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THE FEDERAL BLACK LUNG PROGRAM: A 1983 PRIMER

JOHN S. LOPATTO III*

I. INTRODUCTION

On December 29, 1981, President Reagan signed Public Law No. 97-119, the Black Lung Benefits Amendments of 1981. The legislation was a consensus package drafted largely by the U.S. Department of Labor, and supported by most of the coal industry, labor and the black lung insurance carriers.

The new law is of interest to claimants and defense counsel because of the nationwide volume of federal black lung litigation. The amendments are also of concern to all taxpayers because of the enlarged tax the law places on the over 800 million tons of coal expected to be produced in the United States in 1983 and annually thereafter.¹

The tax increase is an attempt to return the Black Lung Disability Trust Fund to solvency by curing a 1.4 billion dollar deficit. The legislation doubles (until 1995) the producers' tax on each ton of coal from the present fifty cents per ton for underground coal and twenty-five cents per ton for surface-mined coal. The new tax of one dollar and fifty cents respectively is "capped" at 4 percent of the sales price (up from the prior 2 percent cap), meaning the tax will be the lesser of the one dollar/fifty cent tax or 4 percent of the sales price per ton. Prior to 1995, the tax can be scaled back to the original fifty/twenty-five cents per ton rate only if the Trust Fund achieves solvency.²

The 1981 legislation significantly tightens the black lung eligibility formula—but for future (i.e., filed on or after January 1, 1982) claims only:³

— Three of the presumptions of entitlement based on duration of coal mine employment are deleted.
— The provision allowing survivors to collect compensation even if the coal miner only had disabling black lung (pneumoconiosis) prior to death, but died from a cause unrelated to black lung, is repealed.
— The 1978 provision requiring the U.S. Department of Labor to accept a minimally qualified radiologist's positive diagnosis of pneumoconiosis is removed, paving the way for renewed government rereading of X-rays.

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¹ KEYSTONE COAL INDUSTRY MANUAL 956 (1981).
The 1981 amendments also make prospective changes in the benefit structure and in the rules for coal operator/insurance carrier payment of claims during litigation. In addition, new penalties for failure to reimburse the Trust Fund for benefits advanced the claimant on behalf of the operator/carrier are also imposed.

Only one portion of the 1981 amendment is retroactive—an expensive provision mandating the "transfer" of over 10,000 older claims from potential individual operator/carrier liability to Trust Fund responsibility. These claims were the subject of disputed insurance coverage or (in the case of self-insured coal operators) inadequate risk allocation because they had been re-opened and approved under extremely liberal provisions of the March 1978 black lung amendments.

Finally, the 1981 legislation requires the Departments of Labor and Health and Human Services to study the state of the medical arts concerning the diagnosis of pneumoconiosis and resulting disability. Legislative recommendations are to be made to Congress by June 1983. This study provision may be a vehicle for additional amendments.

First conceived in 1969, the federal black lung program was originally to provide temporary compensation for an estimated 100,000 retired miners. But a last-minute Conference change—plus liberalizing amendments in 1972 and 1978—produced an exceedingly different tally by the end of 1981: some 542,000 living miners, their spouses and dependents, and survivors of deceased miners, had collected over 10 billion dollars in benefits, paid from general appropriations. In addition, a 1978 Trust Fund, financed by a producer's tonnage tax and established to pay black lung claims of those employees who left the mining industry before 1970, was 1.4 billion dollars in the red by 1981 and projected to amass a 19.2 billion dollar deficit by 1995.

The 1981 legislation was designed to stop the excesses fostered by three prior black lung statutes.

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5 Id.
6 1981 amendments, § 205 (codified at 30 U.S.C. § 932(c) (1982)).
7 1981 amendments, § 202(e).
9 The statistics in this article are from two sources: HOUSE COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON OVERSIGHT, 97TH CONG., 1ST SESS. (Comm. Print 1981), (citing U.S. Department of Labor and U.S. Department of Health and Human Services (Social Security Administration) figures); and figures cited by sponsors of Senate amendments to H.R. 5159, CONG. REC. S. 15480 (Dec. 16, 1981) also supplied to the Congress by Labor and HHS.

10 Id.
What lessons does “black lung” provide in the national debate over compensation for victims of occupational diseases (e.g., asbestosis, byssinosis) or long-abandoned hazardous wastes—maladies which manifest themselves well after the last exposure has occurred? The eleven years of administrative and legal experience under the federal black lung program should provide some guidance in coping with these other diseases; indeed, in no other area has Congress so minutely defined a disease or made such a determined and expensive effort to fairly compensate its victims.

II. BACKGROUND

Some introduction to certain basic medical concepts, independent of the statute, is essential. Pneumoconiosis is a general description of diseases wherein the lungs react to foreign dust by covering and surrounding the dust with fibers of lung tissue. There are many forms of pneumoconiosis in addition to that encountered by coal workers.

The disease is divided into two important categories: complicated and simple, neither of which is statutorily defined. Complicated (or progressive massive fibrosis, PMF) is the advanced stage of the disease and involves substantial fibrotic reaction of the lungs to dust deposits. In complicated, the lung fibers produce opacities on chest X-rays of 1 cm. or larger or show up on autopsy as massive lesions in the lung. A series of clusters can coalesce in the lungs, and a third or more of a lung can atrophy and become inelastic and useless. The complicated stage of pneumoconiosis produces marked pulmonary impairment and severe disability, especially in later years. Tuberculosis and other lung infections are frequent after-effects. Destruction and obliteration of the pulmonary vascular bed can also occur, producing significant increases in resistance to blood flow. As a consequence, the right side of the heart enlarges and can fail, causing a condition called cor pulmonale or congestive heart failure.

Simple pneumoconiosis is a less advanced form of the disease than complicated. It is diagnosed when fibrotic clusters in the lung produce X-ray opacities of 1 cm. or less or fibrotic masses on autopsy smaller than “massive lesions.” While simple may have some effect on the blood/gas exchange capacity of the lungs, it is not considered disabling and is “seldom productive of significant

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13 See 4a Attorneys' Textbook of Medicine § 205.10 et seq. Among other workers prone to pneumoconiosis are those in the textile, tin, asbestos, limestone, marble, diatomaceous earth, gypsum and mica industries.
15 Id.
respiratory impairment."

Simple and complicated pneumoconiosis are both irreversible, and despite some recently developed palliative therapy, the only means of mitigating the disease is removing the miner from a dusty atmosphere. Complicated pneumoconiosis is progressive, and symptoms may not develop until well after the worker has left coal mine employment. There is some medical debate on whether simple is progressive, but most scientists believe continued dust exposure is a necessary catalyst for any progression of simple, either by expansion of the X-ray opacities within the simple classification or by advancement to the complicated category of 1 cm. or larger. A miner with simple thus may not always advance to complicated, and there are many miners with simple pneumoconiosis working in the nation's mines today.

Federal efforts in the black lung area started in 1969 with enactment of the Federal Coal Mine Health and Safety Act, which re-codified and strengthened earlier federal coal mining safety laws. Among the safety and health topics addressed at the Congressional hearings prior to passage of this legislation were dust control and the damage to miners' lungs from years of working in underground mines. One of the Congressional witnesses was a British medical scientist, who galvanized committee and television attention with vivid presentations of actual slices of autopsied miners' lungs blackened from coal dust. This evidence was augmented by the U.S. Surgeon General who testified that the disease (most likely referring to complicated pneumoconiosis) affected at least 100,000 of this nation's active and inactive miners. Congress was also told by the Surgeon General that American and British studies repeatedly showed that coal miners suffer from more respiratory impairment than does the general population, and that X-ray diagnoses, when compared later to autopsies, tended to under-report the prevalence of the disease.

