

University of Michigan Journal of Law Reform

Volume 23

1989

The Constitutional Conundrum of Black Lung Appeals: Two Proposed Solutions

Pete S. Michaels
Bingham, Dana & Gould

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Civil Procedure Commons](#), [Litigation Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [Workers' Compensation Law Commons](#)

Recommended Citation

Pete S. Michaels, *The Constitutional Conundrum of Black Lung Appeals: Two Proposed Solutions*, 23 U. MICH. J. L. REFORM 27 (1989).

Available at: <https://repository.law.umich.edu/mjlr/vol23/iss1/3>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE CONSTITUTIONAL CONUNDRUM OF BLACK LUNG APPEALS: TWO PROPOSED SOLUTIONS

Pete S. Michaels*

An alarming injustice of the American legal system is the way in which courts dismiss many pneumoconiosis (black lung) appeals because the petitioner fails to conform with procedural guidelines. Nowhere is this problem more acute than in the United States Court of Appeals for the Sixth Circuit, which includes the coal-rich mountains of Kentucky and Tennessee.¹

Black lung claims represent a staggering drain on the Sixth Circuit's docket. In one form or another, approximately one hundred cases come before the court annually.² The majority of these cases are filed by a disabled claimant or the claimant's widow, proceeding pro se.³ Each case presents a story of human struggle against both a crippling disease and a system mired in bureaucracy. Aggrieved parties write of the inability to breathe,⁴

* Associate at Bingham, Dana & Gould, Boston, Mass. B.A., University of Toledo, 1983; M.A., The Ohio State University, 1985; J.D., Boston College, 1988. Law Clerk to The Honorable George C. Edwards, United States Court of Appeals for the Sixth Circuit, 1988-89. The author thanks Professor Mark S. Brodin of Boston College Law School, The Honorable George C. Edwards, Darlene Koenig, Esq. and Ms. Sally A. Michaels for their assistance in the formative stages of this Article.

1. The Sixth Circuit includes the states of Michigan, Ohio, Kentucky, and Tennessee. The court sits in Cincinnati, Ohio, and is presently composed of 14 active and 6 senior judges. For a discussion of the court, see JUDICIAL CONFERENCE OF THE UNITED STATES BICENTENNIAL COMMITTEE, HISTORY OF THE SIXTH CIRCUIT (1976). Because the appeals must be filed in the circuit where the injury allegedly occurred, the Sixth Circuit has many filings, given the location of the mining industry.

2. Memorandum from William M. Eggemeier, Sixth Circuit System Manager, to Darlene Koenig, Staff Attorney (October 6, 1988) (discussing black lung cases filed in the twelve month period ending June 30, 1988) (on file with the UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM). Nationwide, black lung disputes have reached such an epidemic level that a case reporter digest, the Black Lung Reporter (BLR), is now being published.

3. Of the 40 black lung appeals filed by claimants in the Sixth Circuit from April through September, 1988, 27 were filed by pro se parties. *Id.* Memorandum from William M. Eggemeier to Darlene Koenig, *supra* note 2.

4. *Collins v. Director, Office of Workers' Compensation Programs* [hereinafter OWCP], No. 88-3430 (6th Cir. filed May 18, 1988), *dismissed* (June 26, 1988). Many of the cases cited in this Article are unpublished decisions or dismissals. Copies of all cited

to walk over one hundred feet at a time,⁵ or to take care of [themselves].⁶ A wife may write of a spouse whose lung hemorrhages,⁷ a husband who "just smothers so bad,"⁸ and wanting to "give up" her own life so that her husband might live.⁹ This compelling human drama is exacerbated by the dismissal of these cases on appeal prior to the court even considering the merits of the claim for benefits.

In the most recent period for which accurate records are available, April 1, 1988 to September 30, 1988, twenty seven pro se pneumoconiosis appeals were docketed in the Sixth Circuit. Of those twenty seven appeals, only seven were free of procedural defects. The pro se litigants' misunderstanding of the black lung dispute process causes the defects in their appeals and the resultant court of appeals dismissal of those appeals.

Part I of this Article explains the statutory requirements that a black lung benefits claimant must meet and how these claimants' failure to meet statutory prerequisites results in the dismissal of their claims. Part II argues that the current procedures are inadequate to protect the rights of black lung benefits claimants. Dismissal of their claims violates the petitioners' rights to due process of law and pro se representation. Part III proposes two solutions to the crisis. The first proposal is simply a form that would be distributed to all claimants explaining the procedures they must follow to avoid dismissal. Part III presents such a form. The second solution is the liberal interpretation of the statutory guidelines through the doctrine of constructive filing. Part IV concludes that the crisis calls for immediate attention and the implementation of one of the two proposed solutions.

appeals and opinions not officially published are on file with the University of Michigan Journal of Law Reform.

5. Woods v. OWCP, No. 88-3608 (6th Cir. filed Aug. 3, 1988), *dismissed* (Oct. 26, 1988).

6. Kington v. Zeigler Coal Co., No. 88-3661 (6th Cir. filed July 25, 1988), *dismissed* (Aug. 16, 1988).

7. Crawford v. Shamrock Coal Co., No. 88-3883 (6th Cir. filed Sept. 27, 1988), *dismissed* (Oct. 4, 1988) (The court subsequently heard the appeal and affirmed the denial of benefits. See 881 F.2d 1075 (1989)).

8. Fairchild v. OWCP, No. 88-3705 (6th Cir. filed Aug. 8, 1988), *dismissed* (Oct. 18, 1988).

9. Torok v. OWCP, No. 88-3781 (6th Cir. filed Aug. 29, 1988), *dismissed* (Oct. 21, 1988).

I. BLACK LUNG CLAIMS AND STATUTORY REQUIREMENTS

A. *The Background of Black Lung Benefits*

Pneumoconiosis is a devastating disease, afflicting "hundreds of thousands of coal miners who have spent their entire working lives inhaling coal dust."¹⁰ The coal dust causes the lining of the lung to harden.¹¹ This leads to the formation of dust-encrusted nodules in the lobes of the lungs, resulting in a host of lung diseases, including cancer, chronic asthma, and emphysema. Prompted by the severity of the black lung problem, Congress enacted four interdependent statutes protecting the nation's coal miners.¹²

10. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 425 (1988) (Stevens, J., dissenting).

