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A CRITICAL ANALYSIS OF THE LEGISLATIVE HISTORY SURROUNDING THE BLACK LUNG INTERIM PRESUMPTION AND A SURVEY OF ITS UNRESOLVED ISSUES

MARK E. SOLOMONS*

INTRODUCTION

With the possible exception of the Internal Revenue Service, the Social Security Administration is the agency of the United States government which has the most significant impact on the lives of working people and their families. Most persons must turn to this government agency for aid when severe illness, disability, or old age becomes a reality in their lives. It seemed, therefore, altogether proper that the United States Congress would employ the experience and resources of the Social Security Administration when, in 1969, a decision was


Mr. Solomons served as Counsel to the Department of Labor's coal mine workers' compensation program from 1973 to 1978. As such, he was heavily involved in the drafting of both the 1977-78 Black Lung Amendments and the Labor Department's regulations in the black lung area. From 1978 until his association with Kilcullen & Kilcullen, Mr. Solomons was the Department of Labor's Legislative Counsel.

1 The Social Security Administration or "SSA," as it will be referred to herein at times, was established by the Act of August 14, 1934, ch. 531, 49 Stat. 620, 42 U.S.C. §§ 301-1347, as amended from time to time. It is organizationally placed within the United States Department of Health and Human Services (formerly the Department of Health, Education, and Welfare) and is subject to the direction and control of the Secretary of Health and Human Services.

2 Among other things, the Agency administers: (1) the payment of monthly benefits to insured persons who are totally disabled for work or who have reached the requisite age to qualify for old age benefits (Title II of the Social Security Act), (2) supplemental security income benefits for the aged, blind, and disabled (Title XVI of the Act), (3) broad health care insurance programs for the aged, disabled, and needy families with dependent children (Titles IV and XVIII of the Social Security Act) and, (4) grants to states for financial aid and services to needy families with dependent children (Title IV of the Social Security Act).
made to remedy the perceived failure of the states\textsuperscript{3} to provide adequate workers' compensation coverage for those coal miners who had become totally disabled, and for the survivors of those miners who had died, due to Coal Workers' Pneumoconiosis (CWP).

Title IV of the Federal Coal Mine Health and Safety Act of 1969,\textsuperscript{4} which came into being only two days before enactment of the statute, embodied this congressional choice and in so doing established a two part approach\textsuperscript{5} toward the compensation of CWP, or as it is commonly referred to, black lung.

The black lung benefits provisions contained within Title IV were extensively amended by the Black Lung Benefits Act of 1972.\textsuperscript{6} These amendments were deemed necessary by Congress in view of the Social Security Administration's high rate of


\textsuperscript{5} As enacted, the 1969 Act provided lifetime federal benefits for those suffering total disability or death due to pneumoconiosis provided that the claim for benefits was filed between December 31, 1969 and December 31, 1972. 30 U.S.C. § 924 (1970). Claims were to be filed during this period with, and processed and paid by, the Secretary of Health, Education and Welfare through the Social Security Administration. 30 U.S.C. §§ 921-24 (1970). Claims filed on or after January 1, 1973, were to be filed by the claimant under his state's worker's compensation law if that law was approved by the Secretary of Labor, or if no state law existed in the state in which the miner was employed, the claim was to be filed with and processed by the Secretary of Labor and paid by the miner's coal mine employer pursuant to criteria established by the Secretary of Labor. 30 U.S.C. §§ 931-36 (1970). If no coal mine employer could be identified due to insolvency, bankruptcy, or similar events, the Secretary of Labor was authorized to pay approved claims from federal funds. 30 U.S.C. § 934 (1970). Claims filed on or after January 1, 1973 were to be adjudicated pursuant to procedures incorporated (30 U.S.C. § 932 (1970)) from the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-52 (Supp. II 1978), a federally administered and employer-financed workers' compensation law for employees engaged in certain maritime trades. The employer-financed portion of the program was set to expire on December 30, 1976. 30 U.S.C. § 932(e)(3) (1970).

\textsuperscript{6} 30 U.S.C. §§ 901-36 (1976). The 1972 amendments were primarily intended to liberalize the eligibility criteria, expand its coverage, and extend the time period during which it was expected that this temporary federal effort would run its course.
claims denial, which many in Congress felt was due to an overly restrictive and conservative interpretation of the 1969 Act's eligibility criteria.\textsuperscript{7}

In both the 1969 Act and the 1972 amendments, the Social Security Administration was vested with exclusive authority to devise and promulgate medical standards and evaluatory criteria for determining the presence or absence of totally disabling pneumoconiosis for both its part of the program and that of the Department of Labor as well.\textsuperscript{8} This grant of authority presented those in the Social Security Administration with a difficult mission. Not only did they have to devise a way to liberalize the medical criteria, thus improving upon a claims approval rate of almost 50\%,\textsuperscript{9} but they had to avoid making these new standards cumbersome in their application, so that the congressional desire for a rapid review of tens of thousands of previously denied claims could be realized.

SSA's proposed means of achieving these objectives were embodied in what has come to be known as the "interim presumption" or "interim standards."\textsuperscript{10} This regulation was made


\textsuperscript{10} 20 C.F.R. § 410.490 (1980). The text of the SSA presumption in full is as follows:

\textsuperscript{7} 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) Basis for rules. In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such in-
term evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) Interim Presumption. With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

<table>
<thead>
<tr>
<th>FEV₁ and MVV</th>
<th>2.3 92</th>
</tr>
</thead>
<tbody>
<tr>
<td>67'' or less</td>
<td></td>
</tr>
<tr>
<td>68''</td>
<td>2.4 96</td>
</tr>
<tr>
<td>69''</td>
<td></td>
</tr>
<tr>
<td>70''</td>
<td>2.5 100</td>
</tr>
<tr>
<td>71''</td>
<td>2.6 104</td>
</tr>
<tr>
<td>72''</td>
<td>2.6 104</td>
</tr>
<tr>
<td>73'' or more; and</td>
<td>2.7 108</td>
</tr>
</tbody>
</table>

(2) The impairment established in accordance with subparagraph (1) of this paragraph arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) Rebuttal of presumption. The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated),
applicable only to claims subject to review or adjudication by SSA.¹¹

Beginning on July 1, 1973 and during the period in which claims were filed with, and adjudicated by, the Department of Labor, it became increasingly apparent to both the Congress and groups representing the interests of claimants that the Department of Labor's claims approval rate was significantly below that of the Social Security Administration.¹² The inapplicability of the interim presumption to Department of Labor claims was, at a very early date,¹³ recognized as perhaps the most significant factor accounting for this approval rate disparity.¹⁴ Accordingly, beginning in 1973, each time the Congress attempted to significantly amend the black lung benefits provision of the Act, the application of the interim presumption to Department of Labor claims was considered.¹⁵

²⁰ C.F.R. § 410.490(b) (1980).
²² Id.

¹¹ Prior to the adoption of the 1977 amendments, the Department of Labor's overall claims approval rate hovered between 8-9% of the total number of claims filed. UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS COMPENSATION PROGRAMS TASK FORCE REPORT—BLACK LUNG BENEFITS PROGRAM 68 (1977) [hereinafter cited as OWCP TASK FORCE REPORT].
When the Black Lung Benefits Reform Act of 1977 came under serious consideration by the Congress, the House, but not the Senate version contained provisions requiring the Department of Labor to apply the interim standards to most, if not all claims, adjudicated by that agency. The version finally agreed upon by the conference committee retained a provision making the interim presumption applicable to many, but not all Labor Department claims, however, this result was not obtained without heated debate among the committeemen. Under the amended section 402(f)(2) of the Act, the Secretary of Labor was authorized to design and publish, in consultation with the National Institute of Occupational Safety and Health, his own new medical and evidentiary criteria for determining total disability or death due to pneumoconiosis. In addition, the Secretary of Labor was directed to ensure that all claims, including those previously denied or pending claims which were subject to re-review under the 1977 Act, filed prior to the adoption of the new standards, would be adjudicated under criteria "no more restrictive" than the interim presumption adopted by the Social Security Administration. Congress did not require the Department of Labor to adopt the verbatim language of the SSA provision, but instead sought to ensure that the approach ultimately adopted by the Department of Labor would erase the perceived inequity of judging the validity of Part B (SSA) and Part C (Labor) claims by significantly different criteria.

[Footnotes]

18 Id.
19 In addition, all claims for medical benefits, filed only with the Department of Labor under § 11 of the Act, by a miner already receiving monthly benefits from the SSA were to be adjudicated under the interim presumption. H.R. REP. No. 864, 95th Cong., 1st Sess. (1977), reprinted in BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, COMMITTEE ON EDUCATION AND LABOR 890 (1979) [hereinafter cited as 1977 Legislative History]. The Department of Labor's regulations implementing section 11 provide that these types of claims will be automatically approved without further review of the evidence by the Labor Department. 20 C.F.R. § 725.701(A)(b)(2) (1979). The legality of this regulation, among other things, was challenged in National Coal Association v. Marshall et al., No. 80-2321 (D.D.C., filed Sept. 12, 1980).
The Department of Labor proposed to adopt an expanded and revised version of the SSA's interim presumption for application in the prescribed Department of Labor claims, and despite some debate, the proposal was adopted without change by the Department of Labor.

2 20 C.F.R. § 727.203 (1980). The full text of the Department of Labor interim presumption is as follows:

(a) Establishing interim presumption. A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

<table>
<thead>
<tr>
<th>FEV₁</th>
<th>MVV</th>
</tr>
</thead>
<tbody>
<tr>
<td>67&quot; or less</td>
<td>2.3</td>
</tr>
<tr>
<td>68&quot;</td>
<td>2.4</td>
</tr>
<tr>
<td>69&quot;</td>
<td>2.4</td>
</tr>
<tr>
<td>70&quot;</td>
<td>2.5</td>
</tr>
<tr>
<td>71&quot;</td>
<td>2.6</td>
</tr>
<tr>
<td>72&quot;</td>
<td>2.6</td>
</tr>
<tr>
<td>73&quot; or more</td>
<td>2.7</td>
</tr>
</tbody>
</table>

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

<table>
<thead>
<tr>
<th>Arterial pCO₂</th>
<th>Arterial pO₂ equal to or less than (mm. Hg.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 or below</td>
<td>.70</td>
</tr>
<tr>
<td>31</td>
<td>.69</td>
</tr>
<tr>
<td>32</td>
<td>.68</td>
</tr>
<tr>
<td>33</td>
<td>.67</td>
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<tr>
<td>34</td>
<td>.66</td>
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<td>.64</td>
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<td>37</td>
<td>.63</td>
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<tr>
<td>38</td>
<td>.62</td>
</tr>
<tr>
<td>39</td>
<td>.61</td>
</tr>
<tr>
<td>40-45</td>
<td>.60</td>
</tr>
<tr>
<td>Above 45</td>
<td>Any value</td>
</tr>
</tbody>
</table>
Although early cost estimates prepared by the Congressional Budget Office did not anticipate a significant increase in program costs due to the application of the interim presumption to the Department of Labor claims, it is very likely that its application, in an atmosphere of intense political pressure from a few powerful members of Congress, has been largely responsible for the soaring benefit costs being generated by the program, and the inadequacy of either the Black Lung Disability Trust Fund, existing operator insurance or self-insurance arrangements to meet the needs generated by the increased claims approval rate.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) Rebuttal of interim presumption. In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) Applicability of Part 718. Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) Failure of miner to qualify under the presumption in paragraph (a) of this section. Where eligibility is not established under this section, such eligibility may be established under part 718 of this subchapter as amended from time to time.