The 1969 legislative hearings on the black lung problem also found that

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18 Coal Mine Health and Safety: Hearings on H.R. 4047 and Related Bills Before the General Subcomm. on Labor of the Senate Comm. on Education and Labor, 91st Cong., 1st Sess. 565 (1969), (testimony of Dr. Jethro Gough, professor and head, Department of Pathology, Welsh National School of Medicine).
19 Coal Mine Health and Safety: Hearings on S. 355 and Related Bills Before the Subcomm. on Labor of the House Comm. on Labor and Public Welfare, 91st Cong., 1st Sess., 720 (1969) (testimony of Dr. William H. Stewart). Some of the evidence presented to the 91st Congress was based on underground anthracite miners' experiences during the peak production years of that industry in Pennsylvania. Id. at 754 (Statement of Rep. Flood). Anthracite coal has a markedly higher toxicity than bituminous coal and produces a higher incidence of complicated pneumoconiosis. Christian, Nelson & Cody, Coal Workers' Pneumoconiosis: In Vitro Study of the Chemical Composition and Particle Size as Causes of Toxic Effects of Coal, 20 ENVTL. RESEARCH 358-65 (1965). The modern relevance of this anthracite evidence is diminished because anthracite production is presently less than 10% of the apex tonnage figure of 100 million tons in 1917. Coal Industry News, Feb. 8, 1982, at 1. Nearly all U.S. anthracite production has been from Northeastern Pennsylvania, though modest reserves have been identified in Alaska.
20 See also infra note 120, at 242.
the individual states' response was inadequate. Most state workers' compensation laws did not then provide clear causes of action for occupational diseases, and claims for black lung were frequently blocked by 2- or 3-year state statutes of limitation, which were geared to time-definite, traumatic injuries. The filing deadlines often expired before the symptoms of pneumoconiosis alerted the retired miner he had a claim. State statutes that did provide compensation for black lung were found to pay inadequate benefits.\textsuperscript{21}

The original approach of the 91st Congress to compensating victims of pneumoconiosis was limited. The Senate bill posited "temporary and limited . . . interim emergency health disability benefits, in cooperation with the States, to any [underground] coal miner [or to the widows or children of any underground coal miner] who is totally disabled . . . on the date of enactment of this Act due to complicated pneumoconiosis . . . .\textsuperscript{22} The House-passed version of the Senate bill envisioned a temporary federal-state compensation scheme for victims of complicated pneumoconiosis or their widows.\textsuperscript{23} Neither bill mentioned a prospective, private workers' compensation program.

The Conference was critical. Two days before final passage of the FCMHSA of 1969, the Conference applied the two Houses\textsuperscript{24} proposals not only to underground miners (or their survivors) suffering from complicated pneumoconiosis or having autopsy evidence of complicated pneumoconiosis, but also to those underground miners or their survivors who could prove total disability from, or death due to, simple pneumoconiosis.\textsuperscript{25}

The Conference divided the black lung statute into three sections.\textsuperscript{26}

(1) Part A set forth general findings and definitions. Pneumoconiosis was defined as a chronic dust disease of the lungs arising out of coal mine employment, section 402(b). The terms "simple" and "complicated" were not used in the statute, but an irrebuttable presumption of entitlement was created in section 411(c)(3) where there was an X-ray diagnosis (1 cm. opacity or larger) or autopsy/biopsy evidence that comported with the pre-existing medical defini-

\textsuperscript{22} Id.
\textsuperscript{25} Under the final 1969 black lung legislation, a widow was entitled to benefits if the miner-husband:

(1) had been receiving benefits at the time of his death; or
(2) had filed a black lung application prior to his death and was later determined to have been totally disabled due to pneumoconiosis prior to death; or
(3) had died due to pneumoconiosis.

30 U.S.C. §§ 901-941 (1976 & Supp. II 1978). These sections did not provide a means of entitlement for a widow whose husband may have been totally disabled from pneumoconiosis but died from an unrelated cause, where the husband had not filed a claim before his death.
tion of complicated.  

(2) Part B created a black lung claims system for all claims filed before December 31, 1972, to be administered by the Secretary of Health, Education and Welfare.

(3) Part C governed claims filed after December 31, 1972, and specified that miners would be compensated by their employers in accordance with:

(a) state statutes meeting the standards of the federal black lung act; or,

(b) if the state statutes were not so approved by the Secretary of Labor, under a federal black lung workers' compensation scheme administered by the Secretary of Labor in accordance with the Longshoremen's and Harbor Workers' Compensation Act of 1927. Payment would be by employers or insurance carriers; where no company could be identified as the responsible operator, the government would pay benefits out of federal revenues.

(4) Both Part B and Part C were to expire, and payments to cease, by December 30, 1976.

III. Standards for Benefits Under the 1969 Statute

If not proceeding under the irrebuttable presumption of entitlement for complicated pneumoconiosis in section 411(c)(3), claimants were required to prove the following in order to qualify for eligibility under the 1969 version of both Parts B and C:

(1) The presence of pneumoconiosis;
(2) That the pneumoconiosis arose out of coal mine employment; and
(3) That such pneumoconiosis caused the miner to be totally disabled or caused death.

The definition of "total disability" was that established under "regulations of the Secretary of Health, Education and Welfare, but such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42 [i.e., the Social Security Act]."

The 1969 statute also provided two rebuttable presumptions—based on duration of employment—to assist claimants in establishing entitlement:

(1) section 411(c)(1) provided that in the case of a miner with pneumoconiosis who was employed in the nation's underground mines for 10 or more years, the pneumoconiosis was presumed to arise out of the miner's coal mine employment; and
(2) section 411(c)(2) provided that a miner who was employed in the nation's

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mines for 10 or more years and who died from a respirable disease was presumed to have died due to pneumoconiosis.

In addition to the compensation scheme of Title IV of the Federal Coal Mine Health and Safety Act of 1969, a provision in Title II of the Act was directed at prevention of the disease. Section 202(b) mandated interim standards of 3.0 milligrams of respirable dust per cubic meter, with the standard dropping to 2.0 milligrams by December 30, 1972. With the decreasing dust level, it was hoped the pneumoconiosis problem would recede in harmony with the intended expiration of the federal black lung program at the end of 1976. In addition, section 203(a) required each underground operator to afford every miner periodic chest X-rays to detect pneumoconiosis. The miner was also granted the right to a pay-protected transfer to a less dusty work place if the X-ray detected pneumoconiosis.

IV. SSA Administration of Part B Through May 1972

The black lung program of course received widespread publicity in the coal regions. Thousands of miners and widows of deceased miners immediately filed applications. The government paid for initial X-rays of living miner claimants, and widow applicants submitted medical reports, affidavits, and where available, autopsy results. The SSA promulgated brief regulations implementing the 1969 black lung program in April 1970.

Claimants with evidence of complicated pneumoconiosis were readily granted benefits by SSA under the irrebuttable presumption, but those alleging simple pneumoconiosis encountered difficulty on three evidentiary fronts. The first involved government-retained expert radiologists ("B-readers"), throughout the country, who re-read X-rays submitted from the claimant's local hospital and often marked down original readings of positive to negative. The B-reader also frequently found that the original film was of bad quality or that the first reader had mistaken another type of lung scarring for pneumoconiosis.

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35 The government originally paid for an X-ray and a physical exam of the claimant. Only a few facilities were able to perform ventilatory tests where the miner breathed vigorously and rapidly into a machine that could quantify the claimant's pulmonary ability. Even fewer institutions had the equipment to perform another useful test: the arterial blood gas test, where a shunt is inserted in an arm artery, the patient is exercised, and a measurement of the blood-gas exchange of the lungs (oxygen-carbon dioxide balance) is obtained.
37 The B-reader program formalized under Part C is explained in Morgan, Proficiency Examination of Physicians for Classifying Pneumoconiosis Chest Films, 132 AM. J. OF RADIOLOGY 803 (1979); See also 42 C.F.R. § 37.51 (1978).
38 Inaccurate field X-rays have plagued the black lung evidentiary process under both Part B
The second legal impediment to Part B miners alleging total disability due to simple pneumoconiosis was the definition of total disability specified in the 1969 Act. As noted, this rule required a qualifying miner to be unable to perform any substantial gainful activity because of his simple pneumoconiosis arising out of coal mine employment.

The third significant problem under the 1969 statute was the denial of thousands of widows’ claims because evidence could not be marshalled that the miner had died due to pneumoconiosis, even though the miner likely had at least simple pneumoconiosis prior to death. Congress became concerned that pre-Act death certificates were hastily drawn and too often used general terms such as “heart attack” to describe the cause of death.59

Denials of Part B claims began piling up because of the SSA’s X-ray re-reading practice, living claimants’ inability to establish total disability, and the widows’ general lack of evidence. Despite claimants’ appeals efforts,60 approximately 50 percent of the 357,000 Part B claims filed between January 1, 1970 and April 1, 1972 were denied.61

V. 1972 LEGISLATION: BLACK LUNG BENEFITS ACT

In 1972, before Part C became effective, the 1969 Act was amended in the “second” black lung statute, which redesignated Title IV of the FCMHSA of 1969 as the Black Lung Benefits Act.62 This legislation:

(a) Extended federal (as opposed to state or last employer) liability under Part B until December 31, 1972 and postponed the Secretary of Labor’s jurisdictional responsibility under Part C until June 30, 1973.63 The termination of Part C was also extended to May 1984. (Amendment to section 422(e)).

