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THE BLACK LUNG BENEFITS REFORM AND REVENUE ACTS OF 1977

On February 15, 1978, Congress enacted the Black Lung Benefits Reform Act of 1977.¹ The passage of this legislation followed months of congressional indecision over just how the existing black lung benefits system could be reformed.² During this period, the financing of the program appeared to be the most divisive issue. That issue was finally resolved by the enactment in late January of the Black Lung Benefits Revenue Act of 1977.³ After this hurdle was cleared, the conference committee report⁴ on the reform act easily passed both houses.⁵ The Act, which amended the Federal Coal Mine Health and Safety Act of 1969,⁶ was signed by the President and became effective March 1, 1978.

Since the provisions of these acts significantly alter the current standards of administration and review of black lung claims as well as the financing of benefits, this comment will analyze the changes effected by these provisions. In order to place these changes into perspective, the legislative history of federal black lung legislation will first be reviewed, followed with an examination of the 1977 reform and revenue acts.

LEGISLATIVE HISTORY

In response to national concern over the hazardous conditions of the nation's coal mines,⁷ Congress adopted the Federal Coal

¹ Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 95 (to be codified in scattered sections of 30 U.S.C.) [hereinafter cited as BLBRA of 1977].

² See generally H.R. REP. NO. 438, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 300; H.R. REP. NO. 151, 95th Cong., 1st Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 465.

³ Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 11 (to be codified in scattered sections of 30 U.S.C. and the I.R.C.) [hereinafter cited as Revenue Act of 1977].

⁴ H.R. CON. REP. NO. 864, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 536.

⁵ See 124 CONG. REC. H1022 (daily ed. Feb. 15, 1978).

⁶ Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1970), as amended by Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 1290 (tit. IV amended 1978) (original version at Pub. L. No. 92-173, 83 Stat. 742 (1969)) [hereinafter cited as FCMHSA].

⁷ National attention was focused on mining conditions by several mining disasters such as the explosion occurring in 1968 in a mine in Farmington, W. Va., where seventy-eight coal miners lost their lives.

Mine Health and Safety Act of 1969⁸ to improve mining conditions and work practices. Title IV of the FCMHSA⁹ was designed to deal with one symptom of these conditions by providing compensation to thousands of miners or survivors of miners suffering from coal workers' pneumoconiosis,¹⁰ or black lung. The Act provided that miners and survivors could receive benefits when the miner was totally disabled or killed due to pneumoconiosis resulting from employment in a coal mine.¹¹

This new legislation sought to divide the responsibility for the administration and payment of black lung benefits under a two-part program. The objective of the first program was to provide a temporary period during which the large number of persons then eligible for benefits could be designated and paid solely by the federal government.¹² Responsibility under the second program shifted to the coal industry, which would provide benefits to claimants through either state workmen's compensation systems or industry insurance plans.¹³

Administration of the first part of the program, Part B, was vested in the Social Security Administration under the Secretary of Health, Education and Welfare,¹⁴ and involved claims filed from 1970 through 1972.¹⁵ Claims filed during this period could be made without limitation as to the last date of coal mine employment or, in the case of survivors, the date of death. Eligible claimants who filed under Part B could receive monthly benefits for life from the government.¹⁶

⁸ FCMHSA, *supra* note 6.

⁹ *Id.* tit. IV. §§ 401-513, 30 U.S.C. §§ 901-960 (1970, Supp. V 1975) (amended 1978).

¹⁰ Coal miner's pneumoconiosis is defined as "a chronic chest disease, caused by the accumulation of fine coal dust particles in the human lung. In its advanced forms, it leads to severe disability and premature death." TESTIMONY OF THE SURGEON GENERAL, H.R. REP. No. 563, 91st Cong., 1st Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 2503, 2517. The House report placed the number of afflicted active and retired miners at one hundred thousand. *Id.* at 2520.

¹¹ FCMHSA, *supra* note 6, § 412(a) 30 U.S.C. § 922(a) (1970).

¹² See H.R. REP. No. 563, 91st Cong., 1st Sess., reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2503, 2603-2606.

¹³ *Id.*

¹⁴ FCMHSA, *supra* note 6, § 411(a), 30 U.S.C. § 921(a) (1970).

¹⁵ *Id.* § 414, 30 U.S.C. § 924.

¹⁶ 30 U.S.C. § 922(a)(1) (1970). Claimants are entitled to benefits at a rate equal to fifty percent of the minimum monthly payment a GS-2 federal employee may receive if he is totally disabled. Current benefits range from \$205.40 per month for a miner with no dependents to \$410.80 for a miner with three or more dependents. 20 C.F.R. § 410.510 (1977).