25 Id. The Black Lung Disability Trust Fund was established by section 3 of the Black Lung Benefits Reform Act of 1977, 30 U.S.C. § 934(a) (Supp. II 1978), for the purpose of paying benefits due under the Black Lung Benefits Act, 30 U.S.C. §§ 901-962 (1976 & Supp. II 1978), with respect to the total disability or death of a miner who last worked as a miner prior to January 1, 1970, and in those cases where no individually liable coal operator may be found.
This article will explore and evaluate the history and origins of the interim presumption and then focus upon some of the most significant legal questions which have arisen in connection with the application of the presumption by Department of Labor adjudicators in claims involving the potential liability of coal mine operators and their insurance carriers. Part I examines the history of the SSA version of the presumption and the movement to gain the application of the presumption to Labor Department claims is described in detail. Part II examines the evolution of the Labor Department version of the interim presumption and Part III focuses on the litigation under both versions, and in addition, the pending issues regarding the Labor Department's application of the presumption are identified and evaluated. The article concludes in Part IV with a discussion of what the interim presumption has accomplished and what role it is likely to play in future efforts to reform occupational disease compensation for a broader spectrum of workers.

I. THE HISTORY OF THE INTERIM PRESUMPTION PRIOR TO THE 1977 BLACK LUNG AMENDMENTS

A. The Development of the Interim Presumption by the Social Security Administration

One initial concern expressed by those evaluating the early application of the black lung benefits provisions was the lack of adequate facilities for conducting the blood gas or exercise tolerance test. Since this test is the one best calculated to detect and evaluate a coal mine dust related impairment, the infrequency of its use in connection with the SSA's consideration of claims was particularly disturbing.

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26 This test measures the ability of the lungs to transfer oxygen to the blood stream and can detect impairment in this physiological function by comparing levels of oxygen and carbon dioxide in arterial blood against derived normal values. See Lapp, A Lawyer's Medical Guide to Black Lung Litigation, 83 W. VA. L. Rev. 721, text accompanying n.45. See also Kremer, Pulmonary Hemodynamics in Coal Workers' Pneumoconiosis, 200 ANN. NEW YORK ACAD. SCI. 413 (1972); Rasmussen, Patterns of Physiological Impairment in Coal Workers' Pneumoconiosis, 200 ANN. NEW YORK ACAD. SCI. 455 (1972).

Because of Congress' concern over the medical tests used by SSA in claims determinations, the Senate Report on the 1972 amendments to the Act noted the infrequent use of blood gas testing and encouraged SSA and the Public Health Service to expedite the creation of additional facilities to perform this sort of testing in coal mining areas. The report noted, however, that:

[The] backlog of claims which have been filed . . . cannot await the establishment of new facilities or the development of new medical procedures. They must be handled under present circumstances in the light of limited medical resources and techniques.

Accordingly, the Committee expects the Secretary [HEW] to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of these amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claim [sic] on the basis of medical evidence other than breathing tests when it is not practicable to provide physical performance tests of the type described [in the HEW Annual Report].

Nothing more was noted in the House or Conference Committee Reports or in the floor debates on the 1972 amendments regarding interim rules and eligibility criteria. The point was not raised or discussed by witnesses or members in either the House or Senate committee hearings and, although there does not appear to be any official record, it is fairly apparent that the statement in the Senate Report was conceived by Senate staff and HEW officials as a convenient mechanism to permit the adoption of temporary rules to expedite the approval of a much larger number of claims. It is certain that HEW and SSA of-

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30 This conclusion is, of course, the author's best educated guess. Certain SSA officials who were involved on behalf of that Agency in the development of the 1972 amendments were contacted by this author and asked for an interview. While the officials contacted expressed a willingness to relate their knowledge of the events leading up to the adoption of the interim presumption, legal counsel for the Agency precluded any detailed discussion of the pertinent history.
ficials were acutely aware of this fairly brief and general statement, and even though no authority to promulgate temporary or special standards ever found its way into the 1972 amendments, the first set of regulations promulgated by SSA to implement the amended Act contained the new "interim adjudicatory rules."

Paragraph (a) of the rules cited both the need to expedite the processing of the Agency's backlog and the general unavailability of exercise tolerance testing facilities as reasons for the creation of the interim rules. Paragraph (b) then set forth the interim presumption. It provided that a SSA black lung claimant would be presumed totally disabled due to pneumoconiosis if either (1) a chest X-ray, biopsy, or autopsy established the presence of pneumoconiosis or (2) if the miner had been employed in underground or comparable mining employment for fifteen or more years and pulmonary function studies demonstrated a one second forced expiratory volume (FEV$_1$) and maximal voluntary ventilation (MVV or MBC) equal to or less than specified values and, if the detected impairment arose out of the claimant's coal mine employment. The presumption could be rebutted under paragraph (c) of the regulation if the miner was actually performing his regular coal mine work or comparable work, or if the other evidence, including physical performance tests, demonstrated that the miner was able to perform these tasks.

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31 20 C.F.R. § 410.490(a) (1980).
33 The FEV$_1$ measures in liters the volume of air which can be forcibly expelled from the lungs after maximum effort over a period of one second. A deviation from normal may show increased resistance to air flow in the patient's respiratory system. Normal values are derived in consideration of the age, height, and body surface area of the patient. See, Lapp, A Lawyer's Medical Guide To Black Lung Litigation, 83 W. VA. L. REV. 721, 737 (1981).
34 The MVV or MBC measures, in liters, the total volume of air expelled over a period of one minute during repetitive maximal respiratory effort. Test results are highly sensitive to patient effort and normal values are derived in consideration of the age, height, and body surface area of the patient. See Gaenslor & Wright, Evaluation of Respiratory Impairment, 12 ARCH. ENVTL HEALTH 146 (1966) [hereinafter cited as Gaensler & Wright].
37 20 C.F.R. § 410.490(c) (1980).
The rebuttal provisions are definitional. Except in the case of a working miner, they do not provide substantive standards for rebuttal, but instead, refer the adjudicator to those portions of the permanent SSA medical eligibility regulations which more fully set out the standards to be applied in determining whether particular evidence demonstrates the presence or absence of a totally disabling respiratory or pulmonary impairment arising out of coal mine employment.  

The presumption is extremely easy to invoke and by its terms permits an inference of critical facts which are not, medically speaking, justified by the invoking evidence. For example, it is well accepted that a chest radiograph showing early stage simple pneumoconiosis does not demonstrate a disabling respiratory impairment. Yet, under the presumption, a totally disabling impairment is presumed from this evidence alone.

An examination of the qualifying pulmonary function values yields an even more interesting result. It is universally accepted that both the ageing process dramatically affects pulmonary mechanics and that normal values for both the FEV₁ and MVV will decrease gradually, but significantly, as a person grows older. However, despite the apparent consensus on this principle, the qualifying values of the interim presumption are not graduated depending upon the age of the claimant. By ignoring the age factor, the drafters of the SSA interim presumption created a dangerously liberal eligibility standard which, while it may detect impairment in a forty to fifty year old miner, permits a presumption of a totally disabling respiratory or pulmonary impairment in a sixty to seventy year old miner whose pulmonary mechanics are essentially normal. Although this statement may
seem outrageous to those who have confidence in the integrity of federal regulations, it is fairly easy to prove.43

An examination of several studies44 which derive normals for the FEV$_1$ and MVV measurements confirm the generalizations made by Dr. Herbert Blumenfeld45 and Dr. Harold I. Passes46 to the extent that few if any doctors would find a noteworthy respiratory or pulmonary impairment in an individual whose FEV$_1$ and MVV scores equal the minimum qualifying values set forth in the SSA interim presumption.47 These minimum qualifying values, in the case of a miner over age sixty, are generally from 80% to 100% or more of the predicted normal for such individuals.48 In fact, values within 80% of predicted normal are considered to be "within normal limits" and would neither cause inordinate concern on the part of a patient's physician nor be considered indicative of a serious respiratory impairment.49 The pulmonary function standards, which after extensive hearings were published by the Department of Labor50 for application to claims not subject to the interim presumption, adopt values which are 60% of predicted normal.51 However, in the discussion accompanying the published values, it is noted that many of the

43 Kory, supra note 41, at 252.
44 See, e.g., Ericsson & Irnell, Spirometric Studies of Ventilatory Capacity in Elderly People, 185 ACTA MEDICA SCANDINAVICA 179 (1969); Morris, Koski, & Johnson, Spirometric Standards for Healthy Non-Smoking Adults, 103 AM. REV. RESP. DIS. 57 (1971); Ferris, Anderson, & Zickmantel, Prediction Values for Screening Tests of Pulmonary Function, 91 AM. REV. RESP. DIS. 252 (1969). Normal values reported tend to be highest if smokers are screened from the testing group. The Kory sampling does not exclude smokers.
45 Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA.
46 Former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA.
48 See Kory, supra note 41.
50 See IN THE MATTER OF: PROPOSED REVISIONS OF 20 C.F.R. § 718, STANDARDS FOR DETERMINING COAL MINERS TOTAL DISABILITY OR DEATH DUE TO PNEUMOCONIOSIS (1978).
medical authorities who testified considered the 60% figure to be too high and not demonstrative of total disability.\textsuperscript{62}

It should not, therefore, be surprising that Dr. Passes, in his testimony before the House Labor Subcommittee stated:

"I[It should be stressed that the interim criteria, by themselves, were extremely liberal and were not based on substantial medical evidence that the criteria chosen were, in fact equal to a disabling impairment. They did include many values, including pulmonary function standards, which were entirely normal and which would be read by at least 95 percent of all physicians who were knowledgeable of the values presented as normal values.\textsuperscript{53}\n
Nor is it difficult to explain why Dr. Kory, in commenting on the Department of Labor's version of the interim presumption, wrote in a June 25, 1978 letter to the Department of Labor:

It is difficult for me to understand how any honest, knowledgeable, responsible scientific physician could be a party to such unscientific and invalid standards, no matter how compassionate their intent.