(b) Extended the Black Lung Act’s coverage to surface miners as well as underground.64

and Part C. An internal Department of Labor report in 1976 found that only one-third of X-rays interpreted as positive by the field reader were affirmed as positive by the B-reader; many of these confirmations also reduced the grade of pneumoconiosis marked in the first reading. In addition, about ten percent of the films submitted to the expert B-readers were rejected as unreadable because of deficient technique in taking the X-ray (e.g., bad contrast, overexposure or underexposure). See Office of Workers Compensation Programs Task Force Report, U.S. Department of Labor, Black Lung Benefits Program, (1976) at 42.


60 Part B incorporated the adjudication structure of § 205 of the Social Security Act, 42 U.S.C. § 405 (1974), as incorporated by § 413 of the black lung statute, 30 U.S.C. § 923(b) (1976). This meant a claimant had the right to an ALJ hearing, discretionary review before the SSA Appeals Council, and then, if the decision was final, appeal to a U.S. District Court by filing a civil action against the Secretary of HEW. 42 U.S.C. § 405(g) (1976 & Supp. IV 1980). The record made at the agency, however, was the record before the District Court; no trial de novo was allowed. Appeal to the U.S. Court of Appeals was allowed in the same manner as a judgment in other civil actions.

61 Legislative History, supra note 21, at 1948.


63 Codified in § 415, 30 U.S.C. § 925 (1976), providing a six-month transition period between Part B and Part C.

64 Section 3 of the Black Lung Benefits Act of 1972 struck out the word “underground” in §§
(c) Provided a new presumption of entitlement under which miners with negative X-ray evidence of pneumoconiosis who had:
   
   (1) 15 years or more of underground (or "in condition of employment . . . substantially similar" to underground) coal mine employment; and
   
   (2) evidence of a totally disabling pulmonary or respiratory impairment
   
   were rebuttably presumed to be totally disabled due to pneumoconiosis and therefore eligible for benefits.\footnote{46}

(d) Redefined "total disability" so that a claimant no longer had to prove impairment from doing \textit{any} job (the 1969 standard) but now could qualify if he was unable to perform his regular coal mine job or any comparable job.\footnote{47}

(e) Provided for the first time that a claim could no longer be denied solely on the basis of a negative X-ray.\footnote{47}

(f) Changed the statute to provide that survivors of a living miner totally disabled from pneumoconiosis who later died from a cause unrelated to pneumoconiosis were eligible. Under the 1969 law, survivors had to prove the miner's death was due to pneumoconiosis.\footnote{48}

The 1972 amendments' legislative history also favored broad authority on the part of the Secretary of Health, Education & Welfare to promulgate regulations to reopen all pending and denied claims and review them under the new legislation. In a committee report, Congress additionally requested the Social Security Administration, in administering the new definition of total disability, to adopt efficient "interim" regulations that would speedily enable review of backlogged and reopened Part B files.\footnote{47} The SSA took the directive literally and promulgated 20 C.F.R. section 410.90, a set of very liberal "interim" regulations to implement the 1972 amendments. Even SSA doctors conceded that the test standards in these "interim" regulations allowed a finding

\footnote{40, 411(c)(1) and (2), and 422(a) of the statute. The decision to extend the black lung program to surface miners was made even though the congressional hearings revealed no evidence that the incidence of pneumoconiosis was significant among surface miners. Legislative History, supra note 21, at 1967. See infra pp. 701-02.}
\footnote{46 Codified in § 411(c)(4), 30 U.S.C. § 921(c)(4) (1976).}
\footnote{47 Amended § 402(f), 30 U.S.C. § 902(f) (1976).}
\footnote{47 Amended § 413, 30 U.S.C. § 923(b) (1976). The legislative rationale for this change was that SSA denied 62% of the first set of Part B claims on the basis of negative X-rays. The Congress was persuaded that such reliance on X-rays was unwarranted because the Appalachian Research and Defense Fund found that 25% of a random sample of 200 coal miners with negative X-rays showed presence of the disease on post-mortem examination. Legislative History, supra note 18, at 1953. A plausible explanation for this occurrence was not mentioned by the Senate Committee: that the original X-rays were incompetently taken or interpreted. This observation is especially valid in light of the inadequacies and errors in field roentgenology for pneumoconiosis detected by the government B-reader program. See also infra pp. 690-91 (discussion of broadening of weight given local X-ray readers diagnoses by the 1978 amendments).}
\footnote{49 Amendments to § 401, 30 U.S.C. § 901 (1976). This was a significant change in the statute that totally divorced the federal black lung criteria from state occupational disease criteria. State black lung statutes usually provided survivors with claim rights similar to the 1969 federal act, i.e., death due to pneumoconiosis had to be established.}
\footnote{49 Legislative History, supra note 21 at 1963-64.}
of total disability upon breathing results that were *normal,* especially for the elderly Part B claimant population. Indeed, the SSA “interim” regulations made *no* adjustment for claimants’ ages.

The 20 C.F.R. section 410.490 “interim” regulations also created a new rebuttable presumption of entitlement more favorable to claimants than any in the statute. Under 20 C.F.R. section 410.490(b)(1) a claimant was presumed totally disabled due to pneumoconiosis if he had 10 years or more of underground or “comparable” coal mine employment and either a positive X-ray (or autopsy) diagnosis of simple pneumoconiosis or a breathing test score qualifying under the liberal “interim” regulation standard. The presumption could also be invoked with *less* than 10 years coal mine employment if the simple pneumoconiosis or qualifying breathing test result was shown to have arisen out of coal mine employment.⁶¹

VI. Impact of the 1972 Amendments

The significant changes in the 1969 statute made by the 1972 amendments, especially adoption of the “interim” presumption in 20 C.F.R. section 410.490 by SSA, caused a tremendous surge in Part B approvals. By December 31, 1974, the termination point for Part B, SSA had received and processed about 556,200 separate black lung claims. Of these, approximately 400,000 were approved for benefits. Benefit augmentation for survivors and dependents of each miner or deceased miner resulted in nearly 510,000 individuals receiving compensation on these claims.⁶² Part B was costing about 860 million dollars a year by 1974, paid from general appropriations.⁶³ (In 1982, benefits ranged from $304.90 to $609.80 per month, varying with the number of dependents. The actuarial value of a 1982 claim by a living miner with a spouse is nearly $150,000 dollars.)⁶⁴ Benefits are not taxable by the federal government as income,⁶⁵ and the total disability structure of the statute means that black lung


⁶³ Id.


claims cannot be settled for less than the full amount.

As previously stated, claimants not approved under Part B had the right to proceed against HEW in federal district and then circuit court. Several thousand federal Part B black lung cases flooded the federal courts in the coal regions in 1973 and later. District court judges eventually resorted to systematic assignment of the cases to federal magistrates for decision recommendations. By the time the third piece of federal black lung legislation was passed by Congress in March 1978, a few hundred Part B, SSA-HEW claims were still pending in federal courts, and a significant backlog of Part B claims remained in the federal courts even in 1982.

The intensive court review of the black lung statute under Part B added to the drift of the program away from compensation for true total disability from pneumoconiosis. This judicial role arose because of the nonadversary procedural setting of Part B. By definition, an SSA claim involved only two parties, the claimant and the Department of Health, Education and Welfare. Normally, at the ALJ hearing for a Part B claim, the government was not represented by counsel, but the SSA ALJ was informally expected to make the claimant prove his case that the agency denial was incorrect. These Part B procedures meant that the district courts and courts of appeals would place a judicial gloss on the statute with case records lacking both real cross-examination of the claimant and the probative medical reports an employer or insurance carrier normally tenders in litigation. Moreover, the fact that only denied claimants took SSA to court (the government would not appeal its own approval\[^{66}\] stretched the statute in only one direction—toward more entitlement. Despite this important conceptual difference between Part B and Part C litigation, courts readily use Part B precedents to resolve Part C issues. Indeed, the entire body of Part B case law would be revived for use in Part C after the 1978 amendments retroactively applied Part B medical regulations to Part C claims.\[^{67}\]

VII. EARLY DOL IMPLEMENTATION OF PART C

As provided in the 1972 amendments, all black lung claims filed between December 30, 1969 and June 30, 1973 were Part B claims, to be filed and adjudicated by SSA without any individual employer liability. Claims filed after

\[^{66}\] For example, the SSA routinely considered lung cancer a respirable disease that could be used to invoke entitlement through the 10 year presumption in § 411(c)(2), 30 U.S.C. § 921(c)(2). See discussion of the SSA Appeals Council Bulletin (§ 10-30-10) reflecting this practice in Marcelli v. North American Coal Corp., (concurring opinion by Member Miller), 1 BLACK LUNG REP. (MB) 1-757 (1978).

