 30 U.S.C. §§ 901-902 (1970).

[4] 30 U.S.C. §§ 931-936 (1970). No state workmen's compensation has been approved by the Department of Labor to date, and there is no reasonable prospect that such will be approved in the foreseeable future.

[5] 30 U.S.C. § 921(b) (1970).

[6] 30 U.S.C. § 921(c) (1970).

pneumoconiosis arose out of such employment;[7] the second created a rebuttable presumption, upon a showing of ten years of coal mine employment and death from a respirable disease, that death was due to pneumoconiosis;[8] and the third created an irrebuttable presumption that a miner diagnosed as having complicated pneumoconiosis was totally disabled as a result of his condition.[9]

Title IV was amended substantially in 1972.[10] The original concept of a dual system of compensation was retained, but the relevant filing date was moved back to June 30, 1973.[11] A further step was taken toward streamlining claims analysis by the promulgation of an additional statutory presumption of total disability as a result of pneumoconiosis. This additional presumption arose upon a showing that a miner had fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment.[12] Rebuttal of this presumption was limited to a showing that the miner did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of employment in a coal mine.[13]

Historically, a more significant result of the 1972 amendments was the adoption of "interim adjudicatory rules" by the Secretary of Health, Education and Welfare for the adjudication of claims under Part B.[14] In an introductory statement, the Secretary noted that: "The Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims."[15]

Simply stated, the interim adjudicatory rules or "interim presumption," provided that a miner would be presumed totally disabled by coal workers' pneumoconiosis, or totally disabled by coal workers' pneumoconiosis at the time of his death, upon a

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[7] 30 U.S.C. § 921(c)(1) (1970).
[8] 30 U.S.C. § 921(c)(2) (1970).
[9] 30 U.S.C. § 921(c)(3) (1970).
[10] P.L. No. 92-303, 86 Stat. 150 (codified at 30 U.S.C. § 901-945 (1976)).
[11] 30 U.S.C. § 931 (1976).
[12] 30 U.S.C. § 921(c)(4) (1976).
[13] *Id.*
[14] 20 C.F.R. § 410.490 (1980).
[15] 20 C.F.R. § 410.490(a) (1980).

showing of ten years of coal mine employment and evidence that would justify a finding either that he had the disease or that his performance on pulmonary function tests fell below certain levels.[16] The standards for pulmonary function were not varied for age, and were varied only slightly for height, the two factors most directly affecting normal performance on such tests.[17] As a result, many individuals with essentially normal lung function were presumed entitled to benefits.

The "interim presumption" was originally published as part of a more comprehensive regulatory scheme for the evaluation of black lung benefit claims.[18] The remaining portions of Part 410 established more detailed and considerably more restrictive standards for the evaluation of the quality of evidence, and for determining the existence of pneumoconiosis, totally disabling pulmonary or respiratory impairments, and causal links between exposure to coal dust in coal mine employment and the development of disability.[19]

The adoption of the "interim presumption," therefore, created a substantial distinction in the adjudication of claims under Parts B and C. It elevated administrative expediency at the substantial expense of claims analysis. The remedial nature of the statute, combined with the fact that claims under Part B were for federally funded benefits and not a claim for benefits against a private party with its own interests and finances to protect, created an atmosphere strongly favoring the approval of an award of benefits. Adoption of the interim presumption, with its specifically stated avoidance of sophistication and detail in either the investigation or the adjudication of a claim, merely compounded this influence. At the same time, its almost complete reliance upon presumed facts instead of proven facts further obscured the ultimate issue to be decided in a claim, that is, whether total disability or death resulted from a pulmonary or

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[16] 20 C.F.R. § 410.490(b) (1980).

[17] *See* 20 C.F.R. Part 718 (1980). For a good discussion of the failure of the standards to recognize age as an important factor affecting normal performance, *see* 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, and the text accompanying nn. 40-43 (1981).

[18] 20 C.F.R. Part 410 (1980).

