Can Coal Miners Escape Black Lung--An Analysis of the Coal Miner Job Transfer Program and Its Implications for Occupational Medical Removal Protection Programs

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CAN COAL MINERS ESCAPE BLACK LUNG? AN ANALYSIS OF THE COAL MINER JOB TRANSFER PROGRAM AND ITS IMPLICATIONS FOR OCCUPATIONAL MEDICAL REMOVAL PROTECTION PROGRAMS

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I. INTRODUCTION

When it comes to occupational diseases, we have a habit of closing the barn door after the cow gets out. By 1972, the President's Report on Occupational Safety and Health estimated that there were as many as 390,000 new cases, and 100,000 deaths, per year from occupational disease.¹ These figures included over 100,000 coal miners who were afflicted by black lung disease before legislation was enacted to control coal dust exposure and to compensate its victims.²

Recognizing this growing problem, Congress passed the Federal Coal Mine Health and Safety Act (1969)³ to "permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period."⁴ For the first time, legislation introduced a preventive health strategy into the American workplace.

In order to reach its goal, the 1969 Act mandated a three-part attack on the problem of coal workers' pneumoconiosis: reduction of dust exposure through federally-mandated dust control plans and environmental testing;⁵ medical surveillance of working miners with a guarantee that those who showed evidence of developing disease would work in jobs with low coal dust exposure;⁶ and compensation


². Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 6 n.1. (1976) ("The House and Senate Reports on the 1969 Act placed the number of afflicted active and retired miners at 100,000. S. Rep. No. 91-411, p. 6 (1969) and H.R. Rep. No. 91-563, p. 17 (1969), U.S. Code Cong. & Admin. News 1969, p. 2503. The Senate Report specified that, on the basis of X-ray examination, the disease rate was 10% for then-active coal miners, and 20% for inactive coal miners. Other estimates have run significantly higher.")


The right of miners with medical evidence of pneumoconiosis to work in low dust jobs was the first medical removal protection (MRP) provision ever proposed by the federal government. Commentators termed this legislative guarantee of continued employment without wage reduction "a bold new labor concept." In fact, it is still the only federal provision for permanent withdrawal of at-risk employees who are suffering irreversible health effects from their work.  

The 1969 Act's mandate for reduced dust exposure for miners with disease from high dust jobs, therefore, represents an industry-wide experiment in permanent transfers with wage and other protections.

Currently, however, fewer than 150 miners are exercising their medical removal rights. The lack of participation in this program raises significant questions regarding the appropriate design and implementation of medical removal protection plans in the workplace.

II. BACKGROUND OF MEDICAL REMOVAL PROTECTION IN THE WORKPLACE

It is axiomatic that reducing workers' exposure to disease-causing agents helps to prevent work-related disease. This can be accomplished in two ways: reduction of the hazards through environmental controls or removal of workers at increased risk from jobs with high exposures.

11. Data provided to the author by William Sutherland, Chief, Division of Health, Coal Mines Safety and Health Division, Mine Safety and Health Administration by letter, January 11, 1988 [hereinafter MSHA data].
Federal health and safety legislation generally requires reduction in occupational exposures through environmental controls.\(^{13}\) In most situations, such legislation does not provide for removal of individual workers suffering the ill-effects of adverse exposures. Traditionally, this problem has been left to compensation and disability insurance systems.

There are exceptions, however. Although the Occupational Safety and Health Act (OSHA)\(^ {14}\) does not specifically address the issue of medical removal of impaired workers,\(^ {15}\) limited medical removal protection (MRP) provisions appear in a number of OSHA health standards, including those for vinyl chloride\(^ {16}\) and asbestos.\(^ {17}\) The lead standard includes a broad medical removal provision requiring temporary removal of workers with high blood-lead levels.\(^ {18}\) This provision was unsuccessfully challenged by the industry.\(^ {19}\)

None of these regulations includes permanent job reassignment for partially disabled workers who have suffered irreversible health effects of exposure. The MRP provision in the cotton dust standard,\(^ {20}\) which would have required permanent transfer for those workers who suffered from byssinosis but could not use personal respirators, was struck down by the Supreme Court in *American

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\(^{14}\) Id.

\(^{15}\) 29 C.F.R. § 1910.1017(k)(5) (1988): "If any employee's health would be materially impaired by continued exposure, such employee shall be withdrawn from possible contact with vinyl chloride." No provision is made for wage rate retention when impaired workers are transferred under this regulation.

\(^{16}\) 29 C.F.R. § 1910.1001(g)(3)(iv) (1988) (transfer limited to those unable to use a respirator in a job where one is required).

\(^{17}\) The OSH Act does, however, impose a general duty on employers to provide a safe and healthy working environment. 29 U.S.C. § 654(a) (1982).


Textile Manufacturer's Institute, Inc. v. Donovan. The Court held that the Occupational Safety and Health Administration, the federal agency responsible for implementation of OSHA, had not provided adequate justification for the wage retention guarantee included in the MRP standard. No subsequent attempt was made by OSHA to justify medical removal of these workers.

Other than these limited standards for protection of exposed workers, no law requires the continued employment of impaired or at-risk employees. There is no general legal duty to transfer these employees to low risk jobs or to other jobs they are capable of performing. When enforcing collective bargaining agreements, arbitrators have been inconsistent in their willingness to require reassignment of injured or impaired workers unless there is a specific contractual right to light duty work.

The general view of the courts is that workers who are medically fit to perform their regular jobs should do so; those who are unable to do their jobs are relegated to the various disability and workers' compensation systems. This view has persisted under both federal and state laws which prohibit discrimination on the basis of handicap. In cases involving employer obligation to partially-disabled workers under these discrimination laws, both the Fourth Circuit Court of Appeals and the West Virginia Supreme Court of Appeals have refused to require employers to reassign employees to new jobs or substantially redesign current jobs in order to accommodate disabilities. This resistance to accommodation extends to cases involving work-related disabilities.

22. Id., 452 U.S. at 537-540 ("[T]he Act in no way authorizes OSHA to repair general unfairness to employees that is unrelated to achievement of health and safety goals . . .").
26. See, e.g., Coffman v. West Virginia Board of Regents, No. 17904 (W. Va. Supreme Court of Appeals, June 2, 1988); Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) ("The case law is clear
This trend thrusts an expensive and undue burden upon disability benefit programs, as partially disabled workers attempt to maximize their level of disability in order to improve their chances of obtaining benefits. However, insurance and compensation programs do not, and cannot, provide permanent income for partially disabled individuals. As a result, many employees with job-related partial disabilities fall between the cracks of income-maintenance programs. "Medical removal" of these employees often involves discharge rather than reassignment.

Requirements for medical removal and job reassignment unquestionably raise complex issues. Who is to set the medical standards for removal? Who is to provide the binding medical determination that removal is appropriate? How are workers' rights to medical confidentiality and privacy to be protected? How should such programs interface with collective bargaining agreements which establish job bidding procedures based upon seniority? Who should bear the costs of medical screening? Should employees be guaranteed their wage rates if they are transferred to lower wage jobs?

Management argues that the loss of flexibility in assignment of the workforce and the cost of rate retention make MRP programs for common occupational diseases prohibitively expensive. Employees and unions counter by pointing out that this cost, especially in regard to many epidemic diseases like black lung and asbestosis, is the direct result of a prior artificial suppression of production costs through refusal by management to provide necessary environmental controls. In addition, they argue, the cost of an MRP is generally less than the future cost of benefits, if the disease is not prevented.

The miner job transfer program stands alone in the health and safety regulatory scheme, as an industry-wide experiment in pre-

that if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment."); Carty v. Carlin, 623 F.Supp. 1181 (D. Md. 1985).

