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COUNSELING THE COAL MINER SUFFERING FROM RESPIRATORY DISEASE

GAIL FALK*

INTRODUCTION

The coal miner who seeks legal assistance with his black lung claim frequently needs more than just an advocate. The task of the lawyer who represents coal miners suffering from respiratory disease is perhaps unparalleled in the extent to which the function of "counselor" pervades the lawyer's responsibilities. The laws which provide remedies or benefits to coal workers with respiratory problems are so fragmented and complex that the miner attempting to identify and evaluate his economic alternatives often needs sophisticated advice.

A discussion of the political and economic forces which have caused this fragmentation and complexity is not within the scope of this article, nor is a discussion of the nature of coal workers' pneumoconiosis (CWP), which develops insidiously and is difficult to diagnose through the use of objective medical evidence, at least prior to death.¹

Nevertheless, there is no longer any substantial medical debate as to the proposition that continuing exposure to coal mine dust will aggravate any breathing disease of a coal miner, regardless of whether it has an occupational origin.² The coal miner who suffers from a respiratory disease faces a variety of


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¹ The incapacitating effects of black lung are pain and breathlessness; each, a symptom with subjective qualities. Evading objective analysis, the diagnosis of this disease becomes subject to the controversy and disagreement characterized by this symposium.

difficult questions of an economic nature, each of which is modified by numerous legal considerations.

For example, the miner must decide with respect to work, whether he should retire, seek employment in another industry, transfer to a less dusty section of the mine, or remain employed in his present job. If the miner suffering from respiratory disease determines that he can or should not work, how can the continuity of his benefits be ensured in the face of the inherently long delays in benefit claim processing and appeals? Given the various benefit programs (Social Security disability and retirement, black lung, workmen’s compensation, pension and insurance benefits), and their offsets among one another, how can the miner maximize his income? How can he provide for the medical needs of himself and his family? What choices will provide the best economic security for his family after his death?

Many lawyers who are willing to "handle black lung claims" shy away from advising their clients on these questions, and thus do not provide the client with complete representation. This occurs for several reasons: first, the answers to these questions require an active knowledge of the rules and practices of several administrative agencies, which, sensitive as they are to the winds of political influence, change often. Second, the answers to these questions do not lend themselves to generalization and hence require detailed knowledge of the individual miner’s circumstances. For example, the coal miner’s counselor should be aware of the miner’s dependents and their ages, the extent of the miner’s savings, the nature of his coal mine work, his employment alternatives, the nature of his disease and his attitudes toward it. Additionally, intelligent answers to these pressing economic questions facing a disabled miner must take into account the current economic status of the coal industry. For example, are coal operators seeking experienced workers and therefore willing to accommodate the health problems of older miners, or is it a layoff period when the miner will be fortunate just to retain his present employment?

Finally, in some quarters, there is an opprobrium associated with helping disabled coal miners to maximize their economic options, an opprobrium which carries with it overtones of welfare Cadillacs and unbalanced budgets. The premise of this article is that this opprobrium is misplaced; it is no more improper
for attorneys to assist coal miners in negotiating government regulations in such a way as to maximize their income and security than it is for the corporate lawyer or trust lawyer to advise wealthy clients about the same matters. Just as the tax lawyer would be considered unfit if he were familiar with just one tax, so too the attorney who advises coal miners on benefits claims without comprehending the spectrum of benefit programs is providing incomplete representation. This article is intended to familiarize the practicing attorney with the technical knowledge necessary to be a true counselor to the client suffering from respiratory disease.

I. THE MAJOR BENEFIT PROGRAMS—AN OVERVIEW

The practitioner must have a working knowledge of the major remedial programs to analyze the interrelationships between them.

A. State Workmen's Compensation

State workmen's compensation laws are creatures of state statute and are administered on a state level. Generically speaking, they provide cash benefits and reimbursement for medical costs for diseases and injuries that arise from on-the-job conditions. They may pay the costs of training a disabled miner for other gainful employment. They also pay funeral benefits and benefits to surviving dependents of workers who die from a work-connected illness or accident. State workmen’s compensation laws date generally from the beginning decades of the twentieth century. West Virginia's, first enacted in 1913, undergoes nearly yearly amendment as labor and management line up for their annual tug of war on the political ropes.

Major amendments to West Virginia's workmen's compensation law in 1969 expanded the law to include broad coverage of

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2 West Virginia's Workmen's Compensation law is the only state compensation law examined in this article. It exemplifies the workmen's compensation laws of other coal producing states, but is not identical to the law of any other state. Practitioners in other states should therefore carefully consult their own state law. Workmen's compensation claims of coal miners who have moved out of the state where they worked must be filed in the state of their employment and are governed by that state's laws.