[19] *Id.*

respiratory condition arising out of a miner's coal mine employment.[20]

The influence of the Part B experience necessarily affected, to a limited extent, subsequent claims litigation under Part C. There was an unavoidable tendency to mechanically apply regulatory standards for the evaluation of disability and to expand the available statutory presumptions to more closely approximate the effects of the interim presumption.[21] Nonetheless, substantial distinctions in claims adjudication remained, especially if measured in terms of results, and this distinction was attributable primarily to the more demanding requirements for proof of total diability imposed by the regulations applicable to Part C.[22]

The statute was amended for the third time by the Black Lung Benefits Reform Act of 1977.[23] These amendments were seemingly prompted, primarily, as a response to disgruntled claimants whose expectations, heightened by the rather lenient process for approving claims under Part B, were not being satisfied under the stricter standards applicable to Part C. The 1977 amendments accomplished a major revision of the program by (1) revising and expanding the definitions of coal miner, coal mine operator and pneumoconiosis, and (2) liberalizing the time limitations for filing claims.[24] More importantly, the amendments advanced substantially the process of elevating presumed fact over proven fact by creating a presumption of entitlement for the dependents of certain deceased miners;[25] by forbidding the Secretary of Labor from obtaining certain relevant medical evidence under specified circumstances;[26] by providing, in apparent recognition of the extent to which the program had departed from common experience, that a miner employed in his normal coal mining occupation could nonetheless be considered totally

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[20] 30 U.S.C. § 901 (1970).

[21] *See* Bennett v. Leckie Smokeless Coal Co., [1977] 7 BRBS (M-B) 267, BRB No. 76-477 BLA, *appeal dismissed*, [1978] 9 BRBS (M-B) 447, BRB No. 78-1093 BLA.

[22] *See generally* 20 C.F.R. Part 410, Subpart D (1980).

[23] P.L. 95-239, 92 Stat. 95 (codified at 30 U.S.C. §§ 901-945 (Supp. II 1978)).

[24] 30 U.S.C. §§ 902(b), (d), 932(b), (f) (Supp. II 1978).

[25] 30 U.S.C. § 921(c)(5) (Supp. II 1978). For a general discussion of the survivor's presumption, *see* Millstone & Codinach, 82 W. VA. L. REV. 1079 (1980).

[26] 30 U.S.C. § 921 (b) (Supp. II 1978).

disabled;[27] and by requiring that all claims previously denied or pending under either Part B or Part C be reviewed under standards not more restrictive than the "interim presumption" and, if approved, paid under Part C.[28]

Congress thus moved to equalize the law's treatment of claimants under Parts B and C, but in doing so imposed upon operators the burden of defending claims under a series of rules which do little to encourage an accurate assessment of disability resulting from coal mine employment and which have, as their only commendable attribute, expedited the approval of claims on an administrative level.

Following enactment of the 1977 amendments, the Secretary of Labor adopted standards for the adjudication of claims which incorporated in large measure the "interim presumption," as well as revised procedural regulations.[29] The procedural standards, insofar as they relate to identification of the operator to be considered liable for the payment of benefits, create several additional presumptions not included in the statute. The Act give the Secretary of Labor authority to promulgate regulations for the identification of the operator or operators responsible for the payment of benefits in a particular claim.[30] In another apparent effort to simplify administration of the program, the Secretary has foregone the opportunity to allocate liability among multiple employers on the basis of the extent or degree of exposure, and has instead ascribed liability to the last financially responsible operator to have employed a claimant for as much as a year.[31]

The only statutory restriction on the assignment of liability to an operator is the proviso that the operator may not be considered liable for the payment of benefits unless a miner's pneumoconiosis arose, in whole or in part, out of employment in a mine or mines operated by that operator after December 31, 1969.[32] The Secretary's burden for making even that minimal showing has been obviated, however, by regulation. It is pre-

[27] 30 U.S.C. § 902(f)(2) (Supp. II 1978).
[28] 30 U.S.C. §§ 902(f)(1)(B)(ii), 945 (Supp. II 1978).
[29] 20 C.F.R. Parts 725, 727 (1980).
[30] 30 U.S.C. § 932(h) (Supp. II 1978).
[31] 20 C.F.R. § 725.492 (1980).
[32] 30 U.S.C. § 932(c) (Supp. II 1978).