27. See, e.g., Coffman v. Board of Regents, supra note 26. In Coffman, the employee had a work-related back injury which prevented her from performing regular janitorial duties. The West Virginia court refused to require reassignment or job redesign. The majority opinion further questioned her decision to seek accommodation at work rather than to apply to extend her workers' compensation benefits. The court's majority failed to consider the additional drain that such claims would put on the compensation system or the questionable effect which results from discouraging impaired workers from continuing full-time employment.
vention of disabling occupational disease. Nevertheless, this MRP has drawn remarkably little commentary28 and has been the subject of almost no litigation.29 More importantly, miners have a poor understanding of the job transfer program,30 and few participate in it.31

III. Miner’s Option to Transfer Under the 1969 Act: Section 203

Prior to 1969, coal mine legislation did not address the problems associated with coal dust exposure and resulting disability or death due to pneumoconiosis or black lung.32 The 1969 Coal Mine Health and Safety Act (1969 Act) included the first legislative response to these problems.33

Title II of the 1969 Act34 established interim health standards to regulate exposure to airborne coal mine dust.35 However, Congress recognized that the new exposure standards would neither eliminate disability caused by pre-1969 exposure nor guarantee that the new exposure levels would totally prevent future cases of black lung. The Act approached these continuing problems in two ways: it established the first disease-specific federal compensation program for an occupational disease36 and developed a preventive health program,

28. Green, supra note 9, is one of two legal commentaries that have focused on the miner transfer program; see also infra note 91.
29. Litigation under the program has been limited to the cases cited in this article.
30. Interviews by the author with James Weeks, Ph.D, Deputy Director for Occupational Health, United Mine Workers of America (December 15, 1988, and January 7, 1989) [hereinafter Weeks interviews]; interviews conducted by the author with individual coal miners as part of the work of the Occupational Health Project of the Cabin Creek Health Association (CCHA) (1978-1983) [hereinafter CCHA interviews].
31. MSHA data, supra note 11.
35. The dust exposure limits under the legislation were set at 3.0 milligrams of respirable coal dust per cubic meter of air (3mg/m³). Three years after the enactment of the 1969 Act, or on December 30, 1972, the exposure limit was reduced to 2.0 milligrams of respirable dust per cubic meter of air. 29 U.S.C. § 842 (1982).
set out in the interim health standards of Title II of the Act, included both medical surveillance and medical removal protection for miners with evidence of developing pneumoconiosis.

The medical surveillance program, to be administered by the Secretary of Health, Education, and Welfare (HEW), required that operators provide chest x-rays every three years to underground miners. It also provided that x-ray surveillance “shall be supplemented by such other tests” as HEW deemed necessary. The Secretary of the Interior was to submit the results of the medical tests to the miners and advise him of his rights under the 1969 Act.

Section 203(b) of the 1969 Act set out the parameters of the MRP, or job transfer, program:

[A]ny miner who, in the judgment of the Secretary of Health, Education, and Welfare based upon such reading or other medical examinations, shows evidence of the development of pneumoconiosis shall be afforded the option of transferring from his position to another position in any area of the mine, for such period or periods as may be necessary to prevent further development of such disease, where the concentration of respirable dust in the mine atmosphere is not more than 2.0 milligrams of dust per cubic meter of air.

Three years after enactment, the dust exposure limit for miners with developing pneumoconiosis was to be reduced to 1.0 milligram per cubic meter of air. With regard to the job transfer program, the 1969 Act also specified that “Any miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer.”

These interim health standards contained in Title II were applicable to all underground coal mines until superseded in whole or

37. The responsible agency later changed to Health and Human Services (HHS). Within HHS, medical surveillance involving coal dust exposure is handled by the National Institute for Occupational Safety and Health (NIOSH), a division of the Center for Disease Control (CDC).
39. Id. The use of the pronoun “his” to refer to miners in this article is not meant to exclude the possibility that women, too, may participate in the Part 90 program. However, in view of the late entry of women into the mines, it is unlikely that many women ever received notification of eligibility for the program.
in part by improved mandatory health standards promulgated by the Secretary under the provisions of section 101 of this Act.\(^4\)\(^3\)

Section 101 of the 1969 Act, which set out the procedure for the development of mandatory health standards, made no specific reference to medical removal protection.\(^4\)\(^4\) It did, however, mandate that no permanent standard would reduce the protection afforded miners by the interim standards.\(^4\)\(^5\)

As discussed below, no effort was made to replace the Title II interim provisions for coal dust exposure and medical removal with permanent standards until after the Act was amended in 1977. The 1977 Act\(^4\)\(^6\) established broader protections under the permanent health standards but made no changes in Title II.\(^4\)\(^7\)

The House Committee on Education and Labor, which considered H.R. 13950, the House version of the 1969 bill, defined the goal of the legislation as "nothing short of the total prevention of pneumoconiosis."\(^4\)\(^8\) In addressing the medical examination and job transfer provisions in Title II, the Committee indicated that it "considers this section of the bill equal in importance to the dust control section for decreasing the incidence and development of pneumoconiosis."\(^4\)\(^9\)

From its inception, the job transfer program was inextricably linked to two other aspects of the legislation: dust control and medical surveillance. The transfer option hinged upon the existence of sampling data which would identify high and low dust exposure jobs. Entry into the program was based upon medical criteria developed under the medical surveillance program. In part, the success or fail-

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45. Id. The relevant section of § 101 of the 1969 Act reads as follows: "No improved mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners below that provided by any mandatory health or safety standard." Id., title I, § 101(c).
49. 1969 U.S. CODE CONG. & ADMIN. NEWS at 2523.
ure of the transfer program, therefore, depended upon the success or failure of dust sampling and medical surveillance.

A. Job Transfer Regulations Under Section 203(b)

The specifics of the job transfer program were developed by two sets of regulations. In accordance with the language of the 1969 Act and its legislative history, HEW proposed and promulgated regulations establishing an x-ray surveillance program and defining eligibility for medical removal. The Department of the Interior, Bureau of Mines developed regulations regarding miner notification and transfer, in accordance with Section 203(a) of the 1969 Act.

1. HEW Regulations: 42 C.F.R. Part 37

Section 203(b) required that x-rays be provided to underground coal miners every three years on a voluntary basis. X-rays were mandatory for new miners immediately after starting work in the mines, three years thereafter, and again after three years if the second x-ray showed evidence of developing pneumoconiosis. As each “round” of x-rays was completed and analyzed, the regulations governing the program were revised.

The first regulations, effective on August 19, 1970, required coal operators to provide miners with x-rays, in accordance with a plan to be filed and approved by HEW, at the operators’ cost and at a convenient time and place for the miners. There was no requirement that x-rays be taken during work time or at the worksite.

Section 37.7 set out the medical criteria for transfer:

Any miner who, in the judgment of the Secretary based upon reading of a chest roentgenogram or the result of other medical examinations, shows category 2 (2/1) pneumoconiosis or development of category 1 (1/0) in less than 10 years . . .

54. Id., 35 Fed. Reg. 13,208 (codified at 42 C.F.R. §§ 37.20(a), (g) (1971)).
shall be afforded the option by the operator of transferring from his position... 55

No provision was made for the transfer of miners based upon "other medical examinations." In effect, only miners with x-rays read as positive for pneumoconiosis in the surveillance program were eligible for transfer. 56

As required by the statute, miners who met the medical criteria were eligible to work in jobs in which the dust exposure was less than that permitted for unaffected miners. 57 Transferred miners would receive compensation at not less than the regular rate of pay received immediately prior to the transfer. 58

The first "round" of x-rays in the coal miner surveillance program was conducted from 1970 to 1973 under the 1970 regulations. For the second round, the National Institute for Occupational Safety and Health (NIOSH), within Health and Human Services (formerly HEW), revised the regulations. 59 The initial proposal for the second round of medical surveillance included an expansion of the program to include pulmonary function tests. 60 However, no suggestion was made that transfer rights be based upon the results of these additional examinations.


56. These initial regulations set different medical criteria for miners who worked more or less than ten years in underground mining. An x-ray reading of Category 1 (1/0) or greater established eligibility for a miner with less than ten years. Miners with more than ten years needed an x-ray reading of Category 2 (2/0) for eligibility.

International conventions for the classification of pneumoconiosis x-rays establish three "categories" for simple pneumoconiosis, with a breakdown within each category. An x-ray read as "Category 0" is negative for pneumoconiosis. Evidence of the disease is considered more profound as the readings progress from Category 1/0 to Category 3/3. For a discussion of the international classification of these x-rays, see R. H. Morgan, Standards of Interpretation and Classification of Chest Radiographs in Pneumoconioses, in OCCUPATIONAL RESPIRATORY DISEASES, J. A. Merchant, ed. (1986).

57. Miners with the option to transfer, therefore, were entitled to work in a mine atmosphere with no more than 2.0 mg/m³ of coal dust; in keeping with the 1969 Act, the maximum exposure to dust for these miners was decreased to 1.0 mg effective December 31, 1972. 35 Fed. Reg. 13,207 (1970).


The proposal for expansion of the surveillance program met with vehement opposition from both industry and labor.\textsuperscript{61} Despite the fact that pulmonary function and other diagnostic tests were being used to evaluate eligibility for black lung benefits under Title IV of the 1969 Act,\textsuperscript{62} industry argued that such tests would be of little value in diagnosing pneumoconiosis for transfer purposes. Noting that "the Institute is presently not in a position to relate the test results to pneumoconiosis and miner transfer,"\textsuperscript{63} NIOSH abandoned the proposal.