3 West Virginia's Workmen's Compensation laws constitute W. VA. CODE §§ 23-1-1 to 23-6-1 (1978 Replacement Vol.).
coal miners suffering from respiratory diseases. For example, compensation is available for "occupational pneumoconiosis," defined as "a disease of the lungs caused by the inhalation of minute particles of dust over a period of time due to causes and conditions arising out of and in the course of employment."⁵

Workers found to be partially disabled receive compensation computed on the basis of four weeks' compensation for each percent of disability determined.⁶ For instance, a miner who is adjudged twenty percent disabled by pneumoconiosis would receive eighty weeks' compensation. A worker found to be totally disabled by an occupationally related disease or injury receives monthly benefits for the rest of his life.⁷ If a disease or injury is adjudged eighty-five percent disabling, or if the percentage of disabilities caused by two or more partial disabilities adds up to eighty-five percent or more, the worker is considered totally disabled and receives lifetime total disability benefits.⁸

Weekly compensation benefits for occupational pneumoconiosis victims are limited in two very important respects. First, the maximum amount of benefits payable to occupational pneumoconiosis victims is an amount equal to seventy percent of the average weekly earnings of the worker at the time of his last work exposure to coal dust.⁹ Second, both total disability and survivors' benefits are limited to an amount equaling the average weekly wage of all workers in West Virginia.¹⁰ Since coal miners' wages significantly exceed the state's average weekly wage, the state average often provides an initially inequitable ceiling upon those benefits payable to recently retired miners. Rather than being compensated based upon the individual's past earnings, most recently retired miners simply receive the max-

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⁵ W. VA. CODE § 23-4-1 (1978 Replacement Vol.).
⁶ W. VA. CODE § 23-4-6(e) (1978 Replacement Vol.).
⁷ W. VA. CODE § 23-4-6(d) (1978 Replacement Vol.).
⁸ Id.
⁹ In the case of injury claims, benefits equal two-thirds of earnings on the date of injury. If it results in higher benefits, the average weekly earning may be considered the pay received two, six, or twelve months before the date of last exposure or injury. See W. VA. CODE § 23-4-6(b) (1978 Replacement Vol.).
¹⁰ W. VA. CODE § 23-4-6(b) (1978 Replacement Vol.). Partial disability benefits are limited to two-thirds of the average weekly wage in West Virginia. W. VA. CODE § 23-4-6(d) (1978 Replacement Vol.).
However, inflation causes the state average weekly wage to increase each year. This in turn causes the disabled miner's benefits to increase and provides the equivalent of a cost-of-living escalator until that point when the state average weekly wage catches up with the individual miner's earnings. At that point when the state average weekly wage equals seventy percent of the miner's earnings at the time of his last exposure or injury, his benefits become fixed, no longer increasing annually.\(^\text{12}\)

### B. Federal Black Lung Benefits

Federal black lung benefits are monthly cash payments to miners and dependents of miners found to be totally disabled by pneumoconiosis, and to survivors of miners who died from pneumoconiosis or were totally disabled by it when they died.

The federal black lung program was established by Title IV of Federal Coal Mine Health and Safety Act of 1969.\(^\text{13}\) The program was extensively revised by the Black Lung Benefits Act of 1972\(^\text{14}\) and the Black Lung Benefits Reform Act of 1977.\(^\text{15}\)

The federal black lung program does not expressly provide compensation for partial disability,\(^\text{16}\) nor do benefits vary in accordance with the miner's past earnings. Benefits are increased,

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\(^\text{11}\) The maximum permanent and temporary total disability benefits based on the state average weekly wage from July 1, 1979 to July 1, 1980 were $237.00 per week. The maximum weekly benefit for calculating partial disability benefits was $158.00. From July 1, 1980 to July 1, 1981, the maximum permanent and temporary total disability benefits are $262.00 per week, and maximum partial disability benefits are $174.92.

\(^\text{12}\) Except that benefits will not drop below one-third of the average weekly wage in West Virginia. W. VA. CODE § 23-4-6(b) (1978 Replacement Vol.).


however, on the basis of family size.\textsuperscript{17} Cost of living increases are provided by linking the amount of black lung benefits to federal civil service pay rates. For example, the basic black lung benefit for a disabled miner with no dependents is fifty percent of the minimum monthly pay of a GS-2 federal employee.\textsuperscript{18}

For the purposes of this article, it is necessary to distinguish Part B black lung benefits from Part C black lung benefits (there is no such thing as a Part A benefit). Part B benefits are those paid to miners and survivors who filed claims before July 1, 1973, when the program was administered by the Social Security Administration. All Part B benefits are paid from the United States Treasury and continue to be administered by Social Security. Part C benefits are those paid to miners and survivors who filed claims after June 30, 1973.\textsuperscript{19} These claims are administered by the Department of Labor. Part C claims are paid either by the responsible coal operator or from the assets of the Black Lung Disability Trust Fund. Part C benefits include, in addition to cash payments, coverage for medical expenses resulting from the miner’s pneumoconiosis or a related health problem.\textsuperscript{20}

\textsuperscript{17} 30 U.S.C. § 922(a)(4) (1976), provides that "In the case of an individual entitled to benefit payments under clause (1) or clause (2) of this subsection who has one or more dependents, the benefit payments shall be increased at the rate of 50 per centum of such benefit payments if such individual has one dependent, 75 per centum if such individual has two dependents, and 100 per centum if such individual has three or more dependents."