Under the second part of the program, Part C, the duty of administering claims filed after 1972 passed to the Secretary of Labor.¹⁷ Part C claimants were required to file their claims with their state workmen's compensation system, provided the system was approved by the Secretary as providing benefits equivalent to those under the FCMHSA.¹⁸ In the absence of such an approved system, responsibility for payment was placed directly on the miner's coal mine employer, who was required to secure benefits by self-insurance or through an insurance carrier.¹⁹ If no financially responsible employer could be found, then the government would pay the claim.²⁰ It should be noted that to date no state workmen's compensation program has been approved. Thus, all claims are still processed under the FCMHSA.

Claims filed under Part C were to be reviewed by procedures incorporated by reference²¹ from the Longshoremen's and Harbor Worker's Compensation Act.²² These review procedures would allow coal operators, who were liable for a particular claim, to participate in proceedings concerning that claim.²³ Further, unlike Part B claims which were payable for life, benefits payable by the coal industry under Part C were to terminate by 1977.²⁴ The statute of limitations for these claims was three years from the discovery of pneumoconiosis, or from the date of death if due to pneumoconiosis.²⁵

Standards for determining whether a miner died or was totally disabled from pneumoconiosis under Parts B and C were required to be set out in regulations promulgated by the respective Secretaries.²⁶ Recognizing the difficulty of medically establishing *disability* or *cause of death*, Congress provided statutory presumptions with regard to entitlement to benefits, stating:

1. If a miner with ten or more years of underground coal mining employment suffered from pneumoconiosis, there was a re-

¹⁷ FCMHSA, *supra* note 6, § 421, 30 U.S.C. § 931 (1970).

¹⁸ *Id.* § 421(b), 30 U.S.C. § 931(b).

¹⁹ *Id.* § 422(a), (b), 30 U.S.C. § 932(a), (b).

²⁰ *Id.* § 424, 30 U.S.C. § 934.

²¹ *Id.* § 422(a), 30 U.S.C. § 932(a).

²² Longshoreman's and Harbor Workers Act, 33 U.S.C. § 901 (1970 & Supp. V 1975) (original version at Pub. L. No. 69-803, 44 Stat. 1424 (1927)) [hereinafter cited as LSHWA].

²³ *Id.* § 19, 33 U.S.C. § 919.

²⁴ FCMHSA, *supra* note 6, § 422(e), 30 U.S.C. § 932(e) (1970).

²⁵ *Id.* § 422(f), 30 U.S.C. § 932(f).

²⁶ *Id.* §§ 411(b), 422(h), 30 U.S.C. §§ 921(b), 932(h).

buttable presumption that the disease arose out of such employment.²⁷

2. If a deceased miner was employed in underground coal mining for ten or more years and died from a respiratory disease, there was a rebuttable presumption that death was due to pneumoconiosis.²⁸

3. If a miner suffered from a chronic dust disease of the lungs which was diagnosed as complicated pneumoconiosis, there was an irrebuttable presumption of total disability or death due to pneumoconiosis.²⁹

In 1972, Congress amended the FCMHSA with the Black Lung Benefits Act of 1972.³⁰ The purposes of the amendments were to enlarge FCMHSA's coverage and liberalize claim awards in light of what Congress considered to be a restrictive interpretation of the Act by the Social Security Administration.³¹ The amendments extended federal responsibility for miner claims under Part B to June 30, 1973, and to 1974 for survivor claims.³²

To further facilitate the reduction of the backlog of claims resulting from the transition of administration from H.E.W. to the Secretary of Labor, the BLBRA of 1972 established a transition period from July 1, 1973 to December 31, 1973.³³ During this period, the Secretary of Labor was allowed to handle the backlog of claims, but new claims filed in this interim period were to be paid by the government.³⁴ In order to expedite the disposition of pending claims, Congress also expected the Secretary of H.E.W. to establish special regulations for claims filed prior to the interim period.³⁵ All claims filed after 1973 continued to be Part C claims

²⁷ *Id.* § 411(c)(1), 30 U.S.C. § 921(c)(1).

²⁸ *Id.* § 411(c)(2), 30 U.S.C. § 921(c)(2).

²⁹ *Id.* § 411(c)(3), 30 U.S.C. § 921(c)(3).

³⁰ Black Lung Benefits Act of 1972, Pub. L. No. 92-303 (codified at 30 U.S.C. § 901 (Supp. V 1975)) (amended 1978) [hereinafter cited as BLBA].

³¹ See S. REP. No. 743, 92d Cong., 2d Sess., reprinted in [1972] U.S. CODE CONG. & AD NEWS 2305. The committee noted:

Not only have the number of claims far exceeded those earlier expectations of Congress, indicating a more widespread and more serious problem than they anticipated, but also the rate of denials—more than fifty percent nationwide, and as high as 72 percent in some states—suggests strongly that the solution has not been nearly as complete as Congress believed and expected it would be.