The final regulations for round two of the medical surveillance program included a variety of technical changes to the x-ray procedures but made no substantive changes in section 37.7 governing transfers.\textsuperscript{64} The new regulations did note, however, that the procedures for transfer were now governed by the "Part 90" regulations promulgated by the Department of the Interior.\textsuperscript{65}

Round two of the x-rays was completed in 1978. For the third round of x-rays, NIOSH again proposed and implemented changes.\textsuperscript{66} The initial proposals would have changed the transfer program in two ways: by deleting the ten year minimum work requirement for miners with an x-ray reading of Category 1 pneumoconiosis and by eliminating eligibility based on an x-ray reading of Category 1/0.\textsuperscript{67} After considerable comment, the final rule eliminated the ten year work requirement but based eligibility on x-ray readings of Category 1 (1/0) or greater.\textsuperscript{68}

NIOSH rejected a request by the Bituminous Coal Operators' Association (BCOA) to make the transfer right temporary rather than permanent. Although acknowledging that the statutory language granted the option to transfer only "for such period or periods

\begin{footnotesize}
\begin{enumerate}
\item Id. These technical changes, in part, were a reflection of refinements in the classification system for reading chest radiographs for pneumoconioses. Although the system was in fact refined, this also created a lack of comparability between rounds in the surveillance program.
\end{enumerate}
\end{footnotesize}
as may be necessary to prevent further development of disease." NIOSH responded that "sufficient data are not yet available to define a temporary period which will insure against further development of the disease." NIOSH noted that coal workers pneumoconiosis "is assumed to be irreversible." NIOSH also rejected a recommendation that the right to transfer be based on findings from medical tests of lung function in addition to the chest x-rays.

The regulations for the third round made several other modifications regarding the transfer program. For the first time, miners could submit x-rays obtained from outside the surveillance program to NIOSH if the films were taken at certified facilities. The new regulations also provided for x-ray re-reading at the request of the operator after a miner requested reassignment.

The medical criteria for job transfers have not been amended since 1979. Therefore, only miners with positive x-ray readings for pneumoconiosis are entitled to work in low dust jobs. NIOSH has never engaged in a significant discussion regarding the application of the statutory definition of pneumoconiosis, which includes all chronic lung disease associated with coal dust exposure, to the surveillance and transfer programs.

2. Department of Interior Regulations: 29 C.F.R. Part 90

On October 27, 1971, the Bureau of Mines adopted the first comprehensive regulations governing the Section 203(b) medical re-

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76. See discussion infra regarding Identification of the Target Population.
moval program.\textsuperscript{77} These regulations provided for notification to miners of the results of x-rays taken in the medical surveillance program and, to those with positive x-rays, notification of their option to transfer to low dust jobs.\textsuperscript{78} Miners receiving notification of their right to transfer could elect to exercise this option by notifying the Bureau of Mines.\textsuperscript{79} Once notified by the miner that a transfer was desired, the Bureau notified the operator, who was then obligated to transfer the miner to a job with a reduced dust exposure within 45 days.\textsuperscript{80} In the alternative, the operator could notify the Bureau of Mines that the miner was already working in a low dust job, based upon dust sampling data.\textsuperscript{81} The miner then would not be entitled to medical removal.\textsuperscript{82} The transferred miner, although having no voice in choosing a new job, was entitled to receive compensation for the new work "at not less than the regular rate of pay received by him immediately prior to his transfer."\textsuperscript{83}

B. Enforcement of 203(b) under the 1969 Act

The 1969 Act did not set out specific enforcement provisions for the 203(b) transfer right. After some deliberation, the Bureau of Mines concluded that, as part of the mandatory interim health standards, 203(b) should be enforced in the same manner as health standards promulgated pursuant to section 101 of the 1969 Act. If the operator did not respond properly to a notice to transfer a qualifying miner, and the District Manager of the Coal Mine Health and Safety District found noncompliance with the transfer requirements, the operator was subject to orders pursuant to section 104 of the 1969 Act.\textsuperscript{84} Victims of developing black lung were also entitled to protection under the anti-discrimination provisions of the 1969 Act.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{78} 36 Fed. Reg. 20,602 (1971) (codified at 30 C.F.R. § 90.10 (1972)).
\item \textsuperscript{79} Id. (codified at 30 C.F.R. § 90.20 (1972)).
\item \textsuperscript{80} Id. (codified at 30 C.F.R. § 90.30, 90.31, 90.32 (1987)).
\item \textsuperscript{81} Id. (codified at 30 C.F.R. § 90.33 (1972)).
\item \textsuperscript{82} 36 Fed. Reg. 20,602 (1971) (codified at 30 C.F.R. § 90.33 (1972)).
\item \textsuperscript{83} Id. (codified at 30 C.F.R. § 90.34 (1972)).
\item \textsuperscript{84} Id. (codified at 30 C.F.R. § 90.40(b) (1972)).
\item \textsuperscript{85} 30 U.S.C. §§ 820(b), 938(a) (1982).
\end{itemize}
Litigation regarding the MRP of the 1969 Act was remarkably-limited, especially in view of its potentially far-reaching interference with traditional labor-management relations. Several miners brought cases regarding the level of compensation due after a transfer. In *Higgins v. Marshall*, the United States Court of Appeals for the District of Columbia rejected miners' claims that they were discriminated against because their employer failed to pay them the wage increases which accrued to their pretransfer jobs after they transferred. Instead, they were paid their pretransfer wage rates but received no increase until the wage rates of their posttransfer jobs reached the level of their pretransfer jobs. Their wages were therefore frozen at their pretransfer rates until the rates of the new jobs caught up.

The *Higgins* court acknowledged that "the more liberal construction would probably encourage more transfers to cleaner environments by not forcing the afflicted miners to choose between wages and health." Nevertheless, the court found the language of the statute to be unambiguous: "a transferring miner is not to receive less compensation than he would have received had he not transferred, that is, not less than the monetary amount he was receiving immediately prior to transfer." No consideration was given to the remedial nature of the statute in reaching this conclusion.

The Fourth Circuit Court of Appeals reached the same conclusion...


88. This case was brought under both § 938 (discrimination based upon pneumoconiosis) and § 820(b) (discrimination based on assertion of rights under the law) of the 1969 Act.

89. *Higgins*, 584 F.2d at 1036-37.

90. *Id.* at 1037.

in *Matala v. Consolidation Coal Co.*, 92 overruling Judge Haden of the Northern District of West Virginia. The majority in *Higgins* pointedly ignored the admonition in Judge Skelly Wright's dissent:

> The majority today turns its back on Congress' primary concern with the health of miners and adopts an interpretation of the Act that condemns miners suffering from the dread black lung disease (pneumoconiosis) to choose either continued exposure to levels of coal dust that will aggravate their affliction or a significant loss in compensation.93

Judge Wright noted that the miners were receiving 17% less compensation in 1977 than they would have been receiving had they not elected to transfer.94

Further clarification of the wage rate due a transferred miner was provided in *Mullins v. Andrus*.95 Mr. Mullins had worked out-of-classification as a roof bolter prior to his 203(b) transfer. After his transfer, the company paid him at the lower rate of his pre-transfer classification rather than the higher roof-bolter rate. A federal mine inspector agreed with Mullins that he was due the higher rate after the transfer and served the company with notice of a statutory violation.96 Noting that "[t]he legislative history of the pay-maintenance section discloses unambiguously Congress' firm resolve that miners contracting black lung disease were not to be discouraged from health-saving transfers by fear of an ensuing reduction in pay,"97 the court concluded that the transferring miner "takes with him his regular dollar rate of pay, and the job-classification rate for his vacated position."98 Unlike the court in *Higgins*, the *Mullins* court acknowledged the liberal construction due a remedial statute like the 1969 Act and expressed concern that "[t]he incentive to transfer would be dampened, if indeed not seriously depressed, were

93. *Id.* at 1039-40 (Skelly Wright, J., dissenting).
94. *Id.* at 1040 n.5.
96. The company was cited for a violation of § 104(b) (codified at 30 U.S.C. § 814(b)). *Mullins*, 664 F.2d at 300. The problems of enforcement of the § 203(b) protections, discussed at length in *Green*, supra note 9, are highlighted by this case.
97. *Mullins*, 664 F.2d at 302 n. 49 (citations omitted).
98. *Id.* at 307.
miners with actual earnings above their classification rates required
to drop back to their classification levels."

IV. THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

Congress reconsidered the broad issues of mine health and safety in 1977. Once again, the focus was on expanding health protections for working miners: the goal of the new legislation was to "adequately assure that no miner would suffer material impairment of health or functional capacity even if exposed to the regulated substance or hazard regularly for the period of his working life." The entire mining industry was brought under the jurisdiction of the Mine Safety and Health Administration (MSHA), a new agency in the Department of Labor.