It would, therefore, seem proper that those physicians and scientists who participate in the authorship of such proposed standards be listed by name as authors. This would help insure more careful attention to scientific detail, since such individuals would not wish to be regarded by their peers as "sloppy scientists." The authors should also be available to the scientific community for clarification and justification of their proposals.\textsuperscript{54}

Although the Social Security Administration would not comment on the point,\textsuperscript{55} Dr. Passes, in his 1977 testimony to the

\textsuperscript{52} 45 Fed. Reg. 13,711 (1980). However, it is noted that while comments and testimony recommended standards from 40% to 60% of predicted pulmonary capacity without consensus on any given figure, substantial expert support for the 60% standard, coupled with legitimate doubts as to the accuracy of a stricter standard, prompted retention of the originally proposed 60% standard in the tables.

\textsuperscript{53} 1977 House Hearings, supra note 42, at 274-75.

\textsuperscript{54} Letter from Ross C. Kory, M.D., Professor of Medicine, University of South Florida College of Medicine, and Medical Director, Respiratory Services, Tampa General Hospital, to Robert B. Dorsey U.S. Department of Labor (June 25, 1978) in response to the Notice of Proposed Rulemaking contained in 43 Fed. Reg. 17,732-17,765 (1978).

\textsuperscript{55} See note 30 supra.
House Committee, testified that the interim presumption was never given official approval by the SSA's Chief Medical Officer or any member of his staff. Instead, the criteria contained within the presumption were designed and authored "for expediency" by the Agency's Director and Legal Counsel.58

There is little additional information on the public record indicating the possible motivation for the development of the interim presumption by the SSA. Very little fanfare accompanied its original publication and after a short public comment period in September 1972, the final version contained neither a discussion of the public comments nor an explanation of the Department of HEW's reasoning in adopting the interim presumption.

All that can be derived from reading the presumption and studying the accompanying legislative history is that the need to expedite the processing and review of the SSA's backlog of claims, coupled with the scarcity of exercise tolerance testing facilities, formed the official agency justification for the provision adopted.57 This does not, of course, explain why medical standards of questionable validity were contained within the presumption or why SSA felt it necessary to adopt an approach which would award benefits to older retired coal miners who had worked for ten, fifteen or more years in the mines but whose respiratory and pulmonary health was near normal or better. It is reasonable to assume, though, that the intense congressional pressure felt by the SSA during the first years of the program's administration played a fairly significant role in this process.

In his 1977 testimony before the Senate subcommittee, Dr. Blumenfeld acknowledged that the interim presumption "would not necessarily" detect an impairment leading to a functional disability, but defended the need for standards of this type based upon the lack of arterial blood gas testing facilities.58 Once again, the logic is difficult to justify as there remains the need to explain why the Act's mandate to pay benefits only upon a showing of total disability due to pneumoconiosis59 could be largely ignored because a particular medical test was not readily avail-

55 1977 House Hearings, supra note 42, at 274.
57 20 C.F.R. § 410.490(a) (1980).
53 1977 Senate Hearings, supra note 47, at 194-95.
able. The need to expedite claims processing seems a similarly weak excuse, as well, to justify the payment of billions of dollars\textsuperscript{60} of federal revenues in a manner clearly inconsistent with the enabling legislation under which such benefits were established.

B. Events Leading to the Congressional Ratification of the Interim Presumption: 1973-1977

As the SSA claims approval rate steadily increased with the use of the interim presumption,\textsuperscript{61} claimant advocates began urging the Department of Labor to adopt the presumption for use in the adjudication of Part C claims. In particular, several executive officers of the United Mine Workers of America commented on the need for the Department of Labor to adopt the interim presumption.\textsuperscript{62}

The Department of Labor was drawn into this debate at a very early stage. In response to the efforts by the UMWA, the Department of Labor pointed out that it had no legal authority to write its own medical criteria and thus could not adopt the interim standards for use in connection with Part C claims.\textsuperscript{63} It

\textsuperscript{60} 1977 Legislative History, supra note 19, at 1029.

\textsuperscript{61} See DEPT OF H.E.W., S.S.A., 2d ANN. REP. TO THE CONGRESS ON THE ADMINISTRATION OF THE BLACK LUNG BENEFITS ACT OF 1972 (1977) [hereinafter cited as DHEW 2d ANNUAL REPORT TO THE CONGRESS].

\textsuperscript{62} In a July 30, 1973 letter commenting on the Department of Labor's proposed regulations developed for the implementation of the Part C program (20 C.F.R. Part 718), Arnold Miller, President of the U.M.W.A., criticized the restrictive nature of the permanent rules and very strongly protested the Labor Department's exclusion of the interim presumption from the proposed criteria. He stated:

- It has been a constant source of dismay and frustration to continually encounter medical criteria which negate Social Security endeavors to provide services for people.

- Similarly, in a Sept. 14, 1972 letter to Robert M. Ball, Social Security Commissioner, commenting on the SSA proposed regulation which first set forth the interim presumption (20 C.F.R. Part 410), Dr. Lorin Kerr, Director, Department of Occupational Health, U.M.W.A., chastised SSA for limiting the application of the interim presumption to SSA claims and went on to criticize the proposed interim vent standards as being too restrictive. On June 6, 1974, Robert Nelson, the Director of the U.M.W.A.'s Legislative Department recommended to the House Labor Subcommittee that the interim standards be made applicable to all claims by legislative action. See 1973-74 Hearings, supra note 12, at 349 (statement of Robert Nelson).

\textsuperscript{63} See 1973-74 Hearings, supra note 12, at 329, 399 (statement of Nancy M. Snyder, Dept. of Labor, Black Lung Director).
was made clear, however, that the Labor Department had no objection to using the interim presumption. In fact, comment from the Labor Department seemed to acknowledge that, while there was no authority for it to adopt its own medical criteria, the goal of equitable treatment of all claimants certainly favored the Department's adoption and application of the interim presumption. 64

The period following this initial debate over the interim presumption was marked by a continuing effort on the part of the Department of Labor, which had a very low claim approval rate compared to that of SSA, 65 to convince SSA that it would be appropriate to extend the application of the interim presumption to Part C claims. At first, SSA steadfastly refused, arguing that the interim standards were merely an administrative device which served to expedite the approval of claims. SSA further argued that the absence of the interim presumption in the Labor Department claims process would not adversely affect the ability of a miner, truly disabled due to CWP, from securing an award for benefits under the permanent regulations. SSA also raised the point that the application of the interim presumption to operator liability claims might be unconstitutional. 66 The Department of Labor responded with the argument that the unequal treatment of SSA and labor claimants violated the Act, and itself might be unconstitutional. 67

Throughout this debate there was no discussion of the scientific validity of the interim presumption. The Department of Labor never centered its argument on, nor even addressed, the rational relationship between the medical criteria embodied in the interim presumption and the fact presumed, i.e., total disability resulting from pneumoconiosis. Indeed, the Depart-

64 Id. at 399.
65 Compare OWCP TASK FORCE REPORT, note 14 supra, at 68 with DHEW 2d ANNUAL REPORT TO THE CONGRESS, supra note 61.
66 A record of this correspondence was kept on file by the author during his employment in the Department of Labor Solicitor's Office, Employee Benefits Division. The Solicitor's Office was informally asked whether the file could be inspected but failed to respond to the request. The events related are therefore reconstructed from the author's memory which is refreshed considerably by the September 13, 1974 letter from William Kilberg to John B. Rhinelander, H.R. REP. No. 770, 94th Cong. 1st Sess. 126-30 (1975).
ment of Labor's support of the interim presumption was based on the notion that all claimants should be treated equally. The Labor Department never consulted medical or scientific experts in connection with the matter.\textsuperscript{68}

SSA finally relented early in 1975 and agreed in principle to extend the interim presumption to Labor Department claims. This was to be accomplished by amending the existing regulations, thereby removing the July 1, 1973 cut-off date on the use of the interim presumption. Regulations to this effect were drafted and approved both in the Labor Department and SSA but were withheld from publication by higher level officials in the Ford Administration.\textsuperscript{69} No reason for this decision ever publicly surfaced but it is likely that Office of Management and Budget concerns over a significant increase in program costs played a leading role.\textsuperscript{70}

Congress entered the debate in 1974 when, after only eighteen months experience under the 1972 amendments, a second round of major amendments to the Act was considered.\textsuperscript{71} The proposed Black Lung Benefits Reform Act of 1974\textsuperscript{72} contained, among other things, a provision authorizing the Secretary of Labor to modify the eligibility regulations published by SSA.\textsuperscript{73} While this grant of authority to the Labor Secretary was significant, and allowed the language to be altered in a manner consistent with improving the claims approval rate, the House subcommittee involved itself in still more sweeping and controversial provisions. These provisions established a coal industry financed trust fund to pay claims and included automatic entitlement provisions which irrebuttable presumed eligibility for benefits where the miner had been employed in the mines for a specified period of years.\textsuperscript{74}

\textsuperscript{68} The author was significantly involved in this matter and clearly recalls this to be the case. In fact, the need to do so was never really considered.

\textsuperscript{69} \textit{Hearings on H.R. 7, H.R. 8, H.R. 3333 Before the House Committee on Labor Standards of the Committee on Education and Labor}, 94th Cong., 1st Sess. 139-40 (1975) [hereinafter cited as \textit{1975 House Hearings}].

\textsuperscript{70} Id.; see also \textit{REPORT OF THE COMPTROLLER GENERAL, PROGRAM TO PAY BLACK LUNG BENEFITS TO COAL MINERS AND THEIR SURVIVORS—IMPROVEMENTS ARE NEEDED} (July 11, 1977) [hereinafter cited as \textit{REP. OF THE COMPTROLLER GENERAL}].

\textsuperscript{71} \textit{1973-1974 House Hearings}, supra note 12, at 349.


\textsuperscript{73} Id.

\textsuperscript{74} Id. § 3; H.R. 7, H.R. 8, H.R. 3333, H.R. 2913, 94th Cong., 1st Sess. (1975).
Although overshadowed by these seemingly more significant matters, most subsequent reform efforts from 1974 on, contained a provision which either reopened Part B for all claimants and permitted the application of the interim presumption to all previously filed claims or directly instructed the Secretary of Labor to apply standards "not more restrictive than" those contained in the interim presumption to all claims. This later approach, which first appeared in H.R. 2913 on February 5, 1975, was retained in most subsequent proposals.