sumed, in the absence of a showing to the contrary, that the miner was regularly and continuously exposed to coal dust during his employment. Additionally, to the extent that the other criteria for identifying the employer as the operator responsible for payment of the claim are met, it is further presumed that the miner's pneumoconiosis arose in whole or in part out of this employment.[33]

II. A SUGGESTED FRAMEWORK FOR THE DEFENSE OF A BLACK LUNG CLAIM

Dealing with this maze of statutory and regulatory presumptions can obviously present a potential for frustration. Mechanical application of the various adjudicatory rules can render seemingly absurd results. These apparent absurdities, while contributing an element of righteousness to the defense of a claim, will not be sufficient in and of themselves, to defeat a claim for benefits. Presumed fact must be countered with proven fact. The defense of an operator should begin with the assumption that any issue not resolved by the introduction of competent evidence will be decided to the operator's disadvantage. There are no presumptions and no procedural tricks or shortcuts available to the operator to advance its defense of a claim.

Moreover, presenting evidence which merely creates a doubt as to a particular element of a claim will not be sufficient to deny the claim, because conflicts in the evidence will be resolved in the favor of the claimant.[34] Certain claims will, therefore, not be defensible. A meritorious claim for benefits cannot, as a practical matter, be defeated. Accordingly, the first step in properly representing the operator is to evaluate the claim and advise the client as to whether any legitimate purpose would be served by challenging the claim.

Unfortunately, the claim file forwarded by the Department of Labor seldom contains sufficient information to permit such an evaluation. Although Congress sought to temper the effect of the Black Lung Benefits Reform Act of 1977 by directing the

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[33] 20 C.F.R. §§ 725.492(c), 725.493(a)(6) (1980); Zamski v. Consolidation Coal Co., [1980] 2 BLR (M-B) 1-1005, BRB No. 79-194 BLA.

[34] *See, e.g.*, Bethelehem Mines Corp. v. Warmus, 578 F.2d 59 (3d Cir. 1978).

Secretary of Labor to consider "all relevant medical evidence" in applying the "interim presumption,"[35] the Secretary has apparently been content to rely upon the facts presumed. Generally, there is only a superficial investigation of a miner's medical history before an approval of his claim for benefits. Responsibility for full development of all relevant information is placed on the operator. As a result, files received from the Department of Labor are generally woefully incomplete and frequently contain information which is incorrect or outdated. The documents provided must invariably be supplemented and confirmed by additional information from the operator and the claimant.

The regulations anticipate that investigation of the claim will be completed, and any documentary evidence submitted, during administrative adjudication of the claim before a Deputy Commissioner.[36] Although the purpose of this requirement is to enhance the role of the Deputy Commissioner as a claims adjudicator,[37] an initial finding of eligibility is seldom reversed at the administrative level. As a practical matter, the operator should therefore assume that the evidence presented will not be considered critically until it is introduced at a hearing before an Administrative Law Judge.

Although the operator will generally have access to some information regarding the claimant's employment and medical history not contained in the Department of Labor's file, proper evaluation of the claim will usually require specific inquiry directed to the claimant. Use of depositions and interrogatories, as well as less formal means of discovery, are specifically sanctioned by the regulations.[38] Regardless of the form of discovery adopted, the inquiry should be designed to insure access to complete employment and medical histories. Particular emphasis should be placed on the discovery of state claims for occupational disease benefits made by the claimant based on his pneu-

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[35] H.R. REP. No. 864, 95th Cong., 2d Sess. (1978) *reprinted in* LEGISLATIVE HISTORY OF THE BLACK LUNG BENEFITS REFORM ACT OF 1977 AND BLACK LUNG REVENUE ACT OF 1977, at 872, 887 (1979).

[36] 20 C.F.R. § 725.414 (1980).

[37] *See* comments to 20 C.F.R. § 725.414, 43 Fed. Reg. 36,772, 36,794 (1978).

[38] 20 C.F.R. §§ 725.458, 718.402 (1980); *See* Prater v. Jewell Ridge Coal Corp., BRB No. 78-153 (BLA) (Feb. 23, 1979).

moconiosis. State claim files will generally include relevant medical evidence, and any award made may be offset against federal benefits in the event the claim is ultimately approved.[39]

Efforts to develop information from such sources need to be particularly focused where there is a question regarding the identification of the correct responsible operator. Even the operator's records should not be taken at face value where such an issue is presented, since they may indicate that a miner was employed during periods when he was actually off due to sickness or accident. Full investigation of responsible operator questions can be especially fruitful. Although the prospects for reversing a determination on the merits at the administrative level are poor, the Deputy Commissioners are much less reluctant to admit an error in designating an operator responsible for defending the claim.

