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Black Lung Update: The Evolution of the Current Regulations and the Proposed Revolution

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# BLACK LUNG UPDATE: THE EVOLUTION OF THE CURRENT REGULATIONS AND THE PROPOSED REVOLUTION

*William S. Mattingly*

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION</td>
<td>601</td>
</tr>
<tr>
<td>II. WHAT IS COAL WORKERS' PNEUMOCONIOSIS?</td>
<td>602</td>
</tr>
<tr>
<td>A. Obstructive Impairments</td>
<td>602</td>
</tr>
<tr>
<td>B. A Progressive and Latent Disease</td>
<td>611</td>
</tr>
<tr>
<td>III. THE TREATING PHYSICIAN: THE BEST DETERMINER OF PNEUMOCONIOSIS?</td>
<td>614</td>
</tr>
<tr>
<td>IV. ESTABLISHING PNEUMOCONIOSIS UNDER PART 718</td>
<td>617</td>
</tr>
<tr>
<td>V. WHAT TO CONSIDER – IS EVIDENCE CUMULATIVE?</td>
<td>619</td>
</tr>
<tr>
<td>VI. MATERIAL CHANGE IN CONDITION AND DUPLICATE CLAIMS.</td>
<td>621</td>
</tr>
<tr>
<td>VII. IDENTIFICATION OF RESPONSIBLE OPERATORS.</td>
<td>627</td>
</tr>
<tr>
<td>VIII. CONCLUSION</td>
<td>630</td>
</tr>
</tbody>
</table>

## I. INTRODUCTION

Applicants seeking benefits under the Black Lung Benefits Act and coal companies asked to pay these compensation claims continue to litigate the claims under a fog of uncertainty. In recent years, the Federal Circuit Courts of Appeals and the United States Supreme Court have issued complex decisions in determining whether disability due to coal workers' pneumoconiosis has been proven. Differing interpretations of necessary elements of entitlement, as fundamental as the definition of the disease itself, have made the claims take on different meanings depending in which federal appellate circuit the miner worked. Partially in response to these differences and partially in an attempt to have its interpretation adopted by circuits where it has been previously rejected, the Department of Labor has

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proposed to change the regulations controlling the adjudication of Federal Black Lung Claims.

This Article does not attempt to address the majority of the proposed changes in the regulations. Rather, it summarizes the recent changes or clarifications in the interpretations of the Black Lung Benefits Act and its implementing regulations since 1995. Where appropriate, this Article discusses those situations where the proposed changes intersect the recent decisions. Because the majority of the claims that the author handles are controlled by the rulings of the United States Court of Appeals for the Fourth Circuit, the recent black lung decisions of the Fourth Circuit are emphasized in this synopsis of recent decisions.

II. WHAT IS COAL WORKERS’ PNEUMOCONIOSIS?

A. Obstructive Impairments

Only twenty-five years after the passage of the implementing regulations, the definition of the disease for which compensation is provided under the Black Lung Benefits Act (BLBA)\(^2\) is still not as clear as the Congressional definition of the disease might seem to indicate after a causal reading. Congress defined “pneumoconiosis” as a “chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.”\(^3\)

From this straight-forward definition of the pneumoconiosis, the “permanent”\(^4\) regulations add a descriptive definition of pneumoconiosis by providing an illustrative listing of diseases that are included in the definition of pneumoconiosis.\(^5\) From these seemingly clear definitions, distinctions arose


\(^3\) 30 U.S.C. § 902(b) (1994).


\(^5\) Section 718.201 provides:
For the purpose of the Act, pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
between "legal" and "medical" pneumoconiosis. Clinical pneumoconiosis, or what is also referred to as "medical" pneumoconiosis, is a lung disease caused by fibrotic reaction of the lung tissue to inhaled dust, which is generally visible on chest x-ray films as opacities. Legal pneumoconiosis refers to all lung diseases which meet the statutory or regulatory definition of any lung disease that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment. Legal pneumoconiosis can include diseases beyond what is usually described as medical pneumoconiosis.

From this long-standing understanding of the meaning of pneumoconiosis, a split in the circuits has arisen whether "obstructive lung diseases" are or are not encapsulated in the statutory definition of pneumoconiosis. In a brief three page decision issued in 1995, a panel of the Fourth Circuit forever reshaped the definition of pneumoconiosis in black lung claims. The benefits claimant, David Warth, appealed from an Administrative Law Judge's ("ALJ") adverse determination that pneumoconiosis was not established based on the assessments made by two physicians who opined that coal workers' pneumoconiosis did not include obstructive lung diseases. The court concluded,

We agree with Warth that these assumptions are erroneous. Chronic obstructive lung disease thus is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black Lung benefits, Dr. Mutchler's assumption to the contrary undermines his conclusions, because it is undisputed that Warth does not suffer from some form of obstructive lung disease, and Drs. Mutchler and Donnerberg failed to give legitimate reasons for ruling out dust exposure in coal-mine employment as a cause or aggravation of that disease.

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6 The difference between legal and clinical pneumoconiosis is not new. See Nance v. Benefits Review Bd., 861 F.2d 68, 71 (4th Cir. 1988).

7 See Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 6-7 (1976).


9 After an Administrative Law Judge's decision on the merits of the claim is made, the parties have a right to review before the Benefits Review Board ("BRB"). After the BRB renders its final decision in a matter, appeals as of right may be taken to the circuit court of appeals having jurisdiction over the state where the injury is alleged to have occurred. See 20 C.F.R. §§ 725.481-.482 (1997).


11 Id. at 175 (citations omitted).
To reach this conclusion, the court provided three reasons. Two references are contained in the body of the decision: the statutory definition of pneumoconiosis and a prior Fourth Circuit decision, *Eagle v. Armco, Inc.* A third reason appears in a footnote. Neither the statutory definition nor the expanded regulatory definition includes or excludes “obstructive lung diseases” as pneumoconiosis. Both the statutory and regulatory definitions provide any chronic dust disease of the lungs may meet the definition of pneumoconiosis when the chronic dust-induced lung disease arose out of coal mine work.

The other authority cited for the proposition that obstructive lung diseases are encompassed within the definition of pneumoconiosis is a footnote in a prior Fourth Circuit decision. This footnote is *dicta* as the court addresses an issue clearly not needed for the determination of the case. The footnote in *Eagle* provides:

> In deposition testimony, Dr. Daniel asserted his view that breathing coal mine dust does not cause chronic obstructive lung disease. He stated that inhalation of coal dust “is not a cause per se of Chronic Obstructive Lung Disease, it can aggravate Chronic Obstructive Lung Disease,” and insisted that “[n]on-smokers without evidence of asthma or infectious processes show now evidence of obstruction from coal mine employment. . . .” For the purposes of consideration in black lung cases, this opinion must be considered bizarre in view of a Congress’ explicit finding to the contrary.

Nowhere in either title thirty § 901(a) or § 902(b) of the United States Code is there an explicit Congressional finding concerning obstructive lung diseases.

The third reason, provided in a footnote, explained that Doctor Donnerberg “concluded a diagnosis of pneumoconiosis cannot be made without evidence by x-
ray of a nodular or linear infiltrate, an autopsy or a tissue examination."17 This conclusion was found to conflict with the intent of the regulations defining pneumoconiosis. Title twenty § 718.202(a)(4) of the Code of Federal Regulations states that a determination of pneumoconiosis may be made notwithstanding a negative chest x-ray based on objective medical studies such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical work histories. The court concluded Dr. Donnerberg's opinion is based on a premise in direct conflict with the regulations promulgated to apply the BLBA.

