June 1980

The Survivors' 25-Year Presumption under the Black Lung Benefits Reform Act of 1977: A Case for Its Unconstitutionality

David J. Millstone  
*Squire, Sanders & Dempsey*

Maria J. Codnach  
*Squire, Sanders & Dempsey*

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)

Part of the Estates and Trusts Commons, Insurance Law Commons, Oil, Gas, and Mineral Law Commons, and the Respiratory Tract Diseases Commons

**Recommended Citation**  
Available at: [https://researchrepository.wvu.edu/wvlr/vol82/iss4/42](https://researchrepository.wvu.edu/wvlr/vol82/iss4/42)

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
THE SURVIVORS’ 25-YEAR PRESUMPTION UNDER THE BLACK LUNG BENEFITS REFORM ACT OF 1977: A CASE FOR ITS UNCONSTITUTIONALITY

DAVID J. MILLSTONE*
MARIA J. CODINACH**

Title IV of the Federal Coal Mine Health and Safety Act of 19691 [the Black Lung Act], as amended by the Black Lung Benefits Reform Act of 19772 establishes, inter alia, a new presumption intended to substantially assist widows and other dependent survivors of coal miners in gaining benefits for disability caused by coal workers’ pneumoconiosis (more commonly known as black lung disease). Survivors of coal miners who died before March 1, 1978, with twenty-five or more years of coal mine employment accrued prior to July 1, 1971, are presumed to be entitled to benefits unless it is established that, at the time of his death, the miner was neither totally nor even partially disabled by the disease.3

---

* A.B., The Johns Hopkins University, 1968; J.D., West Virginia University, 1971; Partner, Squire, Sanders & Dempsey, Cleveland, Ohio. Member, West Virginia Bar, Ohio Bar, Florida Bar.

** A.B., Loretto Heights College, 1966; M.A., University of Texas, 1969; J.D., Ohio State University, 1976. Associate, Squire, Sanders & Dempsey, Cleveland, Ohio. Member, Ohio Bar.


3 Section 3(a)(3) of the 1977 Act amends § 411(c) of the Black Lung Act, 30 U.S.C. § 921(c) (West Supp. 1979), by adding the following provision:

(5) In the case of a miner who dies on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits, at the rate applicable under section 922(a)(2) of this title, unless it is established that at the time of his or her death such miner was not partially or totally disabled due to pneumoconiosis. Eligible survivors shall, upon request by the Secretary, furnish such evi-
The purpose of this article is to discuss the twenty-five year presumption and some of the constitutional issues which it poses. To put these considerations in perspective, this article will set out a brief overview of the provisions of the Black Lung Act and its various amendments, a brief review of the presumption's legislative history and its operation and, finally, a discussion of some constitutional infirmities of the new presumption.

I. AN OVERVIEW OF THE BLACK LUNG ACT AND ITS AMENDMENTS

The Black Lung Act was enacted in 1969 to provide benefits for miners who were totally disabled due to pneumoconiosis arising out of employment in coal mines and for the survivors of miners whose deaths were due to this disease. At that time, few states were providing benefits for death or disabilities caused by the disease. In response, the federal government set up a temporary program to provide for such benefits. This program was intended to be phased out as the states, in cooperation with the federal government, adopted new laws for the benefit of miners. Title IV was essentially enacted as a one-shot effort to provide what was then characterized as "emergency benefits" for a specific group of miners and their survivors.

As originally enacted, the Black Lung Act created three presumptions for the purpose of aiding miners and their survivors in establishing their claim: First, if a miner who is suffering or had suffered from pneumoconiosis had been employed for ten years or more in one or more underground coal mines, there is a rebuttable presumption that his pneumoconiosis arose out of such employment. Second, if a deceased miner had been employed for ten

dence as is available with respect to the health of the miner at the time of his or her death.


5 See generally, LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, as amended through 1974 including Black Lung Amendments of 1972 Senate Committee on Labor and Public Welfare, 94th Cong. (1975) [hereinafter cited as "LEGISLATIVE HISTORY"], at 348-50; 398-407; 414-50; 503-05; 511-34; 770-72; 904-10; 951-57; 1042-44; 1069-70; 1153-55; 1168; 1191-93; 1112-15; 1120; 1129-33; 1256-57; 1267-79; 1292-94; 1381; 1411-12; 1494-1500; 1532-35; 1542-51; 1556-61; 1564-65; 1598; and 1629-34.

6 Pneumoconiosis was originally defined as a "chronic dust disease of the lung arising out of employment in an underground coal mine." BLA § 402(b), 30 U.S.C. § 902(b) (1969).
years or more in one or more underground coal mines and died from a respirable disease, there is a rebuttable presumption that his death was due to pneumoconiosis. Third, if a miner is suffering or has suffered from a chronic dust disease of the lung which can be diagnosed as complicated pneumoconiosis or progressive massive fibrosis, there is an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis.7 These presumptions were applicable both to the claims which were to be paid by the federal government (Part B claims)8 and the claims which were to be paid by individual coal mine operators (Part C claims)9.

---

7 BLA § 411(c)(1)-(3), 30 U.S.C. § 921(c)(1)-(3) (1969). “Total disability” was defined in the 1969 Act as having “the meaning given it by regulations of the Secretary of Health, Education and Welfare, but such regulations shall not provide more restrictive criteria than those applicable under Section 423(d) of Title 42.” BLA § 402(f), 30 U.S.C. § 902(f) (1976). The regulations defining total disability appeared at 20 C.F.R. 410, Subpart D (1970).