With respect to a living miner, the investigation is not complete without review of a comprehensive medical report regarding the claimant's present cardiopulmonary status. The Department of Labor generally forwards a medical examination report to the operator with its file, but it is seldom of sufficient quality to permit an informed evaluation of the claimant's condition. The Department does not require that the examining physicians it uses demonstrate special expertise in the diagnosis of pneumoconiosis or the evaluation of its resulting impairments. Therefore, the quality of the examination performed at the Department's request will necessarily vary.

An even more limiting factor, however, is the way the Department of Labor, through their appointed physicians, report the results of an examination. Here, the effort to serve administrative expediency appears almost consciously designed to caricature popular notions of how a government bureaucracy works. As might be expected, the Department of Labor provides its examining physicians with a form for reporting their results. Use of a form is not in and of itself a bad method for gathering the information, since it can be used to insure that certain basic data be routinely reported in a way which is understandable and

[39] 30 U.S.C. § 932(g) (Supp. II 1978). For a detailed discussion of the benefit offset phenomena, *see* Falk, *Counseling the Coal Miner Suffering From Respiratory Disease*, 83 W. VA. L. REV. 833, text accompanying nn. 62-68 (1981).

useable. However, the form used by the Department tends to discourage analysis. It reduces what can and should be a medically complex evaluation of an individual's cardiopulmonary history and status to a process of box checking.

As a result, the report seldom provides much insight into the claimant's true overall condition, and, just as importantly, infrequently expalins how or to what extent various concurrently existing diseases affect his ability to function. Moreover, use of the form tends to limit the scope of the examination as well as the scope of the report. Relevant information will therefore not be available, even upon further inquiry, because it was never obtained.

An independent examination by a physician chosen by the operator will therefore be an unavoidable necessity.[40] Since truth is the operator's only ultimate defense, the examining physician should be authorized to conduct as thorough and detailed an examination as he feels is necessary to render a competent opinion. It should include a detailed inquiry into the claimant's past employment and medical history, and the examiner should have the benefit of any information available to the operator prior to the examination, especially records of any prior medical treatment. The report of that examination should be precise and specific, and any conclusions reached should be explained in terms a layman can understand. Speculation should be avoided,[41] and the conclusions themselves must be candid. If the conclusions are not candid or they cannot be supported on the basis of the analysis offered by the examining physician, they can only lead to further expenses being incurred in fruitless litigation.

The examination report will thus be the single most important document in an operator's defense. If the conclusions reached are unfavorable, and if other avenues for defending the claim are not available, the claim can be paid and needless expense avoided. The operator has, at this point, at least confirmed that the claim is meritorious. If further litigation is necessary, it will provide the foundation for any further efforts.

[40] Such examinations are specifically authorized at 20 C.F.R. § 725.414(a) (1980). *See* 20 C.F.R. § 718.402 (1980).

[41] *See generally* Blevins v. Peabody Coal Co., [1978] 1 BLR (M-B) 587, BRB No. 77-175.

Assuming that there is or will be a conflict in the opinions offered by various physicians who have examined the claimant, that conflict can only be resolved by measuring the thoroughness with which the examiner has compiled and analyzed the information available. Thus, the report of the examining physician chosen by the operator will ideally not only fully explain the claimant's overall medical status, but will illustrate, upon comparison, how a report reaching a contrary conclusion is inadequate and incorrect.