The authorities provided by the Warth court fail to support the logical conclusion that chronic lung disease must be encompassed in the definition of pneumoconiosis. It is only when a physician determines that chronic obstructive pulmonary disease ("COPD") arose, at least in part, out of coal mine employment that COPD falls within the definition of pneumoconiosis. There exists no Congressional mandate that all, or any, obstructive disorders can be caused by coal mine dust. The logical conclusion is chronic obstructive lung diseases can, but need not, be included in the definition of pneumoconiosis.

Some representing benefits claimants18 and the Department of Labor19 seek to have all chronic obstructive lung diseases included in the definition of pneumoconiosis and, in so doing, diminish the required causation element linking pulmonary disease to coal mine work. This interpretation stems from the court's reasoning in Warth that reversed the ALJ's denial of benefits because the physicians relied upon failed to give legitimate reasons for ruling out dust exposure in coal mine employment as a cause or aggravation of that disease.20 First, such an analysis needlessly utilizes the term "rule out," which has a significant technical meaning under the old regulations.21 Second, it errantly alters the burden of proof because

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17 Warth, 60 F.3d at 175 n.1.
19 See the suggested revisions to definition of pneumoconiosis in 62 Fed. Reg. 3338 (Jan. 22 1997).
20 Warth, 60 F.3d at 175.
21 See Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 123 (4th Cir. 1984) (holding that under § 727.203(b)(3), a party opposing entitlement had to "rule out" impairment due to pneumoconiosis).
the benefits claimant, and not the employer, shoulders the burden to prove the existence of pneumoconiosis.\footnote{22 See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 280 (1994).}

The controversy is important because obstructive lung diseases are frequently found in coal miners, and cigarette smoking has been diagnosed as, or at least a part of, the cause of the obstructive lung disease.\footnote{23 Obstructive lung diseases diminish the ability to expel air from the lungs, while restrictive lung diseases diminish the ability to get air into the lungs.} It is repeatedly argued on behalf of benefits claimants that based on the strength of the language in \textit{Warth}, if a physician has concluded an obstructive disorder was not coal workers’ pneumoconiosis, the ALJ must discredit the opinion as “hostile to the Act.”\footnote{24 See Cogan, \textit{supra} note 18.}

“Hostile to the Act” is at best a nebulous concept. The Eleventh Circuit affirmed an ALJ’s decision to give negligible weight to a physician’s opinion because the physician would not diagnose pneumoconiosis absent positive x-ray evidence that the disease existed.\footnote{25 See Black Diamond Coal Mining Co. v. Benefits Review Bd., 758 F.2d 1532, 1534 (11th Cir. 1985).} As the BLBA provides a presumption of pneumoconiosis even when it cannot be proven by x-ray,\footnote{26 See 30 U.S.C. § 921(c)(3)-(4) (1994) (creating a presumption of total disability due to pneumoconiosis based on 15 years of coal mine employment and evidence of a pulmonary disability).} the court reasoned that the physician’s opinion could be discounted as inconsistent with the BLBA.\footnote{27 \textit{Black Diamond}, 758 F.2d at 1534.} A whole series of cases related to the “hostile-to-the-Act” concept have since been handed down.\footnote{28 See, e.g., Blakley v. Amax Coal Co., 54 F.3d 1313 (7th Cir. 1995); Penn Allegheny Coal Co. v. Mercatell, 878 F.2d 106 (3d Cir. 1989); Searls v. Southern Ohio Coal Co., 11 Black Lung Rep. (MB) 1-161 (B.R.B. 1988); Wetherill v. Green Construction Co., 5 Black Lung Rep. (MB) 1-248, 1-252 (B.R.B. 1982).} Lost from this series of cases is the reality noted long ago by the Supreme Court when it stated that “[s]imple pneumoconiosis, ordinarily identified by x-ray opacities of a limited extent, is generally regarded by physicians as seldom productive of significant ventilatory impairment.”\footnote{29 Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 6-7 (1976).} As the Benefits Review Board explained in 1982, “hostile to the Act” does not include physicians who refuse to assess disability based on x-ray evidence of pneumoconiosis. It is only when a
physician rejects simple pneumoconiosis as a possible source of disability in coal miners generally, that the physician’s opinion conflicts with the spirit of the BLBA.  

The concept of “hostile to the Act” has recently forced the Fourth Circuit to split hairs. In 1995, a panel of the Fourth Circuit held a physician’s opinion was “hostile to the Act” where the doctor stated that simple pneumoconiosis does not cause total disability “as a rule.” Yet, in a 1997 decision, the Fourth Circuit held a physician’s opinion was properly determined not to be “hostile to the Act” where the physician concluded that simple pneumoconiosis would “not be expected” to cause pulmonary impairment. Apparently, when a physician invokes the magic talisman “not to be expected” as opposed to “as a rule” the opinion is not “hostile to the Act.”

In Stiltner v. Island Creek Coal Co., the Fourth Circuit revisited the definition of coal workers’ pneumoconiosis and addressed the tension created by the suggestion that under Warth an ALJ must automatically discard the opinion of any physician who opined COPD is due to something other than coal dust. In Stiltner, the benefits claimant generally contended that most of Island Creek’s experts improperly theorized that “coal dust exposure does not give rise to an obstructive impairment.” While the court acknowledged that the Fourth Circuit had previously rejected as inimical to the BLBA the premise that “obstructive disorders cannot be caused by coal-mine employment,” the medical opinions challenged here made no such claim. The panel explained,

In Warth, we held that chronic obstructive pulmonary disease (COPD) falls within the regulatory definition of pneumoconiosis if the COPD is significantly related to or aggravated by coal mine employment. We therefore cautioned ALJs not to rely on medical opinions that rule out coal mine employment as a causal factor based on the erroneous assumption that pneumoconiosis causes a purely restrictive form of

30 See Wetherill, 5 Black Lung Rep. at 1-252.
31 See Thorn v. Itmann Coal Co., 3 F.3d 713, 719 (4th Cir. 1995).
32 See Lane v. Union Carbide Corp., 105 F.3d 166 (4th Cir. 1997).
33 86 F.3d 337 (4th Cir. 1996).
34 Id. at 341 (citing appellant’s brief).
35 Id.
impairment, thereby eliminating the possibility that coal dust exposure also can cause COPD.

Unlike the medical opinions we examined in Warth, none of the challenged physicians here assumed that coal mine employment can never cause COPD; they merely opined that Stiltner likely would have exhibited a restrictive impairment in addition to COPD, if coal dust exposure were a factor.\textsuperscript{36}

The rule of law in the Fourth Circuit seems to be if a physician assumes coal mine work never causes obstructive impairments, then that opinion should be viewed as inimical to the BLBA.

The revised rule of law, as stated in \textit{Stiltner}, is that if a physician assumes coal mine work never causes obstructive impairments, that opinion should be viewed as inimical to the BLBA. \textit{Stiltner} corrects the misperception that \textit{Warth} meant COPD automatically falls into the legal definition of pneumoconiosis. The \textit{Stiltner} court, bound by the errant precedent in \textit{Warth}, provides no basis in the BLBA\textsuperscript{37} or the regulations\textsuperscript{38} to assert a physician that assumes coal mine work never causes COPD is inimical to the BLBA.