The 1977 Act retained the interim health standard sections for coal mines of the 1969 Act, including the provisions for medical surveillance and removal. Title I was amended to include new provisions for permanent health standards that would cover all mining, coal and non-coal. Section 101(a)(7) of the 1977 Act specifically empowered MSHA to develop medical surveillance, medical removal, and wage rate retention protection as part of the new permanent health standards:

Where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for

99. Id. at 308.
miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification (emphasis added). 103

This section gave to the Department of Labor concurrent authority with that previously granted to HEW under Title II to establish medical criteria for medical removal programs.

The 1977 legislation specifically addressed the wage rate problems raised in Higgins104 and Matala.105 The Conference Report, which accompanied the final version of the bill, commented that the specifications with regard to wage rate were intended "to encourage miner participation in medical examination programs by insuring that miners who do participate in such programs shall suffer no immediate financial disadvantage if a medical examination results in a job reassignment."106

The purpose of the medical examinations was two-fold:

Such medical examinations are intended to be for the benefit of miners, and are for the purpose both of testing the adequacy of the standard and testing whether the miner has been subjected to material impairment of health of functional capacity as a result of exposure to the substance or hazard. As such, the medical examinations are a key aspect of the health standards.107

The medical surveillance and job reassignment aspects of the health standards were to be enforced through the issuance of appropriate citations, orders, and penalties under sections 105 and 106 of the 1977 Act. In addition, section 106(c) explicitly made it unlawful for an operator to discriminate against a miner who was the subject of medical examination and potential transfer under the provisions of a job reassignment standard.108

104. Higgins, 584 F.2d 1035.
105. Matala, 647 F.2d 427.
A. Regulations Under the 1977 Act

MSHA proposed substantial regulatory changes in Part 90, pursuant to its expanded authority under the new Section 101.\textsuperscript{109} The new rule continued to rely upon the medical findings reported by NIOSH to determine which miners would be eligible for the transfer program.\textsuperscript{110} It also followed Title II in limiting the availability of transfer to underground miners.

By this time, it had become clear that the transfer program had failed to achieve a high level of participation among eligible miners.\textsuperscript{111} MSHA indicated that "the objective of the proposed rule is to improve the health protection of miners by increasing miner participation in the Part 90 program."\textsuperscript{112} It therefore proposed to "provide eligible miners with significant additional protections against fears about job security, adverse economic consequences, undesirable working hours, wages and work assignments."\textsuperscript{113} The purpose of the rule changes was to provide "incentives to increase participation in the Part 90 program."\textsuperscript{114}

The additional protections which were ultimately included in the new Part 90 rules included the following: bi-monthly sampling of the Part 90 miner's dust exposure in order to verify compliance with the reduced dust exposure limit;\textsuperscript{115} specific provisions for waiver and

\textsuperscript{109} 45 Fed. Reg. 24,017 (proposed April 8, 1980). Prior to the major revisions in Part 90, which are discussed in this section of the text, several technical changes were made regarding dust sampling and the definition of respirable dust in order to maintain consistency between Part 90 and the respirable dust sampling programs established by other sections of the regulations. 45 Fed. Reg. 23,990 (1980) (codified at 30 C.F.R. Part 70 (underground mines) and Part 71 (surface facilities) (1987)).

\textsuperscript{110} As noted above, NIOSH made no changes in its Part 37 regulations as a result of the 1977 Act. The authority of the Department of Health and Human Services (formerly HEW) was unchanged under the new legislation.

\textsuperscript{111} See discussion of participation in the Part 90 program, infra notes 143-148 and accompanying text.

\textsuperscript{112} 45 Fed. Reg. 24,018 (proposed April 8, 1980).

\textsuperscript{113} Id.

\textsuperscript{114} 45 Fed. Reg. 80,763 (final rule Dec. 5, 1980): "To remedy inadequacies in the old section 203(b) program, this rule provides eligible miners with significant additional protections against fears about job security, adverse economic consequences, undesirable working hours, wages and work assignments."

\textsuperscript{115} 45 Fed. Reg. 80,770 (1980) (codified at 30 C.F.R. §§ 90.201-90.220 (1987)). The bi-monthly sampling of Part 90 miners, established in the 1980 rules, was in part the result of the switch from
re-exercise of Part 90 rights by the eligible miners;116 and expanded wage, shift, and job assignment protection.117

The rate of compensation due the transferred miner was, as specifically required under the statute, based upon the previous rate of pay plus the actual pay increases applicable to the new job classification. The Higgins118 ruling, which interpreted section 203(b), was not, as MSHA noted, applicable to the pay provisions under section 101.119 Wage rate retention was also extended to include all subsequent transfers of a Part 90 miner. For example, a miner transferred pursuant to these regulations to a dispatcher or maintenance job, who was later realigned as part of a reduction in force to a lower wage rate position, was to be guaranteed the dispatcher wage rate.120

Notably, MSHA again did not institute mandatory transfers of miners with evidence of pneumoconiosis, despite the continuing statutory directive. The agency’s comments indicated that the limited available job placements in a coal mine would make a mandatory program detrimental to the industry. In addition, MSHA was concerned that miners would be reluctant to participate in NIOSH’s voluntary x-ray surveillance program if they did not like the consequences of a positive x-ray reading.121 “However,” the agency noted, “MSHA will monitor participation rates over the next three years, and if the number of miners exercising the Part 90 option does not substantially increase, MSHA will reconsider the appro-

personal dust sampling to area sampling, generally. No longer was dust sampling under Parts 70 and 71 linked to individual miners. 30 C.F.R. Parts 70, 71 (1987). Therefore, it became necessary to establish a special sampling provision for Part 90 miners. MSHA determined that this would be done on a bi-monthly basis.

117. 45 Fed. Reg. 80,771 (1980) (codified at 30 C.F.R. §§ 90.102, 90.103, 90.104 (1987)). A miner can waive his transfer rights and re-exercise them at any time. In addition, miners are not considered participants in the Part 90 program when they take employment in a new mine until they specifically re-exercise their Part 90 option, in order to preserve the confidentiality of the miners’ medical examinations. 45 Fed. Reg. at 80,765.
118. Higgins, 584 F.2d 1035.
119. 45 Fed. Reg. at 80,767.
120. Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432 (D.C. Cir. 1989). The court noted that the Secretary “reads section 101(a)(7) as a basic protection for the miner, a floor, not a ceiling, on health standards for pneumoconiosis sufferers.” At 1436.
priateness of a mandatory transfer program." This was never done.

Despite the extension of power to MSHA to set medical eligibility criteria for removal, MSHA chose not to establish such criteria, relying instead upon the regulations issued by HEW (NIOSH) pursuant to section 203(b) of the 1969 Act. Acknowledging that section 101 granted authority to set new medical criteria, MSHA indicated in 1980 that it would, in cooperation with NIOSH, develop a proposed rule which would specifically address medical eligibility for transfer. The agency never developed such a rule.

V. HOW THE PART 90 PROGRAM WORKS

The general mechanics of the Part 90 program have not changed dramatically since it was instituted in 1970. After underground miners participate in the x-ray surveillance program or submit qualifying x-ray films from a certified medical facility, they are notified of the x-ray reading results by MSHA. If the x-rays show evidence of pneumoconiosis, MSHA sends an additional form to the qualifying miners which can be used to request the option to work in a low dust environment. The miners must complete the form and return it to MSHA to become participants in the Part 90 program.

If this is not done, the miners have waived their Part 90 rights. Once MSHA has notified miners of eligibility for Part 90 status, these rights are permanent. If the miners choose not to exercise their rights immediately, they can do so at a later date. In fact, miners may waive their Part 90 rights (to avoid assignment to a job they do not like, for example) and then reassert them at a later date.

After the miners notify MSHA that they desire Part 90 status, a letter is sent notifying the mine operator that the miners have

123. 45 Fed. Reg. 80,764; (1980): "While MSHA recognizes that under section 101, the Secretary of Labor has the authority to expand the scope of Part 90 beyond the specific provisions of section 203 of the Act, the regulation proposed by MSHA did not contain any changes involving the ... expansion of the medical criteria. These issues are so fundamentally different than what was proposed that no changes concerning these subjects are made in this final rule."
125. In fact, efforts were made by the United Mine Workers of America (UMWA) and by the Occupational Health Project of the Cabin Creek Health Association to stimulate such rule making. See note 160, infra, and accompanying text.
exercised Part 90 rights. The miners must then be placed in a low dust area of the mine within twenty days, or the operator must certify that the miners are already working in an area that meets the respirable dust standard for Part 90 miners, or 1.0 mg/m³ of dust. The operator checks the dust level of the miners' work position by submitting five dust samples to MSHA for analysis. Thereafter, the operator must submit bi-monthly dust samples; whenever a sample exceeds the standard, five more samples must be submitted before a determination is made regarding compliance with the reduced dust standard. MSHA will issue a citation for noncompliance which requires the operator to reassign the miner to work a position which can meet the reduced dust standard.