Id. at 2307.

³² BLBA, *supra* note 30, § 5(1), (2), 30 U.S.C. § 924 (Supp. V 1975).

³³ *Id.* § 7, 30 U.S.C. § 925(a).

³⁴ *Id.*

³⁵ See S. REP. No. 743, 92nd Cong., 2d Sess., reprinted in [1972] U.S. CODE

paid by local operators as originally provided in the FCMHSA,³⁶ with operator liability extended from 1977 to 1981.³⁷

Not only did the amendments extend federal payment of benefits, but they also established a new presumption. This presumption provided that if x-rays failed to establish pneumoconiosis, but other recent evidence demonstrated the existence of respiratory disease, there was a rebuttable presumption of total disability or death due to pneumoconiosis if the miner had been employed as a miner for fifteen or more years.³⁸

In addition, the amendments expanded the eligibility of widows and dependent survivors for benefits.³⁹ Widows were allowed to receive benefits without regard to the cause of death if the miner was totally disabled by pneumoconiosis at the time of death.⁴⁰ Also, medical treatment benefits for eligible miners under Part C were provided,⁴¹ along with prohibitions against discriminatory employment practices affecting miners suffering from pneumoconiosis.⁴²

REFORM AND REVENUE ACTS OF 1977

A review of the major provisions of the BLBRA of 1977 seems to reflect a basic congressional disapproval of the administration and financing of the current black lung program. Congress apparently found, as it did when it enacted the 1972 amendments, that fewer miners and their survivors were meeting the medical and evidentiary standards for the receipt of benefits than had been

CONG. & AD. NEWS 2305, 2322. Interim adjudicatory regulations were promulgated by the Secretary. See 20 C.F.R. § 410.490 (1977).

³⁶ BLBA *supra* note 30, §§ 3(b), 5(3), 30 U.S.C. §§ 931, 933 (Supp. V 1975). See also, *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1 (1975); *Nat'l Independent Coal Operators Ass'n v. Brennan*, 372 F. Supp. 16 (D.D.C. 1974) *aff'd mem.*, 419 U.S. 955 (1974) (where the FCMHSA, as amended in 1972, was upheld as not being violative of due process even though it: (1) required coal mine employers to pay benefits to those terminating employment before the effective date of the Act, and (2) affects their ability to challenge liability by the creation of statutory presumptions.)

It should be noted that BLBRA of 1977 changes the responsibility of coal employers for miners terminating their employment prior to the effective date of the FCMHSA. See note 112, *infra*.

³⁷ BLBA, *supra* note 30, § 5(4), 30 U.S.C. § 932(e)(3) (Supp. V 1975).

³⁸ BLBA, *supra* note 30, § 4(c), 30 U.S.C. § 921(c)(4) (Supp. V 1975).

³⁹ *Id.* §§ 1(c), 3(b), 4(a), 30 U.S.C. § 902.

⁴⁰ *Id.* § 4(b), 30 U.S.C. § 921(a).

⁴¹ *Id.* § 5(5), 30 U.S.C. § 932(a).

⁴² *Id.* § 5(7), 30 U.S.C. § 938.

intended. As a result, the BLBRA requires the Secretary of Labor to draft new permanent medical standards and to review all previously denied or pending claims under Parts B and C by using the more liberal temporary interim standards applied in 1973. At the same time, the Act clarifies the existing requirements of the FCMHSA and makes the black lung benefits program permanent. Finally, the BLBRA, along with the Revenue Act, establishes a new system in which the burden of financing benefits will be borne by the coal industry.

REVIEW OF CLAIMS

Perhaps the most significant of the BLBRA's many amendments is the requirement that all pending and denied claims be reviewed under more liberal medical criteria.⁴³ As this review occurs, new and more liberal medical standards for the future must be established by the Department of Labor.⁴⁴ However, these new medical standards will only apply to claims submitted after the promulgation of new regulations containing the new standards.⁴⁵

Denied and pending claims filed under Parts B and C prior to the new standards are to be reviewed in terms of criteria "no more restrictive" than the interim standards established in 1972 for the prompt disposition of the backlog of claims accumulated at that time.⁴⁶ These interim standards established by regulations are far more liberal than the standards that were being applied by the Department of Labor.⁴⁷ They provide that a miner with x-ray proof of pneumoconiosis may qualify for benefits without additional medical evidence, and require less stringent breathing test standards.⁴⁸ The application of these standards, combined with a more simplified proof of claims procedure established by the BLBRA, means that many prior claimants who were denied benefits will now become eligible for compensation.⁴⁹

⁴³ BLBRA of 1977, *supra* note 1, § 15 reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 103 (to be codified in 30 U.S.C. § 945).