Other circuits have taken a different approach and relied on the language in the BLBA or the implementing regulations to acknowledge that pneumoconiosis is defined broadly and the BLBA does not establish that dust exposure from coal mine work can necessarily cause obstructive pulmonary diseases or impairment.\textsuperscript{39} Instead of setting an iron-clad rule applicable to every case, the Seventh Circuit has determined that “the facts and medical opinions in each specific case answer this question.”\textsuperscript{40} This approach defers to the assessments made by physicians as to the cause of pulmonary disease.

The import of the definition of coal workers’ pneumoconiosis has taken on special meaning for another reason. On January 22, 1997, the Department of Labor published proposed changes to the regulations implementing the Federal Coal Mine

\textsuperscript{36} \textit{Id.} (emphasis added) (citations and footnotes omitted).


\textsuperscript{38} 20 C.F.R. Part 718 (1997).

\textsuperscript{39} \textit{See}, e.g., Blakley v. Amax Coal Co., 54 F.3d 1313, 1321 (7th Cir. 1995); Freeman United Coal Mining Co. v. OWCP, 957 F.2d 302, 303 (7th Cir. 1992).

\textsuperscript{40} \textit{Id.}
Health and Safety Act of 1969. These regulatory changes, which are still under consideration as of the time of this Article, attempt to expand the definition of pneumoconiosis beyond the statutory definition. The proposed change specifically adds a “legal definition” of pneumoconiosis to include,

any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any restrictive or obstructive pulmonary disease arising out of coal mine employment.

By administrative fiat, the Secretary Department of Labor suggests a new definition of pneumoconiosis so as to encompass more chronic lung conditions than otherwise suggested by the various federal appellate courts or the Benefits Review Board. The goal of the change is candidly admitted to “foreclose litigation” attempting to narrow the definition of pneumoconiosis. This proposed change in the regulations would have the effect of expanding the definition of pneumoconiosis to presumptively include all chronic lung diseases as long as some physician asserts the lung disease arose out of coal mine work. Such an expansion of the definition of pneumoconiosis would effectively resurrect the presumption effective for claims filed before the first of April, 1980, that any chronic lung disease is due to coal-mine employment.

The frustration surrounding the definition of pneumoconiosis experienced by the circuit courts, the Department of Labor, and the other parties has been, in part, directly attributable to the parties that litigate these claims. It has been legitimately observed that

[m]uch confusion . . . stems from the failure of counsel and witnesses to specify, when they use the term “pneumoconiosis,” whether they are referring to legal or clinical pneumoconiosis, and

See 62 Fed. Reg. 3338 (Jan. 22, 1997). The proposed changes are so sweeping that most of these changes are beyond the scope of this Article.

The propriety of the change has been challenged not only on its medical grounds but on legal grounds, as the Secretary of Labor has suggested altering the Congressional definition of pneumoconiosis nearly 30 years after it was defined at 30 U.S.C. § 902(b) (1994).


Id. at 3343.

from the failure of the ALJ to resolve the conflict when this ambiguity arises in the record. To make an accurate assessment of whether the ALJ’s decision is supported by substantial evidence, the litigants and the ALJ alike must cooperate to provide a record free from this ambiguity. As we have observed, clinical pneumoconiosis is only a small subset of the compensable afflictions that fall within the definition of legal pneumoconiosis under the Act.46

The Fourth Circuit again addressed the conflict in an unpublished decision by observing,

Experience has shown that Congress chose poorly when it picked the word “pneumoconiosis” to denote the broad class of pulmonary afflictions for which it intended to provide benefits. “Pneumoconiosis” is a word that was already taken, and, moreover, taken by the very expert witnesses — physicians and radiologists — on which the claims resolution process relies. In insisting upon the presence of coal macules for a diagnosis of “pneumoconiosis,” [Doctors] used the term in the sense natural to them as clinicians.

Unfortunately, use of only the clinical sense of the word leaves much unaddressed, because Congress defined “pneumoconiosis” as a broad set of diseases, bound together not by a common pathology but rather by a common cause: exposure to coal dust.47

Parties must not only inquire as to the existence of pneumoconiosis, but also inquire as to whether a benefits claimant has any chronic dust disease arising out of coal mine employment as the BLBA and regulations define pneumoconiosis. An ALJ may not consider the opinion of a physician who refuses to find a causal connection between a claimant’s coal mine employment and respiratory disability solely because disability is obstructive in nature.48 However, an ALJ need not discredit the opinion of a physician who notes the absence of a restrictive impairment if the opinion does not rest on the assumption that coal-mine
employment never causes obstructive impairment.49 The lesson for those that either seek entitlement to Black Lung Benefits or defend these claims is to resolve any potential confusion over the term “pneumoconiosis” and to include both the “medical” and “legal” definition of pneumoconiosis in the presentation of their case.

B. A Progressive and Latent Disease

The obstructive/restrictive question has not been the only source of controversy in the definition of pneumoconiosis. Pneumoconiosis is defined by Congress as a “chronic lung disease.”50 In its first decision addressing the BLBA, the Supreme Court added to the definition by stating that pneumoconiosis is also an “irreversible and progressive disorder.”51 The Third Circuit altered this description in a 1995 decision, and held that pneumoconiosis is a latent dust disease.52

To reach the conclusion that pneumoconiosis is a latent disease, the panel relied not on the administrative record developed before the ALJ, but on The Sloane-Dorland Annotated Medical-Legal Dictionary,53 The Merck Manual of Diagnosis and Therapy,54 and a single medical study of French coal miners.55 The full description of coal workers’ pneumoconiosis in The Merck Manual provides a different picture:

49 See Stiltner v. Island Creek Coal, Co., 86 F.3d 337, 341 (4th Cir. 1996).
51 Usery v. Turner-Elkhorn Mining Co., 428 U.S. 1, 6-7 (1976); see also Mullins Coal Co. v. Director, OWCP, 484 U.S. 135, 151 (1987).
53 R. SLOANE, THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 558 (1987) (“On any given date pneumoconiosis may not be detectable. . . . The disease, nevertheless, may progress and later destroy sufficient lung tissue [to become detectable].”)
54 THE MERCK MANUAL OF DIAGNOSIS AND THERAPY (Robert Berkow & Andrew J. Fletcher, eds., 16th ed. 1992) [hereinafter MERCK MANUAL] (explaining that progressive massive fibrosis, a form of pneumoconiosis “may develop after exposure has ceased, or . . . progressive without further exposure”).
55 David V. Bates et al., A Longitudinal Study of Pulmonary Function in Coal Miners in Lorraine, France, 8 AM. J. INDUS. MED. 21, 21 (1985) (observing continued, accelerated rates of decline in lung function loss after retirement from mining in both smokers and nonsmokers).
Pathology and Pathophysiology

In simple CWP, coal dust is widely deposited throughout the lungs, leading to the development of “coal macules” around the respiratory bronchioles. Later on mild dilation also occurs in the same region. This dilation is known as focal emphysema; however, it does not extend to the alveoli and is not associated with airflow obstruction. Because coal is relatively nonfibrogenic, distortion of lung architecture and functional impairment are minimal. However, a few miners with categories 2 or 3 simple CWP go on to develop progressive massive fibrosis (PMF). The latter is defined as development of a large opacity > 1 cm on a background of relatively advanced simple CWP. PMF may develop after exposure has ceased and may progress without further exposure, but not all subjects show progression. PMF encroaches on and destroys the vascular bed and airways, as does complicated silicosis, but this mass is amorphous and black. The development of PMF appears to be unrelated to the silica content of the coal; however, as in silicosis, anti-nuclear antibodies and lung autoantibodies may be present in the serum of the affected person.