11. Technically, pneumoconiosis includes other inhalation-induced lung diseases, such as asbestosis. However, in the context of this Article, "pneumoconiosis" is used for its more common meaning, "black lung." See Definition of Pneumoconiosis 20 C.F.R. § 718.201 (1988). For a discussion of the disease and its cause and effects, see Hatch, *Pneumoconiosis*, in 8 *TRAUMATIC MEDICINE & SURGERY* 226, 231-32 (P. Cantor ed. 1962); *DORLAND'S ILLUSTRATED MEDICAL DICTIONARY* 1073 (23d ed. 1957).

12. These statutes are:

(a) Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified as amended at 30 U.S.C. §§ 801-945 (1982)). This act was redesignated as the Federal Mine Safety and Health Act of 1977 by Pub. L. No. 95-164, 91 Stat. 1290 (1977). For legislative history, see 1969 U.S. CODE CONG. & ADMIN. NEWS 2503.

(b) Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended at 30 U.S.C. §§ 901-945 (1982)).

(c) Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643 (codified as amended at 30 U.S.C. §§ 901-945 (1982)).

(d) Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982), amended by the Longshore & Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1654 (1984) (codified as amended at 33 U.S.C. §§ 901-948 (Supp. V 1987)). This act, and particularly § 921(b), which governs the Benefits Review Board, are brought into the Black Lung Statutes by reference. 30 U.S.C. § 932(a) (1982).

For law review articles discussing the black lung statutes and related issues, see generally McElveen & Postol, *Compensating Occupational Disease Victims Under the Longshoremen's & Harbor Workers' Compensation Act*, 32 AM. U.L. REV. 717 (1983); Postol, *The Federal Solution to Occupational Disease Claims—The Longshore Act and Proposed Federal Programs*, 21 TORT & INS. L.J. 199 (1986); Rabin, *Environmental Liability and the Tort System*, 24 HOUS. L. REV. 27 (1987); Ramsey & Habermann, *The Federal Black Lung Program—The View from the Top*, 87 W. VA. L. REV. 575 (1985); Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumptions and a Survey of its Unresolved Issues*, 83 W. VA. L. REV. 869 (1981); Volz, *Medical and Health Issues in Coal Arbitration*, 89 W. VA. L. REV. 725 (1987). In addition, the Supreme Court has addressed the black lung benefits program in three principle cases: *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988) (discussing 30 U.S.C. § 902(f)(2) of the 1977 Reform Act); *Mullins Coal Co. v. OWCP*, 484 U.S. 135 (1987) (discussing regulations promulgated by the Secretary of Labor); *Usery v. Turner Elkhorn*

Congress passed the first of the four statutes, the Federal Coal Mine Health and Safety Act, in 1969.¹³ Title IV of the Act established a federal black lung benefits program for coal miners who are totally disabled due to pneumoconiosis. It also provided for benefits to the surviving dependents of miners killed by the disease.¹⁴

The Black Lung Benefit Reform Act of 1977 (1977 Reform Act),¹⁵ the first major change in black lung benefits, expanded the definition of miner to include "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal."¹⁶ At the same time that Congress passed the 1977 Reform Act, it enacted the Black Lung Benefits Revenue Act of 1977,¹⁷ establishing the Black Lung Disability Trust Fund (Trust Fund).¹⁸ An excise tax on each ton of coal sold, paid by coal producers, finances the Trust Fund.¹⁹

The most recent substantive changes affecting the black lung benefits program are the Black Lung Benefits Amendments of 1981 (1981 Amendments).²⁰ The 1981 Amendments make it more difficult for a miner to establish eligibility for disability benefits.²¹ The 1981 Amendments also remove the provision allowing survivors' entitlement to benefits based on the miners'

Mining Co., 428 U.S. 1 (1976) (upholding constitutionality of the Black Lung Benefits Act of 1972).

13. 30 U.S.C. §§ 801-945 (1982).

14. *Id.* at § 901. This Act liberalized the basic provisions for black lung benefits. The first significant amendment to Title IV was the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (codified as amended at 30 U.S.C. §§ 901-936 (1982)). The changes included: (1) expanding the statutory definition of "total disability"; (2) extending the coverage of Title IV to surface miners; and (3) expanding the definition of "dependent."

15. 30 U.S.C. § 902 (1982).

16. *Id.* at § 902(d).

17. 26 U.S.C. § 4121 (1982).

18. 26 U.S.C. § 9501 (1982).

19. 26 U.S.C. § 4121 (1982).

20. 30 U.S.C. §§ 901-945 (1982). After 1973, employees are covered by state workers' compensation laws, 30 U.S.C. § 931 (1982), the United States Secretary of Labor, 30 U.S.C. § 925(a)(1) (1982), or by a black lung insurance program administered by the federal government. 30 U.S.C. § 943 (1982).

21. The 1981 Amendment repealed three of five presumptions in the earlier law that were based on the duration of mine employment: the 10 year presumption of § 411(c)(2), 30 U.S.C. § 921(c)(2) (1982); the 15 year presumption of § 411(c)(4), 30 U.S.C. § 921(c)(4) (1982); and the 25 year presumption of § 411(c)(5), 30 U.S.C. § 921(c)(5) (1982). The presumption was a presumptive entitlement to benefits upon submission of X-ray, biopsy or autopsy evidence which established the existence of pneumoconiosis, and upon showing either the requisite term of mining service or that the impairment arose out of coal mine employment. See *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 417-18 (1988).