⁴⁴ *Id.* § 2(c) (to be codified in 30 U.S.C. § 902(f)).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Compare 20 C.F.R. § 410.490 (1976) with 20 C.F.R. §§ 410.414-426 (1976).

⁴⁸ 20 C.F.R. § 410.490(b) (1976).

⁴⁹ The relaxed standards for claims submitted prior to the transition period resulted in a large number of new claims. As a result, much litigation developed over the question of when a claim could be considered to have been filed within the period and what evidence could be introduced. See, e.g., Talley v. Mathews, 550 F.2d 911 (4th Cir. 1977); Begley v. Mathews, 544 F.2d 1345 (6th Cir. 1976).

The Secretaries of H.E.W. and Labor must notify every claimant whose claim was denied or who has a pending claim that their claims are to be reviewed.⁵⁰ These claimants will not have to file new claims in order to be reviewed.⁵¹ Rather, claimants who originally submitted claims under Part B may elect to have the mandatory review of their claims done either by the Part B program of H.E.W., or by the Part C program of the Department of Labor, or both.⁵² Those originally submitting claims under Part C are to be reviewed only by the Part C program.⁵³

Under the Part B program, claims are to be automatically reviewed under the interim criteria, but no additional medical evidence may be submitted.⁵⁴ If awarded, these benefits would, as in the past, be paid by the federal treasury, which would be later reimbursed by a new trust fund set up by the Revenue Act of 1977.⁵⁵ Claims denied again under the review program will be sent to the Secretary of Labor for any further review under Part C.⁵⁶

Part B claimants electing review under the Part C program will be reviewed by the same interim criteria.⁵⁷ However, additional medical evidence can be considered if submitted by the claimant.⁵⁸ If evidence on file is insufficient for approval of a claim either before or after review, the claimant must be notified that additional medical evidence may be offered to substantiate his claim.⁵⁹ Payment of these claims would also ultimately be paid by the new trust fund set up by the BLBRA.⁶⁰

Claimants originally filing Part C claims will be reviewed in the same manner as Part B claimants electing review under the Part C program.⁶¹ The only difference is that coal operators who

⁵⁰ BLBRA of 1977, *supra* note 1, § 15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 103 (to be codified in 30 U.S.C. § 945).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See text at note 109, *infra*.

⁵⁶ BLBRA of 1977, *supra* note 1, § 15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 103 (to be codified in 30 U.S.C. § 945).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Revenue Act of 1977, *supra* note 3, § 3(d), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 13 (to be codified in 30 U.S.C. § 934).

⁶¹ BLBRA of 1977, *supra* note 1, § 15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 103 (to be codified in 30 U.S.C. § 945).

may be responsible for payment, may participate in such cases consistent with the present practice in all Part C claims.⁶² In this context, it should also be noted that no new claims may be filed under Part B; but claims can be filed under Part C regardless of the last date of coal mine employment under a new statute of limitations.⁶³

All reviewed claims are to receive "expedited treatment" by the reviewing Secretaries,⁶⁴ and upon approval of any claim immediate payment must be made.⁶⁵ More importantly, any claim approved that was denied under the prior standards must receive retroactive benefits.⁶⁶ Part B claims that were denied will receive payments from January 1, 1974.⁶⁷ A previously denied Part C claim will be paid from the date of the original filing.⁶⁸

NEW DEFINITIONS

In addition to requiring review of past claims, the BLBRA of 1977 expands and clarifies the FCMHSA definitions which set the limits of the Act's coverage. The amendments retain the former definition of total disability which states that a miner is totally disabled when "pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time."⁶⁹ However, the amendments require the regulations provide that:

(i) A deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;⁷⁰

⁶² LSHWA, *supra* note 22, § 19, 33 U.S.C. § 919 (1970 & Supp. V. 1975).

⁶³ BLBRA of 1977, *supra* note 1, § 7(e) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 99 (to be codified in 30 U.S.C. § 932).

⁶⁴ H.R. CONFERENCE REP. No. 864, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 543.

⁶⁵ BLBRA of 1977, *supra* note 1, § 15, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 104 (to be codified in 30 U.S.C. § 945).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 30 U.S.C. § 902(f) (Supp. V. 1975).

⁷⁰ BLBRA of 1977, *supra* note 1, § 2(c), reprinted in [1978] U.S. CODE CONG.