8 Under Part B of the original Black Lung Act, the federal government assumed responsibility for all claims filed on or before December 31, 1972, or, in the case of a widow-claimant, six months after the miner’s death or December 31, 1972, whichever was later. BLA § 414(a), 30 U.S.C. § 924(a) (1969). Benefits for Part B claims filed before December 31, 1971, began on the date the claim was filed, and the federal government was liable for such payments as long as the miner or his survivor was entitled to receive benefits under the criteria established by the Secretary of Health, Education and Welfare, who was given authority to administer Part B of the BLA. BLA § 414(b), 30 U.S.C. § 924(b) (1969). Thereafter, such benefits were to be paid by the responsible coal mine operator. BLA § 422, 30 U.S.C. § 932 (1969).

9 Under Part C of the original Black Lung Act, claims for benefits for death or total disability due to pneumoconiosis filed after January 1, 1973, had to be filed pursuant to the applicable state workers’ compensation law, i.e., workers’ compensation laws included in a list published by the Secretary of Labor, who was given the authority to administer Part C of the BLA. BLA § 421(a), 30 U.S.C. § 931(a) (1969). For those periods in which a state workers’ compensation law was not included in the Secretary’s list, coal mine operators were responsible for the payment of benefits to claimants who filed their claims after January 1, 1973. BLA § 422, 30 U.S.C. § 932 (1969). Claims for benefits under Part C had a three-year statute of limitations, beginning on the date of the discovery of total disability due to pneumoconiosis or date of death due to pneumoconiosis. BLA § 422(f), 30 U.S.C. § 932(f) (1969). No benefits were payable under this section for any period prior to January 1, 1973, or for any period after seven years after December 30, 1969. BLA § 422(e), 30 U.S.C. § 932(e) (1969). In those cases in which there was no responsible coal mine operator to secure the payment of such benefits, the federal government assumed liability for Part C claims. BLA § 424, 30 U.S.C. § 934 (1969). The presumptions were applicable to transition period and Part C adju-
Given the fact that by 1972 no state had satisfactorily modified its workers’ compensation laws to meet the requirements imposed by Part C of the Black Lung Act and that the administration of that Act had proved incapable of servicing the goals which the Act had sought to achieve, Congress enacted the Black Lung Benefits Act of 1972. The 1972 Act, inter alia, added a new presumption applicable to both Part B and C claims. If a miner was employed for fifteen years or more in one or more underground coal mines, and if there was a chest x-ray submitted in connection with a claim which was interpreted as negative for complicated pneumoconiosis, and if other evidence demonstrated the existence of a totally disabling respiratory or pulmonary impairment, there was a rebuttable presumption that such miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis. The 1972 Act specifically pro-

10 See generally, Legislative History, supra note 5.
11 Id.
13 The use of this presumption in Part C adjudications was limited by a proviso that for purposes of determining the applicability of § 411(c)(4) to Part C claims, no period of employment after June 30, 1971, shall be considered to determine whether a miner was employed at least 15 years in coal mines. BLA § 430, 30 U.S.C. § 940 (1976).
15 BLA § 411(c)(4), 30 U.S.C. § 921(c)(4) (1976). This presumption was limited by a proviso that in the case of a living miner, a wife’s affidavit cannot be used by itself to establish the presumption. This presumption can only be rebutted by the Secretary by establishing that the miner does not or did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. The definition of pneumoconiosis was amended by the 1972 Act to read as follows: “a chronic dust disease of the lung arising out of employment in a coal mine.” BLA § 402(b), 30 U.S.C. § 902(b) (1976). The definition of total disability was also amended to provide that under the Department of Health, Education and Welfare’s regulations, a miner “shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time.” BLA § 402(f), 30 U.S.C. § 902(f) (1976).
vided that none of the rebuttable presumptions contained in section 411 may be defeated solely on the basis of a negative chest x-ray.\textsuperscript{16}

Another significant feature of the 1972 Act was the extension of benefits to the survivors of miners who were totally disabled by pneumoconiosis at the time of their death and to additional categories of dependent survivors.\textsuperscript{17} Although Congress intended to allow a "reasonable and necessary additional period" for the states to prepare to assume responsibility for the payment of black lung benefits, the nature of the 1972 Amendments quite clearly indicated that the black lung program was no longer a temporary measure to provide emergency benefits but a permanent program.

By 1977, it became obvious to Congress that the states were not moving ahead with the desired black lung legislation and that administrative difficulties were continuing to plague both the Department of Health, Education and Welfare and the Department of Labor.\textsuperscript{18} Congress then amended the Black Lung Benefits Reform Act of 1977\textsuperscript{20}

\begin{enumerate}
\item \textsuperscript{16} BLA §§ 413(b), 430, 30 U.S.C. §§ 923(b), 940 (1976).
\item \textsuperscript{17} BLA §§ 402(a), 402(e), 402(g), 411, 412, 30 U.S.C. §§ 902(a), 902(e), 902(g), 921, 922 (1976).
\item \textsuperscript{18} See, \textit{Legislative History, supra} note 5, at 1731-32.
\item The 1972 Act also extended the deadline for shifting liability to the states or responsible coal mine operators. Under the 1972 Amendments, the federal government's liability was extended to claims filed on or before December 31, 1973. For claims filed on or before June 30, 1973, the federal government assumed lifetime liability. BLA § 413, 30 U.S.C. § 923 (1976). As to claims filed after June 30, 1973, but prior to January 1, 1974, the federal government assumed total liability until December 31, 1973. \textit{Id.} Thereafter, liability for Part B claims was shifted to the states or coal mine operators. BLA §§ 415(a), 422(e), 30 U.S.C. §§ 925, 932(e) (1976). Liability for Part C claims began on January 1, 1974. BLA § 422, 30 U.S.C. § 932 (1976). Benefits under this part were payable until December 30, 1981.
\end{enumerate}
and the Black Lung Benefits Revenue Act of 1977, primarily to revise the criteria for determining eligibility for black lung claims, to transfer from the federal government to the coal industry the residual liability for black lung benefits, and to establish a Black Lung Disability Insurance Fund funded by tonnage payments from the coal industry.