\textsuperscript{18} 30 U.S.C. § 922(a)(1) (1976); 30 U.S.C. § 932(d) (1976). Basic black lung benefits for the past three years are as follows:

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<tr>
<th></th>
<th>miner or widow</th>
<th>miner or widow</th>
<th>miner or widow with one dependent</th>
<th>miner or widow with 2 dependents</th>
<th>miner or widow with 3 or more dependents</th>
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<tr>
<td>Oct. 1, 1980-Sept. 30, 1980</td>
<td>$279.80</td>
<td>$419.60</td>
<td>$489.60</td>
<td>$559.50</td>
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<tr>
<td>Oct. 1, 1979-Sept. 30, 1979</td>
<td>254.00</td>
<td>381.00</td>
<td>444.50</td>
<td>508.00</td>
<td></td>
</tr>
<tr>
<td>Oct. 1, 1978-Sept. 30, 1978</td>
<td>232.00</td>
<td>348.00</td>
<td>405.90</td>
<td>463.90</td>
<td></td>
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\textsuperscript{19} Technically, claims filed between July 1, 1973, and December 31, 1973, are "transition period" claims governed by 30 U.S.C. § 415 (1970). For the purposes of this article, however, such claims may be considered Part C claims.

Previously denied claims reviewed pursuant to section 435 of the Black Lung Benefits Reform Act of 1977 are hybrids of Part B and Part C, and are subject to the rules for Part C claims, regardless of application date.\(^{21}\)

**C. Social Security Disability**

Workers who become totally disabled before they reach retirement age qualify for Social Security disability benefits. The amount of monthly Social Security disability benefits is calculated by a complex formula based upon the worker's earnings.\(^{22}\) The amount is ordinarily equal to that amount the worker would have received if he had retired at age sixty-two. Benefits are augmented for both dependent children and the disabled worker's spouse. After being eligible for Social Security disability benefits for two years, the disabled worker is eligible for a Medicare card for himself but not for the other members of his family.

**D. Social Security Retirement**

A worker becomes eligible for full Social Security retirement benefits at age sixty-five. The worker may choose to take "early retirement" at age sixty-two, or between the ages of sixty-two and sixty-five. If he chooses early retirement, his monthly benefit is reduced below what it would have been had he waited until age sixty-five to draw benefits. The amount of reduction is calculated by multiplying by 1/180 the number of months between the month the worker retired and the month he would reach age sixty-five. For example, if a worker retired eighteen months prior to reaching age sixty-five, his monthly check would be ten percent less \((1/180 \times 18 \text{ months})\) than it would have been had he waited to age sixty-five to retire. A person who has been receiving disability benefits will be converted automatically to Social Security retirement benefits at age sixty-five. As with disability payments, retirement benefits are increased if the retired worker has a dependent spouse or children. Workers who receive Social Security retirement benefits also qualify for a Medicare card.

E. Contract Benefits

Workers covered by the National Bituminous Coal Wage Agreement qualify for several benefits which are important elements of the total benefit picture.22

Sickness and Accident Benefits pay $150.00 per week for up to a year when the miner is off work because of sickness or accident.23 These benefits may provide economic security through a transition period while the worker is waiting to qualify for more permanent benefits, such as workmen's compensation or federal black lung.

Pensions paid under the 1974 Pension Plan to workers who left the mines after December 6, 1974 are based on age and length of service.24 Miners can start to draw pensions at age fifty-five, though the monthly amount of the pension increases for every year the pension is deferred up to age sixty-two. Monthly pension payments under the 1978 contract range from $94.80 for a miner who retired in 1976 at age fifty-five with ten years' credited signatory service to $570.00 for a miner who retired after March 27, 1978, at age sixty-two with forty years' credited signatory service. There is no disability pension for a miner who becomes disabled by black lung; the disability pension only compensates miners who become totally disabled because of a mine accident. A miner who is forced to retire because of black lung before age fifty-five may collect a pension once he reaches age fifty-five. To qualify for a retirement pension, a miner must have at least ten years of employment by a signatory to the National Bituminous Coal Wage Agreement, but periods when the worker received or could have received Sickness and Accident benefits will count. Periods of time after 1974 when the miner was off work and receiving workmen's com-

22 National Bituminous Coal Wage Agreement of 1978, art. xi. Benefits are available for twenty-six weeks to employees who have worked five to ten years for the coal company, for thirty-nine weeks to employees who have worked for the employer for ten to fifteen years, and for fifty-two weeks to miners who have worked more than fifteen years for the employer. At the time this article was written, the 1981 Agreement was in the negotiation stage. The reader should update this discussion with figures from the new Agreement, when it becomes available.

24 Persons who retired from classified employment before that date are covered by the 1950 Pension and Benefit Trust. Its rules are somewhat different from those governing the 1974 Plan and are not examined in this article.
penetration or black lung benefits are not credited toward a pension.

II. Health-Preserving Measures for the Miner Who Remains on the Job

A threshold question faced by miners with respiratory disease is whether to remain in the mines, seek work in another industry, or attempt to qualify for disability benefits. The answer to this question must be an individual one based upon the miner's financial responsibilities, current job assignment, potential for altered job assignment, attitude toward work, attitude toward handicaps, pain threshold, extent of savings, age, skills, and degree of physical impairment.