January 1, 1974 (and certain claims filed in the section 415 transition period between July 1, 1973 and December 31, 1973) were to be adjudicated by the U.S. Department of Labor if the applicable state workers’ compensation law had not been approved by the Secretary of Labor as providing adequate coverage for pneumoconiosis under the standards of the federal statute.

By 1973, no state program was approved, and DOL began implementation of Part C of the statute. Even into 1983, no state program pressed for or received approval. This failure to achieve state primacy has been one of the most profound—but unexplored—disappointments in the black lung controversy.

To initiate its black lung program, the Department of Labor delegated the black lung mission to the Employment Standards Administration, Office of Workers’ Compensation Programs (OWCP), where a new unit was created: Division of Coal Mine Workers’ Compensation. Claims adjudication then proceeded through four steps:68

1. The DOL administrative level (claims examiner and "deputy commissioner," a Longshoremen’s and Harbor Worker’s Compensation Act term);69 then to
2. The DOL Office of Administrative Law Judges (OALJ) for a hearing; then on appeal to
3. The DOL Benefits Review Board (BRB), which had been created by the 1972 amendments to the Longshoremen’s Act;70 then on appeal to
4. The U.S. Court of Appeals for the circuit in which the injury (last exposure) arose.71

These four steps constitute the current, federal black lung adjudication system under Part C.

Section 422(b) of the statute72 also required any operator in the coal mining business after June 30, 1973 to purchase federal black lung workers’ compensation insurance or to qualify with the DOL as a self-insurer and post security. Most companies began compliance with this insurance requirement, but the expense forced smaller operators to shut down.

69 Disputes over the exact incorporation of the Longshoremen’s Act interrupted the adjudication of claims in 1977. See generally, United States Dept. Of Labor v. Peabody Coal Co., 554 F.2d 310 (7th Cir. 1977). At this writing, amendments to the LHWCA, some of which could pass through to black lung, were pending. See S.38, 98th Cong. 1st Sess.
70 33 U.S.C. § 921(c). Under this statute the BRB members are appointed by the Secretary of Labor. In 1982, two members of the BRB challenged Reagan Administration efforts to replace them. The Board members argued that the BRB was identical to an article III (of the U.S. Constitution) court and that they had the protections of federal judges. After partial success at the district court level, the members were defeated by a ruling of the U.S. Court of Appeals for the D.C. Circuit. That court held that in the face of congressional silence at the creation of the BRB, the Board was only a quasi-judicial tribunal within the executive branch and its members could be removed at the discretion of the Secretary of Labor. Kalais v. Donovan, 697 F.2d 376 (1983), rev’d in part, aff’d in part In re Benefits Review Board Litigation, Nos. 82-1278, 82-1406 (D.D.C. 1982). A petition for certiorari to the Supreme Court was filed on April 15, 1982, No. 82-1686.
Finally, claimants who had been denied (with a final order) under Part B by SSA or the courts could also refile under Part C with the DOL. Many Part C claimants thus had closed Part B applications (with accompanying documents) in their DOL claim folders. Early assertions by named responsible operators under Part C that claims with a history of Part B denial were barred by res judicata or collateral estoppel were rejected.

VIII. IDENTIFICATION OF RESPONSIBLE OPERATORS UNDER PART C

Pursuant to section 422 of the statute, every section 415 and Part C claim filed with DOL was screened for identification of a responsible operator-employer against whom liability for benefits could be asserted. The Secretary of Labor promulgated regulations in 1973 to flesh out the responsible operator section of the statute in section 422. Identification of employers against whom to assert the claim proceeded under laborious criteria which permitted the DOL to go back 15 years from the miner’s last coal mine employment date to find a former employer of the claimant that was still in business and could be named as the “responsible operator” defendant.

The Part C retroactive responsible operator identification procedure had problems from the outset because most claimant miners left mining employment before 1969 and others ended their coal mine careers far earlier. The statutory and regulatory mechanism often prompted identifications of operators/defendants whose corporate identities had changed several times or who had no record of claimant’s employment. Currently operating mining companies were frequently identified as the responsible operators for claims of miners who had worked for long-defunct subsidiaries of the companies as far back as the 1920's. The named companies’ challenges to their identification as responsible operators resulted in many black lung hearings being burdened with voluminous corporate merger documentation and testimony. Such a complex evidentiary exercise was out of step with the traditional workers’ compensation goals of simplification and speedy resolution of injured workers’ claims.

Moreover, the DOL responsible operator identification process often did not turn up a responsible operator at all because of corporate dissolution, a pre-Act asset sale, or abandonment of the mine. During congressional hearings before the passage of the 1978 black lung amendments, DOL officials were able to state that responsible operators were being identified in only twenty-five to thirty percent of the cases, despite considerable government expenditures for fact-gathering to unravel the often intricate coal industry and correctly identify responsible operators. The government’s protracted effort to grapple with

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65 Id.
corporate changes and identify successor operators as defendants was a failure. The lack of success lead directly to establishment of the Trust Fund in the 1978 amendments, for compensation of older claimants. The trust fund concept is likely to be the mechanism for other efforts to compensate long-departed employees for a widespread occupational disease.68

In the cases where a responsible operator identification could not be made because all coal companies that had employed the claimant were out of business, section 424 required that the Secretary of Labor pay the claim, if valid, from federal funds. If no operator was identified and the DOL denied the claim, the case, at the option of the claimant, proceeded to hearing and appeal; these claims became known as "federal denials."

IX. CONSTITUTIONAL CHALLENGE

In 1973, twenty-two operators initiated a challenge to the constitutionality of the presumptions and retroactive aspects of Part C. After partial success at the district court level, the operators were defeated when the U.S. Supreme Court upheld the constitutionality of the statute in July 1976.69

The operators' main contentions were that the retroactive features of the Act spread costs in an arbitrary and irrational manner by basing liability upon past employment, rather than taxing all operators presently in business. They further argued that new entrants to the coal industry would have an unfair competitive advantage because they would not be saddled with the significant liability of older companies faced with black lung claims from retired miners.

The Court found no constitutional defect under the fifth amendment due process clause in Congress' design of a compensation scheme for miners who retired before the Act was even enacted. The Court also stated that it would not second guess Congress on whether other retroactive approaches to cost sharing would be wiser or were practical. The retroactive aspect of the statute was simply within the ambit of other economic regulatory statutes—including New Deal legislation—which the Court had earlier upheld. Using similar constitutional analysis and drawing on the medical evidence in the legislative history, the Court also upheld the irrebuttable presumption for complicated pneumoconiosis, the rebuttable presumptions of causation and death due to pneumoconiosis, the definition of total disability in the 1972 amendments, and the section 413(h) prohibition on denial of a claim solely on the basis of the results of a chest X-ray. The applicability of the presumption to surface miners and the validity of the regulations implementing Part C (including the successor operator rules) were not addressed by the Court in Turner Elkhorn.

The emphatic ratification by the Supreme Court of the 1969-72 black lung statutes' retroactive and cost-sharing features suggests that the Turner Elkhorn case could have an increasing profile in the debates over compensating

68 See H.R. 5735, 97th Cong. 2d Sess. (proposing asbestos compensation). Excess Liability Fund and Uranium Ore Compensation Excess Liability Fund, to be funded by assessments against manufacturers and importers of asbestos.
victims of other occupational diseases—or hazardous waste exposure—that manifest themselves well after the exposure has ended. It may be that any new legislation in these areas can survive constitutional challenge if it is modeled after the black lung scheme.

X. DOL Administration of Part C from 1974 to 1978

Claimants were dissatisfied with DOL administration of Part C after 1974 because DOL adjudicated claims under medical eligibility regulations, 20 C.F.R. section 410, subpart D, which were supplied by SSA pursuant to statute but which were more restrictive than the “interim” regulations, 20 C.F.R. section 410.490, mandated for use by SSA under Part B in the legislative history of the 1972 amendments. The 20 C.F.R. section 410, subpart D regulations produced a markedly lower approval ratio than that for Part B under SSA’s “interim” regulations. In addition, the three-year statute of limitations of the 1969 statute (figured from date of the miner’s death) forced denial of thousands of widows’ claims. By 1978, DOL had received over 128,000 Part C claims. Only half of these were administratively processed before the March 1978 amendments were enacted, but less than 5,000 cases were approved with 68,100 being denied and the other 52,000 pending.