Symptoms, Signs, and Diagnosis

CWP is not associated with any respiratory symptoms. Cough and sputum occur as frequently in men without x-ray evidence of this condition. When airways obstruction is present, then it is either due to coincident pulmonary emphysema from smoking, industrial bronchitis, or the presence of PMF, which is the only disabling form of CWP. A few minor abnormalities of the distribution of inspired gas are found in simple CWP, but these are not associated with respiratory symptoms. The diagnosis depends on a history of suitable exposure, usually at least 10 yr underground, and the characteristic x-ray pattern of small rounded opacities in both lung fields (simple CWP) or, in PMF a shadow > 1 cm in diameter occurring on a background of at least category 2 or 3 simple CWP.

Prophylaxis and Treatment

CWP can be prevented by increasing the efficiency of dust suppression at the coal fact. The development of PMF usually can be prevented by removing patients with x-ray changes typical simple CWP from further coal dust exposure. There is no specific
treatment; therapy is similar to that for nonspecific chronic obstructive disease.56

The court believed Congress had to have recognized the perniciously progressive nature of the disease in enacting the BLBA based on statements attributed to a 1985 law review article57 rather than the statutory language or even the legislative history. Relying in part on the Department of Labor ("DOL"), the agency which administers the black lung programs, the court adopted the DOL’s litigation position that pneumoconiosis is a progressive disease and, that while the symptoms may on occasion subside, the condition itself does not improve.58 Other courts have shunned such an analysis and concluded that questions of science are beyond the purview of appellate courts.59

The Third Circuit observed that courts have long acknowledged that pneumoconiosis is a progressive and irreversible60 disease. It found the contention that "simple" pneumoconiosis, in contrast to its "complicated" form, is not a progressive disease unpersuasive.61 The Third Circuit distinguished both the Supreme Court’s Usery decision and the 1985 report of the Surgeon General.62

56 MERCK MANUAL, supra note 54, at 672.
57 See Robert L. Ramsey & Robert S. Habermann, The Federal Black Lung Program – The View From the Top, 87 W. VA. L. REV. 575, 575 (1985) ("Due to the insidious nature of the progressive occupational respiratory disorders such as pneumoconiosis, Congress found that state programs, which were aimed at adjudicating time-definite injuries, often precluded recovery due to the running of statutes of limitations."). This statement refers to limitations on filing for state workers' compensation benefits not the latent nature of coal workers’ pneumoconiosis.
59 See, e.g., Freeman United Coal Mining Co. v. Hillard, 65 F.3d 667, 670 (7th Cir. 1995).
61 Swarrow, 72 F.3d at 315.
In the proposed regulatory changes, the DOL seeks to codify the holding of the Third Circuit in LaBelle. The definition of pneumoconiosis is proposed to be altered to recognize pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."

Encouraged by the judicial change in the definition of pneumoconiosis by the Fourth (obstructive) and Third (latent) Circuits on less than compelling scientific grounds, the DOL seeks to change the definition of the disease for all black lung claims in all circuits. The nature of pneumoconiosis should not be defined by regulatory fiat or by a judicial review of a de minimis selection of the medical literature. The Black Lung Benefits Program has been plagued by repeated attempts to ease the litigation of these complex claims by adopting easy rules for resolving conflicting evidence as imposed by the Benefits Review Board or various appellate courts. In black lung cases, mechanical rules frequently do not work and lead to bizarre results. LaBelle and Warth add another chapter to the attempt to over simplify the adjudication of these claims.

III. THE TREATING PHYSICIAN: THE BEST DETERMINER OF PNEUMOCONIOSIS?

These proposed changes to the regulations are not limited to changing the definition of pneumoconiosis. The changes suggest the role of the treating physician should be moved to the forefront in the litigation of these claims. With

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64 Id.

65 The proposed regulations rely on several medical studies to support the contention that pneumoconiosis is latent and progressive. 62 Fed. Reg. at 3344. Interestingly, these articles come from the study of French coal miners despite the large scale and long term studies of American coal miners that go unaddressed. The proposals are neither an exhaustive analysis of the medical literature nor are proposed by a medical committee or physician trained to offer expert opinion on this issue.

66 For example, the true-doubt rule, used to resolve conflicting evidence in favor of the benefits claimant was eventually discarded as improper. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

67 The short cut method of relying on any positive evidence to shift the burden of proof was rejected. See Stapleton v. Westmoreland Coal Co., 785 F.2d 424 (4th Cir. 1986) (en banc), rev'd sub nom Mullins Coal Co., Inc. of Virginia v. Director, OWCP, 484 U.S. 135 (1987).
certain caveats, the "treating physician," a term that is conspicuously left undefined, is to be given "controlling weight." 68

The role of the treating physician has served as an area of discord in black lung claims. For example, the Sixth Circuit adopted a long standing rule in social security cases acknowledging deference to the benefits claimant's treating physician. 69 The basis for the Tussey decision is dubious. 70 Other circuits have

68 The proposed regulations would provide,
(d) Treating physician. The medical opinion of a miner's treating physician may be entitled to controlling weight in determining whether the miner is, or was, totally disabled by pneumoconiosis or died due to pneumoconiosis. The adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician:

(1) Nature of relationship. The opinion of a physician who has treated the miner for respiratory of pulmonary conditions is entitled to more weight than a physician who has treated the miner for non-respiratory conditions;
(2) Duration of relationship. The length of the treatment relationship demonstrates whether the physician has observed the miner long enough to maintain a superior understanding of his or her condition;
(3) Frequency of treatment. The frequency of physician-patient visits demonstrates whether the physician has observed the miner often enough to obtain a superior understanding of his or her condition; and
(4) Extend of treatment. The types of testing and examinations conducted during the treatment relationship demonstrate whether the physician has obtained superior and relevant information concerning the miner's condition.
(5) Whether controlling weight is given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole.