Most miners realize that continuing dust exposure will aggravate their respiratory disease. Many, however, are not adequately informed as to the available alternatives which might permit them to decrease their dust exposure while continuing to work in the mines.

As an initial measure, the miner who wishes to remain on the job may invoke the dust control requirements of the Federal Mine Safety and Health Act. That law requires that the average concentration of respirable dust in the active workings of a coal mine be maintained at or below two milligrams per cubic meter of air (2 mg./m$^3$). To ensure compliance with this standard, periodic dust sampling is required on all working sections. The dust samples must be submitted to the Mine Safety and Health Administration (MSHA) for analysis. Coal mine operators are required to post MSHA's report of the results of the dust samples. The coal miner who is concerned about his dust environment should be encouraged to investigate the results of dust sampling on his section. If the results show excessive dust, he should monitor the operator's efforts to bring dust levels down to legal limits. If he believes the dust sample results are inaccurate, he should contact MSHA for a special inspection.

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For miners with early stage respiratory disease, the right to transfer to a less dusty job is a significant option. Miners with medical evidence of pneumoconiosis have a right to transfer, with no initial loss in pay, to a job in the mines where the respirable dust levels do not exceed one milligram per cubic meter of air (1 mg./m³). This right takes precedence over contractual seniority rights, as recognized in the National Bituminous Coal Wage Agreement. A miner contemplating transfer to a less dusty job, however, should be advised to consult the posted dust sample results for his present position. If the dust levels on the job where he is presently working have been measured at 1 mg./m³ or less, he will not be entitled to a transfer unless he can establish through additional sampling that the dust levels on his job actually exceed 1 mg./m³. Most importantly, the miner contemplating transfer should also be informed that the right to transfer without an initial loss in pay does not include a right to future wage increases he would have had if he had remained in his old job.

Miners sometimes hesitate to exercise safety or transfer rights because of concern that the coal company will discriminate or take reprisal action against them for seeking to enforce

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27 30 U.S.C. § 843(b) (1976). At the present time a miner must have X-ray evidence of pneumoconiosis to qualify for the statutory right to transfer. 44 Fed. Reg. 23,085 (1979) (to be codified in 42 C.F.R. § 37.7). Some commentators have argued that miners whose lung function tests demonstrate reduced breathing capacity should also have the right to transfer. See e.g., comments of Dr. Wagner and Cabin Creek Health Association, 44 Fed. Reg. 23,085 (1979). The law does not give miners the right to transfer to a less strenuous job, except to the extent that such a right may be construed from The Rehabilitation Act of 1973, Pub. L. No. 93-112 § 503, 87 Stat. 355; see note 35, infra. In fact, the less dusty job may be more strenuous.

28 art. xii, § (i)(10). A miner who has received notice from the National Institute of Occupational Safety and Health (NIOSH) that his medical evidence entitles him to work in a less dusty job is termed a "letter holder." If two or more letter holders request transfer to the same less dusty job, the job must be awarded to the senior letter holder.

29 For instructions about how to exercise the right to transfer to a less dusty job, see McAteer, supra note 26, at 126.

30 See text accompanying note 25, supra.

legal guarantees or because they have pneumoconiosis. While the possibility of reprisal should not be minimized by the attorney as he counsels the client, the miner should be informed that there are several specific legal guarantees protecting him against discriminatory actions. Title IV of the Federal Coal Mine Health and Safety Act, makes it illegal for a coal operator to "discharge or in any way discriminate against any miner employed by him by reason of the fact that such miner is suffering from pneumoconiosis." It should be noted that this section protects only working miners and would not protect against later discrimination if the miner left the mines and then sought to be reemployed. However, the Federal Mine Safety and Health Act contains a general prohibition against discharging or discriminating against a miner or applicant for employment because the miner is eligible for, or has attempted in the past to exercise, safety or transfer rights. West Virginia law prohibits coal companies from discriminating against any present or former employees for receiving or attempting to receive state workmen's compensation benefits. Finally, companies which have federal contracts (i.e., most major coal companies) are banned from discriminating against handicapped workers.

III. EMPLOYMENT, EARNINGS, AND BENEFIT ELIGIBILITY

People who draw disability benefits tend to be unduly worried that any work activity on their part will cause the termination of their benefits. One of the counselor's functions is to advise the beneficiary of the ways in which work will affect his benefits. There are two major questions to address when consid-

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22 30 U.S.C. § 938(c) (1976). A miner who complains of discrimination and prevails is entitled to affirmative relief, back pay, and all costs and expenses (including attorney fees).
33 30 U.S.C. § 815(c) (Supp. II 1978) implicitly prohibits discrimination against miners who have applied for or received federal black lung benefits.
The relationship between work and continued eligibility. The first question is whether the disabled miner’s work will disqualify him from receiving benefits; the second is whether the disabled miner’s earnings will be subtracted from his benefits in the event the employment does not disqualify him altogether. The answers to these questions, as described below, vary according to the benefits program being considered.