Among the significant changes of the 1977 Amendments were the definitions of "miner," "pneumoconiosis," and "total disability"; the introduction of more liberal criteria and presumptions.

---


In order to shift black lung liability to the private sector, the Black Lung Benefits Revenue Act of 1977 created a Trust Fund for benefit payments to be financed by a tax based upon the tonnage of coal mined by coal mine operators. See 30 U.S.C.A. § 934(a) (West Supp. 1979). The Trust Fund, inter alia, pays benefits in cases in which there is no operator who is required to secure the payment of such benefits or where a liable operator has failed to make payment in a timely manner or cases in which the miner's last coal mine employment was before January 1, 1970. 30 U.S.C.A. § 934 (West Supp. 1979). As long as an employer can be identified, however, said employer is individually liable for payments under the 1977 Act. 30 U.S.C.A. § 932 (West Supp. 1979).

23 Miner is now defined, as follows:

any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.


24 The definition of pneumoconiosis is now, as follows: "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 1977 Act § 2(a), 30 U.S.C.A. § 902(b) (West Supp. 1979).

25 Total disability is now defined as having the meaning given it by the Department of Health, Education and Welfare's regulations for Part B claims and by
tions to determine eligibility for benefits; and a mandatory review using the 1977 Act criteria of all Part B and Part C claims that had either been previously denied or were currently pending. One of the most controversial features of the 1977 Act was the introduction of the new twenty-five year survivors' presumption, the subject matter of this article.

regulations of the Secretary of Labor for claims under Part C, subject to other provisions of the Act, except that:

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.


The criteria applied by the Secretary of Labor in the case of

(A) any claim which is subject to review by the Secretary of Health, Education and Welfare, or subject to a determination by the Secretary of Labor, under Section 435(a);

(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor; shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.


II. LEGISLATIVE HISTORY OF THE TWENTY-FIVE YEAR PRESUMPTION

The original House bill\(^{29}\) to amend the Black Lung Act contained a provision entitling a miner or his eligible survivor to the payment of benefits after the miner had been employed for thirty years or more in underground coal mines, or after a miner had been employed for twenty-five years or more in anthracite coal mines.\(^{30}\) No medical evidence of disability or illness was required in order to qualify for this benefit. The federal government would pay the benefits if the last date of employment preceded December 30, 1969, and responsible coal mine operators would pay benefits for miners whose thirty years of employment were obtained by June 30, 1971.\(^{31}\)

The original Senate bill\(^{32}\) established an entitlement to benefits for survivors of miners who worked in the mines for twenty-five years or more prior to June 30, 1971, and who died on or before the date of enactment of the 1977 Amendments, unless it is established that the miner was not partially or totally disabled due to pneumoconiosis when he died.\(^{33}\) Upon request by the Secretary of Labor, survivors were to provide available evidence re-


\(^{30}\) Id. § 2(a). Predecessor bills in Congress had also contained similar presumptions. H.R. 17178, 93rd Cong., 2d Sess. (1974), contained a 25 years-of-employment rebuttable presumption of total disability or death due to pneumoconiosis which could only be rebutted by a negative result of a blood-gas study. If a miner was employed for 35 years or more, there was an irrebuttable presumption of total disability or death due to pneumoconiosis. The same presumption appeared in H.R. 7, 94th Cong., 1st Sess. (1975) and H.R. 8, 94th Cong., 1st Sess. (1975). H.R. 2913, 94th Cong., 1st Sess. (1975), contained a 15 years-of-employment irrebuttable presumption of total disability due to pneumoconiosis. H.R. 10760, 94th Cong., 1st Sess. (1975), contained the same presumptions as H.R. 4544. S. 3183, 94th Cong., 2d Sess. (1976), contained an irrebuttable presumption that black lung disability exists if a miner worked underground in a bituminous or anthracite mine for 25 years. H.R. 1532, 95th Cong., 1st Sess. (1977), contained the same presumption. H.R. 4389, 95th Cong., 1st Sess. (1977), provided that if a miner was employed for 20 years or more, there was an irrebuttable presumption of total disability or death due to pneumoconiosis.


specting the miner's health at the time of his death. 34

Benefits with respect to claims in which the miner's last coal mine employment was before January 1, 1970, were to be paid by a Trust Fund created by the Black Lung Benefits Revenue Act of 1977. 35 Benefits for the survivors of those employed after that date would be paid by the responsible operators, or, if no responsible operator could be found, by the Trust Fund. 36

Although the medical evidence presented to Congress did not demonstrate conclusively that there was a causal relationship between duration of employment and the incidence of total disability due to pneumoconiosis, 37 the House and Senate Committee which reported on the proposed amendments linked years of employment to the entitlement of benefits as a matter of social policy. 38 As the Senate Committee on Human Resources stated:

Widows have perhaps been even more adversely and wrongfully affected by black lung claim denials than living miners, for in all too many instances the probative value of the widow's evidence submitted in support of a claim is not good. It is not her fault. Medical records may have been lost or destroyed. The miner may have been lost forever in an underground mine explosion. He may have died so long ago that clinical knowledge of the day did not include pneumoconiosis — the cause of death was simplistically attributed to 'heart failure.' For these and other reasons the Committee believes that concern for the welfare of these widows, whose husbands gave their physical strength, their bodies and their lives to this most difficult occupation, should override any professed need to demonstrate a clinically precise association between years