*total disability*²² due to pneumoconiosis at the time of death. The Act now requires that a survivor's entitlement be based on the miner's *death* due to pneumoconiosis.²³

This web of statutes requires the petitioner to file the initial claim for benefits at any of the district offices of the Social Security Administration or the Department of Labor.²⁴ These offices forward the claim to the Office of Workers' Compensation Programs (OWCP) where it is filed with the deputy commissioner, who oversees the development of all evidence related to the case.²⁵ If the evidence does not support the claim, the petitioner has opportunities to submit new evidence and receives a hearing before the deputy commissioner.²⁶ After the hearing, the deputy commissioner prepares a stipulation of issues and a proposed order.²⁷ If issues are still disputed by the petitioners or the operator, an Administrative Law Judge (ALJ) reviews the decision.²⁸ The ALJ possesses the power to develop evidence, but may adjudicate only the issues delineated by the deputy commissioner or issues not "reasonably ascertainable" by the parties at the time the claim was before the deputy commissioner.²⁹ The ALJ then must decide whether the evidence indicates: (1) the existence of pneumoconiosis³⁰ and (2) total disability.³¹ She denies benefits if the claimant fails to meet both standards.³² Either party can appeal the ALJ's decision to the

22. The term "total disability" is defined in 20 C.F.R. § 718.204(b) (1988). A miner is considered "totally disabled" if pneumoconiosis prevents or prevented the miner:

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

20 C.F.R. § 718.204(b)(1)-(2) (1988). This section also provides that a miner be considered "totally disabled" if he is diagnosed as suffering from chronic dust disease in accordance with 20 C.F.R. § 718.304 (1988).

23. 30 U.S.C. § 901 (1982).

24. 20 C.F.R. §§ 725.303-725.305 (1988). The claim must be in writing.

25. 20 C.F.R. § 725.410 (1988).

26. 20 C.F.R. § 725.417 (1988).

27. 20 C.F.R. §§ 725.417, 725.421 (1988).

28. 20 C.F.R. §§ 725.419, 725.421, 725.450, 725.451 (1988). The rules of practice and procedure before the ALJ are codified at 29 C.F.R. § 18 (1988).

29. 20 C.F.R. § 725.463 (1988).

30. 20 C.F.R. § 718.202 (1988).

31. 20 C.F.R. § 718.204 (1988).

32. See *Crawford v. Shamrock Coal Co.*, No. 88-3883 (6th Cir. filed Sept. 27 1988), *dismissed* (Oct. 4, 1988).

Benefits Review Board (BRB) of the Department of Labor.³³ The Board will affirm the ALJ's findings of fact and conclusions of law if they are supported by substantial evidence, are "rational," and accord with applicable law.³⁴ The decision of the BRB can be appealed to the United States court of appeals for the state in which the black lung injury allegedly occurred.³⁵ The court reviews the BRB's decisions for errors of fact and law.³⁶

If the black lung benefits process appears straightforward to practitioners, why are so many cases dismissed? The answer is simple: no "appeal guidelines" are provided to pro se black lung claimants.³⁷ In contrast, the government regularly supplies appeal guidelines to claimants in cases involving social security benefits.³⁸ The social security benefits form is a standardized

33. 33 U.S.C. § 921(b) (1982). The ALJ issues a written decision, including findings of fact, conclusions of law, and an order. 20 C.F.R. §§ 725.476, 725.477 (1988). The Rules and Regulations governing the BRB are found at 20 C.F.R. §§ 801, 802 (1988).

34. 30 U.S.C. § 932(a) (1982), 33 U.S.C. § 921(b)(3) (1982). *See generally*, O'Keefe v. Smith, Hinchman & Grylls Assocs., 380 U.S. 359 (1965); Frederick v. OWCP, 808 F.2d 813 (11th Cir. 1987).

35. 33 U.S.C. § 921(c) (1982). The federal district court thus has no jurisdiction over the merits of black lung litigation. Its jurisdiction is limited to enforcement of any order made by the BRB. Thompson v. Potashnick Constr. Co., 812 F.2d 574 (9th Cir. 1987).

36. Kaiser Steel Corp. v. OWCP, 812 F.2d 518, 525 (9th Cir. 1987).

37. The BRB or the ALJ occasionally provides both attorneys and pro se claimants with a partial list of appellate procedures on an ad hoc basis. Of the 40 cases filed with the Sixth Circuit from April 1, 1988 to September 30, 1988 six received one of two types of post hoc notice. It is clear, however, that the practice is neither standard nor mandatory, and the quality of the notice provided in the forms varied among the six cases.

In five of the cases, the post hoc notice was provided to the claimant by the clerk of the BRB, in the form of a letter, after the claimant had mistakenly mailed the appeal to the Board. *See* Fairchild v. OWCP, 863 F.2d 17 (6th Cir. 1988) (petition mailed to BRB Feb. 23, 1988; BRB returned it to petitioner May 13, 1988); Reffitt v. OWCP, No. 88-3586 (6th Cir. filed July 6, 1988), *dismissed* (Oct. 20, 1988) (petition mailed to BRB Feb. 22, 1988; BRB returned it to petitioner June 22, 1988); Godsey v. OWCP, No. 88-3582 (6th Cir. filed July 1, 1988), *dismissed* (Oct. 20, 1988) (petition mailed to BRB Mar. 2, 1988; BRB returned it to petitioner May 16, 1988); Reed v. OWCP, No. 88-3453 (6th Cir. filed May 26, 1988), *dismissed* (Aug. 15, 1988) (petition mailed to BRB Jan. 8, 1988; BRB returned it to petitioner May 16, 1988); Gilkerson v. OWCP, No. 88-3452 (6th Cir. filed May 26, 1988), *dismissed* (June 23, 1988) (petition mailed to BRB June 2, 1987; BRB returned it to petitioner May 16, 1988). In all five cases, the notice was mailed to the claimant 60-300 days after the BRB received the request for an appeal. The form of the letters is virtually identical, and informs the claimant that the BRB has "no jurisdiction to consider your request for an appeal."