A. Black Lung Disability Trust Fund

The March 1978 black lung amendments created the Black Lung Disability Trust Fund, to be administered by the Secretaries of HHS, Labor, and Treasury as trustees, and to be financed by an excise tax on each ton of surface (twenty-five cents) and underground (fifty cents) mined coal. The Fund assumed liability for all valid Part C claims in which the miner’s last coal mine employment ended before January 1, 1970. This amendment immediately nullified the DOL efforts to assess current operators for thousands of claims of long-departed employees. New claims with coal mine employment ending before 1970 also became a responsibility of the Trust Fund. The DOL Office of the Solicitor served as attorneys for the Fund in claims litigation.

B. Imposition of SSA “interim” regulations on pending and denied Part C claims

The second most important change in the 1978 amendments was the revi-
val of the SSA "interim" regulations and a mandate that these extremely liberal\textsuperscript{77} rules be applied to all Part B and Part C claims pending or denied as of March 1, 1978, as well as any new Part C claims filed before March 31, 1980, the effective date of new, permanent Part C regulations (20 C.F.R. Part 718). Imposition of the "interim" presumption for use by DOL on Part C claims was done indirectly, in that the amending language required that the DOL regulations for review of pending and denied claims "not be more restrictive than the criteria applicable to a claim filed on June 30, 1973. . . .," meaning no more restrictive than the extremely liberal 20 C.F.R. section 410.490 "interim" regulations used by SSA after the 1972 amendments.\textsuperscript{78}

C. Other entitlement changes in the March 1978 Amendments

Another key dimension of the 1978 amendments was the requirement that the DOL accept a board-certified or board-eligible radiologist's interpretation of an X-ray if the film met minimal quality standards.\textsuperscript{79} (This amendment continued a trend begun in the 1972 legislation, which prohibited a claim from being denied solely on the basis of a negative X-ray.\textsuperscript{80}) The radiology community opposed this change because the term "board-eligible" is fairly obsolete and qualified any doctor who did even a one-year residency in radiology.\textsuperscript{81} The use of board-certified readers does not guarantee capability to diagnose pneumoconiosis, because pneumoconiosis is not usually an emphasized subject in a medical school or hospital residency curriculum.

In practice, the DOL's forced acceptance of board-certified or board-eligible radiologists' diagnoses meant that the government re-reading was used only to assess the quality of the film.\textsuperscript{82} The government B-reader's opinion on the presence of pneumoconiosis—even if different from the diagnosis of the field reader—was ignored. In a Trust Fund case (one with coal mine employment ending before 1970), the field diagnosis of pneumoconiosis was the last word and became a material link in the entitlement chain. If the claim involved recent employment and assertion against a responsible operator, DOL began physically obliterating the diagnosis report of the B-reader to prevent its use by the operator-defendant.\textsuperscript{83}

\textsuperscript{77} See supra notes 48 & 49.


\textsuperscript{79} 30 U.S.C. § 923(b) (Supp. IV 1980).

\textsuperscript{80} 30 U.S.C. § 923 (Supp. IV 1980).

\textsuperscript{81} See Statement of American College of Radiology in Hearings Before the Comm. on Labor and Human Resources, 95th Cong., 1st Sess. (April 4, 6, 1977) at 217-220. The DOL interpreted 30 U.S.C. § 923(b) broadly and elevated board eligible X-ray readers (defined as those having completed a residency in radiology, 20 C.F.R. § 727.206(b)(2)) to the level of board certified readers and accepted both levels of diagnoses as equal.

\textsuperscript{82} The government B-reading program began with SSA under Part B and was expanded and systematized by the DOL under Part C. See supra note 37.

The March 1978 amendments also added a new presumption which allowed compensation to survivors of a miner employed 25 years or more in one or more coal mines before June 30, 1971, unless it was established that such miner was not partially or totally disabled due to pneumoconiosis (section 411(c)(5)). This new presumption marked the statute's first recognition of partial disability. The 1978 legislation made numerous other liberal changes in the entitlement structure, including expanding the definition of pneumoconiosis to include "sequelae" of the disease and adding a proviso that a deceased miner's employment in a mine at the time of death (even from a fatal mine accident) would not be conclusive evidence that the miner was not totally disabled from black lung before death. In addition, the 1978 amendments deleted the three-year (from death) statute of limitation on survivors' claims, substituting a virtually open-ended timeframe for filing.

The 1978 amendments had a dramatic effect on the black lung approval figures. The SSA allowed an additional 23,178 claims, bringing the final tally for Part B claims under the 1969, 1972, and 1978 legislation to an 81 percent approval rate. On July 28, 1980, the Government Accounting Office reported to Congress that its random study of SSA approvals indicated that 88.5 percent were not based on adequate medical evidence establishing total disability or death from black lung. (The United Mine Workers of America would later criticize this study for using a doctor who was not a pulmonary specialist and for not defining "adequate medical evidence.")

The DOL approval figure shot up to 60,028 by 1980, and by the end of 1981, the total was 89,400 approved claims. In addition, nearly 111,000 medical benefit only (MBO) claims were approved for Trust Fund payment by DOL.
The exceedingly high approval rate in the wake of the 1978 amendments was very expensive. The claims SSA approved because of the 1978 amendments were paid under Part C (DOL jurisdiction) provisions, either from the Trust Fund if the claimant’s coal mine employment ended before 1970, or by assertion against the last responsible operator, if post-1970 coal mine employment was present. (See the discussion of section 435 and the Yakubco decision, infra.) Most of the new approvals had coal mining employment ending before 1970, but section 424 of the statute also directed the DOL to pay “interim” benefits to government-approved claimants in responsible operator cases during litigation. Those facts meant that nearly the full amount of the increase in entitlement between 1978 and 1981 was borne by the Trust Fund. By the end of FY 1980, the Fund had paid out 1.3 billion dollars, plus 101 million dollars in administrative expenses. Income from the 1978 coal excise tax was expected to make the Trust Fund self-sufficient in a few years, but supplements from the general appropriations were necessary in 1978 and each year thereafter to keep checks flowing to approved claimants. These advances to the Fund were, by statute, repayable with interest, and at the end of 1981 the Black Lung Disability Trust Fund had a 1.4 billion dollar deficit, including a 250 million dollar interest obligation.

XII. 1981 Amendments

The Reagan team that moved into the Department of Labor in 1981 had a very difficult task in dealing with the burgeoning deficit in the Trust Fund. The huge increase in approvals after the March 1978 amendments was obviously the cause of the deficit, and the UMWA argued that such entitlement was a one-shot remedy for claimants who had been denied under the 1969 and 1972 statutes. Also, by 1981 the approval rate for new claims had dropped

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benefits only (MBO). Section 11 of the Black Lung Benefits Reform Act of 1977 instructed the Secretary of HEW to notify the over 200,000 Part B recipient miners of a new chance to file for MBO under Part C, a right set to expire six months after notification. As the HEW notification to all Part B recipients was on May 3 and 4, 1978, the filing deadline should have been November 4, 1978. Instead, the Secretary of Labor, without advance notice or public comment as required under the Administrative Procedure Act, several times extended the deadline to its final date of December 30, 1980. See 44 Fed. Reg. 38,840 (1979) (extension to December 31, 1979); 45 Fed. Reg. 27 (1980) (extension to December 30, 1980), codified in 20 C.F.R. § 725.308(b)(1980). Some estimates place a $20,000 potential cost on each MBO claim.


significantly, to 10 percent or less, because “permanent” Part C regulations (20 C.F.R. Part 718, applicable to claims filed after March 31, 1980) were more restrictive and required better quality medical evidence than had the DOL version of the interim presumption in 20 C.F.R. Part 727.88

These circumstances presented only two painful legislative alternatives to cure the Trust Fund short-fall: attempting to remove many current beneficiaries from the approval rolls by a re-filing or review amendment or else increasing the tax. The former option was simply too politically inflammatory, and the strategy emerged in mid-1981 to go with a tax increase accompanied by substantially restrictive amendments applicable to future claims.

A. Path of legislation

The House Committee on Ways and Means reported H.R. 5159 to the floor on December 14, 1981. This bill contained the tax increase on underground and surface coal and a slight recodification of the original 1978 Trust Fund statute. The bill also switched receipts for penalty excise taxes (for self-dealing, improper expenditures, or excessive contributions) on operators’ I.R.C. section 510(c)(21) self-insurance trusts from general revenues to the Black Lung Disability Trust Fund. House Bill 5159 made no changes in the eligibility portion of the statute.