Job reassignment, or transfer, is closely regulated by the current regulations. The job offered must be on the same shift and be a regular (not specially created) work assignment. Waiver of these protections requires written permission of the miner involved. The operator may offer a miner a reassignment which involves "bumping" another miner, including one with more contractual seniority, in order to assign the Part 90 miner to a position with a guaranteed dust exposure level of under 1 mg/m³.126

VI. THE UNION RESPONSE

Concerned about the potential loss of pay for Part 90 miners and stimulated by a new, more democratic leadership, the United Mine Workers of America (UMWA) tackled the problem of medical removal for black lung victims in the 1974 negotiations for a national agreement.127 Like other unions, the UMWA had fought for the distribution of jobs among qualified miners on the basis of seniority. A medical removal program required the waiver of contractual seniority provisions in order to protect the health of the affected miner.

The UMWA's initial "wish list" for negotiations noted, in particular, that members had complaints about wage rates and the lack

126. MSHA specifically notes the possibility that a Part 90 miner could "bump" another miner from his job and even to another shift. 45 Fed. Reg. at 80,768.

of consistency in the manner of post-transfer job placement in the implementation of the statutory program. "This has caused confusion and bitterness on the part of Union members where transfers have been accomplished without following contractual posting and bidding procedures," noted the Union's contract demands.128

The 1974 negotiations resulted in a health-related exception to the seniority clause in the national contract:

If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercised his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.129

The agreement did not, however, solve the problem of financial loss for miners who elected to transfer out of the dust to a job with a lower wage classification. Negotiations faltered over the problem of the wage rate to pay transferees; ultimately, negotiators agreed to "bet on the litigation" which was then pending.130

Nor did the agreement successfully put to rest the disagreements among miners which arose as a result of the conflict between transfer rights of letterholders and seniority rights of their coworkers. Numerous grievances were brought both by letterholders who were denied superseniority rights as well as by more senior coworkers who were preempted by letterholders.

The Arbitration Review Board (ARB), confronted with its first issue under this clause in 1976, held that a miner who had exercised

128. Article III, Section (n), 1974 UMWA demands (unpublished; provided to the author by Yablonski).

129. Article XVII, Section i (10), National Bituminous Coal Wage Agreement of 1974. The same language has been carried forward in each subsequent contract, including the 1988 contract.

130. Interview with Yablonski, supra note 128; UMWA notes of 1974 negotiations at 773 (unpublished; provided to the author by Yablonski). Ultimately, the union lost this issue in Higgins v. Marshall, 584 F.2d 1035.
his statutory rights to obtain a low dust job could not thereafter use his contractual superseniority rights to obtain a more desirable low dust job.\textsuperscript{131} A low dust job, for purposes of this contract clause, was a job with the same reduced dust exposure guaranteed to Section 203(b) miners.\textsuperscript{132} Similarly, miners working in jobs with dust exposures below one milligram were not eligible for superseniority under this contract provision.\textsuperscript{133} Moreover, the contract provision was limited to miners working on production crews; miners on non-production jobs with high dust exposures were not entitled to exercise superseniority.\textsuperscript{134}

The contractual provision was activated by the same positive chest x-ray which triggers eligibility for the statutory transfer program. It conferred substantially different rights, however. The Part 90 regulations guarantee a transfer with wage retention to a low dust job, but do not give the transferring miner any choice over which job he will ultimately receive. The contractual provisions made no wage retention guarantee, but conferred one-time superseniority upon a letterholder in a production job, thereby allowing him to choose his posttransfer low dust job.\textsuperscript{135} To many, this meant the difference between working in the general labor classification (often an undesirable job) and working as dispatcher (possibly the most sought after job in the mines).\textsuperscript{136} The arbitration decisions foreclosed the possibility of utilizing the contractual rights to obtain a desirable

\textsuperscript{131} "[T]he subsection's letterholder right is confined to an employee who has not made the legal election and thus has not already been transferred to a 'less dust area' job at the time that a vacancy is posted for bidding. This is the equivalent of saying that the subsection's special benefit applies only to a letterholder who yet resides in a job from which, in terms of dust concentration, he has the right to get away." A.R.B. Decision No. 6, Beth-Elkhorn Corp. and Local Union 1468, at 10 (Mar. 18, 1976) (unpublished).

\textsuperscript{132} Id. at 6.


\textsuperscript{134} In the matter of the grievance of Caudill, L.U. 1468, District 30, and Beth-Elkhorn Coal Corp., Mine No. 26, Case No. 81-30-83-479 (Stone, 1983).

\textsuperscript{135} It is unresolved under the contract whether an eligible miner who has moved from one employer to another may again utilize superseniority to obtain a low dust job. No arbitration decisions have clarified this issue. Telephone interview, S. Lindner, Contract Department, UMWA (Jan. 6, 1989).

\textsuperscript{136} Data shows that more Part 90 miners work in the general inside-labor classification than in any other single job classification.
job if the miner was already assigned to a low dust job. Not ir-
rationally, some miners eligible for Part 90 status chose not to ex-
ercise their statutory option, waiting instead for a desirable (and low
dust) job to be posted for bid. 137

This created considerable confusion, as is illustrated by the case
of Jimmy Mullins. 138 After being notified that he had a positive x-
ray in the surveillance program, Mullins bid on and received a non-
production electrician’s job which exceeded the one milligram dust
standard required for Part 90 miners. Although the operator offered
a statutory transfer, Mullins at this point elected to waive his transfer
option, 139 so that he could retain the electrician job. One year later,
the dispatcher’s job came open at his mine. Mullins then informed
MSHA that he wished to re-exercise his Part 90 rights to obtain
that particular job. In his letter, Mullins stated, “If I cannot obtain
this job as a dispatcher, then I do not wish to re-exercise my rights
as a Part 90 miner.” 140 Mullins also bid on the dispatcher job using
his superseniority rights under the national agreement. After he was
awarded the job, a grievance was filed by the more senior miner
who had also bid on it. The arbitrator held that the superseniority
provision applied only to miners who are members of a production
crew, which Mullins was not.

The operator offered Mullins the choice of returning to his elec-
trician job or taking another job with a dust exposure of less than
1 milligram. In response, Mullins filed a Section 105(c)(1) 141 com-
plaint with MSHA, charging both the operator and the union with
discrimination because he was removed from the dispatcher’s po-

137. Weeks interviews, supra note 30; CCHA interviews, supra note 30.
139. Pursuant to 30 C.F.R. § 90.104(a) (1987).
140. 9 F.M.S.H.R.C. at 893.
142. 9 F.M.S.H.R.C. at 895.
more rights than are conferred by the regulations or the Act: “The Mine Act does not bar operators and unions from agreeing to give Part 90 miners placement rights more generous than those provided by statute and regulation.”

Jimmy Mullins obviously had his heart set upon a particular job, not upon removal from exposure to coal dust. Because he did not work on a production crew, he could not use the contractual provision protecting letterholders, although he was working in excessive dust. His case is an example of the possible abuse of a medical removal protection provision based upon superseniority contractual rights which are not fully consistent with a statutory or regulatory scheme.

VII. PARTICIPATION IN THE PART 90 PROGRAM

Miners eligible for the Part 90 program meet two criteria: participation in the x-ray surveillance program and a positive reading of that x-ray. Obviously, poor participation in the x-ray program automatically limits the effectiveness of the transfer program.

Four rounds of x-rays have been completed. At the end of Fiscal Year 1986, 217,065 examinations had been performed. The data available for the first three rounds reveals that participation in the voluntary component of the program was highest in the first round (50%) and declined steadily thereafter to 44% in the second and 32% in the third round. In addition to the low level of participation overall, the proportion of participation by older miners, those most likely to have x-ray evidence of disease, decreased in each of the rounds. However, despite this decrease in average tenure in the mines, MSHA data shows that the proportion of miners with positive x-rays has not decreased.

143. Id. at 900.
145. Althouse, *Ten Years' Experience with the Coal Workers' Health Surveillance Program, 1970-1981*, 34 MMWR, Morbidity and Mortality Weekly Report, 33SS-37SS (1985). Of course, this decrease in the number of older miners may have been the result of the rapid retirement of older coal miners during this period.
Liberalization of the rules governing transfer in 1981 failed to increase participation. The highest proportion of eligible miners electing to exercise Part 90 rights occurred in 1972 and 1974. At the time the new rules were under discussion in 1980, MSHA indicated that only 1,350 of approximately 8,600 eligible miners had elected to participate in the program, a ratio of less than 1 in 5.146 Throughout the lifetime of the program, 9,138 miners have been eligible for transfer, but only 2,119 miners have exercised this option. Of these, the number of active Part 90 miners has declined from a total of 550 at the end of 1981 to 140 by the end of 1987.147 Of course, it is not clear how much of this decline is attributable to reductions in force in the underground coal mining industry and how much to decisions by individual miners to waive their Part 90 rights.