The sixth case involved a letter sent by the clerk of courts for the Sixth Circuit Court of Appeals. *See* Crawford v. Shamrock Coal Co., No. 88-3883 (6th Cir. filed Sept. 27, 1988), *dismissed* (Oct. 4, 1988). In his letter, the clerk informed the claimant's wife that her husband must sign and return the petition for review.

38. *See, e.g.*, the standard printed form advising an unsuccessful social security claimant of the appeals procedure, *reprinted in* Blankenship v. Secretary HHS, 858 F.2d 1188, 1191 n.1 (6th Cir. 1988).

preprinted sheet listing all of the deadlines for filing appeals.³⁹ The form describes the place for filing in detail. Blanks are left for the claimant's name and address, and the ALJ attaches the form to the front of the decision. The packet of papers is then mailed to the claimant, who may subsequently pursue the proper means of appeal.

Black lung litigants have not been so fortunate. The government provides them with no "notice" or "warning" sheet in the event of an adverse ALJ or BRB decision. Without such guidance, they must guess at the proper appellate procedure.⁴⁰ Consequently, many of the litigants commit gross procedural errors that result in the dismissal of their cases. The most frequent procedural defects are:

- (1) filing the appeal directly with the BRB instead of the U.S. court of appeals,⁴¹
- (2) the claimant's failure to sign the appeal,⁴² and
- (3) the claimant's appeal is not timely.⁴³

39. See 20 C.F.R. § 725.417 (1988).

40. This is against the spirit of the law. Congress notes in the Black Lung Benefits Reform Act that "[i]ndividual assistance in preparing and processing claims shall be offered by the Secretary of Health and Human Services and the Secretary of Labor and provided to potential beneficiaries." 30 U.S.C. § 904 (1982).

41. See, e.g., *Torok v. OWCP*, No. 88-3781 (6th Cir. filed Aug. 29, 1988), *dismissed* (Oct. 21, 1988); *Norris v. Peabody Coal Co.*, No. 88-3885 (6th Cir. filed Aug. 22, 1988), *dismissed* (Feb. 22, 1989); *Fairchild v. OWCP*, 863 F.2d 17 (6th Cir. 1988); *Woods v. OWCP*, No. 88-3690 (6th Cir. filed Aug. 3, 1988), *dismissed* (Oct. 26, 1988); *Thompson v. OWCP*, No. 88-3663 (6th Cir. filed July 25, 1988), *dismissed* (Aug. 16, 1988); *Kington v. Ziegler Coal*, No. 88-3661 (6th Cir. filed July 25, 1988), *dismissed* (Aug. 6, 1988); *McLain v. OWCP*, No. 88-3602 (6th Cir. filed July 8, 1988), *dismissed* (Oct. 5, 1988); *Reffitt v. OWCP*, No. 88-3586 (6th Cir. filed July 6, 1988), *dismissed* (Oct. 20, 1988); *Partin v. OWCP*, No. 88-3585 (6th Cir. filed July 5, 1988), *dismissed* (Nov. 7, 1988); *Godsey v. OWCP*, No. 88-3582 (6th Cir. filed July 1, 1988), *dismissed* (Oct. 20, 1988); *Reed v. OWCP*, No. 88-3453 (6th Cir. filed May 26, 1988), *dismissed* (Aug. 15, 1988); *Collins v. OWCP*, No. 88-3430 (6th Cir. filed May 18, 1988), *dismissed* (June 26, 1988).

42. See, e.g., *Crawford v. Shamrock Coal Co.*, No. 88-3883 (6th Cir. filed Sept. 27, 1988), *dismissed* (Oct. 4, 1988); *Woods v. OWCP*, No. 88-3690 (6th Cir. filed Aug. 29, 1988); *Torok v. OWCP*, No. 88-3781 (6th Cir. filed Aug. 29, 1988) *dismissed* (Oct. 21 1988); *Norris v. Peabody Coal*, No. 88-3885 (6th Cir. filed Aug. 22, 1988) *dismissed* (Feb. 22, 1989); *Kington v. Ziegler Coal*, No. 88-3661 (6th Cir. filed July 25, 1988).

43. *Collett v. OWCP*, No. 88-3455 (6th Cir. filed May 20, 1988), *dismissed* (Aug. 15, 1988); *Fairchild v. OWCP*, 863 F.2d 17 (6th Cir. 1988).

B. *The Procedural Defects That Result in Dismissal*

1. *Filing the appeal with the BRB*— Understandably, many unsuccessful claimants file their “notice of appeal” or “appeal petition,” which is usually a handwritten one or two paragraph letter pleading for relief,⁴⁴ with the BRB instead of with the United States court of appeals as statutorily required. As discussed above, the appeals procedure in black lung cases has many steps, going from ALJ to BRB, and finally to the United States Court of Appeals. For attorneys it may be straightforward; but for lay people it is difficult to follow. Moreover, from the pro se claimant’s point of view, the BRB denied the appeal from the ALJ. Why wouldn’t the BRB also hear the appeal from its own decision?