This language is consistent with the case law under the FCMHSA which does not make current employment a per se bar to benefits: *e.g.*, where the miner was in a "make work" situation or continued work as a "heroic effort."⁷¹ However, it appears that in the past continued employment was frequently used to deny coverage. Consistent with this concept, the Act provides that a miner, while he is still working, may apply to see if he would qualify for benefits if he stopped working.⁷² This procedure is aimed at complaints under the old law that miners quitting work risked months or years without benefits before receiving a decision on their black lung eligibility.

Another definition that is expanded is that of a "miner." The existing definition stated that a miner is "any individual who is or was employed in a coal mine."⁷³ As a result, there was some dispute over whether other auxiliary workers in the industry, such as coal loaders or truck drivers, were covered by the FCMHSA.⁷⁴ The BLBRA eliminates this uncertainty by allowing self-employed miners to be covered as well as persons working in or around coal mines or coal preparation facilities, including coal mine construction and transportation workers to the extent they are exposed to coal dust in their employment.⁷⁵

Finally, the definition of pneumoconiosis itself is clarified to include medical aftereffects of the disease.⁷⁶ The purpose of this change is not clear, but it may be important in cases claiming death resulting from black lung where the cause of death is uncertain.

& AD. NEWS 92 Stat. 95 (to be codified in 30 U.S.C. § 902). For current regulations see 20 C.F.R. § 410.412(a)(1) (1977).

⁷¹ Compare *Collins v. Mathews*, 547 F.2d 795 (4th Cir. 1976); *Felthager v. Weinberger*, 529 F.2d 130 (10th Cir. 1976); with *Padavich v. Mathews*, 561 F.2d 142 (8th Cir. 1977).

⁷² BLBRA of 1977, *supra* note 1, § 5(b), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 97 (to be codified in 30 U.S.C. § 923(b)).

⁷³ 30 U.S.C. § 902(d) (Supp. V 1975) (amended 1978).

⁷⁴ See, *e.g.*, *Adelsberger v. Mathews*, 543 F.2d 82 (7th Cir. 1976) (clerical employee); *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975) (truckdriver).

⁷⁵ BLBRA of 1977, *supra* note 1, § 2(b), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 95 (to be codified in 30 U.S.C. § 902(d)).

Employers, other than coal mine operators, of workers involved in the transportation of coal or in coal mine construction will not have to secure the payment of benefits to such workers except upon a determination of eligibility by the Secretary of Labor who may then require security. *Id.* at § 7(b).

⁷⁶ BLBRA of 1977, *supra* note 1, § 29(a), [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 95 (to be codified in 30 U.S.C. § 902(b)).

ESTABLISHMENT OF CLAIMS

The BLBRA seeks to simplify the establishment of eligibility for benefits for future and reviewed claims by: (1) applying new presumptions;⁷⁷ (2) requiring less evidence and less review of the evidence by the government;⁷⁸ and (3) extending the statute of limitations.⁷⁹ Many of these reforms are primarily designed to aid survivors' claims concerning deceased miners afflicted with black lung.

In this regard, the Act establishes a new presumption that the survivors of a deceased miner who was employed for twenty-five years or more before June 30, 1971, will be entitled to benefits, unless it is established that at the time of his death he was not partially or totally disabled due to pneumoconiosis.⁸⁰ However, upon request of the Secretary of Labor, eligible survivors must furnish any evidence that is available concerning the health of the miner.⁸¹ Despite this possibility of review by the Secretary, the effect of the new presumption is to make nearly all survivors of such miners eligible for benefits.

Besides adding a new presumption, the BLBRA also broadens the application of the existing fifteen-year presumption. The fifteen-year presumption previously benefited only those miners who had worked fifteen years before 1971 and applied within three years of their last coal mine employment.⁸² Under the new Act, both of these limitations are removed, and the presumption may be invoked regardless of when the years of work are accumulated or when application for benefits was made.⁸³ The application of this revised presumption will facilitate the proof of both future and reviewed claims.

Equally important in the simplification of proof of claims are the Act's changes with regard to the kinds of evidence that can be submitted. The Act's amendments allow a claimant of a deceased miner to submit affidavits of family and co-workers describing the miner's condition to establish total disability or death due to pneu-

⁷⁷ *Id.* §§ 3(a)(3), 10(2) (to be codified in 30 U.S.C. §§ 921(c), 940).

⁷⁸ *Id.* § 5 (to be codified in 30 U.S.C. § 923(b)).

⁷⁹ *Id.* § 7(e) (to be codified in 30 U.S.C. § 932(f)).

⁸⁰ *Id.* § 3(a)(3) (to be codified in 30 U.S.C. § 921 (c)) (emphasis added).