69 See Tussey v. Island Creek Coal Co., 982 F.2d 1036, 1042 (6th Cir. 1993).

70 Tussey relies on two cases, Sexton v. Director, OWCP, 752 F.2d 213 (6th Cir. 1985), and Collins v. Secretary of Health and Human Services, 734 F.2d 1177 (6th Cir. 1984), to support the asserted rule of law that it is "clearly established that a treating physician's opinion is entitled to greater weight than those of non-treating physicians." Tussey, 982 F.2d at 1042. Neither of these cited cases provides a basis for the precedent underlying the assertion of deference to treating physicians in Tussey. Sexton provided an ALJ erred in giving greater weight to a non-examining doctor's negative reading of a single x-ray than to the results of examinations and x-ray readings by two qualified physicians. Sexton, 752 F.2d at 215-16. Collins held the finding of non-disability contained in the report of a physician who has not examined a patient is insufficient evidence to rebut the positive proof of disability established in this case. Collins, 734 F.2d at 1180. These cases do not stand for the
shunned such a blanket or mechanical deference to the treating physician based only on the status of the physician-patient relationship.\textsuperscript{71} The Fourth Circuit, over a dissent, addressed the suggestion that it adopt a blanket or mechanical rule to credit the treating physician:

We reject his contention. Neither this circuit nor the Benefits Review Board has ever fashioned either a requirement or a presumption that treating or examining physicians' opinions be given greater weight than opinions of other expert physicians. We have often stated that as a general matter the opinions of treating and examining physicians deserve especial consideration. We stated, for example, in Hubbard v. Califano, 582 F.2d 319, 323 (4th Cir. 1978), that "[w]e place [ ] great reliance on a claimant's treating physician," and, citing Hubbard, in King v. Califano, 615 F.2d 1018, 1020 (4th Cir. 1980), that "[w]e place [ ] great reliance on the conclusions of a claimant's examining physician." In neither case, however, did we suggest, much less hold, that the opinions of treating or examining physicians must be accorded greater weight than the opinions of other physicians. It is, of course, one thing to say that we give great weight to the treating or examining physician's opinion; it is quite another to say that as a matter of law we give greater weight to such an opinion than to opinions by other physicians.\textsuperscript{72}

Requiring the ALJ, as the trier-of-fact, to analyze all of the relevant evidence and to make a determination which competing physician's opinion as to a disease or a disability assessment is the better reasoned, and the most just, approach. There is no logical reason to assume the treating physician is always the best judge of the presence of pneumoconiosis.

The Third Circuit recently reiterated its position that a treating physician's opinion may be accorded greater weight than the opinions of other physicians of record, but the ALJ may permissibly require the treating physician to provide more than a conclusory statement before finding that pneumoconiosis contributed to the proposition that clearly a treating physician's opinion is entitled to greater weight.

\textsuperscript{71} See, e.g., Peabody Coal v. Helms, 901 F.2d 571, 573 (7th Cir. 1990).

\textsuperscript{72} Grizzle v. Pickands Mather and Co./Chisolms Mines, 994 F.2d 1093, 1097-98 (4th Cir. 1993) (footnotes omitted) (omissions in original).
miner's death. In reaching this conclusion, the Third Circuit adopted a holding from the Eighth Circuit. The treating physician's statement on a death certificate that refers to pneumoconiosis could not be viewed as a reasoned medical finding, particularly if no autopsy had been performed.

The proposed change by the DOL runs afoul of the majority of established circuit court guidance for the analysis of conflicting opinions under the BLBA. In fact, the treating physician rule attempts to create a presumption, virtually irrebuttable, to accord extra weight to the opinion of the treating physician, which steals the discretion from the fact finder in rendering a decision based on an analysis of all the evidence of record.

IV. ESTABLISHING PNEUMOCONIOSIS UNDER PART 718

As most claims currently being adjudicated were filed after 1982, they are controlled by the criteria presented at 20 C.F.R. Part 718. In 1997, the United States Court of Appeals for the Third Circuit agreed with the position presented by the Director that to establish pneumoconiosis, all of the relevant evidence as to its existence should be considered together rather than separately. Consideration of all relevant evidence is a fundamental tenet of the BLBA.

In Penn Allegheny, the Third Circuit agreed with the position presented by the Director that although Section 718.202(a)(1) through (4) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease. The court found significant the language of the regulation that does not

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73 See Lango v. Director, OWCP, 104 F.3d 573 (3d Cir. 1997).
74 Risher v. Office of Workers' Compensation Programs, 940 F.2d 327, 331 (8th Cir. 1991).
75 Id.
76 Both the BLBA and the Administrative Procedure Act require that all relevant evidence be considered in rendering decisions. See 30 U.S.C. § 923(b) (1994); 5 U.S.C. § 556(d) (1994); Underwood v. Elkay Mining Co., 105 F.3d 946 (4th Cir. 1997).
77 See Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 24 (3d Cir. 1997).
79 Section 718.202(a)(1) through (4) provides, in pertinent part, (a) A finding of the existence of pneumoconiosis may be made as follows: (1) A chest x-ray conducted and classified in accordance with 718.102 may form the basis for a finding of the existence of
list the four methods in the disjunctive. The word “or” did not appear between the paragraphs enumerating the four approved methods of determining the presence of pneumoconiosis. The Benefits Review Board erred by affirming the finding of the presence of pneumoconiosis based on analysis of x-ray evidence without an evaluation of the other relevant evidence. In this case, biopsy evidence was available that did not show evidence of pneumoconiosis. The BLBA\textsuperscript{80} requires that all relevant evidence must be evaluated to determine the existence of pneumoconiosis.

An unanswered issue in weighing conflicting evidence as to the existence of pneumoconiosis stems from the interpretation of Section 718.202(a) (1) through(a)(4) by the Third Circuit in Penn Allegheny and the distinction between the “legal” and “medical” pneumoconiosis. If a physician relies, in whole or in part, on a chest x-ray believed to be positive for pneumoconiosis to diagnose pneumoconiosis, then the x-ray evidence is ruled not to establish the existence of pneumoconiosis, is the physician’s opinion relevant to a determination of pneumoconiosis under Section 718.202(a)(4)? While the Fourth Circuit has specifically addressed the contrary situation – where physicians believe x-rays do not reveal evidence of pneumoconiosis and the preponderance of the x-ray evidence is found to show the existence of pneumoconiosis\textsuperscript{81} – courts have yet to determine what, if any, weight should be accorded to a physician’s assessments under Section 718.202(a)(4) premised on the incorrect notion that x-rays revealed pneumoconiosis.

\begin{itemize}
\item[(2)] A biopsy or autopsy conducted and reported in compliance with § 718.103 may be the basis for a finding of the existence of pneumoconiosis;
\item[(3)] If the presumptions described in §§ 718.304, 718.305 or § 718.306 are applicable, it shall be presumed that the miner is or was suffering from pneumoconiosis;
\item[(4)] A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201.
\end{itemize}


\textsuperscript{81} See Grigg v. Director, OWCP, 28 F.3d 416, 418-19 (4th Cir. 1994); Hobbs v. Clinchfield Coal Co., 45 F.3d 819, 820 (4th Cir. 1995); Dehue Coal Co. v. Ballard, 65 F.3d 1189, 1195 (4th Cir. 1995).
V. WHAT TO CONSIDER – IS EVIDENCE CUMULATIVE?

Courts and commentators have fretted over the amount of evidence proffered in the litigation of Black Lung Claims, usually objecting to the amount of evidence coal mine operators have developed in defense of these claims. One appellate Judge observed,

The current norm is the contest of physician’s reports. If this exercise ever had a fresh, truth-seeking outlook, it has long since faded. Tell me where the miner lives and the name of the respondent employer, and I can make a pretty accurate guess as to who the various experts are and what their reports say. Though the employer’s resources usually translate into more experts, I am not singling out one side for the blame. Disability, or the lack thereof, seems inevitably in the eye of the paid beholder.

The DOL has proposed to radically alter the adjudicatory procedures in Black Lung Claims by arbitrarily limiting the amount of evidence the parties can offer in a claim. The DOL proposes to fundamentally restructure the claims adjudication process by limiting evidentiary development. The parties would only be allowed to offer evidence while claims are pending before the District Director and are limited in the types and amounts of evidence that can be offered. These proposed changes have been criticized by both claimants and coal mine operators as needlessly restrictive.