34 Id.
worked and totally disabling lung disease. This provision, and others contained in the bill, give the benefit of any doubt to the miner's widow. Any burden is on the Secretary to show that the miner was not partially or totally disabled.²⁹

The conference substitute bill, which became law, adopted the Senate provision for a twenty-five year presumption.⁴⁰

III. Operation of the Presumption

The basic requirements for eligibility for benefits under Section 411(c)(5) are: (1) that the miner died on or before March 1, 1978; (2) that the miner was employed twenty-five years or more in one or more coal mines before June 30, 1971; and (3) that the claimant is an eligible survivor of the miner. If a claimant establishes these facts, his or her eligibility can only be defeated by establishing that the miner at the time of his or her death was neither partially nor totally disabled due to pneumoconiosis. Survivors who establish eligibility under this presumption are entitled to benefits on a retroactive basis for a period beginning no earlier than January 1, 1974.⁴¹

The term partial disability, as used in the twenty-five year presumption, is not defined in the 1977 Act. The legislative history of the Act is also silent as to the exact meaning of this term. The Secretary of Labor's interim regulations define partial disability as a miner's "reduced ability to engage in his or her usual coal mine work or comparable and gainful work."⁴³ Since the Act

²⁹ S. REP. NO. 95-209, supra note 22, at 621.
⁴¹ BLA § 435(c), 30 U.S.C.A. § 945(c) (West Supp. 1979). Under the 1977 Amendments, widows are entitled to lifetime benefits. 1977 Act § 7(d), 30 U.S.C.A. § 932(e) (West Supp. 1979). Other survivors are subject to the limitations of BLA § 402(a) and (g), 30 U.S.C.A. § 902(a) and (g) and regulations thereunder.
⁴² 20 C.F.R. § 727.204(b)(1979). Comparable and gainful work for purposes of the Act is defined as "gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time." 20 C.F.R. § 410.412(a)(1)(1979).

Under the new permanent regulations, applicable to all claims filed after March 31, 1980, partial disability is defined as "reduced ability to engage in work" which is the miner's "usual coal mine work" or "gainful employment in the immediate area of his or her [the miner's] residence requiring the skill or abilities com-
defines total disability to mean the inability to engage in the miner's regular coal work or comparable and gainful work, the Secretary, in the comments to the regulation on partial disability, adds that "partial disability must mean something less than total disability for the same type of work." Accordingly, the Department of Labor's regulations establish that in order to rebut this presumption the evidence must demonstrate that the miner's ability to perform his or her usual and customary work or comparable and gainful work was not reduced at the time of his or her death or that the miner did not have pneumoconiosis. The Department of Labor's regulations further provide that the following alone shall not be sufficient to rebut the twenty-five year presumption: evidence that a deceased miner was employed in a coal mine at the time of death; evidence pertaining to a deceased miner's level of earnings prior to death; a chest x-ray interpreted as a negative for the existence of pneumoconiosis; a death certificate which makes no mention of pneumoconiosis.

Given the vague definition of the term partial disability in the regulations, it is expected that a significant number of claims under the twenty-five year presumption will be contested and that the Benefit Review Board's (the "Board") decisions will refine its exact meaning. Four cases discussed below give some indication of the Department of Labor's hearing officer's application of the presumption.

In Marinelli v. North American Coal Corp., evidence of a cough in 1968, increased bronchial markings in x-rays taken in 1970, and the reluctance of the particular miner to complain were held to have established that a miner who was diagnosed as having cancer of the right lung in March of 1974 was "partially disabled" due to pneumoconiosis prior to the onset of cancer and at the time of his death. The miner had performed his usual coal mine work as a mechanic until the carcinoma was diagnosed. He subsequently died of cancer of the right lung in March of 1975.

parable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." 20 C.F.R. §§ 718.204(b), 718.306(b)(1980).
20 C.F.R. §§ 727.204(c), 718.306(c)(1979).
Case No. 76-BLA-971 (Decision dated February 28, 1979).
The hearing officer held that the responsible coal mine operator was liable for the payment of widow's benefits beginning on the date of the miner's death.\textsuperscript{47}

\textit{Freeman v. Old Ben Coal Co.}\textsuperscript{48} is another unreported decision construing the twenty-five year presumption and the regulations thereunder. Although the hearing officer in that case found that the miner had never been disabled to an extent that would hinder the performance of his most recent tasks at the mine, he went on to note a lack of evidence which would establish that, during these latter years, he was \textit{not} disabled by pneumoconiosis that would prevent him from engaging in work which was "comparable to the most arduous employment in which he engaged with some regularity and over a substantial period of time during his entire career as a coal miner."\textsuperscript{49} Accordingly, he awarded benefits to the claimant and held that the responsible coal mine operator was liable for their payment.