⁸¹ *Id.*

⁸² 30 U.S.C. §§ 940, 932(f)(2) (Supp. V 1975) (amended in 1978).

⁸³ BLBRA of 1977, *supra* note 1, §§ 10(2), 7(e), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 100 (to be codified in 30 U.S.C. §§ 940, 934).

moconiosis when there is no other relevant medical evidence available.⁸⁴ If there is an autopsy report establishing the presence of pneumoconiosis, the report may not be contested unless there are good reasons indicating that the report is not accurate or that there is fraudulent representation.⁸⁵ Moreover, the Secretary cannot re-read or reinterpret x-rays of living or deceased miners if those x-rays have been interpreted by certified radiologists to indicate the presence of pneumoconiosis.⁸⁶ Apparently, these provisions seek to curb much of the delay in appeal of claims where the government or coal operators have contested a claimant's medical evidence. This change is most significant in the case of x-ray re-reading where a second class of government certified readers have been allowed to reinterpret x-rays of all claimants.⁸⁷

Proof of pneumoconiosis by complete pulmonary examination, including blood gas and ventilatory function tests, is also stressed. The BLBRA allows every miner the right to substantiate his claim, at government expense, by such an examination.⁸⁸ In fact, it appears the Congress intends that no claim be denied unless the claimant has been offered the opportunity to submit proof by means of a pulmonary examination.⁸⁹

The procedures under which medical proof may be reviewed are also affected by the amendments. This change arises out of the judicial confusion⁹⁰ that resulted from the 1972 amendments to LSHWA administrative procedures⁹¹ which were incorporated by reference in the FCMHSA of 1969.⁹² It was unclear whether the 1972 LSHWA amendments were also to be incorporated by reference. The BLBRA clears the air by specifically stating that the LSHWA amendments will apply, except that the LSHWA require-

⁸⁴ *Id.* § 5(a) (to be codified in 30 U.S.C. § 923(b)) (amending 30 U.S.C. § 923(b) (Supp. V 1975)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See H.R. REP. NO. 151, 95th Cong., 1st Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 465, 484.

⁸⁸ BLBRA of 1977, *supra* note 1, § 5(b), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 97 (to be codified in 30 U.S.C. § 923(b)).

⁸⁹ H.R. CONFERENCE REP. NO. 864, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 536, 539.

⁹⁰ See, e.g., *Director v. Peabody Coal Co.*, 554 F.2d 310 (7th Cir. 1977); *Director v. Nat'l Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977); *Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685 (3rd Cir. 1977).

⁹¹ 33 U.S.C. §§ 919(d), 921 (Supp. V 1975).

⁹² See notes 21-22 and accompanying text, *supra*.

ment that administrative law judges, rather than hearing officers, will hear claims⁹³ will not be effective for one year.⁹⁴

The final and quite significant change in the claim procedures is the new statute of limitations provided by the Act. Under the old law, survivor claims had to be filed within three years of the miner's death.⁹⁵ This statute of limitations for survivors has been completely removed by the BLBRA.⁹⁶ For living miners, the old law provided that a miner could file a claim within three years of the discovery of total disability due to pneumoconiosis.⁹⁷ Now, the amendments provide that any miner, regardless of the date of his last coal mine employment, may file a Part C claim within three years of discovery or the date of the enactment of the BLBRA, whichever occurs later.⁹⁸ Thus, living miners will have until February, 1981, to file regardless of when they became disabled. After that time the three year discovery rule will apply.

OTHER BENEFITS

The BLBRA requires the Secretary of H.E.W. to notify those miners already receiving benefits under Part B, and who the Secretary believes are eligible for medical services and supplies under the prior act, that they may refile for benefits under the Department of Labor medical program established by the 1972 amendments.⁹⁹ After notification, miners will have six months to file a claim for medical services even if the original three-year statute of limitations has expired.¹⁰⁰ Miners who apply before the permanent medical standards are promulgated will be judged by the interim standards and should automatically qualify.

In connection with this requirement, the annual ten million dollar authorization for black lung clinics is revived.¹⁰¹ The funding

⁹³ 33 U.S.C. § 919(d) (Supp. V 1975).

⁹⁴ BLBRA of 1977, *supra* note 1, § 7(i) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 100 (to be codified in 30 U.S.C. § 934).

⁹⁵ 30 U.S.C. § 932(f) (Supp. V 1975) (amended 1978).

⁹⁶ BLBRA of 1977, *supra* note 1, § 7(e) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 99 (amending 30 U.S.C. § 932(f) (Supp. V 1975)).

⁹⁷ 30 U.S.C. § 932(f) (Supp. V 1975) (amended 1978).

⁹⁸ BLBRA of 1977, *supra* note 1, § 7(e) reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 99 (to be codified in 30 U.S.C. § 932(f)).