Such proposed limitations would run afoul of the principles upon which the BLBA functions. Hearings conducted under the BLBA are also governed by


83 Cogan, supra note 18, at 1004 n.3.

84 Grizzle, 994 F.2d at 1101.


provisions of the Administrative Procedures Act which requires consideration of relevant evidence.\textsuperscript{87}

The applicable provisions of the Administrative Procedure Act (APA), governing the admission of evidence provides, “Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”\textsuperscript{88} The Fourth Circuit offered the following black letter rule for an ALJ to determine if evidence should be considered:

\begin{quote}
[I]n considering multiple opinions of medical experts in black lung benefits cases, ALJ’s should recognize that they must consider all relevant evidence, erring on the side of inclusion, but that they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value.\textsuperscript{89}
\end{quote}

There is little room to argue what the rule should be: when in doubt, the ALJ should let evidence into the administrative record to be considered. Unless the provisions of the APA are changed by Congress, all relevant evidence shall be considered. There seems to be little controversy left regarding “cumulative evidence.”

\textsuperscript{87} See id. § 925(a) (incorporating 33 U.S.C. §919(d), in turn incorporating 5 U.S.C. §554 (the Administrative Procedure Act)); see also 20 C.F.R. § 725.452(a) (1997); Bethlehem Mines Corp. v. Henderson, 939 F.2d 143, 148 (4th Cir. 1991).


\textsuperscript{89} Underwood v. Elkay Mine, Inc., 105 F.3d 946 (4th Cir. 1997).
VI. MATERIAL CHANGE IN CONDITION AND DUPLICATE CLAIMS

Two provisions of the regulations escaped much attention before the mid-1980s. Section 725.309 provides for reconsideration made within one year of a denial of benefits. Interest in the application of these regulations exploded with the 1988 decision of the Benefits Review Board that ruled a claimant is not entitled to a full hearing on the claim of a material change in conditions. Several years later the Tenth Circuit

20 C.F.R. § 725.309(c) - (d) provides:
(c) A claimant who filed a claim for benefits under part B of title IV of the Act or part C of title IV of the Act before March 1, 1978, and whose previous claim(s) are pending or have been finally denied, who files an additional claim under this part, shall have the later claim merged with any earlier claim subject to review under part 727 of this subchapter. If an earlier claim subject to review under part 727 of this subchapter has been denied after review, a new claim filed under this part shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met. If an earlier survivor's claim subject to review under part 727 of this subchapter has been denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met;
(d) In the case of a claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of §725.310 are met. If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the deputy commissioner determines that the later claim is a request for modification and the requirements of § 725.310 are met.

20 C.F.R. § 725.309(c) - (d) (1997).

20 C.F.R. § 725.310(a) provides:
(a) Upon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in determination of fact, the deputy commissioner may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.


90 20 C.F.R. § 725.309(c) - (d) provides:
91 20 C.F.R. § 725.310(a) provides:
reversed the decision\(^93\) and held that a miner is entitled to a full administrative hearing on a duplicate claim. The circuit courts that routinely consider Black Lung Claims have each in turn addressed the standard to apply in considering a claim under the duplicate claim provision and whether a material change in condition has been established.\(^94\)

The Sixth Circuit adopted the Director’s interpretation of the regulations and held that proof of one element of entitlement\(^95\) is sufficient to show a change in conditions and require the ALJ to weigh all of the relevant evidence to determine if benefits should be awarded on modification.\(^96\) A second method has been suggested by the Seventh Circuit.\(^97\) Here, the benefits claimant is held to a somewhat more rigorous standard of proof, which requires a showing that there has been a substantial change in health than that which existed at the time of the prior denial. However, even a slight worsening could be a material change in condition.\(^98\) A material change of conditions is “that evidence which is relevant and probative so that there is a reasonable possibility that it would change the prior administrative result.”\(^99\)

In 1997, the Eighth Circuit addressed the material change in condition standard to be applied to subsequent claims under the duplicate claim provision of

\(^93\) See Lukman, 896 F.2d 1254.

\(^94\) See Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1994); Lisa Lee Mines v. Director, OWCP, 86 F.3d 1358 (4th Cir. 1996) (en banc); Sahara Coal Co. v. Director, OWCP, 946 F.2d 554 (7th Cir. 1991).

\(^95\) In a Part 718 claim, the benefits claimant needs to prove four distinct elements: (1) the existence of pneumoconiosis; (2) that pneumoconiosis arose out of coal mine employment; (3) that there is a pulmonary impairment that would prevent the miner from performing their exertional rigors associated with the last regular coal mine work; and (4) that the pulmonary impairment is due, at least in part, to pneumoconiosis. See Robinson v. Pickands Mather & Co., 914 F.2d 35, 36, 38 (4th Cir. 1990).

\(^96\) The Third and Fourth Circuits have adopted this same approach. See LaBelle Processing Co. v. Swarrow, 72 F.3d 308 (3d Cir. 1995); Lisa Lee Mines v. Director, OWCP, 86 F.3d 1358 (4th Cir. 1996).

\(^97\) See Sahara Coal Co. v. Director, OWCP, 946 F.2d 554, 558 (7th Cir. 1991).

\(^98\) Id.

\(^99\) Sahara Coal Co., 946 F.2d at 556.
Section 725.309. Pneumoconiosis was held to be a progressive and irreversible disease in that it may develop in a miner after he has ceased working in the mines. The Eighth Circuit applied the one element standard previously adopted by the Third, Fourth, and Sixth Circuits. Specifically, the ALJ must consider whether the weight of the new evidence of record submitted by all the parties establishes at least one of the elements of entitlement previously adjudicated against the miner. The one element must be capable of change, for example the existence of pneumoconiosis or total disability. The court adopted the Director’s explanation that if a miner was found not to have pneumoconiosis at the time of the earlier denial, and the miner thereafter establishes that he has the disease, in the absence of evidence showing the denial was a mistake, an inference of a material change is not only permitted, but compelled.

The Tenth Circuit has taken yet a third approach. Using the language of the regulation, the court held, “[I]n order to bring a duplicate claim, a claimant must prove for each element that actually was decided adversely to the claimant in the prior denial that there has been a material change in that condition since the prior claim was denied.”

The Tenth Circuit observed that all of these approaches look to an element test; that is, if the claim was denied for the failure to prove one element (i.e., the existence of pneumoconiosis) and the miner is able to produce evidence on this element, there may be a new adjudication of the claim with no deference given to the previous decisions.

These duplicate claims provisions apply only to miner’s claims. A survivor’s claim that has been denied is not able to be re-litigated under the duplicate claim provision if there has not been a claim of a material change in condition or an allegation of a mistake in the determination of fact made within one

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101 See Lisa Lee Mines, 86 F.3d 1358; Sharondale Corp. v. Ross, 42 F.3d 993 (6th Cir. 1996); Sahara Coal Co., 946 F.2d 554.

102 See Lovilia Coal, 109 F.3d at 453.

103 See Wyoming Fuel Co. v. Director, OWCP, 90 F.3d 1502, 1509 (10th Cir. 1996).

104 Id. at 1511.
year of the denial of the claim.105 Like a miner, the survivor can move for modification under Section 728.310, apparently, for an unlimited number of times.