A. Part B Benefits

Part B black lung benefits are reduced by earnings of a miner from any source. The general formula is that a miner’s benefits are reduced by one-dollar for every two-dollars of earnings in excess of the annual earnings exemption. Because of the earnings offset, the questions of whether a miner’s continuing coal mine work will disqualify him for Part B black lung benefits has most commonly arisen in the context of deciding whether a currently working miner is initially eligible for benefits. As with most legal questions, the answer is, “it depends.” Miners with complicated pneumoconiosis are irrebuttable presumed to be totally disabled, and hence qualify for benefits regardless of the work they are doing. Working miners who lack evidence that their pneumoconiosis has progressed to the complicated stage have ordinarily been declared ineligible for Part B benefits, although a raft of litigation on this question has established some significant exceptions. A miner who is working at a job outside the mining industry is not disqualified by that work unless the work is comparably strenuous to his previous coal mine work. Miners who are not working at the time their ap-

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37 42 U.S.C. § 403(f)(3) (Supp. II 1978). The exempt amount goes up every year as the result of the formula based on national wages. In 1981, $4,080.00 ($340.00 per month) in earnings is exempt from offset.
38 Even though a working miner will not receive regular Part B benefits because of the earnings offset, it may still be advantageous for him to qualify for benefits in order to qualify to receive benefits for months when he is on strike, on layoff, or ill; and in order to assure his survivors' eligibility in case of his death.
40 See Stephens & Hollon, supra note 39.
41 20 C.F.R. § 410.412(a) (1980), states that “A miner shall be considered totally disabled due to pneumoconiosis if: (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring skills
plication is approved have an obligation to notify Social Security if they return to work.\textsuperscript{42} Social Security has the authority to disqualify the miner if he demonstrates renewed capacity to work, although, as a practical matter, this rarely occurs.

\textbf{B. Part C Benefits}

Part C benefits are not reduced by a disabled miner's current earnings.\textsuperscript{44} Thus, if possible, it is advantageous for a miner or former miner who has any earnings, or who contemplates earnings in the future, to establish eligibility under this program. This is a major distinction between the Part B and Part C programs. A miner with complicated pneumoconiosis can establish entitlement to Part C benefits even while working.\textsuperscript{45} For miners with simple, rather than complicated pneumoconiosis, regular and satisfactory performance of the miner's usual coal mine work does preclude a finding of eligibility.\textsuperscript{46} The Benefits Review Board and numerous courts have held that continued coal mine employment does not \textit{per se} preclude a finding of eligibility. However, only in widows' cases have the exceptions been etched into law. In such cases, evidence showing that the deceased miner worked intermittently,\textsuperscript{47} or his work was of the "make-shift" variety\textsuperscript{48} may be used to permit a finding that a working miner was totally disabled when he died.\textsuperscript{49} As a practical matter, it is virtually impossible for any miner, except one suffering

\textsuperscript{42} 20 C.F.R. § 410.476 (1980).
\textsuperscript{43} 20 C.F.R. § 410.432 (1980).
\textsuperscript{44} Gaul v. Bethlehem Mines Corp., [1978] 9 BRBS (M-B) 245, BRB No. 77-580 BLA; Fisher v. Bethlehem Mines Corp., [1978] 7 BRBS (M-B) 914, BRB No. 77-151 BLA. In Fisher, the Board found that unlike Part B claims "there is no statutory provision in Part C for an offset against Black Lung benefit amounts due to receipt of unemployment compensation or on account of excess earnings." Fisher, \textit{id.} at 917.
\textsuperscript{46} See, \textit{e.g.}, Williamson v. U.S. Steel Corp., [1979] 10 BRBS (M-B) 755, BRB No. 76-512 BLA.
\textsuperscript{47} Marsella v. Starvaggi Industries, Inc., [1979] 10 BRBS (M-B) 279, BRB No. 76-189 BLA.
\textsuperscript{49} See 30 U.S.C. § 902(f)(1)(B) (Supp. II 1978); \textit{see also} Felthager v. Weinberger, 529 F.2d 130 (10th Cir. 1976).
from complicated pneumoconiosis, to qualify for Part C benefits while still working regularly in the mines.

A former miner who works at a non-mining job, where the work required of him is less arduous than his previous coal mine work, can draw full Part C black lung benefits and also full earnings from his new job. However, a former miner who is working at a job outside the coal industry will be disqualified by that work if it is shown to be "gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a period of time."50 The test is three pronged. One must first determine whether the work is gainful,51 second, whether the work is available in the immediate area of the worker's residence,52 and third, whether the work requires skills and abilities comparable to those required by the miner's previous coal mine work. "Comparable" means work involving comparable levels of physical exertion.53

C. Other Benefits

Social Security retirement benefits are reduced on the same basis as Part B black lung benefits: one-dollar for every two-dollars of earnings above the annual earnings exemption.64 In 1981, a worker age sixty-two to sixty-five had an earnings offset against Social Security retirement benefits for earnings over $4,080 per year, and a worker age sixty-five to seventy-two had an offset for earnings of over $5,500. Workers over age seventy-