⁹⁹ *Id.* § 11, 92 Stat. 101.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 9, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 100 (to be codified in 30 U.S.C. § 937) (amending 30 U.S.C. § 937(c) (Supp. V 1975)).

for these clinics had expired in 1976.¹⁰² In addition, the amendments require the establishment of field offices of the Department of Labor to assist miners and survivors in the filing and processing of claims for benefits.¹⁰³

Further, the BLBRA changes the amount of basic compensation benefits a miner or survivor is entitled to receive. The past practice had been to reduce Part B black lung benefits by the amount of state unemployment or workmen's compensation the miner receives, even if paid for an injury unrelated to black lung.¹⁰⁴ Under the BLBRA, such benefits will no longer be subtracted from black lung benefits unless the compensation is awarded because of occupational pneumoconiosis.¹⁰⁵

FINANCING

Perhaps the most controversial aspect of the 1977 revenue and reform acts is the system used to finance the benefits program. Under the old Act, Part B claims filed prior to 1974 were paid by the federal government,¹⁰⁶ and claims arising after that time were the responsibility of the coal miner's employer under a state workmen's compensation system or industry insurance plan.¹⁰⁷ The Black Lung Benefits Revenue Act of 1977¹⁰⁸ changes the financing of claims to be paid by the government by creating a trust fund within the U.S. Treasury.¹⁰⁹ Funding of the trust is to be accomplished by the imposition of an excise tax on the tonnage of coal sold by coal operators. The tax is set at a rate of fifty cents per ton

¹⁰² See BLBA, *supra* note 30, § 5(6), 30 U.S.C. § 937(c) (Supp. V 1975).

¹⁰³ BLBRA of 1977, *supra* note 1, § 18, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 105 (to be codified in 30 U.S.C. § 903).

¹⁰⁴ 30 U.S.C. § 922(b) (Supp. V 1975) (amended 1978).

¹⁰⁵ BLBRA of 1977, *supra* note 1, § 4, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 97 (to be codified in 30 U.S.C. § 923(b)).

¹⁰⁶ 30 U.S.C. § 922(a) (1970) (amended 1978).

¹⁰⁷ 30 U.S.C. §§ 931, 932(a)(b) (1970 & Supp. 1975) (amended 1978).

¹⁰⁸ Revenue Act of 1977, *supra* note 3.

¹⁰⁹ *Id.* § 3(a), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 12 (to be codified in 30 U.S.C. § 934(a)).

A trust fund, financed by the coal industry, was established largely because the transfer of responsibility for the payment of Part C claims from the government to the coal operators had been frustrated by: (1) failure of state workmen's compensation systems to qualify under Part C; (2) inability of the Department of Labor to identify responsible operators in approximately 78% of the Part C claims; and (3) more than 97% of putative responsible operator cases are being contested by the industry. See H.R. REP. NO. 151, 95th Cong., 1st Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 465, 485.

for underground coal and twenty-five cents per ton for surface mined coal.¹¹⁰ This tax may not in any event exceed two percent of the selling price of a ton of coal and applies to sales after March 31, 1978.¹¹¹

The trust fund will provide funds for payment of benefits in the following situations: (1) for miners or survivors where the miner's last coal mine employment was prior to 1970;¹¹² (2) where there is no operator who is required to secure the payment of such benefits;¹¹³ and (3) when an operator liable for payment of benefits has not commenced payment within thirty days of the determination of eligibility for benefits.¹¹⁴ Thus, the fund will basically take over payment of presently paid Part B benefits, Part B claims approved under the review requirements of the amendments, and new claims filed under Part C where the miner's last date of employment was prior to 1970. Of course, the trust will also fund the present payment of Part C benefits where a solvent or insured coal operator responsible for payment either cannot be found or refuses to pay.¹¹⁵ Operators defaulting or refusing to make payment will be liable to the trust fund.¹¹⁶

These revenue measures, however, do not change the current liability of individual coal operators for claims filed from 1974 on, except for claims of miners who terminated their employment prior to 1970. The revenue and reform acts simply modify the manner in which operator liability may be satisfied, and make the benefits program permanent.¹¹⁷ The first modification concerns the question of when state workmen's compensation systems can be approved as providing benefits consistent with the federal law.¹¹⁸ To date, no state workmen's compensation law has been approved by the Secretary of Labor.¹¹⁹ The BLBRA of 1977 does not change the requirements that state systems must have standards and benefits

¹¹⁰ *Id.* § 2(a) (to be codified in I.R.C. § 4121).

¹¹¹ *Id.* § 2(a), (d) (to be codified in I.R.C. § 4121).