Throughout the course of congressional hearings during the period from 1974-1977 it became increasingly clear that the Department of Labor's low claim approval rate was significantly related to the inability of that agency to use the interim presumption. In fact, Department of Labor officials pointed to this situation repeatedly in an effort to answer congressional criticism of the Department's program. A July 11, 1977 Report by the United States General Accounting Office lent additional credence to the Department's position by recommending congressional action to mandate the use of the interim standards by the Labor Department with some modifications. This recommendation was based on the belief that the inability of the Department of Labor to apply those standards dramatically contributed to the low approval rate experienced under the Part C program.

Beginning with the 1975 House of Representatives hearings, congressional pressure in support of a broader use of the interim presumption mounted. At first, Congress sought to join the Department of Labor in an effort to encourage such broader application through regulatory changes. Congressman Dent (D. Pa.) suggested to HEW officials that they had misread congressional intent with respect to the interim standards and should make them applicable to Labor Department claims until Congress made the decision that adequate blood gas testing facilities had become available. HEW officials made no defense of

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75 See text accompanying notes 18-22, supra.
76 H.R. 2913, 94th Cong. 1st Sess. § 3 (1975).
79 1975 House Hearings, supra note 69, at 201.
their position, but did not act in response to the Congressman's suggestions.81

In December, 1975, the House Education and Labor Committee finally reported out an omnibus black lung benefits reform package82 which included, among other things, a provision which precluded the application of more restrictive medical eligibility criteria to claims filed after June 30, 1973 than were applicable to claims filed before that date.83 The explanation for this proposal adopted by the House Committee pointed out that the availability of adequate medical testing facilities did not "magically" occur when the Part C program began, and further stated that: "To the extent that more restrictive standards are justified by the presence of 'new facilities' or 'new medical procedures,' it is apparent that the Congress must in the future make that determination."84

In separate views accompanying the Report on H.R. 10760, Congressman John Erlenborn (R. Ill.) became the first member of Congress to go on record challenging the scientific validity of the interim standards.85 Congressman Erlenborn pointed out, for the first time, that the interim presumption was not significantly different in principle from the automatic entitlement provision based upon years of employment alone.86 Despite this reasoned attack on the rationale of the interim standards, the House approved H.R. 10760 by a vote of 210 to 183 on March 2, 1976.87

Little additional discussion took place when H.R. 10760 was considered by the Senate. The Department of Labor continued to support an expanded use of the presumption, HEW opposed it, and UMWA medical director Kerr suggested that the interim standards were, themselves, too restrictive.88 Dr. Kerr suggested that the Kory-AMA normals used in computing qualifying pulmonary function values in the SSA interim presumption be discarded in favor of normal values developed by the Interna-

85 Id. at 95, 96.
86 Id.
87 1977 Legislative History, supra note 19, at 320-22.
tional Labor Organization which computed a table of normals based upon the testing of heavy laborers in Europe. While the Senate did not mandate the use of the ILO normals, it used the Kerr testimony to offset the statements of HEW officials to the effect that the interim vent tables do not detect disability. It is noteworthy, however, that not even Dr. Kerr testified that the SSA medical eligibility criteria, as embodied in the interim presumption, were valid indicators of total disability, and no witness, including Dr. Kerr and every other medical authority who testified, supported the scientific validity of the presumption. The Senate Report simply ignored the validity question raised by SSA testimony by referring to the Kerr testimony comparing ILO and Kory normals. The Senate, however, was not able to gain passage of the bill in the closing hours of the session and black lung legislation was again held over for the next Congress.

The Black Lung Benefits Reform Act of 1977 was proposed early during the 95th Congress. With a new Presidential Administration, one that was more sympathetic to the proposed amendments, advocates of the Reform Act were encouraged that passage could be obtained. However, as this renewed initiative began, the Department of Labor withdrew its support for the adoption of the interim presumption. In light of both the Labor Department’s history of supporting the interim presumption and the presence of a supportive Administration, it is difficult to identify a political motive precipitating this altered view. What happened, in fact, was that the Social Security Administration finally made it clear to Department of Labor officials that the interim presumption was scientifically invalid and that it was used by them, not as a screening device to separate approvable claims from potential denials, but as an irrebuttable presumption which would permit the approval of large numbers of marginal claims with a minimum of effort and with-

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9 Id.
10 Id.
91 1977 Senate Hearings, supra note 47, at 196.
92 See 1977 Legislative History, supra note 19, at 405-08.
Thus, the Department of Labor's 1977 testimony to both the House and Senate subcommittees stating that the interim presumption was "not entirely appropriate," is not indicative of a significant change in policy as much as it is a result of the honest efforts of SSA to make the Labor Department officials understand the practical effect of the interim presumption.

Those in Congress who advocated expanded use of the interim presumption were faced with a difficult fight over the interim presumption question. On April 6, 1977, Labor Assistant Secretary Elisburg testified that while the interim presumption was perhaps used only as a "preliminary screening mechanism" its eligibility criteria might not be "medically supportable as standards for total disability." Similar testimony was delivered to the House subcommittee. In both instances, the Department of Labor suggested that it should write its own eligibility standards based upon the best medical knowledge available.

More devastating testimony was delivered by Drs. Passes and Blumenfeld. Dr. Blumenfeld, who was working at SSA at the time he appeared before the Senate subcommittee, testified that the only "practicable way" SSA could respond to the language in the 1972 Senate Report relating to "interim evidentiary rules" was to establish criteria which permitted an award if some level of disease was detected, whether or not any impairment was present. Dr. Blumenfeld also noted that "[t]he interim criteria were purposely set very high to avoid the necessity of relying on the physical performance test." He cautioned against any congressional liberalization of the physical performance test (blood gas) standards in the permanent regulations, pointing out that any effort to equate the two would cause the approval of many claims which did not involve genuine disability. Dr. Blumenfeld concluded by noting that adequate blood

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95 See Rep. of the Comptroller General, supra note 70.
97 1977 Senate Hearings, supra note 47, at 146.
98 1977 House Hearings, supra note 42, at 241-42.
99 1977 Senate Hearings, supra note 47, at 155.
100 Id. at 194.
101 Id.
102 Id. at 195.
103 Id.
gas testing facilities were still not generally available to all claimants. 104

The only other physician to testify on the interim standards before the Senate committee was Dr. Lorin Kerr of the UMWA, who once again urged the use of ILO rather than Kory-AMA normals in computing the ventilatory function criteria to be applied in claims adjudications. 105 Other witnesses representing both claimant and employer interests debated the social wisdom, or lack thereof, of the interim presumption, but it is safe to say that the validity of the presumption itself, as a proper mechanism to detect total disability due to pneumoconiosis in living coal miners, was not established by any expert witness before the Senate.

This same evidence appears in hearings conducted by the House Labor subcommittee. Once again both Labor and HEW officials testified that the interim presumption was not fully valid and should not be extended to a larger universe of claims. 106 Again, UMWA witnesses testified that the standards applied by the Labor Department were too restrictive, 107 and that the ILO normals should be used as a base to calculate compensable levels of disability. 108 With the exception of the 1976 testimony of Dr. Donald Rasmussen urging the adoption of disability standards compensating an individual whose FEV1 was reduced to 67% of predicted normal, 109 the only other scientist to directly address the interim presumption was Dr. Passes. 110 In addition to his previously noted criticism of the interim criteria, Dr. Passes testified that the permanent criteria were liberal enough to “include all of the ex-miners who are symptomatic and who have objective evidence of medical disease due to employment in the mines” as well as “a huge number of persons who happened to work previously in the mines but who do not have coal workers pneumoconiosis or other similar disease.” 111 Earlier testimony by

104 Id.
105 Id. at 196.
107 Id. at 111 (statement of Arnold Miller).
108 Id. at 284 (statement of Lorin Kerr, M.D.).
109 1975 House Hearings, supra note 69, at 100.
110 1977 House Hearings, supra note 42, at 274-76.
111 Id. at 275-76.
a panel of medical experts urging more scientific standards\textsuperscript{112} was also reiterated by Dr. Passes.\textsuperscript{113}

The House committee, despite these criticisms, reported out a bill containing a provision which would require the application of the interim standards to all claims.\textsuperscript{114} The Senate committee was more concerned about the validity of this blanket adoption and by contrast determined that it, (the committee) was not fully qualified to assess the "appropriateness of medical test standards to be used in determining disability."\textsuperscript{115} The Senate, therefore, gave the Secretary of Labor, in consultation with the National Institute of Occupational Safety and Health, the authority to write its own medical eligibility criteria. The committee cautioned the Secretary of Labor that in developing those new standards (which were to be applied to new claims and the review of pending and previously denied claims), the benefit of the doubt must be resolved in favor of the claimant. The committee went no further than this proviso, and hence did not require the automatic permanent adoption of the interim standards\textsuperscript{116} by the Secretary of Labor. The House version of the Black Lung Benefits Reform Act of 1977 passed on September 19, 1977.\textsuperscript{117} On the next day, the Senate passed its version.\textsuperscript{118}

When the differences between the House and Senate version surfaced at early conference committee meetings, the debates were deliberate and spirited.\textsuperscript{119} Considerable concern was voiced by the House and Senate conferees that adoption of the interim presumption would be irresponsible and would require expenditures of billions of dollars for invalid claims. The compromise reached by the conferees merged the Senate and House proposals and apparently satisfied the major concerns

\textsuperscript{112} Id. at 270-73 (testimony of Dr. Howard Van Ordstrand, Dr. Hans Well, and Dr. N. Leroy Lapp).

\textsuperscript{113} Id. at 276-77.


\textsuperscript{115} Id. at 13.

\textsuperscript{116} Id. See S. 1538, 95th Cong., 1st Sess. § 2 (1977).

\textsuperscript{117} See 1977 Legislative History, supra note 19, at 804.

\textsuperscript{118} Id. at 868.

\textsuperscript{119} There is ordinarily no official reporting of conference committee proceedings. The author was in attendance at the conference sessions which were open to the public.
voiced by the committee members. According to the compromise, the interim standards would apply to all claims filed with or reviewed by either the Department of Labor or HEW until the Department of Labor promulgated new Part C medical eligibility regulations. Additionally, all claims filed after the publication of the new regulations would be adjudicated exclusively thereunder, and over time the interim presumption would be phased out of existence.