51 See Young v. Harper Valley Coal Co., [1979] 10 BRBS (M-B) 127, 133, BRB No. 77-358 BLA, where the Board held that part time uncompensated work on a family farm was not comparable if not performed in the area of the miner's residence.
52 Id., in Young, the Court implied that work, even though actually performed by the miner, would not be considered comparable if not performed in the area of the miner's residence.
53 Light construction work was held to be not comparable in Viehwig v. Freeman United Coal Mining Co., [1978] 8 BRBS (M-B) 901, BRB No. 77-145 BLA. Whether the job of custodian at a college is comparable would depend upon the frequency and duration of heavy physical activity. Sebben v. Director, OWCP, [1979] 10 BRBS (M-B) 136, BRB No. 77-861 BLA. Work as a millright was held comparable to coal mine employment in Miller v. U.S. Steel Corp., [1978] 7 BRBS (M-B) 568, BRB No. 77-107 BLA.
two (seventy starting in 1982) have no earnings offset regardless of what they earn.\textsuperscript{55}

Social Security disability recipients do not have an earnings offset, but they will be disqualified if they demonstrate significant earning capacity. Earnings over $300 a month will ordinarily be considered to demonstrate capacity to perform gainful work and will result in disqualification.\textsuperscript{56} Earnings between $190 a month and $300 a month may result in disqualification, depending upon the circumstances.\textsuperscript{57} A recipient may work for a nine-month trial work period and receive full wages and benefits, but if he demonstrates his ability to work for nine months, he will ordinarily be disqualified thereafter.\textsuperscript{58}

West Virginia workmen's compensation benefits are not reduced because of earnings. It is common for workers to draw partial disability benefits while working. Earnings from work at a job outside the coal industry are not considered inconsistent with total disability benefits, and under certain circumstances, a miner might draw total disability benefits and continue working in the mines.

Sickness and Accident Benefits, provided by the National Bituminous Coal Wage Agreement, are suspended by any employment.\textsuperscript{60} Pensions are not paid until the miner ceases coal mine work and are suspended if the miner returns to work in the bituminous coal industry, but they are not affected by employment outside the industry.\textsuperscript{51}

IV. OFFSETS AMONG BENEFITS

The concept behind benefit offsets is a straightforward one—disabled or retired persons should not be able to aggregate benefits in such a way as to be better off by staying home

\textsuperscript{57} Id.
\textsuperscript{59} Id.
\textsuperscript{60} National Bituminous Coal Wage Agreement of 1978, art. xi.
\textsuperscript{62} UMWA HEALTH AND RETIREMENT FUNDS, 1974 PENSION PLAN SUMMARY PLAN DESCRIPTION, at 15.
than they would have been had they continued to work. In practice, however, the operation of the offset rules is complicated.

The intricacies of the laws relating to offsets among various benefit programs reflects and results from the complexity of the benefit programs for coal miners.

Because of both the variable eligibility rules among the benefit programs and also the irrationalities in the claims determination process, miners and their dependents often qualify for differing “mixes” of benefits. One miner may qualify for Social Security disability but not federal black lung benefits or workmen’s compensation. Another may qualify for workmen’s compensation, but be found ineligible for all other benefits. As a result, rules designed to correct the inequities inherent in any one situation, often produce inequities in alternate situations.

In West Virginia, workmen’s compensation benefits are paid in full regardless of other benefit payments for which the beneficiary might qualify.

Federal black lung benefits under Part B and Part C are reduced dollar for dollar by state workmen’s compensation benefits paid for disability “due to pneumoconiosis.” A widow or other surviving dependent who receives Part B black lung benefits is not subjected to a reduction of those benefits for the simultaneous receipt of state workmen’s compensation benefits based upon the death of a miner due to pneumoconiosis. A widow or other surviving dependent who receives Part C black lung benefits, on the other hand, will experience a dollar-for-dollar offset of state workmen’s compensation benefits received because a miner was found to have died from pneumoconiosis. There is no apparent justification, let alone an explanation, for this discrepancy.

If a miner receives total disability workmen’s compensation benefits from a state based upon a combination of pneumoconiosis and other diseases or injuries, only that proportion of the workmen’s compensation check which is attributable to pneumo-

\[\text{West Virginia Law Review, Vol. 83, Iss. 4 [1981], Art. 8}\]

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coniosis will be subtracted from black lung benefits. For example:

Miner W receives $400 per month in state workmen's compensation payments for total disability. His award is based upon 20% disability from pneumoconiosis and 65% disability from a back injury. Twenty-six and two-thirds percent (25/85ths) of his monthly compensation would be attributable to pneumoconiosis. Thus $106.40 would be subtracted from his monthly black lung check.