While the principles of finality do not generally apply to black lung claims,106 the re-litigation of the same issues by the same parties may be precluded even under the duplicate claim or reconsideration provisions.107 The reconsideration provisions provide a Congressionally-granted exception to claim preclusion.108 These provisions, entitled modification, allow either party to re-litigate a claim on one of two grounds: a mistake in determination of fact or a material change in conditions.109 While arguments might be effectively made as to the need for such an exception to claim preclusion as coal workers’ pneumoconiosis can progress in some individuals, the exception is not so clear in all cases. When a benefits claimant is disabled and has simple coal workers’ pneumoconiosis, but fails to be able to prove pneumoconiosis has caused the pulmonary disability, there is no need for repeated hearings. In these situations, the need for finality for both the benefits claimant and the coal mine operator is justified if, for no other reason, than to halt the seemingly endless attempts to secure benefits. Finality provides certainty for the parties that the procedures have finally ended, allowing the applicant, the operator, and its insurer to close the claim and move on.

The Supreme Court addressed the applicability of modification in a recent case arising under the Longshore and Harbor Workers’ Compensation Act.110 The Court explained,

On the initial claim for nominal compensation under the Act, then, the employee has the burden of showing by a preponderance of the evidence that he has been injured and that the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future. But when an employer seeks modification of previously awarded compensation, the employer

105 20 C.F.R. § 725.309(c) - (d) (1997); see also Clark v. Director OWCP, 9 Black Lung Rep. (MB) 1-205 (B.R.B. 1986) (per curiam), rev'd on other grounds, 838 F.2d 197 (6th Cir. 1988).

106 See generally Jessee v. Director, OWCP, 5 F.3d 723, 725 (4th Cir. 1993).


109 See Jessee, 5 F.3d 723.

is the proponent of the order with the burden of establishing a change in conditions justifying modification. In a case like this, where the prior award was based on a finding of economic harm resulting from an actual decline in wage-earning capacity at the time the award was entered, the employer satisfies this burden by showing that as a result of a change in capacity the employee’s wages have risen to a level at or above his pre-injury earnings. Once the employer makes this showing, § 8(h) [33 U.S.C. § 308(h)] gives rise to the presumption that the employee’s wage-earning capacity is equal to his current, higher wage and, in the face of this presumption, the burden shifts back to the claimant to show that the likelihood of a future decline in capacity is sufficient for an award of nominal compensation.111

The impact of the Court’s Rambo decision has yet to impact federal black lung claims. Whether the presumption of a progressive and latent nature of pneumoconiosis is proper or which party shoulders the burden of proof for the analysis are still debatable and seem to vary among the federal circuits.

The Seventh Circuit, sitting en banc, reversed a three judge panel’s decision that would have drastically altered the standard utilized in evaluating duplicate claims.112 In an unusual turn of events, Circuit Judge Wood wrote both the panel’s opinion in Spece I and the majority opinion in Spece II. In Spece I, the Court ruled that the duplicate claim should have been interpreted to have merged with a prior denied claim and, for purposes of adjudicating the duplicate claim, it should be merged with the first claim taking on the properties, including, the eligibility for review under 20 C.F.R. Part 727 instead of Part 718.113 This interpretation of the regulations conflicted with another circuit’s decision114 and risked adding $1.08

111 Rambo, 117 S. Ct. at 1963-64.

112 See Peabody Coal v. Spece, 117 F.3d 1001 (7th Cir. 1997) (en banc) (Spece II) rev’g Peabody Coal Co. v. Spece 94 F.3d 369 (7th Cir. 1996) (Spece I).

113 Spece I, 94 F.3d at 372. The difference between Part 727 and Part 718 is significant. When a miner presents evidence of pneumoconiosis or a pulmonary disability, the presumption of total disability due to pneumoconiosis arises, and the burden of persuasion shifts to the employer to rebut the elements of entitlement. Under Part 718 no such presumption is afforded a miner as to pneumoconiosis, total disability or disability due to pneumoconiosis.

114 See Tonelli v. Director, OWCP, 878 F.2d 1083 (8th Cir. 1989).
billion in liability to the Black Lung Disability Trust Fund. Additional risk would be borne by coal mine operators and their insurers beyond the one billion dollars in potential benefits that would be imposed on the Black Lung Disability Trust Fund.

In Spece II, the en banc panel of the Seventh Circuit reversed the Spece I determination and held that where a material change of condition is established, there is no merger with any earlier denied claims for purposes of determining the onset of benefits unless the earlier claim is pending or finally denied before March 1, 1978. While sitting en banc, the Seventh Circuit addressed a perceived confusion among its sister circuits about the scope of the decision in Sahara Coal Co., Inc. v. O.W.C.P. regarding what is required to show a material change in conditions for purposes of a second or subsequent application.

The Seventh Circuit explained there existed no quarrel with the general proposition or the applicability to new claims brought under the black lung benefits program. The key point is that the claimant cannot simply bring in new evidence that addresses his condition at the time of the earlier denial. His theory of recovery on the new claim must be consistent with the assumption that the original denial was correct.

The court adopted the Director’s interpretation that

[a]t least one element might independently have supported a decision against the claimant has now been shown to be different (implying that the earlier denial was correct), then we would agree that the ‘one-element’ test is the correct one. [However,] if the Director means something more expansive, his position would go beyond the principals of res judicata that are reflected in Section 725.309(c) and that we endorsed in Sahara Coal.

The court deferred from addressing whether pneumoconiosis progresses. Rather, it explained the question of whether simple pneumoconiosis can progress

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115 Spece I, 117 F.3d at 1005.
116 946 F.2d 554 (7th Cir. 1991).
117 Spece II, 117 F.3d at 1008.
118 Id.
in the absence of further exposure to coal dust is a question of legislative fact. 119
While progression of pneumoconiosis is not the sort of thing that should vary from
case to case, there will always be a question of whether a particular miner in fact
contracted the disease and became totally disabled by it. Rather than try to resolve
the scientific issue, the court agreed that Peabody had failed to both make a proper
record in this case and exhaust its remedies before the ALJ with this argument.
Without such a record, the court was left to judge Mr. Spece's evidence of a
delayed appearance of pneumoconiosis and the agency's acceptance of the general
theory of progression, which was enough to establish entitlement.

VII. IDENTIFICATION OF RESPONSIBLE OPERATORS

Two recent cases 120 have addressed the responsibilities of the Director in
naming coal mine operators as being potentially responsible for payment of benefits
to miners under the BLBA. 121 The Third Circuit resolved to award benefits to
Armando Venicassa, a retired coal miner, because of errors in the naming of the
responsible operator. 122 Venicassa had been initially awarded benefits by an ALJ
who designated the Office of Workers' Compensation Program ("OWCP") to pay
benefits to Venicassa through the Black Lung Disability Trust Fund. United States
Steel Corporation, the entity that had been incorrectly named as responsible operator,
123 had been dismissed by the ALJ in a 1988 decision after a hearing. The
OWCP moved to remand the responsible operator and the claim prior to the hearing
to rename Venicassa's last coal mine employer (Consolidation Coal Company) as
responsible operator. However, this motion was denied. The ALJ denied the motion
believing due process dictated a hearing go forward and OWCP be substituted to
defend the claim when the operator named was not found to be the responsible
operator. He based this belief on a prior decision from the Benefits Review

119    Id. at 1010. (citing Menora v. Illinois High School Ass'n, 683 F.2d 1030, 1036 (7th Cir.
1982)) (explaining that legislative facts are "general considerations that move a law making or rule
making body to adopt a rule").