In another opinion, \textit{Guadiano v. U.S. Steel Corp.},\textsuperscript{50} the miner in question had been killed in a coal mine accident and prior to the 1977 Act his widow had been denied black lung benefits under the criteria then in effect. On remand by the Board for a determination under the 1979 Amendments, the administrative law judge held that the widow qualified for benefits under the

\textsuperscript{47} The \textit{Marinelli} case was initially decided on April 22, 1977, 6 BRBS 1 (1977) (ALJ op.), by a hearing officer who denied the claim and held that the miner's total disability and death were caused by lung cancer. On appeal to the Board, the Board affirmed the hearing officer but, pursuant to the review provisions contained in § 15 of the 1977 Act, 20 U.S.C.A. § 945 (West Supp. 1979), remanded the case to be determined under the provisions of the 1977 Act, which had become effective after the first hearing was held. 8 BRBS 1046 (1978). On remand, the hearing officer denied the miner's claim, holding that the claimant had failed to meet the requirements of the interim presumption contained in 20 C.F.R. § 410.490 (1979) because the miner was able to work until March of 1974, but he nonetheless awarded benefits on the basis of the twenty-five year presumption. The hearing officer's 1979 Decision had been appealed to the Board, which heard oral argument on October 17, 1979. BRB No. 79-259 BLA. The argument before the Board included argument on constitutional issues raised by the responsible coal mine operator. On appeal the \textit{Marinelli} case was consolidated with \textit{Guadiano v. United States Steel Corp.}, BRB No. 79-435 BLA and \textit{Freeman v. Old Ben Coal Co.}, BRB No. 79-114 BLA, also discussed in this section.

\textsuperscript{48} BRB No. 79-114 BLA.

\textsuperscript{49} Id.

\textsuperscript{50} BRB No. 79-435 BLA.
twenty-five year presumption because the miner's autopsy showed that he had simple pneumoconiosis and because his foreman had testified that the miner had some physical difficulties at work when required to walk long distances and that his breathing sounded abnormal. He rejected the employer's contention that, since there was no physical limitation on his ability to work at the time of his death, the miner was not partially disabled within the meaning of the Act.

However, in the most recent unreported decision, *Jackson v. North American Coal Corp.*, the hearing officer held that a coal miner who died of cardiac arrest due to a myocardial infarction and who was employed at the time of his death performing the same work he had been doing for at least seven years at the same earnings level was not partially disabled due to pneumoconiosis.

It appears from these decisions that there is no consensus as to the meaning of partial disability for purposes of the twenty-five year presumption and that, at least at the hearing level, the slightest evidence of a physical discomfort will establish in most cases that a miner was partially disabled. Considering that the responsible coal mine operator must then prove the negative (i.e. that the miner was not partially disabled), it is not unreasonable to postulate that the twenty-five year presumption has become an irrebuttable one for all practical purposes.

IV. CONSTITUTIONAL ISSUES

A. Rationality

Presumptions arising in civil statutes involving economic legislation such as the Black Lung Act are tested for their constitutionality against the rational connection standard articulated by the United States Supreme Court in *Mobile Jackson & K. C. Railroad v. Turnipseed*.82

81 Case No. 80-BLA-210 (Decision dated March 28, 1980). This decision has also been appealed to the Board by the claimant with a cross appeal by the operator.

82 219 U.S. 35, 43 (1910). In *Mobile*, a state statute provided that in tort actions against railroad companies for damages to persons or property, proof of injury inflicted by the running of the locomotives or cars of the company shall be *prima facie* evidence of negligence on the part of the company. The statute was construed by the Supreme Court of Mississippi as to create a presumption of lia-
That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him. 53

The constitutionality of the presumptions contained in subsections 411(c)(1) and (2) of the Black Lung Act 54 was challenged by coal mine operators in Usery v. Turner Elkhorn Mining Co. 55 on the ground that a presumption based on duration of employment, without reference to degrees of exposure to coal dust, was irrational and arbitrary and, thus, did not meet the Mobile standards. Using the standards set out in Mobile and United States

53 Id. at 43. See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976). The same test has been used by the United States Supreme Court to test the constitutionality of presumptions contained in criminal statutes. See Leary v. United States, 395 U.S. 6 (1969); United States v. Gainey, 380 U.S. 63, 67 (1965); Tot v. United States, 319 U.S. 463, 466 (1943).

54 30 U.S.C.A. § 921(c)(1)-(2)(West Supp. 1979). This section provides:

(c) For purposes of this section —

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis.

v. Gainey, the Court found that both presumptions were valid. The Court reasoned that since all a presumption does is to shift the burden of going forward from the claimant to the operator and that since there was medical evidence before Congress indicating the noticeable incidence of pneumoconiosis in cases of miners with ten years' employment in the mines, it could not be said that Congress acted arbitrarily in selecting a ten-year figure as a point of reference to determine the cause of the disabling disease. This holding was based on the fact that the ten years of employment would not by itself activate the presumption of pneumoconiosis, but rather that the prerequisite length of employment plus medical evidence of pneumoconiosis would establish the cause of it. The Court's position was summarized as follows:

It is worth repeating that mine employment for 10 years does not serve by itself to activate any presumption of pneumoconiosis; it simply serves along with proof of pneumoconiosis under § 411(c)(1) to presumptively establish the cause of

---

56 380 U.S. 63 (1965). In Gainey, respondent had been convicted, _inter alia_, of carrying on the business of a distiller without bond in violation of 26 U.S.C. § 5601(a)(4) on the basis of a presumption which authorized a jury to infer guilt of the substantive offenses from the fact of a defendant's unexplained presence at the site of an illegal still. See 26 U.S.C. § 5601(b)(2)(1976). The United States Supreme Court held that the statutory presumption of 26 U.S.C. § 5601(b)(2) is constitutionally permissible since there is a reasonable connection between a defendant's unexplained presence at a still and the comprehensive crime of the illegal distilling operation. The Court stated:

The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and culled conclusions from it. As the record in the Circuits shows, courts have differed in assessing the weight to be placed upon the fact of the defendant's unexplained presence at a still. 380 U.S. at 67.