Participation has not been impeded by court decisions adverse to miners. Since the initial cases challenging pay rates for transferred miners, there have been virtually no significant decisions which raise questions regarding the transfer program.148

MSHA and NIOSH have been unable to provide adequate explanation for the low participation rates in the Part 90 program, and studies are underway to review the problem. MSHA officials have suggested such strategies as development of training materials and brochures, advertisements, and promotional gimmicks. NIOSH and MSHA also have formed a joint committee to review the X-ray regulations.149 However, there appears to be no ongoing attempt to reevaluate the medical criteria for transfer, the dust sampling program, or the job transfer mechanisms.

VIII. Analysis

An evaluation of a medical removal program must hinge upon one question: Does the program accomplish its public health pur-
pose? Effectiveness depends upon two factors: 1) accurate identification of impaired workers; and 2) the ability to encourage these impaired workers to utilize the program's preventive options.

The lack of experience with medical removal programs in the American workplace has contributed considerably to the confusion and low participation rates in the Part 90 program. Moreover, this program has neither correctly identified the target population nor successfully encouraged participation.

A. Identification of the Target Population

Under both the 1969 and 1977 Acts, miners cannot transfer to low dust jobs unless they satisfy the requirement that they show medical evidence of developing pneumoconiosis. The critical issue is how to define "medical evidence of developing pneumoconiosis." There is a strong contrast between the definition of pneumoconiosis, or black lung, under the Black Lung Benefits Act and its definition in the Part 90 and contractual transfer program. In the opinion of the author, it is this deviation which has most contributed to the failure of the Part 90 program.

Consider the following case studies:

1) T.W.

Mr. W. worked underground in the mines from approximately 1958. He had x-rays read as positive for coal workers' pneumoconiosis (Category 1) in 1973 in the first round of the federal surveillance program and again by certified radiologists in 1978. His pulmonary function studies consistently showed substantially reduced function (76% and 81% of predicted values for his age and size). In 1977 he was awarded 15% disability for occupational pneumoconiosis from the West Virginia Workers' Compensation Fund. He received an initial determination of totally disabling pneumoconiosis from the Department of Labor under the federal Black Lung Benefits Act while he was working on a production crew.


152. These case studies are based upon the true experiences of individual miners who participated in the Occupational Health Project of the Cabin Creek Health Association, Dawes, West Virginia during the period 1978 to 1982.
in a high dust job. No low dust jobs had been posted for bid for a substantial period of time. In 1980, he asked NIOSH for a transfer based upon his medical evidence. The response: he did not qualify for Part 90 status. He is now retired and collecting federal black lung disability benefits.

2) E.M.

Mr. M. worked for 30 years underground. He had x-rays taken in the NIOSH surveillance program in 1971 and 1974 which were read as negative for pneumoconiosis. X-rays taken outside the federal program in 1973 and 1979 were read as Category 2 by certified readers. A lung biopsy performed in 1979 at the Cleveland Clinic showed anthracotic mediastinal lymph nodes. Pulmonary function tests performed at the same time showed performance at 64% of predicted. Mr. M. received a 30% disability award for occupational pneumoconiosis from the West Virginia Workers' Compensation Fund. Mr. M. was also denied transfer status by NIOSH in 1980 until new x-rays were taken, submitted, and read as positive for pneumoconiosis.

3) F.B.

Mr. B. worked underground for more than 35 years. In 1973, 1974, and 1975 he had x-rays taken at certified facilities and read by qualified readers which showed evidence of pneumoconiosis (Categories 2/3, 1/1, 1/2, 3/2, and 1/2). Like Mr. W., he had an x-ray read as Category 1 in the federal surveillance program in Round 1. However, Mr. B. had not worked ten years in the mines and, therefore, did not qualify for transfer under the regulations in effect at that time. In 1976, he received letters from a well-respected pulmonary physician recommending that he not work in a dusty environment. Pulmonary function tests showed that his breathing capacity was 75% of predicted. Mr. B. attempted repeatedly to achieve Part 90 status. NIOSH would not accede to his requests. Mr. B. received federal black lung benefits for total disability after his retirement.

The denial of transfer status to these miners underlines the fundamental problem with the Part 90 program.

The medical community has traditionally defined coal workers pneumoconiosis so that a diagnosis, for all practical purposes, is dependent upon the interpretation of a chest x-ray. Under this

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153. In Mr. W.'s case, his x-rays did not qualify for consideration for several reasons. When the film in the federal surveillance program was taken, he had not worked ten years in the mines. At that time, with less than ten years of underground mining, a reading of Category 1 did not entitle him to Part 90 status. The other films, while taken at certified facilities, had not been submitted within six months; NIOSH refused to consider them. NIOSH persisted in this refusal despite its agreement that the x-rays would show evidence of irreversible lung disease.

154. The variability of the x-ray readings in Mr. B.'s case exemplifies the problem with reliance upon x-rays in both preventive and disability programs. See note 155, infra.

155. Weeks & Wagner, supra note 149.
definition, the specific changes that occur in the lungs as a result of the deposit of respirable dust must be detected on an x-ray.

This is a restrictive definition with regard to the lung disease suffered by coal miners for two reasons. First, x-rays fail to detect even these dust-related lung changes in a substantial number of miners because of limitations in the films and disagreements in the interpretation of the films.156 Second, many medical experts now contend that miners suffer from a variety of work-related lung diseases that are not amenable to x-ray diagnosis.157

The U.S. Congress, therefore, did not follow the strict medical definition when defining pneumoconiosis for legal purposes: "The term pneumoconiosis means a chronic dust disease of the lung arising out of employment in an underground coal mine."158

The Congressional definition of pneumoconiosis does not imply exclusive reliance on a single diagnostic procedure and is, therefore, broader in scope. It appears to acknowledge both the limitations of x-rays as a diagnostic tool and the growing scientific evidence that coal workers suffer from other respiratory diseases which are dust-related but not diagnosable by x-ray.

Nevertheless, NIOSH required that miners demonstrate x-ray evidence of disease. Furthermore, despite its expanded powers to define eligibility for MRP programs under Section 101(a)(7) of the 1977 Act, MSHA has continued to rely upon the NIOSH eligibility requirements. This is particularly surprising in view of the fact that MSHA included the statutory definition of pneumoconiosis in both


158. 1969 Act, title IV, § 402 (codified at 30 U.S.C. § 902 (1982)). No definition of "pneumoconiosis" was included in Title II. The definition is found only in Title IV.
the initial Part 90 regulations\textsuperscript{159} and in the introductory comments to the second set of regulations.\textsuperscript{160} As a result, miners with medical evidence of chronic lung disease whose x-rays are read as negative for coal workers pneumoconiosis are barred from participation in the transfer program.\textsuperscript{161}

Medical literature indicates that actual respiratory impairment among coal miners does not correlate well with x-ray findings of simple pneumoconiosis.\textsuperscript{162} Thus, NIOSH limited eligibility for the transfer program to individuals many of whom did not necessarily perceive themselves to be in need of protection. Simply put, many miners with positive x-rays do not feel that they have breathing disabilities; many miners with perceived impairment may not have positive x-rays. It is, therefore, understandable that miners continue to be distrustful of the x-ray surveillance and transfer programs.

The debate over the definition of pneumoconiosis and the appropriate medical proof of developing disease has waged fiercely in the context of establishing black lung disability for purposes of federal compensation.\textsuperscript{163} Remarkably, none of that debate has been con-
considered by NIOSH or MSHA in establishing criteria for transfer.

NIOSH's persistence in predicating access to the transfer program upon positive radiological findings has created an anomalous situation: the eligibility criteria for compensation, which consider ventilatory studies, blood gases, and the reasoned medical opinion of the treating physician, are more flexible than the eligibility criteria for the preventive program which was designed to make compensation obsolete.\textsuperscript{164} Many miners who can qualify, after retirement, for federal black lung compensation based upon totally disabling lung disease cannot qualify for transfer in the Part 90 program. Instead of providing expansive access to measures designed to prevent the development of disabling disease, NIOSH chose to do the opposite: to restrict access to the Part 90 program even though eligibility for compensation benefits is defined more broadly.