A separate black lung bill, S. 1922, which embodied the tax increase and the Reagan Administration’s prospective entitlement changes had been introduced on December 8, 1981 in the Senate. Hearings on S. 1922 were held on December 14, 1981 before the Labor Subcommittee of the Senate Labor and Human Resources Committee. The coal and insurance industries supported the DOL bill, despite the tax increase. The Edison Electric Institute, representing the nation’s investor-owned utilities, criticized the bill as not tough enough, but noted it would not be a last-minute obstructionist to consensus amendments. The EEI testimony lamented that its members—already in precarious straits because of high interest rates and state rate ceilings—would bear the brunt of the black lung tax increase because these utilities use 68 percent of the nation’s coal production and typically face cost-pass-on clauses in their coal contracts.89


89 Statement of P.L. Weber, executive vice president for government affairs, Edison Electric Institute, before Labor Subcommittee of the Senate Labor and Human Resources Committee, 97th
The United Mine Workers of America's position with respect to the DOL proposal was not to oppose it generally, but to call for improvements in the federal mine safety and health program, including more X-ray screening of surface miners. The UMWA also requested a re-opening of the 20 C.F.R. Part 718 regulations, which had substantially lowered the approval rate for recently-filed claims.\(^{100}\)

The House passed H.R. 5159 on December 15, 1981. When the House bill came to the Senate on December 16, 1981, the contents of S. 1922 were added as amendments. (The Senate amendments to H.R. 5159 included a separate, non-germane tax provision allowing Members of Congress three new and generous methods to compute living expenses incurred in connection with serving in Washington, D.C.\(^{101}\)) The Senate then passed H.R. 5159, as amended, by a vote of 63 to 30, with 7 not voting.

House Bill 5159, with the above Senate amendments, was passed by the House (363 to 47, 19 not voting, 4 voting present) on December 16, clearing the way for Presidential signature on December 29, 1981.

The accelerated path of this legislation means there are no committee reports on the "transfer provision" or the entitlement changes. The legislative history will thus consist of the hearing,\(^{102}\) the section-by-section explanations (prepared by the DOL) and sponsors' statements found in the Congressional Record.

B. Undoing the section 435 fiasco with the "transfer" remedy of the 1981 amendments

To actually reopen the pending and denied Part B and Part C claims for evaluation under the 1978 amendments (as implemented in 20 C.F.R. Part 727 (1982)), Congress employed a complicated set of options, or "elections", for claimants in section 15 of the Black Lung Benefits Reform Act of 1977, codified in section 435.\(^{103}\) These election procedures merit some comment, for they fostered a serious retroactive risk problem for federal black lung insurance carriers and self-insured operators. Congress would try to correct the problem in the 1981 amendments by "transferring" liability for several thousand claims with post-1970 coal mine employment to the Trust Fund.

In the 1978 version of section 435, Congress allowed Part B claimants who had been denied benefits the right to elect:

\(^{100}\) See supra note 90.

\(^{101}\) Wall Street Journal, May 11, 1982 at 1. The deduction is estimated as worth $30,000 a year or more per member. (Section 113 of Pub. L. No. 97-119, amending 26 U.S.C. § 280 A).

\(^{102}\) The Subcommittee on Oversight of the House Ways and Means Committee also held a hearing on the Trust Fund's deficit on September 28, 1981 but this was before the Department of Labor bill was made public. The Department of Labor did not participate at this hearing. A front-runner of the 1981 transfer provision was introduced in the 96th Congress as H.R. 7745 but did not emerge as an enacted bill. The legislative history of H.R. 7745 may be cited to explain the transfer provision in § 205 of the 1981 amendments.

(1) Review by SSA [section 435(a)(1)(A)] under the liberalizing 1978 amendments, based on the evidence in the SSA file; or
(2) Review by the DOL directly [section 435(a)(1)(B)], with an opportunity for the claimant to present additional medical or other evidence.

1. Reopened [section 435(a)(1)(A)] and approved [section 435(a)(2)(A)] Part B claims

The 1978 amendments did not authorize the SSA to pay reopened Part B claims which that agency had approved under section 435(a)(2)(A). The amendments instead required claims approved by SSA to be referred to the DOL for payment, where SSA's approval of the claim under section 435(a)(1)(A) was binding on the DOL. Under this format, 82,434 miners and survivors (out of 165,000 previously denied Part B claims) requested review by SSA, and another 36,104 chose direct review by DOL under section 435(a)(1)(B). A dispute immediately arose as to what the DOL was to do with the reopened [section 435(a)(1)(A)] and approved [section 435(a)(2)(A)] claims sent to the DOL by the SSA. The SSA and the DOL viewed the structure of section 435 as requiring the DOL to receive the section 435(a)(2)(A), SSA-approved claim and then, if post-1970 coal mine employment was present, assert the claim against the last responsible operator. The SSA notification letter sent to Part B claimants shortly after the 1978 amendments reflected this government view, as did SSA and DOL regulations promulgated several months later. If post-1970 coal mine employment were not present, DOL would immediately pay the section 435(a)(2)(A), SSA-approved claim from the Trust Fund.

Insurance carriers and self-insured coal operators argued that claimants who elected section 435(a)(1)(A) review and gained SSA approval under section 435(a)(2)(A) should be referred to the DOL, but that all claims so referred—even those with post-1970 coal mine employment—should be paid from the Trust Fund. The carriers and operators asserted that the language of section 435 mandated such a result. They further contended that premiums or reserves set prior to the 1978 amendments did not contemplate old Part B claims being asserted against the carriers/self-insureds under the liberal entitlement standards retroactively imposed by the 1978 amendments. Insurance coverage was denied in some cases.

The Benefits Review Board accepted the carriers' self-insureds' arguments on the fate of section 435(a)(2)(A), SSA-approved claims and directed the DOL to pay all such valid claims from the Trust Fund, including some 1,400

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106 The first litigation arising out of such denial of coverage was in Rockwood Ins. Co. v. Raglani Coal Co., C.A. No. 2054-1980 (Indiana Co., Pa., Common Pleas Ct.), appeal to Pa. Super. Ct. (No. 688-Pitts-1981) discontinued (Feb. 25, 1982). The Indiana County Common Pleas Court held in favor of the carrier, i.e., that a section 435(a)(2)(A) claim was not covered in the policy.
with post-1970 coal mine employment, *Yakubco v. Republic Steel Corp.* 107 The DOL appealed the issue to various courts of appeals, and the Third Circuit affirmed the BRB in a *per curiam* opinion in November 1981. 108 However, the Seventh 109 and then the Fourth 110 circuits later reversed the BRB in cases similar to *Yakubco* and ratified the DOL interpretation of section 435. The "Yakubco" pool of section 435(a)(1)(A)-(a)(2)(A) claims was the main target of insurance industry lobbying, and this class of claims has now been made a Trust Fund liability under the "transfer" provision of the 1981 amendments.

2. Section 435(a)(1)(B) claims

Aside from the *Yakubco* section 435(a)(1)(A)-(a)(2)(A) class, problems also accompanied part of the claims described in section 435(a)(1)(B)—those 36,104 denied Part B claimants who elected direct DOL review. Some 6,540 of these claims with post-1970 coal mine employment were asserted by the DOL against last responsible operators, rather than the Trust Fund. 111 Again, the carriers/self-insureds contended that they simply had not reserved for the risk of such a class of claims being asserted against them under the liberal entitlement standards specified by the 1978 amendments. This class of claims is also included in the "transfer" provision of the 1981 amendments.

3. Reopened Part C claims

The third class of claims which generated insurance coverage disputes were those Part C claims (without a Part B history) which were pending or denied (at the administrative level) at the time the 1978 amendments passed. Again, the carriers and self-insureds protested that they had counted on defending these claims under the then (pre-March 1, 1978) "permanent" Part C regulations in 20 C.F.R. Part 410, Subpart D (1972). The call in the 1978 amendments for reopening all pending and denied Part C claims for adjudication under the liberal standards (including the new DOL interim presumption promulgated in 20 C.F.R. section 727.203 (1982)) was a retroactively imposed, new risk the insurance companies allegedly had not bargained for. The largest carriers began denying coverage, pleading change of circumstances in the original insurance risk contract. 112


The 1981 "transfer" provision will move to the Trust Fund only those Part C responsible operator claims that were denied by an ALJ (DOL interpretation) or appellate tribunal prior to March 1, 1978, or abandoned by the claimant one year prior to March 1, 1978, (total estimated to number 2,200). The large remaining class of cases—Part C responsible operator claims that were only pending or awaiting ALJ hearing on March 1, 1978—will apparently not be transferred. The latter pool of claims is the subject of several of the denial of coverage cases, but savings recouped by the black lung carriers through other aspects of the transfer could prompt the insurance companies to rescind their denial of coverage. Of course, the carriers may wish to study their actuarial experience under the transfer amendment over a significant time, before making any decisions on these Part C claims.