Where a claim is presented by the survivng dependent of a deceased miner, the operator's defense must be more indirect. A full and complete medical history is critical in such claims, since an independent medical examination will not be available. A report of the autopsy examination, if one was performed, will be the best source of information regarding the decedent's condition at death. Furthermore, microscopic tissue slides should be available for review and comment by a pathologist of the operator's choice. While evidence relating to impairment of pulmonary function of a deceased miner must be indirect, review of the microscopic slides should permit a definitive diagnosis as to the presence or absence of pneumoconiosis and the extent to which the disease has comprised the lung tissue. The Department of Labor has refused to adopt standards for evaluating autopsy materials,[42] but comprehensive standards are available in the medical literature.[43]

Regardless of whether an autopsy was performed, the available medical records should be reviewed by a competent pulmonary physiologist for an analysis of the inferences to be properly drawn regarding the miner's cardiopulmonary condition. While this effort necessarily involves a second hand interpretation of someone else's data, a comprehensive evaluation of the available records, synthesizing information from a number of independent sources, is necessary if the miner's condition prior to death is to be described accurately. The same process may be beneficial in the case of a living miner where there are substantial unresolved conflicts in the medical evidence.

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[42] *See* comments to 20 C.F.R. § 718.106 (1980), 45 Fed. Reg. 13,678, 13,684 (1980).

[43] Kleinerman, *Pathology Standards for Coal Workers' Pneumoconiosis*, 103 ARCH. OF PATH. AND LAB. MED. 375 (1979).

Where the medical evidence is complete and fully developed, lay testimony at a formal hearing will have limited significance. Lay testimony will, however, generally be offered with respect to the miner's work history and symptoms. Full investigation of the claim prior to the hearing should adequately protect the operator against undue exaggeration by the claimant's lay witnesses.

When a living miner continues to work, or when a deceased miner was working at the time of death, it may be necessary to present independent testimony regarding the miner's work experience. As a result of the 1977 amendments, miners may prove total disability by showing a substantial change in the circumstances of their employment, necessitated by their breathing impairment.[44] If the circumstances of the miner's employment were in fact unchanged, or if he evidenced no breathing impairment on the job, the operator must be prepared to establish this on the record through competent evidence.

Thus the key to successful defense of black lung claims, as with most litigation, is preparation. The most strikingly unique element of black lung litigation is that this preparation cannot merely be defensive. Since the claimant shifts the burden of going forward to the operator so easily, the operator must be prepared to take the offensive. Presentation of the defense must be complete and comprehensive, and cannot focus solely on the inadequacies of the claimant's evidence. Presumed fact will too often overcome those inadequacies, and only by fully developing the facts can an operator prevail.

The frustrations inherent in the prescribed scheme for determining the merits of a claim have, unfortunately, been compounded by obstructive administrative practices regarding procedures. Obviously, preparation of the scope and depth suggested above requires time. The time originally provided by the Department of Labor for these efforts was sixty days. Reaction by the coal industry to such an arbitrary restriction of the time allotted for preparation was particularly harsh, however, and the proposed procedural regulations were modified to permit an operator a "reasonable time" to investigate and, if necessary,

[44] 30 U.S.C. § 902(b) (Supp. II 1978); 20 C.F.R. § 727.205 (1980).
[45] 43 Fed. Reg. 17,732, 17,748 (1978).

present a defense to the claim.[46] This victory proved illusory, as the Department of Labor administratively determined that thirty days would be a "reasonable time" to prepare a particular claim. Regardless of whether this effort was intended to merely prod the operator into immediate action or was part of a design to prejudice the defense of claims, it served to confuse litigation and divert attention and resources from the investigation and development of the substantive isssues presented for an extended period of time.

The Department of Labor has since tempered its attitude toward developing a defense, and an operator will generally be allowed to proceed unmolested so long as its efforts are made in good faith and are not unduly delayed. The experience does, however, illustrate once again the Department of Labor's concern with expediting claims development, a concern which is clearly reasonable, even if manifested in unreasonable ways. It also illustrates the risk inherent in any purposeful program of delay in presenting a defense.

CONCLUSION

In short, defense of the operator involves a search for the complete truth. Though this premise smacks of overstatement, it is nonetheless essentially correct. The basic premise of the "interim presumption" is to give a claimant the benefit of any doubt created by partial truths, and obfuscation and delay therefore seldom lead to any discernible benefit to the operator defending a claim. Only by imposing clarity and directness to an analysis of conflicting facts obscured by meaningless presumptions can an operator hope to successfully defend a claim.

[46] 20 C.F.R. § 725.414 (1980); *see* comments at 43 Fed. Reg. 36,772, 36,794 (1978).