Unfortunately, a letter of appeal to the BRB often proves fatal to the petitioner’s claim. The BRB often will not return the appeal to the claimant with instructions to file it with the court of appeals until the sixty day appeal period for black lung claims has lapsed.⁴⁵ In such cases, no matter how sympathetic the cause, the court of appeals must dismiss the appeal as untimely.⁴⁶

2. *The failure of the claimant to sign the appeal petition*— Sufficiency of the notice of appeal constitutes the second ground upon which courts dismiss pro se claimants’ appeals before reaching the merits.⁴⁷ As previously noted, these notices of appeal are often simply letters describing the debilitating effects of pneumoconiosis.⁴⁸ Problems arise when the claimant fails to per-

44. See *supra* notes 4-9 and accompanying text.

45. See, e.g., *Fairchild v. OWCP*, No. 88-3705 (6th Cir. filed Aug. 8, 1988) (petition mailed to BRB Feb. 23, 1988; BRB returned it to petitioner May 13, 1988); *Reffitt v. OWCP*, No. 88-3586 (6th Cir. filed July 6, 1988), *dismissed* (Oct. 20, 1988) (petition mailed to BRB Feb. 22, 1988; BRB returned it to petitioner June 22, 1988); *Godsey v. OWCP*, No. 88-3582 (6th Cir. filed July 1, 1988), *dismissed* (Oct. 20, 1988) (petition mailed to BRB Mar. 2, 1988; BRB returned it to petitioner May 16, 1988); *Reed v. OWCP*, No. 88-3453 (6th Cir. filed May 26, 1988), *dismissed* (Aug. 15, 1988) (petition mailed to BRB Jan. 8, 1988; BRB returned it to petitioner May 16, 1988); *Gilkerson v. OWCP*, No. 88-3452 (6th Cir. filed May 26, 1988), *dismissed* (June 23, 1988) (petition mailed to BRB June 3, 1987; BRB returned it to petitioner May 16, 1988).

46. FED. R. APP. P. 4(a)(1), 25(a).

47. See, e.g., *Torok v. OWCP*, No. 88-3781 (6th Cir. filed Aug. 29, 1988), *dismissed* (Oct. 21, 1988) (petitioner did not sign and petition mailed to BRB instead of Sixth Circuit); *Norris v. Peabody Coal Co.*, No. 88-3885 (6th Cir. filed Aug. 22, 1988), *dismissed* (Feb. 22, 1989) (petitioner did not sign and petition mailed to BRB instead of Sixth Circuit); *Woods v. OWCP*, No. 88-3690 (6th Cir. filed Aug. 3, 1988), *dismissed* (Oct. 26, 1988) (petitioner did not sign and petition mailed to BRB instead of Sixth Circuit).

48. See *supra* notes 4-9 and accompanying text.

sonally sign the form that a spouse or child prepares. In almost all the defective cases, the claimant's spouse or child signs the form, invariably resulting in the dismissal of a pneumoconiosis appeal.⁴⁹

II. THE ILLEGALITY OF THE CURRENT PNEUMOCONIOSIS APPEALS PROCESS

A. A Brief Overview of Procedural Due Process

The fifth amendment to the Constitution provides that a person cannot be deprived of life, liberty, or property without "due process of law."⁵⁰ Similarly, the fourteenth amendment states that no "State shall deprive any person of life, liberty, or property, without due process of law."⁵¹ As Professor Laurence Tribe has pointed out, "[t]hese procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action."⁵² Those historical origins extend back to the Magna Carta.⁵³

One aspect of the due process notion is procedural due process, which concerns the limitations that the Constitution places on the judicial, executive, and administrative functions of our governments—state and federal. Procedural due process raises the question of what process or procedure the government owes a person before the government takes actions that affect that person's "life, liberty, or property." As Justice Frankfurter wrote in 1951:

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet

49. As the Sixth Circuit noted in its October 4, 1988 Order dismissing the appeal of the claimant in *Crawford v. Shamrock Oil Co.*, "[P]arties may plead and conduct their own cases personally or by counsel. 28 U.S.C. § 1654. An individual who is not an attorney cannot represent his or her spouse.' *Lindstrom v. Illinois*, 632 F. Supp. 1535, 1537 (N.D. Ill. 1986)." *Crawford v. Shamrock Coal Co.*, No. 88-3883 (6th Cir. filed Sept. 27, 1988), *dismissed* (Oct. 4, 1988); *Cf. Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829 (7th Cir. 1986) (*per curiam*) (dismissing employment discrimination appeal because consultant, who was neither claimant nor counsel, signed the notice of appeal).

50. U.S. CONST. amend. V.

51. U.S. CONST. amend. XIV, § 1.

52. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 664 (2d ed. 1988).

53. *Hurtado v. California*, 110 U.S. 516, 531 (1884).

it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.⁵⁴

The Supreme Court has recognized that the *continued* receipt of governmental benefits is an interest protected by the fifth amendment guarantee against deprivation without due process.⁵⁵ In so holding, the Court has implied that a prerequisite of maintaining an action for a violation of procedural due process in an entitlement case is the "present enjoyment" of that entitlement.⁵⁶ The Court noted in *Board of Regents v. Roth* that "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security interests that a person has *already acquired in specific benefits.*"⁵⁷

This restrictive view of procedural due process is unpersuasive, however. Justice Black, negating the logic of this perspective, pointed out that if procedural due process were not needed in the entitlement application process, a state would be tempted to delay putting a person on welfare until absolutely sure he or she was eligible, because once the individual started receiving welfare payments, the payments could not be discontinued without a hearing.⁵⁸ That logic is sound. As Professor Tribe has noted, "it would be inconsistent with any intelligible rationale underlying due process protection to deny all procedural safeguards to the new applicant where the law provides that all individuals meeting certain objective criteria are entitled to, say, welfare."⁵⁹

B. *The Principles of Due Process Applied to Black Lung Claims*

Because it is likely that procedural due process applies to an application for benefits,⁶⁰ the next step is to determine whether

54. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

55. *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970).

56. *Board of Regents v. Roth*, 408 U.S. 564 (1977); see also L. TRIBE, *supra* note 52, at 690; Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L. J. 89.

57. *Roth*, 408 U.S. at 576 (emphasis added).

58. *Goldberg*, 397 U.S. at 279 (Black, J., dissenting).