Prior to enactment of the statute, the various federal courts of appeals were divided as to whether juries should be instructed that a defendant's presence at a still could be considered by them as determining whether the defendant had participated in carrying on the illegal operation, but the majority allowed such instruction. The statutory presumptions were enacted to solve the lack of uniformity in the applicable instructions. The Court emphasized the fact that "it is precisely when courts have been unable to agree as to the exact relevance of a frequently occurring fact in an atmosphere pregnant with illegality that Congress' resolution is appropriate." 380 U.S. at 67.

57 428 U.S. at 29.
pneumoconiosis, and along with proof of death from a respiratory disease under § 411(c)(2) to presumptively establish that death was due to pneumoconiosis.\textsuperscript{58}

Although, for the purpose of shifting the burden of proof, years of employment was used to the exclusion of other relevant factors such as the degree of dust exposure, the Court refused to hold that Congress had acted arbitrarily in giving more weight to that particular contributing factor. Given the number of factors contributing to pneumoconiosis and the impossibility of measuring the exact impact of each one, the Court concluded that it was just a matter of "rough accommodations" for Congress to determine that a particular and significant variable would signal the point at which the coal mine operator must come forward with the cause of the disease or death.\textsuperscript{59}

The coal mine operators in \textit{Turner} also challenged the constitutionality of the presumptions contained in section 411(c)(4) of the Black Lung Act,\textsuperscript{60} which provides that a miner who is employed for fifteen years in underground mines and offers proof of a totally disabling respiratory or pulmonary impairment shall be

\textsuperscript{58} Id. (emphasis added).
\textsuperscript{59} Id. at 29-30.
\textsuperscript{60} 30 U.S.C.A. § 921(c)(4) (West Supp. 1979). This section provides:
(c) For purposes of this section—
(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's, his widow's, his child's, his parent's, his brother's, his sister's, or his dependent's claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions in an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.
rubbtably presumed to be totally disabled by pneumoconiosis. Applying the Mobile and Gainey standards to test the constitutionality of this presumption, the Court found that in light of the testimony before Congress indicating that the fifteen year point marks the beginning of the linear increase in the prevalence of the disease with years spent underground, the durational basis of this presumption was also unassailable. As is the case in sections 411(c)(1) and (2), the presumption of section 411(c)(4) is triggered by proof of years of employment accompanied by medical evidence of a disabling respiratory or pulmonary impairment.

Tested against the principles enumerated in Turner, the constitutionality of the section 411(c)(5) twenty-five year presumption is at best questionable. The legislative history of the 1977 Act shows that Congress did not have clear medical evidence in support of the proposition that there is a reasonable relationship between years of employment and the incidence of partial or total disability due to pneumoconiosis. In addition, the survivors entitled to the twenty-five year presumption are not required to submit any medical evidence of a respiratory disease, thus failing to meet the years of employment plus medical evidence test mandated by Turner.

The Senate report on the 1977 Amendments, which succinctly summarizes the evidence upon which Congress based its enactment of the twenty-five year presumption for survivors and rejected the proposal that the same presumption should apply to living miners, essentially admits that Congress' enactment of the presumption was based on social policy, not sound medical evidence:

The House Committee on Education and Labor was per-

---

61 428 U.S. at 30-31.
63 In Turner, the coal mine operators also challenged the constitutionality of the irrebuttable presumption contained in Section 411(c)(3), 30 U.S.C.A. Section 921(c)(3) (West Supp. 1979). The Court's decision on this presumption is analyzed infra.
suaded that there is a link of causality between time employed in the mines and the incidence of pneumoconiosis. The report of the House Committee states that '80.89 percent of the claims involving miners with a known coal mining employment experience of 30 or more years have been allowed under part B of the program', and that 'In recognition of the historically demonstrated and exceedingly high probability of total disability . . . and out of concern for an equally probable risk of error in the remaining cases, an objective test was established to simply provide part B benefits payments to all claimants whose claims have been denied and who could demonstrate 30 or more years of underground mining experience.' Dr. Murray B. Hunter, director of the Fairmont Clinic in Fairmont, West Virginia, testified that 'It is exposure over time that produces coal workers' pneumoconiosis and the enactment of a reasonable presumption that thus and so many years of exposure to coal mine dust . . . represents sound social policy.

Although no extant medical study demonstrates conclusively the prevalence of pneumoconiosis and job-related respiratory and pulmonary impairments, and although the estimates of such prevalence vary widely from study to study, it is interesting to note that partial data from the National Coal Workers' Autopsy Study conducted by the Appalachian Laboratory for Occupationally Related Diseases (ALFORD) of the National Institute for Occupational Safety and Health indicate that of 1,299 cases, coal workers' pneumoconiosis was mentioned in 1,175, or more than 90 percent of these. On the other hand, other evidence available to the Committee indicates that there is no clear causal relationship between duration of employment and the incidence of total disability due to pneumoconiosis.

Nevertheless, it is clear to the Committee, just as it was in 1972, when those remedial amendments were enacted, that many disabled miners' claims have been denied, partly because the state of the medical art is not sufficiently advanced to unequivocally identify occupationally related disability in coal miners. This problem is markedly exacerbated in the case of deceased miners, particularly those who had the misfortune of dying at a time when medical knowledge of coal workers' pneumoconiosis was far scantier.