The statutory language does not, however, tell the entire story. The substance of the compromise is reflected to a greater degree in the Conference Report than it is in the Act itself. The conferees were most troubled by the allegation that the Social Security Administration treated its interim presumption as irrebuttable, thus engaging in only a perfunctory investigation of the claims. To ensure that the Secretary of Labor did not follow this practice, the conferees, after heated debate, agreed upon the following Report language:

With respect to a claim filed or pending prior to the promulgation of such [new] regulations such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, except that in determining claims under such criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.

By this statement, the conferees alerted the Secretary of Labor that he was not to treat the interim presumption as irrebuttable. Dealing with the alleged perfunctory claims processing by SSA proved more troubling. A few conferees were determined to permit SSA to continue the practice which had characterized its prior use of the presumption. Following a debate

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121 Id.
123 The allegation suggested that SSA went only so far in the development of a claim as was necessary to find any single item of evidence that could justify an award. At this point SSA was said to award benefits and close the claim adjudication process, thus discounting to a nullity any rebuttal evidence that might have been presented.
among the conferees, it was agreed that the Secretary of HEW would be instructed to act in accordance with the following statement:

The conferees expect the Secretary of HEW to administer the "interim" standards with a view to the just accomplishment of the purpose of allowing for reviewed Part B claims to establish disability within the meaning of the 1977 amendments as they apply to all reviewed Part B claims.\textsuperscript{125}

This intentionally ambiguous and strangely worded statement broke a difficult stalemate in the proceedings and apparently was considered adequate to convey the range of meanings advocated by the adversaries on the point. Senator Javits, who was instrumental in the drafting of the Conference Report language on the interim presumption, explained on the day the Conference Report was passed that the compromise language relating to HEW adjudications was intended to preclude the payment of benefits with respect to a claim in which the "evidence in the file is fragmentary or otherwise incomplete but to require payment of a claim where there is evidence of the presence of pneumoconiosis and that it has caused disability for performing coal mine work."\textsuperscript{126} Senator Javits then further directed HEW not to approve claims if the file was not fully developed, but instead to transfer the file to the Labor Department for completion of the medical evidence and further review.\textsuperscript{127}

Congressman Perkins saw the conference language quite differently. In his floor statement eight days later, after agreeing that the Secretary of Labor was required to consider all relevant medical evidence, Congressman Perkins noted:

I would also take note of certain remarks made during the Senate consideration of the conference point. To the extent those remarks assert that the Secretary of HEW must, in the course of fulfilling his review responsibilities under the law, utilize and apply the "interim" standards in a manner different than that utilized in the past, then the assertions are totally without legislative support... I therefore trust that neither the Secretary of HEW nor of Labor will be confused by those

\textsuperscript{125} Id. at 22, reprinted in [1978] U.S. CODE CONG. & AD. NEWS 315-16.

\textsuperscript{126} 1977 Legislative History, supra note 19, at 909.

\textsuperscript{127} Id.
With this muddle squarely identified, both the House and the Senate easily passed the Black Lung Benefits Reform Act of 1977 and the bill was signed by the President on March 1, 1978. With regard to this apparent inconsistency, it is interesting to note the following language in a letter from Labor Secretary Marshall recommending that the President sign the bill:

[W]e were opposed to provisions making the use of the "interim standards" mandatory for the determination of total disability under Part C. . . . While we still believe the "interim standards" are inappropriate, the limitation of their use to reviewed and pending claims in conjunction with the requirement that all other relevant evidence be considered reduces our concerns substantially.

II. IMPLEMENTATION OF THE LABOR DEPARTMENT'S INTERIM PRESUMPTION

A. Publication Of The Labor Presumption

The Department of Labor had virtually completed draft regulations to implement the amended Act by the time it was signed by President Carter. These regulations included an adaptation of the interim presumption for use in Department of Labor claims.

Congress did not give the Labor Department a great deal of official guidance on how this adaptation should evolve. The statute made it clear only that the Labor standards could be no more restrictive than the SSA presumption. The SSA presumption, however, was susceptible to dual interpretation—as written and as applied. As indicated above, the Conference Report indicated that the Labor Department was to develop standards no more restrictive than the interim presumption as written, thus evidencing a choice between these two possible interpretations. The Department of Labor was directed to con-

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128 Id. at 916-17.
130 Report of February '28, 1978 on H.R. 4544 from Ray Marshall to James McIntyre, Director, OMB.
sider all relevant evidence in determining the application or rebuttal of the presumption. It was also instructed to establish total disability by weighing medical evidence in light of the presumption and precluded from awarding benefits in those cases which presented some qualifying evidence but an incomplete or fragmentary file. The Labor Department was also authorized to ensure by regulation that the quality of any evidence used to invoke the interim presumption was adequate. Perhaps, most significantly, the Department of Labor was directed to write its own interim standards and publish them in the Federal Register, and it is clear that a mirror image of the HEW standards was not anticipated.

The final draft of the Department's new regulations were approved within the Department and, prior to publication, sent to selected congressional staff members for review and presumably for approval. These regulations were reviewed by both congressional staff and professional persons associated with the various black lung associations. As a result of this initial review, the Department's proposed "interim presumption," after close scrutiny, was severely criticized. Other parts of the regulations were also criticized, thus failing to win the approval of those reviewing the proposal. While the actual draft of these proposed regulations is most likely not in existence, some of its provisions can be reconstructed from written criticisms used by Black Lung Association representatives to comment on the draft submitted to Congress.

134 1977 Legislative History, supra note 19, at 909.
137 Id.
138 The author has in his possession an undated and unsigned document entitled The Black Lung Association Issues Relating To New Black Lung Legislation To Discuss With Department of Labor. The document was circulated to various officials in response to the first internally approved draft of the Department's proposed regulations, prior to the time this proposal was published for comment in the Federal Register.

One of the proposed sections would have prohibited the approval of a claim
In light of the severe criticism evoked by these proposed regulations, the Department of Labor sought to formulate more acceptable regulations. This was accomplished and the new Labor interim standards were published as a proposal on April 25, 1978. Despite numerous comments, the provisions were adopted in final form without a single change. In the discussion and comments following the adopted regulation, however, the Department clearly pointed out that (1) the presumption is not "irrebuttable," (2) that all relevant evidence will be considered, (3) that the Department would not look for a single item of evidence to support an award and ignore other evidence, and (4) that doubt would always be resolved in favor of the claimant.

B. A Contrast Between the Labor and SSA Versions

To begin, it must be understood that the SSA and Labor versions of the "interim presumption" can be contrasted in the hypothetical only. An attempt at explaining how SSA applied the interim presumption prior to 1977 or how either SSA or HEW applied the presumption after passage of the 1977 Act would be to engage in speculation, at best. A July 28, 1980 report of the Comptroller General, however, did find that 88.5% of all claims reviewed and approved by SSA lacked any evidence of total disability or death due to pneumoconiosis, thus indicating very liberal application of the interim presumption by SSA. The response to this suggestive statistic was merely that

unless the file demonstrated that a full series of medical tests had been conducted. The Black Lung Association and congressional staff objected strenuously and the section was removed. Another provision would have required the adjudicator to weigh all the medical test evidence to determine whether the weight of this evidence established total disability. This too was stricken by congressional command. One very important section in the draft attempted to clarify the confusion over whether qualifying pulmonary function studies would invoke the interim presumption with 15 or 10 years of coal mine employment. The SSA presumption seemed to require 15 years but in practice SSA awarded benefits with qualifying pulmonary function scores and 10 years. The draft Labor presumption required 15 years. The clarification was also vetoed by the group in favor of the SSA practice of using 10 years for this purpose.

134 Id.
it resulted from following the requirements of the law; this point it reiterated without discussion or comment at five separate places in the GAO Report.

The forthcoming GAO Report on the Labor Department's portion of the program promises to be enlightening, but until the report is issued the mode of application of the interim presumption by the Labor Department will remain an open question. A preliminary review of some one-hundred claim approvals involving operator liability, however, clearly indicates that most Labor claim examiners generally treat the interim presumption as irrebuttable.\textsuperscript{143}

It may therefore be, that in practice, the Labor and SSA interim presumptions are very similar. By their express terms, however, there are some significant differences between the two. The SSA version could be invoked on the basis of qualifying X-rays, biopsies, autopsies, or pulmonary function studies alone.\textsuperscript{144} The Labor version expands the scope of qualifying evidence to include qualifying blood gas test results\textsuperscript{145} and "other medical evidence including the documented" and reasoned report of a physician establishing the "presence of a totally disabling respiratory or pulmonary impairment."\textsuperscript{146} In the case of a deceased miner, lay affidavits demonstrating the presence of a totally disabling respiratory or pulmonary impairment may also invoke the Labor presumption.\textsuperscript{147} No reason was ever advanced publicly to explain this expansion of the interim presumption by the Labor Department. Because of the Labor Department's failure to justify this expansion publicly, it is not unreasonable to suggest that the expansion was adopted for administrative convenience alone, to expedite the review and adjudication of the large numbers of claims the Labor Department expected to handle under the 1977 amendments.

\textsuperscript{143} The survey was conducted by the author on claims in the author's office.

\textsuperscript{144} 20 C.F.R. § 410.490(b)(1) (1980).

\textsuperscript{145} 20 C.F.R. § 727.203(a)(3) (1980). It should be noted that SSA also inferred total disability on the basis of qualifying blood gases outside the provisions of this interim presumption. See 20 C.F.R. § 410, subpart D, app. The Labor Department's qualifying values are, however, more liberal than those used by SSA.

\textsuperscript{146} 20 C.F.R. § 727.203(a)(4) (1980).

\textsuperscript{147} 20 C.F.R. § 727.203(a)(5) (1980).
The rebuttal provisions of the Labor presumption, as compared to those in the SSA version, demonstrate some significant differences as well. There are two rebuttal provisions contained in the SSA presumption. These two are, however, definitional only and seem to encompass a broad range of possibilities. The Act defines compensable total disability, generally, to mean the inability of the miner to do his regular coal mine work or other gainful work requiring the use of comparable skills and abilities. The SSA interim presumption may be rebutted by its terms if the miner is in fact doing his usual coal mine work or comparable and gainful work, or if other evidence "including physical performance tests" establishes that the miner is able to do such work. Both SSA rebuttal paragraphs contain the parenthetical phrase "(see § 410.412(a)(1))." This section again repeats the definition of total disability and then cross references to yet other sections of the permanent evaluatory standards which define total disability in more detail in terms relating to both medical and non-medical (age, education, and work experience) criteria.