59. L. TRIBE, *supra* note 52, at 690 & n.37.

60. It is important to point out that not all of the black lung appeals that are subject to the problems detailed in this Article are the product of an initial application for benefits. In some cases, the claimants received benefits for a period of time, and then OWCP

the black lung appeals process, as presently constituted, accords with the general principles of procedural due process. In the 1976 case of *Mathews v. Eldridge*, the Supreme Court set forth three factors to balance in determining whether a procedural due process violation has taken place in a given case.⁶¹ Those factors are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administration burdens that the additional or substitute procedural requirement would entail.⁶²

The first prong of the *Mathews* test focuses on the degree of the private interest that will be affected by the official action.⁶³ In black lung claims, the private interest is manifestly important. To qualify, black lung claimants must be totally disabled.⁶⁴ Most petitioners are undereducated and untrained and hence can only earn a living in labor-intensive occupations. Unfortunately, because of their disability, those types of jobs are not open to them. Thus, the black lung benefits are frequently their sole source of support.

The second *Mathews* factor is the risk of an erroneous deprivation of a private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.⁶⁵ Under the present appeals process, the risk of an erroneous deprivation in pneumoconiosis appeals is high. Many of the appeals satisfy the substantive statutory criteria for valid claims, yet courts dismiss and terminate appeals because of unpublicized procedural defects.⁶⁶ These defects can be substantially cured through the implementation of the substitute procedural safeguards discussed in Part III of this Article.

The third and final *Mathews* factor to be balanced in ascertaining the constitutionality of the black lung claims appeals process is the government's interest, taking into account the function involved and the fiscal or administrative burdens that

cut them off. See, e.g., *Torok v. OWCP*, No. 88-3781 (6th Cir. filed Aug. 29, 1988), dismissed (Oct. 21, 1988) (benefits cut off after five years' receipt). Such a situation would clearly require the application of standard due process principles, even if the *Roth* language were read restrictively, so as to apply only to "present enjoyment" situations.

61. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

62. *Id.* at 335.

63. *Id.*

64. See *supra* note 22 and accompanying text.

65. *Mathews*, 424 U.S. at 335.

66. See *supra* notes 42-43 and accompanying text.

the additional or substitute procedural requirements would entail.⁶⁷ In black lung appeals, the solutions described in Part III would not unduly burden the government's fiscal or administrative interests. The cost of implementation would be negligible.

This analysis demonstrates that, under the three-prong *Mathews* analysis, the black lung appeals process violates claimants' procedural due process rights. Substantial private interests are lost through current procedures that the government can easily reform.

C. *The Restriction of Claimants' Rights to Appear Pro Se*

In addition to the violation of claimants' constitutional rights of procedural due process, the statutory right to appear pro se is also violated by the present system. The judiciary has long recognized the rights of a party to proceed pro se.⁶⁸ As Lord Coke noted in 1644, "any person that is to make any claim may the first day of eire [Circuit Court] either make it in person or by attorny."⁶⁹ The patriot Thomas Paine noted in 1777:

[E]ither party . . . has a natural right to plead his own cause; the right is consistent with safety, therefore it is retained; but the parties may not be able, . . . therefore the civil right of pleading by proxy, that is, by a council, is an *appendage* to the Natural right [of self-representation].⁷⁰

Federal courts generally accept the spirit expressed in the words of Coke and Paine to mean that pro se civil pleadings

67. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

68. This Article is not an overview of the history and implications of pro se representation in our legal system. For more detailed discussions see Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157 (1972); Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109 (1987) (authored by Joseph M. McLaughlin); Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right To Be Heard*, 96 YALE L.J. 1641 (1987) (authored by Helen B. Kim).

69. COKE'S INSTITUTES, Fourth, 296 (1644) (London 1797).

70. *Faretta v. California*, 422 U.S. 806, 830 n.39 (1975) (emphasis added) (quoting T. PAINE, ON A BILL OF RIGHTS, 1777, (reprinted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 316 (1971)). See generally Kauper, *The Higher Law and the Rights of Man in a Revolutionary Society*, 18 U. MICH. L. QUADRANGLE NOTES, Winter 1974, at 8 (Available in University of Michigan Law School Library).

should be, at a minimum, "liberally construed."⁷¹ The Supreme Court stated, in *Haines v. Kerner*,⁷² for example, that pro se complaints are held to "less stringent standards than pleadings drafted by lawyers."⁷³ Indeed, some circuits have greatly broadened the implications of *Haines*. As the Second Circuit noted in *Traguth v. Zuck*,⁷⁴ "[i]mplicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training."⁷⁵

Unfortunately, in black lung appeals, claimants are forfeiting important rights because of "their lack of legal training." The common law right to self-representation and extra latitude in pleadings, like the historical platitudes of Coke and Paine, mean little to aggrieved claimants. A claimant, uninformed about the methodology of filing a proper appeal, is effectively foreclosed from exercising his common law right to self-representation.

In addition to the common law right to appear pro se and have pleadings construed liberally, a federal statute provides for the right to self-representation.⁷⁶ It states, "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct cases therein."⁷⁷ The statute represents a codification of the sixth amendment's guarantee of a right to counsel, including the right to appear pro se.⁷⁸ The statute's roots extend back at least to 1824, when Chief Justice John Marshall wrote for the Court:

71. See, e.g., *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 472 (N.D. Tex. 1975); see also *Kelly v. Butler County Bd. of Comm'rs*, 399 F.2d 133, 134 (3d Cir. 1968) (vacating lower court's dismissal of complaint which lacked detail in the pleadings; pro se plaintiff "was untutored in legal niceties"); *Weaver v. Pate*, 390 F.2d 145, 147 (7th Cir. 1968).

72. 404 U.S. 519 (1972).

73. *Id.* at 520.

74. 710 F.2d 90 (2d Cir. 1983).

75. *Id.* at 95.

76. 28 U.S.C. § 1654 (1982).