It is clear that complicated pneumoconiosis is a progressive and irreversible disease, and that the incidence of simple pneumoconiosis, along with other serious respiratory impairments — which some believe also to be progressive — increases in relation to duration of coal mine employment. How-
ever, these indicators are not so clear and compelling as to be persuasive that miners be entitled to benefits solely on the basis of years of service without a showing of disability.65

Extensive medical testimony before the House Education and Labor Committee demonstrated that miners with clear x-rays and with simple pneumoconiosis, some even with 35 or more years of coal dust exposure, can still have normal ventilatory capacities and only a slight reduction of diffusing capacity (gas transfer), a decrease of insufficient severity to constitute disability.66 Dr. Donald Rasmussen, from the Appalachian Regional Hospital, testified in response to a direct question as to whether the duration of exposure to coal dust has any relationship to a miner's respiratory condition. He responded, "We see quite a variation. . . . We could show you some miners with . . . fewer than 15 years who exhibit impairments in functions. We could show you miners with 50 years or more and no impairment. I can't really relate it to years of employment."67

Dr. N. LeRoy Lapp, from the West Virginia Medical Center, who has been involved in numerous studies at ALFORD, also stated:

[T]he preponderance of the medical evidence does not support the presumption that because a man has worked for 25 years or more in an underground coal mine that he should be necessarily totally disabled due to pneumoconiosis or that his death should have occurred as a result of such pneumoconiosis unless the individual has radiographic evidence of the complicated form of the disease. . . .

[T]he assumption that employment for 35 years or more in an underground mine necessarily results in total disability due to pneumoconiosis is not supported by the medical evidence to date.68

In addition, the National Academy of Sciences, in a 1976 report entitled "Coal Workers' Pneumoconiosis Medical Considerations, Some Social Implications," showed that although about 60% of the miners who worked at least thirty years in anthracite coal mines had some stage of black lung, only 14.3% had

65 S. REP. No. 95-209, supra note 22, at 17-18.
66 H.R. REP. No. 95-151, supra note 22.
67 Id. (emphasis added).
68 Id. at 589 (emphasis added).
progressive massive fibrosis, the disabling stage.\textsuperscript{69} The number of miners with the disease is even smaller in other than anthracite mining regions. In the Appalachian region, 45\% had the simplest first stage, while only 2.1\% were disabled. In the Midwest, only 25\% had the disease after thirty years and no statistically significant number were disabled. In the West, 10\% had the disease, and no statistically significant number were disabled.\textsuperscript{70}

Although it is true that the probability of developing pneumoconiosis increases with the number of years of coal mine employment, it is also true that the total percentage of miners contracting pneumoconiosis as the result of coal mine employment remains very small.\textsuperscript{71} Curiously enough, after substantial testimony by eminent black lung medical specialists, the Committee was "deeply impressed" by James L. Weeks, a lay consultant in the area of pneumoconiosis, whose report is attached as an appendix to House Report 95-151.\textsuperscript{72} Mr. Weeks' report is essentially based on public policy, not on medical evidence. Similarly, those members of the medical profession who supported the entitlement provision of the 1977 Act did so on the basis of social policy rather than on medical evidence.\textsuperscript{73}

Interestingly, the presumption of disease based on length of coal mine employment was even strongly opposed by the medical profession as being detrimental to the miners in the long run. Dr. Hans Weill, President of the American Thoracic Society, a branch of the American Lung Association, testified:

We are here today speaking for the medical and scientific communities in strongly suggesting that these entitlement provisions not be adopted. They would undermine the advances and increasing sophistication of medical diagnosis and, in fact, prejudice as ineffective the important dust control measures

\textsuperscript{69} Id. at 602.


\textsuperscript{71} See H.R. Rep. No. 95-151, supra note 22, at Appendix.

\textsuperscript{72} Id.

\textsuperscript{73} See statements of Drs. Fine, Martin, Hunter and Desser in H.R. Rep. No. 95-151, supra note 22.
being undertaken in this and other industries which we hope will effectively prevent occupational lung disease in the future.\textsuperscript{74}

Dr. Howard VanOrdstrand, the 1974 President of the American College of Chest Physicians and head of the environmental health section of the Cleveland Clinic Foundation, also opposed the entitlement provisions. He stated:

We do have medically established, clear-cut ways of determining both diagnosis as well as disability with reference to coal workers' pneumoconiosis, as well as all of the other currently known fibrogenic dust diseases of the lungs.

I and our entire American College of Chest Physicians strongly feel, therefore, that it continues to be sound medical judgment that the determination of both coal workers' pneumoconiosis, as well as other pneumoconiosis, be made through completely well-established ways of diagnosis and disability regardless [sic] of the number of years of working at the dust hazards [sic] such as in mining, rather than just empirically on the basis of years of mining.\textsuperscript{75}

He also testified that most miners are under the false impression that they will eventually develop black lung disease and that in his opinion it would be in the best interest of all living miners if they were given the correct medical information: only a small percentage are likely to develop coal workers' pneumoconiosis, and safe dust exposure levels in the working environment are being achieved in most instances.\textsuperscript{76} The United States Department of Labor as well as the West Virginia Black Lung Association opposed the entitlement provision on the same grounds.\textsuperscript{77}

Given the testimony before Congress and the fact that claimants are not required to show any medical evidence of a respiratory disease, as Turner seems to require, a strong argument can be made that the twenty-five year presumption does not meet the


\textsuperscript{75} Id.

\textsuperscript{76} H.R. Rep. No. 95-151, supra note 22, at 589-90.

\textsuperscript{77} Id. at 590. See also, 1977 Hearings, supra note 74, at 104-05; 125-27; 142-43.
rational connection test applied in *Mobile* and *Turner* and thus should be ruled unconstitutional as violative of the fourteenth amendment to the United States Constitution.