Ironically, under the 1977 amendments to the federal black lung benefits program,\textsuperscript{165} denial of compensation could not be based solely upon a negative x-ray.\textsuperscript{166} Coal miners fought for this provision because of the variability in x-ray readings and the lack of correlation between x-ray findings of simple pneumoconiosis and impairment. Commenting on this restriction in \textit{Usery v. Turner Elkhorn Mining Co.},\textsuperscript{167} the U.S. Supreme Court noted:

\begin{quote}
Congress was presented with significant evidence demonstrating that X-ray testing that fails to disclose pneumoconiosis cannot be depended upon as a trustworthy indicator of the absence of the disease. ... Taking these indications of the unreliability of negative X-ray diagnosis at face value, Congress was faced with the problem of determining which side should bear the burden of the unreliability. ... The prohibition is only against sole reliance upon negative X-ray evidence in rejecting a claim.\textsuperscript{168}
\end{quote}


\textsuperscript{167} 428 U.S. 1 (1976).

\textsuperscript{168} Id. at 32.
Remarkably, the decision to "resolve doubts in favor of the disabled miner"\(^{169}\) never carried over to the program established to prevent continuing occurrence of the disease.

As a result, the number of retired miners who are awarded benefits for permanent and total pulmonary disability arising from coal mine employment each year exceeds not only the number of active miners participating in the transfer program, but also the number of miners who become eligible for transfer in that year. See Table I. This has continued to be true despite the significant tightening of eligibility standards for benefits after the 1981 amendments to the Black Lung Benefits Act of 1977.\(^{170}\)

Table I\(^{171}\)


<table>
<thead>
<tr>
<th>Year</th>
<th>Awarded Benefits</th>
<th>Transfer Option Offered</th>
<th>Active Part 90 Miners</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>5,148</td>
<td>245</td>
<td>550</td>
</tr>
<tr>
<td>1982</td>
<td>1,145</td>
<td>119</td>
<td>315</td>
</tr>
<tr>
<td>1983</td>
<td>763</td>
<td>94</td>
<td>205</td>
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<tr>
<td>1984</td>
<td>556</td>
<td>271</td>
<td>204</td>
</tr>
<tr>
<td>1985</td>
<td>570</td>
<td>79</td>
<td>199</td>
</tr>
</tbody>
</table>

The problems created by exclusive reliance on x-rays are exacerbated by the restriction to x-rays produced and read in the medical surveillance program. Any problems with the x-ray surveillance program itself become magnified in the transfer program. Most im-

\(^{169}\) Id. at 34.


portantly, the low participation of working miners in the surveillance program has prevented even those miners with x-ray evidence of black lung from qualifying for transfer.\textsuperscript{172} Even a miner with a positive x-ray taken outside the program does not meet the entry criteria.\textsuperscript{173}

Furthermore, NIOSH has failed to consider the transfer program to be one which entitles individual miners with lung disease to transfer to low dust jobs; instead it views the transfer program as an addendum to the medical surveillance program. In this context, the refusal of NIOSH to expand the surveillance program to include other diagnostic tests becomes more troubling. This refusal, although apparently supported by both industry and the UMWA,\textsuperscript{174} is directly counter to the legislative history of the Act. Senate Report 91-411 noted that:

\begin{quote}
 sickness who have shown no X-ray evidence of the disease are found, in an autopsy, to have contracted the disease. Therefore, the committee is authorizing the Surgeon General [changed to HEW in later drafts] to require any medical examinations which, in his judgment, are necessary both to establish the extent and severity of the disease and otherwise to promote the health of miners.\textsuperscript{173}
\end{quote}

Despite this broad instruction, NIOSH shied away from the administrative complexity of either administering additional tests\textsuperscript{176} or accepting diagnostic respiratory tests administered by outside physicians or laboratories for transfer eligibility purposes.\textsuperscript{177}

The NIOSH decision was not, however, totally irrational. As with any program which hinges upon medical evaluations, expansion beyond a NIOSH-controlled surveillance program would raise the inevitable problem of whose tests and diagnoses would be accepted.

\begin{footnotes}
\footnotetext[172]{Wagner & Spieler, \textit{supra} note 155.}
\footnotetext[173]{The insistence upon x-rays taken in the surveillance program was somewhat ameliorated in 1982 when NIOSH agreed to allow entry into the transfer program through use of an x-ray taken by a NIOSH-certified facility whether or not the x-ray was initially taken under the operator's plan. However, NIOSH continued to require that these x-rays be accompanied by all information necessary for inclusion in the surveillance program. Moreover, this change was never effectively communicated to miners or health care providers in the coal fields.}
\footnotetext[174]{38 Fed. Reg. 10076-77 (Jul. 27, 1973).}
\footnotetext[175]{S. REP. No. 411, 91st Cong., 1st Sess. 21 (1969) (to accompany S. 2917); see also id. at 50.}
\footnotetext[176]{38 Fed. Reg. 20,076-77 (1973).}
\footnotetext[177]{44 Fed. Reg. 23,085 (1979); see also \textit{supra}, note 160.}
\end{footnotes}
This problem is at the root of much disability-related litigation. In general, the opinion of the claimant’s physician must be considered, although not necessarily accepted, in compensation claims. In employment decisions, the employee’s treating physician may sometimes be ignored.\textsuperscript{178}

The question of the weight to be given any particular medical opinion is therefore critical. By continuing to rely exclusively upon the results of examinations in the x-ray surveillance program, NIOSH ducked this problem. As a result, for the twenty years since passage of the 1969 Act, miners with respiratory disability have been denied their statutory rights to work in jobs with reduced dust exposure.

Moveover, those miners who do not have positive x-ray readings from NIOSH but do have substantial evidence of occupational respiratory disease are not equal competitors for reduced dust exposure jobs. Because both contractual and statutory rights hinge upon a positive x-ray reading from NIOSH, the miner with other evidence of disease is relegated to a position equal to those with no such evidence and to one inferior to those with positive x-rays. This adds considerably to the confusion regarding job assignments and application of seniority, which are discussed below.

In sum, the policy decisions made first by NIOSH and then by MSHA to limit eligibility for transfers to miners with positive x-ray evidence obtained in the NIOSH surveillance program have doomed the program to failure. These limited eligibility criteria are neither medically sound nor do they meet the statutory mandate to ensure that all miners will be able to work their entire working lives without contracting disabling disease.

B. Deterrents to Participation in the Part 90 Program

1. Seniority and Job Assignment

Seniority provisions are indisputably one of the foundation blocks of collective bargaining in the United States. These provisions pro-

\textsuperscript{178} 8 F.M.S.H.R.C. 1860 (1986). For example, in \textit{Gary Goff v. Youghiogheny & Ohio Coal Co.}, 8 F.M.S.H.R.C. 1860 (1986), Goff followed the admonition of his treating physician who recommended that he not return to work underground because of respiratory disability. Goff was fired after being examined by the company doctor, who told the employer that the complainant was not suffering from pneumoconiosis and could return to work. The discharge was upheld both by an arbitrator and by the Mine Safety and Health Review Commission.
tect employees from arbitrary job assignment by providing an objective basis for choosing among applicants for a particular position. They also provide older or more senior workers with a reward: the job of their choice, assuming that they are qualified for it. In general, the only contractual exception to this general rule is made, on a limited basis, for union officers whose duties require them to remain in the labor force.\(^{179}\)

Unions traditionally have viewed any attack upon this system with suspicion. This can be seen most clearly in the vehement defense of seniority systems against charges of race and sex discrimination.\(^{180}\) The result of an MRP is to change the job allocation system, at least on a limited basis, to provide job preference for workers with health impairments who are more likely to become disabled by continued exposure to a particular physical or toxic agent. When less senior workers are accorded MRP rights, disagreements over job allocation between more senior workers and MRP-entitled workers inevitably ensue. Nevertheless, unions have supported MRP plans for workers threatened with serious health effects deriving from workplace exposures.\(^{181}\)

Not surprisingly, when the Part 90 regulations granting federal transfer rights to miners were first proposed, a considerable portion of the initial comments addressed the potential conflict between the transfer provisions and the seniority and job bidding provisions of the national agreement. The agency responded ""It is the position of the Department that since section 203(b) of the Act is a properly enacted Federal Statutory provision, it may operate to supersede, in part, provisions of this labor contract.""\(^{182}\)

Disagreements among miners over job allocation have occurred as a result of their contractual right to use their letterholder status to obtain a desirable low dust job. Under the contract, the issue is

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179. Elkouri, supra note 23, at 181.
not usually the entitlement to a low dust job but the entitlement to the low dust job of choice.\footnote{See, e.g., Mullins v. Beth-Elkhorn Mining Co., 9 F.M.S.H.R.C. 891 (1987).} As discussed above, this problem is exacerbated by the failure of the letterholder program to reflect the miners' own perceptions of who is disabled or in need of transfer.