77. *Id.*

78. *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 477 (N.D. Tex. 1975) ("This Court . . . concludes that 28 U.S.C.A. § 1654, . . . was enacted to enforce the Sixth Amendment's guarantees to right to counsel . . ."); see also *Elmore v. McCamron*, 640 F. Supp. 905, 911 (S.D. Tex. 1986) ("To be certain, the right to file a lawsuit *pro se* is one of the most important rights under our Constitution and laws."); *Phillips v. Tobin*, 548 F.2d 408, 411 (2d Cir. 1976) (recognizing the "long established principle that in the federal Courts the parties have the right to plead and conduct their own cases . . ."). But see *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), cert. denied, 476 U.S. 1172 (1986) (stating that 28 U.S.C. § 1654 confers only a statutory, not a constitu-

“[n]atural persons may appear in court, either by themselves or by their attorney.”⁷⁹

By failing to instruct pro se litigants⁸⁰ in the methodology of black lung appeals, the BRB is denying claimants' common law and statutory rights to informed self-representation. The impact of these violations upon the right to appeal the denial of benefits on a pro se basis, combined with the transgressions against claimants' due process rights,⁸¹ warrants an immediate solution.

III. TWO SOLUTIONS TO THE PNEUMOCONIOSIS APPEAL DILEMMA

A. *The BRB Must Adopt a Standardized Notice Form*

A standard “appeal information form,” similar to that provided in social security benefits cases, would be the easiest solution administratively. As in social security cases, the form could be stapled to the BRB's decision and mailed to the claimant. Thus, petitioners would at least “know the rules” by which the appellate process is run. In addition, this form would satisfy the fiscal and administrative concerns of the third prong of the *Ma-*

tional right to self-representation in civil cases.)

It is well settled, of course, that the right to proceed pro se in a *criminal* proceeding is a constitutional right. *See, e.g.,* *Faretta v. California*, 422 U.S. 806 (1975); *Meeks v. Cra-ven*, 482 F.2d 465 (9th Cir. 1973); *Bayless v. United States*, 381 F.2d 67 (9th Cir. 1967).

79. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738, 829 (1824).

80. In other contexts, courts often go to heroic ends to protect the pro se party. In *United States v. Sacca*, for example, the Second Circuit commended the trial judge for warning the party about the rules of law and evidence, and telling him to refrain from using the first person as if he were testifying when questioning witnesses. 563 F.2d 552 (2d Cir. 1978), *cert. denied*, 434 U.S. 1039 (1977). Courts have also held that pro se litigants must be given special notice of their rights and responsibilities when the pleading or procedure in question is “contrary to lay intuition” and dismissal will result if the party fails to respond. *See* *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982). Courts have extended this analysis to cases involving service of process, status calls, and motions to dismiss. *Borzeka v. Heckler*, 739 F.2d 444 (9th Cir. 1984) (service of process); *Mitchell v. Inman*, 682 F.2d 886 (11th Cir. 1982) (motion to dismiss); *Camps v. C. & P. Tel. Co.*, 692 F.2d 120, 124-25 (D.C. Cir. 1981) (status call). *See also* Note, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 672-75 & n.68 (1988) (authored by Julie Bradlow).

81. One commentator has collapsed the three-prong *Matthews* procedural due process balancing test and the constitutional and common law pro se guarantees into a single test. In support of the right to proceed on a pro se basis in civil cases, she calls for “a particularized due process balancing test to determine the procedural leniency due a pro se litigant in federal court.” Note, *supra* note 80, at 675. Under that standard, the black lung claimant is due even more leniency from the federal court system. As Bradlow notes, “the pro se civil litigant's lack of knowledge will retain its rightful place as a ‘shield’ for him, and not become a ‘sword’ for the court to use to deter him.” *Id.* at 683.

*thews*⁸² test, because the adoption of the form would save time, money, and administrative inconvenience by reducing the amount of improperly filed appeals that presently need re-routing. The suggested form would read as follows:

NOTICE OF DECISION-DENIAL

PLEASE READ CAREFULLY

The enclosed decision rendered by the Benefits Review Board becomes final sixty (60) days after the date of the decision, unless a written petition for review is filed with the appropriate United States court of appeals prior to the expiration of the sixty (60) day period, or unless a timely request for reconsideration is filed with the Board within 30 days. 33 U.S.C. § 921(c); 30 U.S.C. § 932(a); 20 C.F.R. §§ 802.406, 802.407.

Any party who wishes to request reconsideration by the Board must file a motion for reconsideration with the Board within thirty (30) days of the issuance of the board's decision. The motion for reconsideration must conform to 20 C.F.R. § 802.407B, a copy of which is attached. A timely request for reconsideration suspends the time for filing a petition for review to the U.S. court of appeals until a decision is made by the Board on the request of consideration. 20 C.F.R. § 802.406.

Any party who wishes to request review by the United States court of appeals must file a petition for review. A petition for review should include, at a minimum, the party or parties taking the appeal, the judgment or order appealed from, and the court to which the appeal is taken, as well as the SIGNATURE OF THE CLAIMANT. The petition for review must be sent directly to the appropriate court of appeals, NOT THE BOARD. (See attached list of Court of Appeals addresses). The state in which the injury occurred will determine which court of appeals has jurisdiction of the case. In a black lung claim, any place in which there was coal mine employment is considered the state in which the injury occurred. The petition for review must be received by the United States court of appeals within sixty (60) days of the Board's decision. 33 U.S.C. § 921(c); 20 C.F.R. § 802.406.

82. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Parties may plead and conduct their own case personally or by counsel. 28 U.S.C. § 1654. The petition must be signed by the named claimant or his attorney. A spouse, child or friend of the claimant cannot sign the petition on behalf of the claimant unless such person has been appointed by a court as the personal representative of the claimant or the claimant's estate. The failure of a claimant to sign the petition will result in dismissal of the appeal.

B. Application of the Doctrine of Constructive Filing

A second and admittedly more complex solution would be to apply the doctrine of "constructive filing" to the pneumoconiosis claims process. The doctrine of "constructive filing," based in part on Federal Rule of Civil Procedure 60,⁸³ takes a common sense approach to the kinds of procedural defects described in this Article.