It is therefore apparent that on its face, the SSA interim presumption could be rebutted if the miner was not totally disabled due to pneumoconiosis. Whether such disability was present would depend in part on what work, if any, the miner was actually performing at the time of adjudication or whether in fact he had a totally disabling respiratory or pulmonary disease related to his coal mine employment. If there was no rebuttal evidence, the interim presumption would carry the claim and benefits would be awarded. If there was rebuttal evidence, that evidence would have to be evaluated by the SSA adjudicator, as a condition precedent to awarding or denying the claim.

The Labor rebuttal provisions are quite different and reflect some very significant changes. At the outset, the Labor rebuttal paragraphs require the adjudicator to consider "all

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148 20 C.F.R. § 410.490(c) (1980).  
relevant medical evidence."\textsuperscript{153} While the SSA rebuttal sections
do not preclude the consideration of any relevant evidence,\textsuperscript{154} Congress made it clear that the Labor Department was not to
follow the suspected SSA practice of ignoring rebuttal evidence.
Next, the rebuttal section provides that the interim presump-
tion "shall be rebutted" if any one of four conditions are met.
The first two conditions\textsuperscript{155} are similar to the two SSA rebuttal
provisions. Rebuttal clause 1 would upset the presumption if
the miner was still doing his usual coal mine work or comparable
and gainful work. Clause 2 would rebut the presumption if "in
light of all relevant evidence" it is proven that the miner is able
to do these types of work. Like their SSA counterparts, Labor
rebuttal clauses 1 and 2 cross reference 20 C.F.R. § 410.412(a)(1)
of the SSA permanent criteria. Labor clause 2 differs from its
SSA counterpart in that it requires a weighing of "all relevant
evidence" (presumably including the evidence relied upon to in-
volve the presumption) instead of "other evidence" (presumably
excluding the evidence relied upon to invoke the presumption)\textsuperscript{156}
in the balancing process used to determine whether facts initially
presumed by the interim presumption have been effectively
rebutted.

Labor rebuttal clauses 3 and 4 are entirely new and their
origins are not easily discernible. Clause 3 permits rebuttal if
the total disability or death of the miner "did not arise in whole
or in part out of coal mine employment."\textsuperscript{157} This rebuttal clause,
at first glance, seems unresponsive to that which is presumed
under the interim presumption. That is, the presumption per-
mits an inference that equates a qualifying X-ray, vent, blood
gas, or medical report with total disability or death due to
pneumoconiosis "arising out of coal mine employment." Indeed
no other conditions are compensable under the Act, with the ex-
ception of certain partial disabilities in claims involving a
deceased miner who was employed as a miner for twenty five or
more years prior to June 30, 1971 and who dies prior to March 1,

\textsuperscript{153} Id.

\textsuperscript{154} See Johnson v. Califano, 585 F.2d 89 (4th Cir. 1978).


\textsuperscript{156} See, e.g., Conn v. Harris, 621 F.2d 228 (6th Cir. 1980); Henson v.
Weinberger, 548 F.2d 695 (7th Cir. 1977); Oliver v. Califano, 476 F. Supp. 12 (C.D.
Ut. 1979).

\textsuperscript{157} 20 C.F.R. § 727.203(b)(3) (1980).
This rebuttal section, on the other hand, invites debate over whether the presumed total disability was wholly or partially related to coal mine employment and at least facially appears to preclude rebuttal unless no part of the miner's disability, however insignificant, is related to coal mine employment. It is likely that this provision was also a product of expediency. Many, if not most claimants are older individuals and are afflicted with a myriad of health problems, many of which cause respiratory or pulmonary symptoms. Rather than ask the adjudicator to sort through each of these conditions and determine whether the pneumoconiosis itself is totally disabling, rebuttal paragraph 3 invites the adjudicator to lump all respiratory or pulmonary impairments together regardless of the etiology of each. Because at least one of the claimant's conditions would presumptively be pneumoconiosis under the invoking provisions of the interim presumption, rebuttal under paragraph 3 of the Labor presumption would be virtually impossible and the clause itself would be wholly without meaning—except to imply that the etiology of a respiratory or pulmonary impairment is irrelevant in the adjudication of a claim under the Labor interim presumption. While this approach certainly makes the job of the claims examiner and deputy commissioner much easier, its validity under the Act is clearly suspect.\(^1\)

Rebuttal clause 4\(^2\) is of the same genre as rebuttal clause 3. It permits rebuttal if the evidence establishes that the miner does not have pneumoconiosis. A negative X-ray cannot, of course, satisfy this rebuttal provision.\(^3\) Moreover, the 1977 amendments to the Act altered the definition of pneumoconiosis to include "respiratory and pulmonary impairments arising out of coal mine employment."\(^4\) In its new implementing regulations, the Department of Labor further modified the definition of pneumoconiosis by defining "arising out of coal mine employ-
ment" to include "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to or aggravated by, dust exposure in coal mine employment." Because there is no clear cut way under the interim presumption to distinguish the coal dust origins of a respiratory or pulmonary impairment from non-coal dust origins, the prospect of proving that any miner who could invoke the presumption does not have "pneumoconiosis" is very slim indeed, or perhaps, impossible. The Department has, however, permitted rebuttal on the basis of an autopsy report indicating the absence of pneumoconiosis in the guidelines provided to claim examiners.

Despite the Department of Labor's protestation to the contrary, one must conclude that the Department of Labor does not expect or encourage its claim examiners to engage in a rebuttal exercise once the interim presumption is invoked. Many years of litigation lie ahead as coal operators attempt various escapes from this rebuttal trap, so artfully designed by the Department of Labor to avoid a renewal of the intense congressional criticism of the Department's low approval rate and glacial claims processing and development systems.

IV. CURRENT ISSUES UNDER THE DEPARTMENT OF LABOR'S INTERIM PRESUMPTION

A. SSA Precedents

While many SSA denials were litigated in the federal courts there has been very little useful precedent flowing from this litigation. Perhaps the most significant reason for this is that litigation between black lung claimants and the Social Security Administration has involved a minimal level of adversity. As a general rule SSA would not appeal an adverse district court decision unless a significant policy matter was at stake. SSA, unlike the Labor Department, did not have its own litigation

165 This section of the article is only intended as a brief overview of federal litigation on the interim presumption. For a more detailed discussion, see Stephens & Hollon, Closing the Evidentiary Gap: A Review of Circuit Court Opinions Analyzing Federal Black Lung Presumptions of Entitlement, 83 W. Va. L. Rev. 793 (1981).
166 See, e.g., Hall v. Secretary of HEW, 600 F.2d 556 (6th Cir. 1979) (cut off date for survivor filings with SSA); Yakim v. Califano, 587 F.2d 149 (3d Cir. 1978);
authority and thus was forced to rely on the many United States Attorneys' offices throughout the country to advance a consistent agency legal policy on the wide range of matters which arose. Considering the thousands of claims which must have been delivered to the U.S. Attorneys' offices involving difficult questions concerning a myriad of issues arising under the Act and its regulations, it is likely that black lung claims were viewed as nuisance cases and thus handled in a routine manner and with a minimum of effort. As a result, important questions concerning the proper administration of the interim presumption went unanswered while many district court cases were disposed of on cross motions for summary judgment with detailed argument to the court being the exception rather than the rule.

There is not a single circuit court decision which engages in either a penetrating or particularly well informed analysis of the SSA interim presumption. True rebuttal questions are ordinarily addressed only in the context of working-miner claims and, after reading hundreds of federal district and circuit court decisions the reader would have no better idea how to rebut the SSA interim presumption than could have been gained by just reading the provision itself.

It is important, however, to note the few substantive points which have evolved from these court decisions and equally important to identify those points which may confuse the practitioner. For example, it has been established that a claimant who seeks to benefit from the interim presumption bears the burden of proving the facts necessary to invoke the presumption by a preponderance of the credible evidence. Another point uniformly applied is that evidence not meeting applicable quality standards may not be used to invoke the interim presumption. A provision reflecting this rule is specifically incorporated into

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168 Pannell v. Califano, 614 F.2d 391 (4th Cir. 1980).

the Department of Labor's regulations and, with the exception of any dispute which may arise over which quality standards apply (HEW's or Labor's) the matter is well settled. It is also likely that both the invoking and rebuttal provisions of the interim presumption apply with equal force to claims involving deceased miners, notwithstanding the use of the present tense in the wording of both the Labor and SSA presumptions.

Beyond these basic points it is not at all clear that the courts have reached a consensus on other current issues under the interim presumption. The best example of this confusion is probably the issue concerning the extent to which pneumoconiosis alone must contribute to a miner's disability in order to support an award of benefits under the interim presumption. In both Sharpless v. Califano and Pannell v. Califano the Fourth Circuit recognized that in order to establish compensability, the miner's total disability must be due to pneumoconiosis and must arise out of coal mine employment. In making this determination, even under the SSA presumption, all relevant evidence must be considered by the ALJ in making the decision with regard to a particular claim. The difficult issue of what relative weight is to be accorded particular items of evidence such as spirometry, blood gas, radiographs, medical reports, and

171 Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975).
172 585 F.2d 664 (4th Cir. 1978).
173 614 F.2d 391 (4th Cir. 1978).
174 See Prater v. Harris, 620 F.2d 1074 (4th Cir. 1980); Winfrey v. Califano, 620 F.2d 37 (4th Cir. 1980); Barnette v. Califano, 585 F.2d 698 (4th Cir. 1978).
175 See Wyatt v. Califano, 618 F.2d 1079 (4th Cir. 1980); Arnold v. Secretary, HEW, 567 F.2d 258 (4th Cir. 1977).
176 See Souch v. Califano, 599 F.2d 577 (4th Cir. 1979); Henson v. Weinberger, 548 F.2d 695 (7th Cir. 1977). See Peabody Coal Co. v. Director, OWCP, 581 F.2d 121 (7th Cir. 1978) wherein the court found that pulmonary function scores showing some impairment were not adequate, when combined with the claimant's testimony relating a severe respiratory impairment, to establish a basis for eligibility under 30 U.S.C. § 921(c)(4) (1976 & Supp. II 1978). Compare Bozwich v. Mathews, 558 F.2d 475 (8th Cir. 1977).
178 See Whitman v. Califano, 617 F.2d 1055 (4th Cir. 1980); Dickson v. Califano, 590 F.2d 616 (6th Cir. 1979); Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1979).
179 See Conn v. Harris, 621 F.2d 228 (6th Cir. 1980); Winfrey v. Califano, 620
or, on the other hand, evidence indicating the presence of a significant non-coal mine related condition, is as yet not clear.\textsuperscript{180}

Coal operators have been more successful than SSA in urging the courts to focus on the evidence rather than on a general legislative intent to pay benefits, as indicated by a number of circuit court decisions in SSA cases.\textsuperscript{181} For this reason and because operators are likely to ask the courts to review a broader range of difficult evidentiary and statutory matters, it is probable that future court decisions will be far more definitive in addressing these difficult issues.