The arbitration decisions regarding the contract clause underline these problems. Such problems arise both because the more senior workers believe that the letterholders were not entitled to the jobs and because the letterholders feel they were denied appropriate use of their superseniority. Uncomfortable with any exception to the seniority provisions of the contract, arbitrators, and the Arbitration Review Board, first moved to restrict the application of the exception, noting:

> We think it needs to be appreciated, in the first place, that subsection (10) constitutes the carving-out of an exception to the general length-of-service rule laid out in Section (i). Granted that it is for a good purpose that the black-lung hardships to which the Union has spoken are not to be minimized. For it tends to substantiate what one would expect: that it would be only under compelling circumstances that the parties would make seniority inoperative with respect to bidding for job vacancies. It is not too much to say, in other words, that the suspension of seniority for that purpose represents a very special step one which goes contrary to a tradition long adhered to. In such context, we believe that care must be taken not to permit a legislated exception to be applied in a fashion which might expand the exception's intended scope.\footnote{A.R.B. Decision No. 6, Beth-Elkhorn Corp. and Local Union 1468, at 9 (unpublished).}

Based upon this reasoning, arbitrators limited the use of the contract clause to individuals who were production crew members who had not previously obtained a job with less than 1 mg./m\(^3\) of dust exposure and who had not previously exercised their superseniority rights under the contract.

These restrictions did not fully resolve the problems, however. Arbitrators found it troubling that miners with previous compensation awards for black lung, who were the senior bidders for jobs, could be by-passed by younger miners who were letterholders. In a West Virginia case, the company awarded an outside, low dust job to a letterholder, denying the job to the grievant who had received a 20% compensation award for occupational pneumoconiosis from
the state Workers’ Compensation Fund. The company argued that it was “fair” to award the job to the letterholder. The arbitrator responded:

The grievant also has black lung and receives 20 percent disability payment. He is not a letter carrier and has not proceeded under the regulations to attain the status of a letter carrier with its attendant rights; however, in discussing 'fairness', who is to say that he, or anyone desiring to improve the atmosphere in which he works should not have that opportunity if the contract provides it?185

There is no data available on the participation of miners in the transfer program under the collective bargaining agreement. Federal officials, unhappy with the rate of participation in the Part 90 program, have expressed the hope that many miners have used their contractual rights instead.186

There is no simple answer to the problem of job allocation. It is no doubt true that the contractual program has encouraged some miners with developing respiratory impairment to change jobs by guaranteeing to them a job of their choice. Conversely, it has also created an incentive to avoid participation in the federal program. Moreover, rancor and distrust of medical removal have sharpened as miners who are not letterholders have been denied their right to exercise the privileges that ordinarily come with seniority. MSHA’s failure to provide letters to miners who appear impaired as a result of chronic lung disease has further contributed to the problem. In the end, the additional protection offered some letterholders under the contract has probably heightened the confusion regarding this MRP without contributing substantially to its success as a public health program.

2. Wage and Job Protection Under the MRP

Litigation and negotiations concerning the transfer program initially focused on the specific wage and job protection guarantees to be offered transferred miners. However, as noted above, the Part

185. In the matter of the Arbitration between Big Bear Mining Company and UMWA District 17, Local Union No. 7692, Case No. 81-17-81-48 (LeWinter, 1981) at 7 (unpublished).
186. Interview with Joseph Hoffman by the author (Oct. 25, 1987).
90 regulations adopted in 1980 substantially increased the protections offered the participating miners. Nevertheless, participation rates remained low.

Adoption of these regulations coincided with other significant changes in the industry which may have discouraged worker participation in a health protection program. As jobs become fewer, workers are less inclined to call attention to themselves through assertion of statutory rights. While the number of miners available for transfer did not substantially decrease, participation in the program continued to be low. Clearly, in this particular case, the guarantee of wage and job protections was insufficient to overcome miners' reluctance to participate in the program.

3. Dust Sampling Data and the Identification of Low Dust Jobs

An effective MRP program depends upon the ability to identify correctly the jobs which involve reduced exposure to the disease-causing agent. In the case of underground coal mines, extensive regulations were promulgated in order to establish a dust monitoring program that would provide accurate data regarding dust exposure levels.\(^{187}\)

Since 1972, the exposure limit for respirable coal dust has been 2.0 mg/m\(^3\). Coal mine operators are required to collect samples on a periodic basis and to send the samples to MSHA for analysis. MSHA inspectors also monitor dust levels during inspections.

Under the Part 90 program, a participating miner must be assigned to work in a job with an average dust exposure of no greater than 1.0 mg/m\(^3\). The decision as to whether a miner may remain in his or her regular job or must be transferred to a new one is based upon the dust samples which are supplied to MSHA by the operators. The accuracy of the dust monitoring program cannot be addressed in detail here. However, it is important to note that serious questions have been raised with regard to the accuracy of this dust

sampling data.\textsuperscript{188} There have been several criminal convictions involving violations of the Act in which employees of large coal companies have been accused of willfully providing MSHA with invalid sampling data.\textsuperscript{189}

Under-reporting of dust exposure levels, if it occurs, would impact directly upon the participation of miners in the Part 90 program. Miners who elect to participate would be less likely to be transferred to another job if their initial jobs are reported to be below the reduced 1.0 mg/m\textsuperscript{3} dust exposure standard. Miners, therefore, would perceive no benefit to participation in the program. In addition, miners' distrust of the program would be heightened: not only do those who do not appear "sick" get notified of their rights to transfer, but the low dust jobs which are offered to participants may not guarantee reduced exposure.

Furthermore, individual miners complain consistently about the inconvenience of wearing the dust sampling device.\textsuperscript{190} The sampler is necessary to test for dust exposure in the miners' immediate environment. The Part 90 program "rewards" participating miners by requiring them to carry the sampler bi-monthly and repeatedly if samples show excessive exposure. Miners, therefore, postpone transfer until they can exercise their contractual superseniority rights, even if this results in a substantial delay in obtaining the indicated health protection.

4. Lack of Awareness of the Part 90 Program

Until recently, no one attempted to educate coal miners regarding the purposes and operation of the Part 90 program. As a result, miners have been confused about both the purpose and the operation of the program.\textsuperscript{191} Other problems, discussed above, have increased


\textsuperscript{189} See, e.g., U.S. v. Consolidation Coal Co., 560 F.2d 214 (6th Cir. 1977).

\textsuperscript{190} CCHA interviews, supra note 30.

\textsuperscript{191} Weeks interview, supra note 30.
the level of distrust. MSHA and NIOSH have recently attempted to confront the lack of understanding of the program. However, they are not addressing either the medical eligibility standards or the problems in the dust sampling program. It is, therefore, unlikely that participation will increase substantially as a result of these renewed efforts.

IX. CONCLUSION

Problems associated with chronic lung disease in the coal industry are no longer in the limelight. While the dangers of asbestos have reached national prominence, concerns about black lung have receded from the public consciousness.

Although public outcry has lessened, we have not solved the problem of black lung. Miners still exhibit evidence of developing pneumoconiosis on chest x-rays taken in the federal surveillance program. While more restrictive legislation governing eligibility for federal benefits has decreased the number of miners who appear to be totally disabled from black lung, substantial numbers of miners, nevertheless, are collecting both federal and state workers' compensation benefits for occupational lung disease. These benefit awards are the result of disability evaluations which link pulmonary impairment directly to coal mine employment.

The need for medical removal protection for miners with evidence of developing pneumoconiosis remains. However, an analysis of the Part 90 program raises significant questions as to whether a voluntary MRP program can work.

There is enormous employee resistance to programs which single out victims of disease for special treatment. This resistance is often based upon rational fears of retaliation and concerns about coworker hostility. It is further intensified by the mismatch between perceived health status and eligibility for protection.

Reluctance to participate will continue until a program is designed which gives the option for increased environmental protection.

192. Hoffman, supra note 144.
to those miners who correctly perceive themselves to be in need of this protection. This can be done in only one way: by increasing the sensitivity of the eligibility criteria in order to increase the likelihood that miners with occupationally-induced pulmonary impairment are eligible for transfer. The financial costs which may result from expanded criteria for an MRP are far outweighed by the considerably greater costs of providing benefits to disabled workers who have been denied the option to transfer.

By refusing to make the Part 90 protections available to individuals indisputably in need of medical removal, NIOSH and MSHA have failed to meet both their statutory obligations and the needs of impaired miners. By maintaining strict eligibility criteria, they have made it impossible to assess the true potential impact of the program.

There is a final lesson of the Part 90 program. Programs which single out individually impaired workers for special treatment inevitably meet resistance. Impairment from occupational disease cannot be prevented on a broad scale by use of a voluntary MRP which must overcome managerial desire for control of the workforce and employee reluctance to participate. While an adequately designed MRP may be a useful adjunct to other disease control strategies, ultimately prevention of occupational disease depends upon effective environmental controls in the workplace.