Papers and pleadings are generally considered filed when the clerk of the court receives them.⁸⁴ The clerk's possession of the papers may be actual or constructive.⁸⁵ Under the constructive filing doctrine, failure to satisfy a minor procedural requirement

83. FED. R. CIV. P. 60 reads in pertinent part:

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(A) CLERICAL MISTAKES

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(B) MISTAKES; INADVERTENCE; EXCUSABLE NEGLIGENCE; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

84. 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1153 (1969).

85. *United States v. Dae Rim Fishery Co.*, 794 F.2d 1392, 1395 (9th Cir. 1986).

will not always vitiate an otherwise valid appeal.⁸⁶ If, for example, a notice of appeal is sent to the BRB instead of a United States court of appeals, the date that the Board receives the notice can be considered the date of filing.⁸⁷ Similarly, in the case of an appeal sent without the claimant's signature, the date of the initial receipt would be judged the date of filing for purposes of the appeals process, and the claimant would have a specified period, perhaps fourteen days, to return the petition with the correct signature. As a result, application of the doctrine of constructive filing would preserve a pneumoconiosis claimant's right of appeal and would alleviate the procedural due process and pro se defects inherent in the status quo.

IV. CONCLUSION

The poet Sir Owen Seaman wrote, in the early part of this century:

Ye that have faith to look with fearless eyes
Beyond the tragedy of a world at strife,

86. See, e.g., *Parissi v. Telechron, Inc.*, 349 U.S. 46 (1955) (failure of appellant to include \$5.00 filing fee did not vitiate appeal); *Cintron v. Union Pacific R.R.*, 813 F.2d 917 (9th Cir. 1987) (holding that appellant's failure to punch two holes at the top of the complaint, provide a copy of the civil cover sheet, and send a check for the proper filing fee, was not enough to vitiate appeal); *Lyons v. Goodson*, 787 F.2d 411 (8th Cir. 1986) (holding that pro se complaint considered filed when sent to court, even if deficient in one or more required elements); *Loya v. Desert Sands Unified School Dist.*, 721 F.2d 279 (9th Cir. 1983) (holding that submission of complaint on wrong size paper, and passing of the 90-day appeal period before error was corrected was not enough to vitiate appeal); *Brown v. City of Meridian*, 356 F.2d 602 (5th Cir. 1966) (holding that failure to comply with local rule was not grounds for dismissal); *Woodham v. American Cystoscope Co.* 335 F.2d 551 (5th Cir. 1964) (also holding that failure to comply with local rule was not grounds for dismissal).

87. The doctrine of constructive filing in this context came under the scrutiny of the Supreme Court in the 1988 Term. The Court granted certiorari to the U.S. Court of Appeals for the Sixth Circuit in *Houston v. Lack*, 819 F.2d 289 (6th Cir. 1987), and reversed. *Houston* concerned the pro se petition of a prisoner that was denied air mail delivery by the warden because the prisoner lacked sufficient funds. The Sixth Circuit dismissed the appeal as untimely without a published opinion. The Supreme Court, in reversing, limited its decision to prisoners' pleadings. Henceforth, any prisoner's pleading is deemed "filed" when it is delivered to the warden for mailing. *Houston v. Lack*, 108 S. Ct. 2379 (1988).

It remains to be seen if the *Houston* opinion will have any effect in black lung litigation in the Sixth Circuit. The court, as demonstrated by its dismissal of *Houston*, is intolerant of procedural shortcomings in pro se cases. This includes black lung appeals. See e.g., *Danko v. OWCP*, 846 F.2d 366 (6th Cir. 1988) (per curiam); *Bolling v. OWCP*, 823 F.2d 165 (6th Cir. 1987) (stating that the court would not accept the date a petition of review was received by the BRB as the date of filing).

And trust that out of night and death shall rise
 The dawn of ampler life;
 Rejoice, whatever anguish rend your heart,
 To live in these great times and have your part
 In Freedom's crowning hour; . . .⁸⁸

Unfortunately, black lung claimants throughout the United States are gradually losing the trust that an "ampler life" exists. As one claimant's spouse writes:

I am sitting here at three o'clock in the morning and wondering why am I and my husband living? They took the Black Lung [benefits] away from his and our lively hood [sic] yet they can give welfare and all that to other people and took away his.

I have sent reports and all to every judge I could think of and none want to reply—is it because they don't care to help or what?

I think something like this should be made public because there any many more people like us in the same situation.

I would give anything—even my life—to get on a T.V. talk show and let them know how bad the system is. My husband has one lung . . . After he got [the benefits] for 5 years and now they took it from him.

Please somebody do something for us poor people.⁸⁹

As detailed in this Article, the black lung appeals process is complex for the lay person, especially for the pro se claimant who is frequently undereducated. The process, moving from the deputy OWCP commissioner, to the ALJ, to the BRB and finally to the United States court of appeals, is a bureaucratic web of rules and procedural regulations that trap many claimants, forcing them to forfeit their appeals before the appellate court has the opportunity to address the merits of their claims. This system deprives the claimants of their constitutional right to procedural due process, as well as their statutory and common law right to appear in a legal proceeding pro se. Two solutions would cure this problem. The first entails the adoption of an appeal notice form, similar to that employed in social security benefits cases. The second, admittedly more complex, solution ap-

88. O. SEAMAN, *Between Midnight and Morning*, The Book of King Albert (1910).

89. *Torok v. OWCP*, No. 88-3781 (6th Cir. filed Aug. 29, 1988), *dismissed* (Oct. 21, 1988).

plies the doctrine of constructive filing to black lung appeals. That doctrine allows the preservation of appeals when the procedural difficulty is a minor one, such as a petition containing the wrong signature. Whichever solution is adopted, action must be taken soon. As the latest statistics in the Sixth Circuit show, the situation has already reached crisis proportions.