\textbf{B. Some Pending Issues Under the Labor Interim Presumption}

Although the Labor Department's interim presumption has been in effect for more than two years, there have been no circuit court decisions (nor are any pending) which address its applicability. Neither has the Benefits Review Board\textsuperscript{183} yet provided any detailed guidance in this area. There are many issues to be resolved including matters relating to the general constitutional


\textsuperscript{181} See Johnson v. Califano, 585 F.2d 860 (4th Cir. 1978); Petrey v. Califano, 577 F.2d 860 (4th Cir. 1978); Bozwich v. Mathews, 558 F.2d 475 (8th Cir. 1977). But see U.S. Steel Corp. v. Gray, 588 F.2d 1022 (6th Cir. 1979); Peabody Coal Co. v. Director, OWCP, 581 F.2d 121 (7th Cir. 1978); Peabody Coal Co. v. Benefits Review Board, 560 F.2d 797 (7th Cir. 1977).

\textsuperscript{183} Under § 422(a) of the Act, which incorporates 33 U.S.C. §§ 919, 921, see note 5 supra, Department of Labor claims are first adjudicated informally by a deputy commissioner employed by the Department of Labor. Next they are subject to a \textit{de novo} review by an administrative law judge in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1976). An adverse decision by an administrative law judge may be appealed to the Benefits Review Board, a quasi-judicial body comprised of three persons appointed by the Secretary of Labor. The Board has only appellate review powers and may reverse a decision of an administrative law judge \textit{only} if it is not supported by substantial evidence or is not in accordance with law. A party dissatisfied by a Board decision may appeal as a matter of right to the United States circuit court of appeals with jurisdiction over the place of the miner's last coal mine employment with the named coal mine operator.

\textsuperscript{183} Id.
and legal validity of the Labor presumption itself.\textsuperscript{154} Despite this lack of judicial guidance, it is possible to identify a few of the most significant pending issues and describe some of the considerations which will be relevant to their resolution.

1. **Invoking The Presumption and Evidentiary Quality**

   **Invoking the Presumption**

   The Labor interim presumption is relatively easy to invoke as a claimant need only submit a qualifying X-ray, pulmonary function study, blood gas study, medical report, or in the case of a deceased miner, affidavits demonstrating a totally disabling respiratory or pulmonary impairment. With respect to the three objective tests—the X-ray, pulmonary function (vent) or blood gas study, the question is simply whether any item of the evidence presented meets the specified values. The trier of fact must often consider conflicting X-rays, vent or blood gas values and thus must base his decision upon one of two or more conflicting test reports. This, however, is ordinarily not a difficult matter for the ALJ to resolve since the most recent test results may usually be given greater weight.\textsuperscript{155} Additionally, the qualifications of the examining physician are considered,\textsuperscript{156} and test results which are inconsistent with the weight of the evidence should be discarded.\textsuperscript{157}

   Medical reports and affidavits present a more difficult evaluatory problem for the ALJ. In order to invoke the presumption, a physician’s report must (1) be documented (2) demonstrate an

\textsuperscript{154} These matters are pending before the Benefits Review Board in McCluskey v. Zeigler Coal Co., BRB No. 79-738 BLA, and in many other cases. In McCluskey, the Board first held the presumption valid when applied on the basis of pulmonary function evidence, 2 BLR (M-B) 1-1248, BRB No. 79-738 BLA. The matter is now under reconsideration by the Board. Because of the scope and complexity of the issues involved, this article will not address the constitutional and statutory questions raised in McCluskey.


\textsuperscript{156} See, e.g., Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1978); Honaker v. Jewell Ridge Coal Co., [1980] 12 BRBS (M-B) 609, BRB No. 77-397 BLA; Bower v. Amigo Smokeless Coal Co., [1979] 11 BRBS (M-B) 582, BRB No. 76-150 BLA.

\textsuperscript{157} See, e.g., Souch v. Califano, 599 F.2d 577 (4th Cir. 1979).
exercise of reasoned medical judgment, and (3) establish a totally disabling respiratory or pulmonary impairment. In order to be "documented" the report would, of course, have to reflect the results of medical tests, clinical observations, and should include an acknowledgement of the claimant's work and health history. In order to demonstrate an "exercise of reasoned medical judgment," the evidence should include a detailed discussion of tests, observations, and patient history which, interrelates the objective evidence of impairment with a predicted or observed level of disability. In his evaluation, the ALJ should distinguish those conditions, noted in the physician's disability determination, which are not respiratory or pulmonary in nature. A conclusory report or one which has drawn clearly incorrect inferences from the objective evidence will most likely be considered inadequate.

Affidavits may invoke the presumption in the case of a deceased miner only if there is no medical evidence available and if the affiant had sufficient personal knowledge of the miner's condition to permit observance, over time, of a totally disabling respiratory or pulmonary impairment. Strictly construed, the interim presumption could rarely be invoked by this method as some medical evidence would be available in almost every case. Whether, for example, a death certificate or medical report compiled in connection with a non-respiratory condition would constitute "medical evidence" is a question which must yet be decided. Whether the contents of an affidavit is adequate must, of course, be determined on a case by case basis.

**Evidentiary Quality**

The applicability of quality standards is a most significant area of inquiry in determining whether particular evidence is adequate to invoke the interim presumption. The Department of

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189 See, e.g., Gastineau v. Mathews, 577 F.2d 356 (6th Cir. 1978).

190 See, e.g., Adkins v. Director, OWCP, [1980] BRBS (M-B) 53, BRB No. 77-782 BLA; Gomola v. Manor Mining & Contracting Corp., [1979] 10 BRBS (M-B) 16, BRB No. 77-853 BLA.


Labor's regulations provide that any X-ray, ventilatory study or blood gas test which is not in compliance with the quality standards in effect when the evidence is "submitted" will not be considered adequate to invoke the interim presumption.\(^3\) It is clear that the courts\(^4\) and the Benefits Review Board\(^5\) will adhere to this standard, and, it is fairly clear that the claimant bears the burden of proving that most of the quality standards are met.\(^6\)

Prior to the enactment of the 1977 amendments, all quality standards were prescribed by the Social Security Administration and were published in the Federal Register.\(^7\) In those amendments Congress gave the Department of Labor, in consultation with the National Institute of Occupational Safety and Health, the authority to prescribe new quality standards for X-rays\(^8\) as well as other objective tests.\(^9\) The Department of Labor's new standards were published on February 29, 1980, to be effective March 31, 1980.\(^10\)

The Labor Department's quality standards, while including all those prescribed by SSA, include additional quality standards to be applied, in particular, to pulmonary function and blood gas studies.\(^11\) Because many claims which contain evidence first obtained prior to March 31, 1980, are submitted *de novo* at an administrative hearing conducted after that date, the meaning of the term "submitted" in the Labor Department's regulations may have considerable significance.

Because the validity of ventilatory function tests is dependent upon patient effort, both the SSA and the Department of Labor regulations governing evidentiary quality require the technician administering the test to attest to both the patient's understanding of the instructions and his full cooperation in put-

\(^{12}\) 20 C.F.R. § 727.206(a) (1980).

\(^{13}\) *See, e.g.*, Johnson v. Califano, 585 F.2d 89 (4th Cir. 1978); Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1978).

\(^{14}\) *See, e.g.*, Wilkerson v. Georgia Pacific Co., [1978] 9 BRBS (M-B) 45, BRB No. 77-207 BLA; Grove v. U.S. Steel Corp., [1978] 7 BRBS (M-B) 382, BRB No. 76-510 BLA.

\(^{15}\) Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1978).

\(^{16}\) 20 C.F.R. §§ 410.428, 410.430 (1980).


ting forth maximum effort during the test.\textsuperscript{202} As a check on the subjective views of the technician administering the test, both the Labor Department and SSA regulations require the submission of three sets of spirometric tracings,\textsuperscript{203} showing three attempts by the patient. If the FEV\textsubscript{1} tracings show a variation of more than 5\% between the highest two attempts or if the MVV shows a variation of more than 10\%, then the full cooperation and understanding of the patient is brought into question.

Under the SSA regulations, tracings showing larger variations would not automatically be discarded unless the tracings were reviewed by an SSA expert who identified the problem. Under the Labor regulations, however, the 5\% and 10\% variability standards are explicitly set forth\textsuperscript{204} and thus, without being dependent on an expert, the attorney or adjudicator can determine that the tracings submitted are not adequately similar and should therefore be invalidated for interim presumption purposes. This illustration highlights the fact that the construction afforded the term "submitted," which is contained in the Labor Department's regulations and applicable to claims heard after March 31, 1980, will have a significant effect on the quality standards by which many claimants' medical evidence is judged.

Moreover, while the SSA regulations contained no quality standards for conducting blood gas tests,\textsuperscript{205} the Labor regulations contain extensive provisions on this point. The Benefits Review Board and the courts will, therefore, almost certainly have to decide which quality standards apply in a number of interim presumption cases.

2. Rebuttability

While Department of Labor claim examiners may not favor rebuttal of the interim presumption, it is certain that mine operators' attorneys will utilize the rebuttal provisions in an attempt to overcome the presumption. Primary consideration certainly will be given to the types of evidence which will support a rebuttal of the presumption.

\textsuperscript{202} 20 C.F.R. §§ 410.430, 718.103(b)(5) (1980).
\textsuperscript{203} 20 C.F.R. §§ 410.430, 718.103(b) (1980). Only two tracings are required if the two tracings of MVV are within 5\% of one another.
\textsuperscript{204} 20 C.F.R. § 718, app. B (1980).
\textsuperscript{205} Id.
The Benefits Review Board has given some guidance on how the interim presumption may be rebutted. In *Sykes v. Itmann Coal Company* 206 the Board recently held that the interim presumption, once invoked, may be rebutted by medical evidence demonstrating that a miner’s respiratory or pulmonary impairment is not totally disabling.207 In *Johnson v. Cannelton Industries*, 208 decided on the same day, the Board held that medical proof of the non-existence of a presumed impairment would also rebut the presumption.209 In both cases the provision governing rebuttal was considered to be 20 C.F.R. § 727.203(b)(2) and, unlike the few courts which had previously grappled with this definitional rebuttal section under the SSA presumption, the Board followed the reference in 20 C.F.R. § 727.203(b)(2) to 20 C.F.R. § 410.412(a)(1) and concluded, that under rebuttal clause 2, presumed total disability due to pneumoconiosis could be rebutted by medical evidence.