Federal black lung benefits are not reduced because the miner receives Social Security benefits. However, both Part C black lung and state workmen's compensation benefits may be subtracted from Social Security disability benefits (but not from Social Security retirement benefits). For any worker under age sixty-two who receives Social Security disability benefits, the total of his Social Security, state workmen's compensation, and Part C black lung benefits cannot exceed eighty percent of his average monthly earnings before he became disabled.\(^4\)

Particular caution is needed in the timing of state workmen's compensation benefits based on pneumoconiosis because of the possibility of a "double offset." State workmen's compensation benefits paid for pneumoconiosis are subtracted dollar-for-dollar from federal black lung benefits and they may again be subtracted from Social Security disability benefits. In such a case, the miner receiving state workmen's compensation payment may, because of this double offset, receive less total payments than if he had not received an award of state workmen's compensation benefits.\(^5\)

Timing is essential in minimizing the impact of the double offset possibility posed by the miner's receipt of benefits. Both the Social Security Administration and the Department of

\(^4\) In making this computation all Social Security benefits paid to the disabled worker and his dependents are considered. There are several methods for computing average monthly earnings. For workers who retired after 1972, the most favorable outcome will usually result from computing one-twelfth of the miner's highest annual income in the five years preceding his retirement.

\(^5\) The double offset was challenged on constitutional grounds with inconclusive results. Freeman v. Califano, 574 F.2d 264 (5th Cir. 1978). Other challenges to the Social Security offset rules have been unavailing. Richardson v. Belcher, 404 U.S. 78 (1971); Lofty v. Richardson, 440 F.2d 1144 (6th Cir. 1971), cert. denied 404 U.S. 985 (1971). See cases cited at ¶ 12,445.035 UNEMPL. INS. REP. (CCH).
Labor have adopted rules which require the offsetting of state workmen's compensation benefits against federal black lung benefits only when they are received for the same month in which federal benefits are paid. Thus, miners can maximize their combined state and federal benefits by applying for state workmen's compensation benefits while they are still working. Here is an example:

At age forty-five, miner X is told by his doctor that he shows signs of the development of pneumoconiosis. He continues to work, but applies for state workmen's compensation benefits. Two years later, at age forty-seven, he receives an award for 20% disability. He continues to work, and at age fifty reopens his claim. Two years later he receives an additional 10% award. The next month he retires and applies for federal black lung benefits. He will probably not qualify for any more state workmen's compensation benefits, but he will not experience any reduction of federal black lung benefits as he would have had he waited and filed his state and federal claims simultaneously upon retirement, and he will not have to worry about the possible double offset.

Sickness and Accident Benefits, made available by the UMWA/BCOA collective bargaining contract, are reduced dollar-for-dollar by any state workmen's compensation, black lung, or Social Security benefits. Effective with the 1978 Contract, UMWA pensions are not reduced by black lung benefits, nor are they reduced because of state workmen's compensation or Social Security benefits.

V. TAXES

Part B federal black lung benefits are not considered income for the purposes of federal income taxation. The Black Lung Benefits Act does not address the issue of whether Part C benefits are considered income, but they would appear to come within the Internal Revenue Code's exclusion from gross income of amounts received under workmen's compensation laws. State

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64 20 C.F.R. § 410.520(b) (1980); 20 C.F.R. § 725.535 (1980).
65 National Bituminous Coal Wage Agreement of 1978, art. xi.
66 Id. at art. xx.
68 26 U.S.C. § 104(a)(1) (1976); 26 C.F.R. § 1.104-1 (1980). However, if the worker claimed deductions for medical expenses in years past, any monies he received which compensated him for those medical expenses would be considered income.
workmen's compensation benefits are excluded from income by virtue of the same law.\textsuperscript{71}

In contrast, pension benefit payments are taxable income if the pension is awarded based upon the retiree's age and length of service, as are UMWA pensions. These payments are taxable, even if the worker retired because of an occupational illness.\textsuperscript{72} A permanently disabled worker can claim an exclusion of up to $100 per week for pension benefits he claimed before he reached full retirement age.

Payments under accident and health insurance policies for sickness must be reported as income if they derive from an employer-funded policy, as do the UMWA's Sickness and Accident Benefits.\textsuperscript{73} However, seventy-five dollars a week can be excluded from income during the first thirty days of an employee's absence from work, and one-hundred dollars a week can be excluded thereafter for the duration of payments under the accident and health plan.\textsuperscript{74}

Survivors of a deceased miner do not have to pay taxes on amounts they receive from state workmen's compensation or the federal black lung program.\textsuperscript{75} Death benefits of up to $5,000, paid to survivors through the UMWA Health and Retirement Funds, are not considered taxable income.\textsuperscript{76} Proceeds from life insurance policies not funded by the employer are subject to an unlimited exclusion from gross income.\textsuperscript{77}