The insurance coverage litigation which the "transfer" provision sought to ally, brought a rare glimpse into the high-stakes insurance pool that looms behind the nitty-gritty of black lung claims litigation. This insurance aspect of the federal black lung program took a dramatic turn in March 1982 when an insured coal operator in Kentucky filed a 124 million dollar suit in U.S. District Court in Louisville against Old Republic Insurance Co. and 11 other leading black lung insurers doing business in Kentucky. The complaint alleged that the defendants (in concert with workers' compensation insurance trade associations and reinsurance goals), by denying coverage in certain Part C claims and by other actions, conspired to violate the antitrust laws in a manner not exempted under the "business of insurance" rule of the McCarran-Ferguson Act. Also alleged were fraud, breach of fiduciary duty to the insured, and abuse of process through an earlier declaratory judgment suit against the plaintiff-coal operator on the 1978 amendments' insurance coverage issue. The case was settled.

The transfer legislation was a victory for the black lung insurance industry, and the amendment should clarify a difficult statutory question created by the 1978 amendments. However, the myriad possible classifications for a claim upon the enactment of the March 1, 1978 amendments made it exceedingly difficult to draft a finite transfer provision. In addition, many of the denied Part B and Part C claims that were reopened and approved under the March 1978 amendment were denied on the merits by ALJs (after operator/carrier controversy) during 1978-81; treatment of these claims by DOL is unclear. What is clear is that DOL will resist overly-broad interpretations of the transfer, to prevent too many claims from being dumped on the Trust Fund. Litigation seems inevitable in this area, and a volume of transfers exceeding the 10,200 total (actuarially worth 1.2 billion dollars or more) cited in the sparse legislative history could fuel a continued deficit of the Fund.


Elkhorn & Jellico Coal Co. v. Old Republic Ins. Co., No. C82-0151-L(A) (E.D. Ky. at Louisville, complaint filed March 5, 1982).

Id. (dismissed under Fed. R. Civ. P. 41, Sept. 3, 1982).
C. Deletion of three presumptions

Three of the statute's five presumptions are repealed by section 202 of the 1981 amendments. Deleted are:

(1) the section 411(c)(2) presumption\(^{118}\) (from the original 1969 statutes) which provided that if a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis;
(2) the section 411(c)(4) presumption\(^{118}\) (added in the 1972 amendments), which provided that a miner, employed fifteen or more years in underground coal mines (or nonunderground coal mines with conditions substantially similar to underground coal mines) and with a totally disabling respiratory or pulmonary impairment, shall be rebuttably presumed to be totally disabled from pneumoconiosis, and eligible for benefits; and,
(3) the 25-year presumption in section 411(c)(5),\(^{117}\) deletion effective 180 days after the January 1, 1982 enactment.

Remaining are the section 411(c)(1)\(^{118}\) presumption (pneumoconiosis presumed to have arisen out of coal mine employment if 10 or more years of such employment is proven) and the section 411(c)(3)\(^{110}\) presumption (irrebuttable presumption of eligibility upon a showing of medical evidence comporting with the X-ray or autopsy definition of complicated pneumoconiosis).

The withering of presumptions based on duration of employment ends probably the most controversial part of black lung litigation. The medical evidence behind the presumptions—incidence of black lung linked to various years of coal mine employment—was drawn from regularly employed underground workers who labored at the mine face.\(^{120}\) This concept was lost in the realities of black lung claims work and litigation, as often the key issue was whether the miner (or survivors) could establish a few more months of coal mine employment and thereby activate a presumption. Moreover, the 11 years of agency rule-making and tribunal decision-making in the black lung program never produced a definition of "year of employment." Armed with the workers' compensation axiom that doubts are resolved in favor of the employee,\(^{121}\) claimants' counsels had great success in getting benefits for retired miners with

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fragmented work records.

D. Death claims

The 1972 amendments allowed survivors to receive benefits not only if the miner died due to pneumoconiosis but also if he was disabled due to pneumoconiosis and then died from an unrelated cause. The 1981 legislation eliminates this "unrelated death" path to entitlement for survivors by striking the 1972 language allowing a survivor to receive benefits if the miner was totally disabled due to pneumoconiosis prior to death. The remaining language now directs that survivors are eligible for benefits if the miner's death "was due to pneumoconiosis." The legislative history states that a survivor will be compensated if:

complications of pneumoconiosis have caused a miner's death or where pneumoconiosis was a substantially contributing factor to that death. For example, pneumoconiosis may have been a substantially contributing cause of death in a case where the principal cause of death was pneumonia. Of course, survivors would not be eligible for benefits in those situations where death was caused by traumatic injury or an unrelated medical condition.123

The exact parameters of this change in the unrelated death rule and the import of the "substantially contributing cause of death" explanation in the legislative history cannot be gauged until the DOL regulations implementing the 1981 amendments are promulgated, in 1983.124 Even with those rules in place, litigation of future death claims, especially those with lung cancer or detailed autopsy evidence, will be necessary to clarify the issue. For these reasons, it is too early to conclude that the deletion of the unrelated death provision in the 1981 amendments aligns the federal statute with the more restrictive survivors' standards in some state black lung (occupational disease) statutes. Compare the lead opinion on "death resulting from" occupational disease under the Pennsylvania Workmen's Compensation Act, Elliot v. WCAB and Bethlehem Mines Corporation,125 requiring a finding that pneumoconiosis "in and of itself could have resulted in death."

Another important change with respect to survivors' claims is the prohibition on use of affidavits from persons eligible to share in the benefits ultimately awarded. This 1981 amendment rescinds the 1972 rule that invited affidavits on the miner's condition from the widow or members of the deceased miner's household.126

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E. X-ray evidence

As noted, the 1978 amendments severely limited the use of government-retained expert radiologists ("B-readers") by requiring acceptance, at least in Trust Fund cases, of a board-certified or board-eligible radiologist's positive diagnosis of pneumoconiosis, provided quality standards were met. The 1981 amendments delete this 1978 addition to section 413(b), apparently paving the way for government B-readers' rereading and, where appropriate, overruling local physicians' X-ray interpretations. Left intact is the 1972 prohibition on denying a claim solely on the basis of a negative X-ray.\(^\text{127}\)

F. Benefits

Future claims will now have a reduction by the amount by which such benefits would be reduced on account of excess earnings under section 203(b) through (l) of the Social Security Act.\(^\text{128}\) Formerly, Part C recipients could earn income, without penalty, in work not comparable to their last coal mine job. The 1981 amendments also change the rules for operator responsibility to pay past benefits upon completion of litigation of the case. Prior to the 1981 amendments, when administrative approval of the claim was answered by an employer request for a hearing, the DOL paid two sets of benefits from the Trust Fund: accrued (past) benefits from the filing date and prospective, monthly benefits from the administrative approval dates.\(^\text{129}\) After litigation was complete, the DOL was in one of two difficult positions, depending on the outcome of the case: trying to recover benefits paid to a claimant found by the courts to be ineligible or else collecting only 6 percent simple interest on the sum of benefits for which the employer/carrier was forced to reimburse the government trust in a court-approved claim. Under the 1981 legislation,\(^\text{130}\) the Trust Fund will pay only prospective benefits during litigation. However, when litigation is complete, the operator/carrier will be liable for interest on both the unpaid, prospective monthly benefits and the unpaid accrued (back) benefits.\(^\text{131}\) The interest will be set under section 6621 of the Internal Revenue Code, and the rate has varied in 1982 and 1983 from 13 to 18 percent.\(^\text{132}\)

XIII. Remaining Issues

Section 202(e) of the 1981 amendments mandates that the Secretaries of Health and Human Services and Labor undertake a medical study of black lung disease and make legislative recommendations by July 1983. In September 1982 the Franklin Research Center of the Franklin Institute in Philadel-

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\(^{128}\) 42 U.S.C. § 402(b) through (l).

\(^{129}\) The DOL decision to pay retroactive as well as prospective benefits was grounded in § 424, 30 U.S.C. § 934 (Supp. 1982).