In *Sykes*, the Board examined the types of medical evidence which might rebut the presumption. Citing *Ansel v. Weinberger* 210 and *Henson v. Weinberger*,211 the Board concluded that the mere showing of non-qualifying vent and blood gas values is insufficient to establish that a miner does not have pneumoconiosis.212 Relying on a number of other SSA cases, the Board also held that this non-qualifying evidence does not preclude a finding of a totally disabling respiratory impairment.213 However, the Board went on to hold that non-qualifying tests, if evaluated in a reasoned medical opinion, may be sufficient to establish that the claimant is not totally disabled due to pneumoconiosis and thus rebut the interim presumption.

While these two decisions are a positive step toward a full and detailed evaluation of the interim presumption, many questions remain unanswered.214 Although the Board has held, under

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206 2 BLR (M-B) 1-1089, BRB Nos. 79-396 BLA & 79396 BLA/A (1980).
207 Id. at 1-1095 to -96.
208 2 BLR (M-B) 1-1081, BRB No. 79-261 BLA (1980).
209 Id. at 1-1087.
210 529 F.2d 304 (6th Cir. 1979).
211 548 F.2d 695 (7th Cir. 1977).
212 2 BLR (M-B) 1-1089, BRB Nos. 79-396 BLA & 79-396 BLA/A (1980), slip op. at 1-1100.
213 Id.
214 The Department of Labor Solicitor’s Office has asked the Benefits Review Board to reconsider its rulings in *Sykes* and *Johnson*, arguing in effect that any
the facts presented, that the interim presumption cannot be rebutted by relying solely on non-qualifying vent or blood gas values, it has not addressed the consideration which might be given to evidence indicating normal or above normal values on these tests. At least one Fourth Circuit SSA case indicates that such normal values would merit a different evaluation than that suggested by the Board.215

*Sykes* and *Johnson* also leave open the question of whether the specific methods of rebuttal enumerated in 20 C.F.R. § 727.203(b) are exclusive or whether other rebuttal methods might be used. In contrast to the rebuttal limitation in the section 411(c)(4) presumption the rebuttal provisions of the Labor interim presumption are not expressly exclusive. The real question is whether all presumed facts are rebuttable or, whether certain presumed facts are irrebuttable. It is fairly apparent from the Board's decision in *Sykes* that no situation has yet been presented to the Board which would require a foray outside the specific rebuttal parameters of 20 C.F.R. § 727.203(b)(1)-(4).

There may, however, be a few areas where such a foray is arguably necessary—not so much as a means to determine whether presumed facts can be rebutted by evidence, but in an effort to find some additional evaluatory standards to apply to the evidence presented. The Labor interim presumption contains, in paragraph (c), the statement that 20 C.F.R. Part 718,16 which contains the permanent evaluatory criteria to be applied to medical evidence, is also applicable to interim presumption claims “except as is otherwise provided” in the Labor interim presumption itself.217 The Department of Labor Solicitor's Office has argued in many pending cases that this section, in effect, means only that a claim which cannot be approved under the in-

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215 See *Prater v. Harris*, 620 F.2d 1074 (4th Cir. 1980).


217 20 C.F.R. § 727.203(c) (1980).
terim presumption may, if appropriate, be approved under the permanent criteria. This argument, however, fails to consider the fact that the very situation it addresses is fully covered in paragraph (d) of the Labor interim presumption. The argument would, therefore, render paragraph (c) totally meaningless.

It is more probable that paragraph (c) was intended by the Labor Department as a mechanism to bring into play all of the evaluatory criteria contained in 20 C.F.R. Part 410, subpart D, except for the permanent vent and blood gas standards and certain other unnecessary provisions, in order to retain some continuity and consistency in the evaluation of evidence. Paragraph (c) was intentionally innocent on its face and couched in technical terms so that it would pass political scrutiny. In fact, subsection (c) is loaded with potential significance.

Among the provisions incorporated by 20 C.F.R. Part 718 are, for example, (1) a clause which provides that in determining the presence of total disability primary consideration is given to the medical severity of the individual's pneumoconiosis, (2) a clause which provides that a miner shall be found to have a compensable disability "only if his pneumoconiosis is the primary reason for his disability," and (3) a clause which permits consideration of a miner's age, education, and work experience if vent values and physical performance tests are negative or contra-indicated and, other relevant evidence establishes a severe respiratory or pulmonary impairment. Many other significant provisions may be incorporated by this paragraph and, with respect to a claim subject to the Department's new medical criteria contained in the amended 20 C.F.R. Part 718, the breadth of paragraph (c) of the Department's interim presumption might be even more significant than indicated above.

Another major area of concern will focus on the rebuttability of the interim presumption in a claim involving mixed respiratory impairments traceable to factors other than coal dust inhalation. The Fourth, Fifth, and Seventh Circuits have

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219 20 C.F.R. § 410.422(d) (1980).
220 20 C.F.R. § 410.426(a) (d) (1980).
221 20 C.F.R. § 410.426(a) (1980).
222 See Barnette v. Califano, 585 F.2d 698 (4th Cir. 1978).
223 U.S. Steel Corp. v. Gray, 588 F.2d 1022 (5th Cir. 1979).
224 See Peabody Coal Co. v. Benefits Review Board, 560 F.2d 797 (7th Cir. 1977).
held that total disability which does not arise at least primarily out of coal mine employment, is not compensible. Thus, if the evidence establishes that the miner's respiratory condition was the result of coronary artery disease, a neurological or genetic disease, or cancer and if the evidence on the record further establishes that these conditions are not significantly related to coal mine employment, then a state of facts would be present which would seem to mandate a denial of the claim. On appeal, the quality and credibility of the medical evidence would be critical. Assuming that the decision was based on substantial evidence, a reversal and award by the Board or a court would approximate "judicial legislation" and effectively amend the statute so as to provide benefits for partial disability due to pneumoconiosis—an idea which was rejected very early by Congress.

A literal reading of the Department of Labor's rebuttal paragraph (b)(3) might however, lead to the conclusion that something in the 1977 amendments justified such a change. In the many cases raising the issue, the Labor Department Solicitor's office has argued, in effect, that while the interim presumption presumes total disability arising out of coal mine employment, it can be rebutted only if partial disability is disproven. Thus, at least one fact presumed under the Labor presumption—total disability arising out of coal mine employment—cannot be rebutted according to the Department of Labor. Avenues of rebuttal may be available under rebuttal clause or paragraph (c) of the interim presumption, or under the Act itself, and the matter will certainly be resolved by the Board and the courts in the coming years. It is not unlikely that rebuttal paragraph (c) which plainly goes well beyond the statutory language it implements, will be declared an invalid regulation.


\[226 \text{ See U.S. Steel Corp. v. Gray, 588 F.2d 1022 (5th Cir. 1979).} \]

\[227 \text{ While such a proposal did not surface in any of the major black lung bills, it was discussed by interested parties at some length.} \]

\[228 \text{ See Sykes v. Itmann Coal Co., [1980] 2 BLR (M-B) 1-1089, BRB Nos. 79-396 BLA & 79-396 BLA/A.} \]
Another significant question which will ultimately find its way to the courts involves the relative weight to be assigned to vocational evidence and availability of work in determining whether a miner is able to do his usual coal mine work or comparable work. In *Sturnick v. Consolidation Coal Co.*, the Benefits Review Board, over the dissent of Chief Judge Smith, held that one of the criteria for determining whether the interim presumption was rebutted should focus on the actual availability of comparable and gainful work in the area of the miner's residence. This evaluatory criterion was first developed by the Board in *Fletcher v. Central Appalachian Coal Company* in connection with a claim adjudicated under the section 411(c)(4) presumption, and in substance directs the trier of fact to consider vocational evidence as well as all other evidence in adjudicating the claim. The *Fletcher* rationale was evolved from the permanent SSA regulations and, as construed in *Sturnick*, suggests that the Board will continue to look outside the interim presumption for the full array of evaluatory criteria which will be used in interim presumption cases. The extent to which vocational evidence will be weighed against medical evidence will probably develop on a case by case basis.

It is certain that many more issues of this sort will arise in connection with the rebuttability of the interim presumption as current litigation progresses. Much will ultimately be decided by the United States circuit courts in the years to come and the level of litigation in this area will remain high until many of these matters are resolved.

V. CONCLUSION

Unless Congress decrees otherwise, the interim presumption will not be with us for many more years. Its memory will, however, linger on in higher federal deficits, higher energy costs and perhaps most significantly in the minds of those millions of other occupational disease victims who, because of the black lung experience, will wait many more years before any relief at the federal level will be forthcoming.

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220 See *Sturnick v. Consolidation Coal Co.*, [1980] 12 BRBS (M-B) 634, BRB No. 79-512 BLA.
220 *Fletcher v. Central Appalachian Coal Co.*, [1978] 9 BRBS (M-B) 342, BRB No. 78-301 BLA.
One cannot, of course, blame the interim presumption alone for the fact that black lung has frightened even the most dedicated crusaders for occupational disease compensation reform. It is, however, a good symbol and a significant factor in making the black lung program a bad example to follow.

The interim presumption began life a sort of dark secret, contrived by federal agency personnel who probably saw their careers flash before their eyes as a few powerful members of Congress grew more and more strident in their demands that more claims be paid. Its continued viability was buoyed by misconceptions of how it worked, how it was applied, and what results it brought forth. For five years, Department of Labor personnel labored under the notion that the SSA interim presumption actually meant what it said. Nothing could have been further from the truth.

Then, when Labor Department officials finally found out how the interim presumption really worked, they thought they could control it and make it a useful claims adjudication device. That was not to be and the Department of Labor quickly fell into the same trap that had snared its sister agency five years earlier. The interim presumption was a conduit for an enormous amount of Congressional largesse and the Department of Labor would not be permitted to play the spoiler.

There is no doubt that the interim presumption has helped a lot of needy people. Many of them were and are victims of pneumoconiosis, many are not. There is certainly no absolute evil in government initiatives which aid those in need. But the flaw in the interim presumption arises from the fact that it was conceived, packaged, and sold to the Congress and the American public as a legitimate mechanism for compensating the real victims of black lung disease. It is not. Instead, it partially accomplishes indirectly what certain congressional advocates could not do directly\textsuperscript{21} that is, to turn the black lung program into a \textit{de facto} federal pension program for some older retired miners and many of the survivors of deceased miners. This is not an exercise which should be repeated without a full awareness on the part of Congress and the American public of the nature, scope, and consequences of the action proposed.

\textsuperscript{21} That is, to enact an automatic entitlement based upon years of employment alone.