¹¹² *Id.* § 3(d) (to be codified in 30 U.S.C. § 934(a)(2)).

¹¹³ *Id.* § 3(d) (to be codified in 30 U.S.C. § 394(a)(1)).

¹¹⁴ *Id.*

¹¹⁵ 30 U.S.C. § 934 (Supp. V 1975).

¹¹⁶ Revenue Act of 1977, *supra* note 3, § 3(d), [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 14 (to be codified in 30 U.S.C. § 934(b)).

¹¹⁷ The Part C program was made permanent by BLBRA of 1977, *supra* note 1, § 7(d), [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 98 (amending 30 U.S.C. § 932).

¹¹⁸ 30 U.S.C. § 931(b)(2) (Supp. V 1975). *See also* 20 C.F.R. § 722.101 (1977).

¹¹⁹ *Id.*

“substantially equivalent” to those of the federal act.¹²⁰ These requirements also demand that state laws must cover miners who were last employed prior to the enactment of the law. The new amendments modify this requirement by permitting the approval of the state law by the Secretary. It should be noted that even if a state law is approved, operators in that state will still be liable under the federal act for miners terminating employment prior to that time.¹²¹ Of course, all operators, even those in approved states, will still be required to pay the coal excise tax.

If the applicable state laws have not been approved, both the revenue and reform acts provided several ways in which coal operators may meet the insurance requirements originally set up by the FCMHSA.¹²² Operators choosing to self-insure may set up tax exempt trusts with certain deductions available for amounts paid into the trust by the operator.¹²³ Certain investment limitations and prohibitions on self-dealing,¹²⁴ excess contributions,¹²⁵ and taxable expenditures¹²⁶ are imposed to prevent abuse of such trusts. If an operator wishes instead to obtain insurance from a private carrier, but cannot do so at a reasonable cost, he may purchase insurance from the Secretary of Labor.¹²⁷ In order to facilitate this procedure, the BLBRA sets up an insurance fund within the Department of Labor which will charge participating operators premiums calculated in accordance with “accepted actuarial principles.”¹²⁸

The new amendments make it clear that an operator’s responsibilities may not be easily avoided. If, during or after 1970, any operator or corporation sells substantially all its assets in a mine, or reorganizes, merges or otherwise changes its identity or owner-

¹²⁰ BLBRA of 1977, *supra* note 1, § 6, [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 98 (to be codified in 30 U.S.C. § 931(b)(2)(A)).

¹²¹ *Id.*

¹²² The current requirements for coal mine operators’ insurance appear at 20 C.F.R. § 726.1 (1977). See also DeCarlo & Vieweg, *Federal Black Lung Law and Insurance in a Nutshell*, 11 FORUM 661 (1975).

¹²³ Revenue Act of 1977, *supra* note 3, § 4(a), (b), [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 15, 16 (to be codified in I.R.C. § 501(c)(21) (exempt organizations) and I.R.C. § 501(c)(192) (deduction allowance)).

¹²⁴ *Id.* § 4(c) (to be codified in I.R.C. § 4951).

¹²⁵ *Id.* § 4(c) (to be codified in I.R.C. § 4953).

¹²⁶ *Id.* § 4(c) (to be codified in I.R.C. § 4952).

¹²⁷ BLBRA of 1977, *supra* note 1, § 13, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 101 (to be codified in 30 U.S.C. § 943).

¹²⁸ *Id.*

ship, the successor operator or corporation is subject to liability for the payment of benefits as if the change had not occurred.¹²⁹ More severe penalties have also been added to the existing penalties for failure to secure payment of benefits¹³⁰ or to repay benefits paid by the trust fund.¹³¹

CONCLUSION

In summary, the 1978 amendments evidence a general congressional reappraisal of the basic problems of the black lung benefits system. Through these amendments, Congress has sought to open the doors of the system so that more miners and their survivors may more easily establish eligibility for black lung benefits under more liberal medical and evidentiary standards. The amendments attempt to wipe the slate clean of disputed claims resulting from what was considered to be an overly restrictive administrative system, and to create a more viable approach for future claims. This effort has been bolstered by the creation of a more flexible financing system that is closely tied to the coal industry itself. The success of these reforms is yet to be determined, but it is apparent that in order for them to succeed new responsibilities will have to be borne by both industry and government.

John Rollins

¹²⁹ *Id.* § 7(g) (to be codified in 30 U.S.C. § 932(i)).

¹³⁰ *Id.* § 8 (to be codified in 30 U.S.C. § 933).

¹³¹ Revenue Act of 1977, *supra* note 3, § 3(d), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 92 Stat. 14 (to be codified in 30 U.S.C. § 934(b)).