120    See Venicassa v. Consolidation Coal Co., 137 F.3d 197 (3d Cir. 1998); Lane Hollow Coal
Co. v. Director, OWCP, 137 F.3d 799 (4th Cir. 1998).


122    See Venicassa, 137 F.3d 197.

123    See 20 C.F.R. §§ 725.490-493 (1997), which address the criteria for naming the responsible
operator. Generally, the responsible operator is the most recent employer of a benefits claimant that
employed the claimant as a coal miner for at least 125 working days over at least a 12 month period.
See id. §§ 725.492-493.
Board. The Benefits Review Board vacated the award of benefits, remanded the claim to OWCP, designated Consolidation Coal Company as a possible responsible operator, and returned the claim to be re-adjudicated. Based on new evidence presented in 1992, the ALJ denied benefits and found Venicassa could not establish total disability due to pneumoconiosis. While the Benefits Review Board affirmed the denial of benefits, a two judge majority of the Third Circuit concluded it was error to remand the case for designation of a second responsible operator.

Despite possessing accurate information concerning Venicassa’s employment history since the filing of the claim, OWCP had failed to designate the proper operator responsible to defend the claim. The failure to make a timely designation of the proper responsible operator could not jeopardize the award of benefits that was made. In reaching this conclusion, the majority pointed to the language of the regulations that require identification of the responsible operator as soon as after the filing of a claim as the evidence obtained permits. The Third Circuit agreed with the logic in the BRB’s Crabtree decision and concluded that remand for reconsideration of the responsible operator issue would be tantamount to re-litigating the claim, would cause piecemeal litigation, and obviously would not be compatible with the efficient administration of the BLBA or the expeditious processing of claims.

OWCP sought to have the court disregard Crabtree and follow the Sixth Circuit’s decision in Director v. Oglebay Norton Company. The court easily distinguished Venicassa’s situation from Oglebay. Oglebay involved a dispute between the OWCP and the named responsible operator; Venicassa’s case involved a dispute between the claimant, OWCP, and the putative responsible operator. Oglebay had the ALJ remand the case for determination of another responsible operator prior to a resolution of the claim on its merits; Venicassa’s claim had an ALJ issue on award of benefits. The Crabtree case concerns about due process and piecemeal litigation, relied on by the ALJ in denying the motion to remand filed by OWCP, were judged greater in Venicassa’s case than those which were faced by the Sixth Circuit in Oglebay. The court also recognized another important distinction, OWCP had before it all the relevant evidence necessary to designate the proper responsible operator, but simply failed to do so. This penalized not only Venicassa,
who had already litigated the case and won, but also the second responsible operator, Consolidation Coal Company, which had to litigate a ten-year-old claim.\textsuperscript{129}

In \textit{Lane Hollow Coal Co. v. Director, OWCP},\textsuperscript{130} the Fourth Circuit addressed the process for the naming of the responsible operator. Mr. Lockhart, the benefits claimant, filed his claim for benefits in 1975. His claim was reviewed in 1980 and again in 1981. After the eligibility criteria were loosened by Congress in 1977, the claim was forwarded to the Office of Administrative Law Judges for a hearing. After five additional years had passed, OWCP moved to remand the claim to name a responsible operator. The claim was remanded in 1986, and after five more years passed, three responsible operators were named, but not his last coal mine operator, Lane Hollow. After being referred to the Office of Administrative Law Judges, a second motion to remand was filed and granted. This allowed Lane Hollow to be finally notified of the claim in 1992, or seventeen years after notice could have been given and eleven years after the regulations commanded that it be given in accordance with the miner’s request for a hearing.\textsuperscript{131}

The extraordinary delay in notifying the responsible operator of potential liability deprived Lane Hollow of a meaningful opportunity to defend itself, in violation of the due process clause of the Fifth Amendment. Due process, aptly is described as analogous to a big tent, covering not only procedural fundamentals, but also substantive personal liberties and basic rules of justice.\textsuperscript{132} The inexcusable delay in notifying Lane Hollow deprived it of the opportunity to mount a meaningful defense to the proposed depravation of its property, monetary benefits that would be paid to Mr. Lockhart, and consequently Lane Hollow was denied due process of law. As Lane Hollow could not be lawfully named the responsible operator, payment of benefits to Mrs. Lockhart, on behalf of and as the survivor of the deceased miner, must be made from the Black Lung Disability Trust Fund.

Both decisions are logical extensions of a 1995 Fourth Circuit decision.\textsuperscript{133} In 1995, the Fourth Circuit indicated it was OWCP’s decision and burden to identify, notify, and develop evidence regarding the responsible operators.\textsuperscript{134} The \textit{Lane Hollow} and \textit{Venicassa} decisions clearly advise OWCP that identification of

\begin{itemize}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} 137 F.3d 779 (4th Cir. 1998).
  \item \textsuperscript{131} \textit{See} 20 C.F.R. § 725.410(d) (1997).
  \item \textsuperscript{132} \textit{See Lane Hollow}, 137 F.3d at 808.
  \item \textsuperscript{133} \textit{See Director, OWCP v. Trace Fork Coal Co.}, 67 F.3d 503 (4th Cir. 1995).
  \item \textsuperscript{134} \textit{Id.} at 507.
\end{itemize}
the responsible operator shall be accomplished or else the Black Lung Disability
Trust Fund will be responsible for the claims.

VIII. CONCLUSION

The Black Lung Program has never lived up to competing parties' expectations. After the initial experiences in the early 1970s that saw huge approval rates for claims, the program was legitimately viewed as a federal pension program. After 1973, when the federal government passed the burden of paying for the program to coal companies and their insurers, the program took on a whole new flavor. Employers did not want to pay a federally-mandated pension program cloaked as a disability program. Conflicts arose when the employers' expectations collided with the established expectations of eligible benefits claimants. Claimants' expectations were unrealistically inflated as the claims were not vigorously defended by the government and were considered under presumptions (now not applicable) that were beneficial to the benefits claimant. It became common for claims to take years to resolve. While claims continue to take years to resolve, there appears to be less tolerance among the parties and the courts for needless delays.

Black Lung claims are not easy to try. Those that litigate the claims are challenged with conflicting precedent and byzantine regulations. As if that were not enough, an understanding of pulmonary medicine becomes necessary. Yet, those interested in these claims are afforded, via the internet, new resources that can provide the understanding to represent parties in these claims. The Office of Administrative Law Judges,\textsuperscript{135} as well as Emory University,\textsuperscript{136} maintain wonderful web sites to afford the advocate the background to represent parties in these matters.

The black lung program has been subjected to quick-fix solutions that have generally failed. It continues to be an example of how not to compensate individuals afflicted with an occupationally-related disorder. The all-or-nothing format that prohibits settlement of claims based on partial disability forces the parties and physicians to take unrealistic positions to secure or defeat entitlement for retired coal miners afflicted with a breathing disorder. The proposed changes to the existing regulations fail to correct the existing problems and create a whole new series of trap doors that, if adopted, will undoubtedly keep black lung cases on the dockets of federal circuit courts in the coal mining regions in the United States for years to come.