\section*{VI. Benefits for Survivors}

A deceased miner's estate may consist largely of the entitlements to benefits he leaves to his survivors. By establishing his own eligibility for certain benefits, a miner can assure benefits for his surviving dependents.\textsuperscript{78} The assurance of these benefits will usually be far more valuable to them than the savings of

\begin{itemize}
\item \textsuperscript{71} 26 C.F.R. § 1.104-1 (1980).
\item \textsuperscript{72} 26 C.F.R. § 1.104-1(b) (1980).
\item \textsuperscript{73} National Bituminous Coal Wage Agreement of 1978, art. xi.
\item \textsuperscript{74} 26 U.S.C. § 105 (Supp. II 1978); 26 C.F.R. § 1.105-1 (1980).
\item \textsuperscript{75} 26 C.F.R. § 1.104-1(b) (1980).
\item \textsuperscript{76} 26 U.S.C. § 101(b) (1976); 26 C.F.R. § 1.101-2 (1980).
\item \textsuperscript{77} 26 U.S.C. § 101(a) (1976); 26 C.F.R. § 1.101-1 (1980).
\item \textsuperscript{78} For the purposes of the federal black lung program, "surviving dependents" may include the widow (including a surviving divorced wife), children (including adult children who become disabled before age eighteen), and dependent parents, brothers, or sisters. 30 U.S.C. § 922(a)(5) (Supp. II 1978).
\end{itemize}
possessions most working people can manage to accumulate. In helping the miner plan for effective post death support of his dependents, a counselor should advise the miner of the possible benefits with a view towards survivor eligibility.

A case in point is federal black lung benefits. Because of the operation of workmen's compensation or earnings offsets, the miner may get little current benefit from qualifying for black lung benefits. Nevertheless, if he has dependents, he may still be well advised to pursue an application to establish entitlement because surviving dependents of miners who were totally disabled by black lung at the time of their death qualify for continuing benefits.79 If the miner's entitlement has already been established, no independent adjudication of the underlying medical issues is required after the miner dies.80

In contrast, payments of state workmen's compensation benefits to a disabled worker cease in the month of the worker's death.81 Survivors can qualify for benefits only by establishing in an independent claim that the worker died from a work-related disease or injury.82 Sickness and Accident Benefits are also payable only to the worker during his lifetime.

Social Security benefits are paid to survivors of workers covered by Social Security without regard to whether the worker was drawing benefits when he died. Widows, widowers, surviving divorced wives, children, and dependent parents may qualify as survivors of a worker who was insured by Social Security when he died.83

The surviving spouse of a miner who was eligible for a regular pension when he died will qualify for a pension equal to
fifty percent of the pension the miner was receiving or was eligible to receive when he died. The surviving spouse of a miner who was receiving a disability pension can also receive a pension equal to fifty percent of the amount the miner was receiving at his death, but the surviving spouse of a miner who collected a deferred vested pension (less than twenty years) cannot draw a pension. These pension benefits are in addition to the $2,500 lump sum death benefit payed to surviving dependents of all pensioners and the $12,000 life insurance benefit payable to the named beneficiary of a working miner.

CONCLUSION

The method by which attorneys who represent coal miners have traditionally been paid, based upon a benefits award, has encouraged them to develop expertise in establishing eligibility and to neglect other important legal and economic issues collateral to the establishment of eligibility.

This article focused upon aspects of benefits eligibility other than entitlement which should become familiar to the attorney who advises coal miners suffering from respiratory disease. The article is not intended as a complete review of all available benefits. Certain benefits for which miners may qualify, such as food stamps, unemployment compensation, Veteran's benefits, and Railroad Retirement benefits, have not been reviewed. It may, however, serve as an initial resource for the attorney who wishes to provide his coal miner clients with the information they need to take best advantage of the laws and regulations, which are intended for their benefit.

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84 National Bituminous Coal Wage Agreement of 1978, art. xx. The surviving spouse will receive the pension until death. The surviving spouse is also eligible for a Health Services card, but must forfeit this upon remarriage. The surviving spouse of a pensioner who left classified employment before December 6, 1974, does not receive a pension, but may receive health benefits until her death or remarriage.

85 National Bituminous Coal Wage Agreement of 1978, art. xx. If the miner dies "due solely to violent, external, and accidental means," the life insurance benefit is $24,000.

86 See TABLE 1 at the end of this article, summarizing the various benefit and offset principles discussed herein.
### TABLE 1

<table>
<thead>
<tr>
<th>Earnings Offset</th>
<th>Part B Black Lung</th>
<th>Part C Black Lung</th>
<th>Workmen's Compensation</th>
<th>Social Security Disability</th>
<th>Social Security Retirement</th>
<th>Sickness and Accident</th>
<th>Pension</th>
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<td>Offset for Federal Black Lung Benefits</td>
<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Offset for Workmen's Compensation Paid for Pneumoconiosis</td>
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<td>Yes</td>
<td>--</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Offset for Workmen's Compensation Not Paid for Pneumoconiosis</td>
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<td>No</td>
<td>--</td>
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<td>No</td>
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<tr>
<td>Medical Benefits Included</td>
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<td>Yes</td>
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<tr>
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<td>No</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Benefits Augmented for Dependents</td>
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<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
</tr>
</tbody>
</table>

1. Offset for Part C Black Lung benefits, but not Part C benefits.
2. Medical benefits only for pneumoconiosis and related health problems.
3. Medical benefits only for costs arising from work-connected illness or injury.
4. Medicare eligibility effective two years after date of eligibility.
5. Not eligible for pension while working in the coal industry, but earnings in other employment not subtracted.