\(^{130}\) Section 204 of 1981 amendments, referencing § 424(b)(5) of Black Lung Benefits Act.

\(^{131}\) Id.

\(^{132}\) Section 203(c) and section 104 of the 1981 amendments, and section 424(a)(5) of the Black Lung Benefits Act.
Philadelphia, Pennsylvania, was awarded the first phase medical study contract. Issues for the study are the statute's definitions and diagnostic advances with respect to pneumoconiosis and total disability. The special health consequences of cigarette smoking in coal miners may also be considered. The Secretaries of Health and Human Services and Labor are expected to issue the final medical report by August 1983.

Another possible topic for the required study is the definition of "miner," especially in terms of the extension of the statute's coverage to surface miners in 1972 and transportation and coal mine construction workers in 1978. The incidence of pneumoconiosis among those workers has never been shown to be significant. A government study of 1,438 Eastern surface miners (conducted after coverage was extended to such miners) showed that only 59 (4 percent) had roentgenographic evidence of pneumoconiosis, and of those 59, only seven had degrees beyond the first of three stages of simple pneumoconiosis. These seven had an average term of 17 years of surface mining preceded by an average of 14 years underground work. Of the 1,171 surface miners who had never worked underground, only 2.5 percent showed X-ray evidence of pneumoconiosis.

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134 Section 203(c) of the 1981 amendments also directed the Secretary of Labor to undertake a study of all benefits received by federal black lung recipients.
135 Section 3(a) of 1972 amendments, Pub. L. No. 92-303.
136 Section 2(b) of the March 1978 amendments, Pub. L. No. 95-239.
137 Section 3 of 1972 amendments, Pub. L. No. 92-303. Indeed, the legislative history of the 1972 extension of black lung coverage to surface mines acknowledged the dearth of medical evidence that pneumoconiosis was prevalent among surface miners:
Existing law limits the program to underground miners. This means that those who have worked exclusively in surface mines — the strip miners — are presently ineligible for program benefits. This would be reasonable if it were positively ascertainable that strip miners cannot be afflicted with pneumoconiosis — but the fact of the matter is that there is no evidence that those who work only in surface mines may not contract this disabling disease.
It would seem reasonable to assume that those strip miners who have worked in extremely dusty conditions — at the tipple, for example — for long periods of time, would be subject to conditions similar to those which result in the development of black lung among underground miners. Under the current law, the miners who have worked their entire adult lives at above ground facilities of an underground coal mine are eligible for benefits if they are totally disabled by coal miner's pneumoconiosis but those who may have worked their entire adult lives at even dustier above ground facilities of surface mines are not eligible, even if they have complicated pneumoconiosis. This is grossly unfair and was not intended by the legislation passed by the Senate in 1969. . . . Where the possibility of the disease exists, a miner should not be denied the benefits of the black lung program because of circumstance — simply because he has always worked above the ground rather than below it.

Legislative History, supra note 21.
moconiosis. Today, some 59 percent of coal production and 33 percent of employment are associated with surface mines.

Advances in dust control in the nation's mines should also be considered by the medical study. By 1980, more than 75 percent of all underground mines were in compliance with the upper limit of 2.0 milligrams of respirable dust per cubic meter set by section 202(b) of the 1969 statute. Where a random sampling of cutting machine operators in 1969 had shown a 5.9 milligram environment in 1968-69, a follow up sampling in 1980 showed a 1.1 milligram figure. Also, a July 1981 National Institute for Occupational Safety and Health (NIOSH) statement reported that overall dust levels in United States mines averaged less than 1.5 milligrams per cubic meter. The NIOSH statement predicted that simple pneumoconiosis and the two diseases allegedly associated with it, chronic bronchitis and airways obstruction, will decline in future years because of this dust abatement.

The 1969 medical evidence presented to Congress assumed that the pneumoconiosis problem would not be significant in a less-than-2.0 milligram respirable dust environment. The most recent NIOSH statistics from the National Coal Workers' Health Surveillance Program sustain the 1969 thinking that advances in dust control will virtually eliminate pneumoconiosis. Of 39,483 coal workers working only since the dust control law was enacted in 1969, only 433 (less than 2 percent) had pneumoconiosis and only 2 of the 433 exhibited symptoms of the complicated stage.

The overall thrust of the program toward retired employees may also be a focus of additional black lung amendments. There is widespread questioning of payment of workers' compensation benefits—which are supposed to make up for wages lost from injury or disease—to fully retired workers who are not seeking to return to mining and who prefer retirement. Indeed, the average age of DOL living miner beneficiaries as of December 1979 was 67.4. The standard ALJ hearing involves a retired claimant in his or her sixties, but the lawyers, judges and doctors must debate whether the individual is able to return to his last coal mine job or a comparable nonmining position.

On the organizational side, some have called for independent trustees or

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139 Fairview, Respiratory Status of Surface Coal Miners in the United States, Archives of Environmental Health Sept. - Oct. 1977 at 211.
141 Mine Safety and Health Administration, U.S. Dep't of Labor, Annual Report and Achievements Fiscal Year 1980.
142 Id.
144 Id.
145 Testimony of Surgeon General Stewart, supra note 120.
146 1981 NIOSH Statement, supra note 143 at 32.
for statutory appointment of independent counsel for the Trust Fund. This point is of continuing concern because even in 1981 and 1982, some 56 percent of new Part C claims show coal mining employment ending before 1970. These claims are solely the responsibility of the Trust Fund, meaning no carrier or coal operator is involved. Under present law, a claims examiner's approval of a Trust Fund claim rarely, if ever, sees additional review. Independent counsel for the Fund would provide another layer of defense to an unfounded Trust Fund payment for the lifetime of the miner or survivor.

The Trust Fund is presently represented by the DOL Office of the Solicitor (SOL), but questions have arisen whether the organization of the SOL permits these government lawyers to be truly zealous in denying claims. The same SOL lawyers oppose claimants in "federal denials" and then argue in favor of different claimants' entitlement in cases where the Deputy Commissioner has approved the claim and is tendering section 424 "interim payments" to the miner/survivor from the Trust Fund during litigation of the claim. Conflicts of interest on medical questions and what issues to appeal inevitably arise, as they would for any law firm that represents, by the thousands, both plaintiffs and defendants under a single statute. (The concept of Special Counsel for the Trust Fund would also have to address the contradiction of opposing federal denials and supporting interim benefit recipients.)

The SOL ability to maintain consistent positions is also hampered by the sheer volume of black lung litigation. Nearly 10,000 ALJ hearings were held in 1982, throughout the country (at the convenience of retired claimants) but primarily in the remote coal fields. Moreover, until 1982, the SOL had the strategic advantage of conducting all black lung trial and appellate litigation through its Employee Benefits Division in Washington. Starting in 1982, trial work was parcellated out to SOL Regional Offices. With each black lung claim worth 100,000 dollars or more, the stakes in effectively organizing the legal effort are high.148

**XIV. Conclusion**

Those who make predictions about the federal black lung program have a poor track record, as seen by the claims and payment experiences after the

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148 Black lung litigation in 1983 consists mainly of hundreds of Office of Administrative Law Judges and Benefits Review Board adjudications under the 20 C.F.R. Part 727 regulations. (No constitutional challenge to the liberal "interim" presumptions in 20 C.F.R. § 727.203 has yet been successful.) Claims filed between March 31, 1980 and December 31, 1982 will be adjudicated under 20 C.F.R. Part 718, and claims filed after January 1, 1982 will be judged under revisions to 20 C.F.R. Part 718 necessary to implement the December 1981 amendments. (These revisions have been delayed until 1983.) The March 31, 1980 - December 31, 1981 and post-Jan. 1, 1982 sets of claims have not yet reached the Office of Administrative Law Judges or Benefit Review Board in significant numbers. However, litigation of these two classes of claims will likely produce a smaller number of hearings and appeals than the case load under 20 C.F.R. Part 727. This result is anticipated because DOL application of the restrictive regulations governing these two classes of claims will result in fewer approvals at the administrative level, in turn causing more claimants to abandon their cases and permitting defendant carriers or responsible operators to request fewer hearings.
1969, 1972, and 1978 legislation. One safe projection is that the next year of black lung activity will be most exciting, with the unfolding of a new statute, a new implementing regulation, and the medical study. Given the significance of the program in its own right as well as its implications for other state and federal occupational disease statutes, the legal and medical issues embedded in the federal black lung scheme will continue to merit the attention of lawyers and legislators.