**B. Is the Twenty-Five Year Presumption Irrebuttable, and Thus a Pension?**

The basic reason for the enactment of the twenty-five year presumption was to provide benefits for the elderly widows of older miners who were unable to gather relevant medical evidence to support their claim.\(^7^8\) The medical data required by the Act prior to the 1977 amendment was either nonexistent or totally inadequate.\(^7^9\) Thus, the provision in the presumption that claimants must furnish to the Secretary evidence with respect to the health of the miner at the time of his or her death will be superfluous in the majority of the cases. And, if there is no medical evidence available, the twenty-five year presumption is, in effect, an irrebuttable presumption.

To the extent that the twenty-five year presumption irrebuttable entitles a survivor to benefits without a congressional finding of a medical relationship between length of employment and incidence of pneumoconiosis, the presumption is unreasonable and arbitrary under the standards set forth in *Turner*.\(^8^0\) In *Turner*, the Court held that the effect of the irrebuttable presumption contained in section 411(c)(3) was "simply to establish enti-

---

\(^7^8\) See 1977 Hearings, *supra* note 74, at 181; S. Rep. No. 95-209, *supra* note 22, at 18; Senate Debate on S. Bill 1538, 123 CONG. REC. at § 12516, S12545 (daily ed. July 21, 1977), reprinted in *LEGISLATIVE HISTORY OF 1977 AMENDMENTS*, *supra* note 19, at 659. Another important reason was to "get rid of the black lung backlog which plagued HEW and DOL for years." *Id.* To the extent that the presumption was created to avoid such backlog, administrative convenience cannot override constitutional mandates. In *Stanley v. Illinois*, 405 U.S. 645 (1972), a case that involved the constitutionality of an Illinois law which presumed unwed fathers to be unfit to raise children, the Court emphatically stated:

d... [t]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. *Id.* at 656.

\(^7^9\) 1977 Hearings *supra* note 74, at 142. See also S. Rep. No. 95-209, *supra* note 22, at 18; Senate Debate on S. Bill 1538, *supra* note 78, at 659.

\(^8^0\) 428 U.S. 1 (1976).
tlement in the case of a miner who is *clinically diagnosable as extremely ill with pneumoconiosis* arising out of coal mine employment."\(^81\) The Court added:

[W]ere the Act phrased simply and directly to provide that operators were bound to provide benefits for all miners *clinically* demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines, we think it clear that there could be no due process objection to it. . . . We cannot say that it would be irrational for Congress to conclude that *impairment of health* alone warrants compensation.\(^82\)

Significantly, on this particular issue the Court emphasized the fact that Congress was dealing exclusively with complicated pneumoconiosis, the most advanced and progressive stage of the disease.\(^83\) It is extremely doubtful that a non-clinically based irrebuttable presumption would meet the constitutional requirements set forth in *Turner*.

It can be argued that a presumption such as the twenty-five year presumption, which is not triggered by evidence of a medical disability and is practicably irrebuttable, is in fact a pension for the benefit of widows and other dependents. In such case, the constitutional question is whether Congress has the power to establish such a pension system for widows whose husbands died before the 1977 Amendments were passed. The *Turner* decision's analysis of the pre-1977 presumptions sheds some light on this issue. In *Turner*, the coal mine operators relied on *Railroad Retirement Board v. Alton Railroad*,\(^84\) in support of the proposition that the Black Lung Act violated the due process clause\(^85\) by requiring them to compensate employees who terminated their work in the industry prior to the enactment of the Act and their survivors. *Railroad Retirement Board v. Alton Railroad* involved the constitutionality of the federal Railroad Retirement Act of 1934\(^86\) which, *inter alia*, established a compulsory retirement and pension system for railroad employees. The Supreme Court held that the requirement of pensions for railroad employees was not a

\(^{81}\) Id. at 22.

\(^{82}\) Id. at 23 (emphasis added).

\(^{83}\) Id.

\(^{84}\) 295 U.S. 330 (1935).

\(^{85}\) U.S. Const. amend. XIV, § 1.

regulation of interstate commerce within the meaning of the Constitution because it had no reasonable relation to the safety and efficiency of the regulated business. The Court rejected the argument that social and humanitarian considerations demanded the support of the retired employee on the grounds that such argument failed "to distinguish constitutional power from social desirability." To the extent that the pension requirement in question was based in part on past services, the Court held that "[T]his clearly arbitrary imposition of liabilities to pay again for services long since rendered and fully compensated is not permissible legislation." The Court also distinguished pension plans from workers' compensation plans on the grounds that the latter, by assuring that compensation must be paid for every injury, promotes and encourages safety on the part of the employer. In addition, the Court emphasized the fact that workers' compensation statutes affect existing rights and liabilities under the theory that the employer should compensate the employee for injuries that occur during the course of employment. Pensions, to the contrary, do not attempt to affect any existing obligation or legal liability but instead seek purely social ends. Accordingly, the Supreme Court found that the federal government was without power to impose upon the employer the burden of establishing a pension system for railroad employees.

With regard to the constitutionality of the retroactive aspects of the 1972 amendments, the Railroad Retirement Board v. Alton Railroad decision was distinguished by the Supreme Court in Turner. In answer to the challenge made by the coal mine operators, the Court reasoned:

"[t]he point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary to meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business." To the extent that the Black Lung program merely requires

---

87 295 U.S. at 367.
88 Id. at 354.
89 Id. at 370.
90 Id. at 371.
91 Turner, 428 U.S. at 19.
an employer to compensate his employees for their death or disability due to pneumoconiosis arising out of employment in the mines, the Court found the Railroad Retirement Board v. Alton Railroad decision inapposite. Because the Black Lung program, as it existed in 1972, was analogous in operation to ordinary workers' compensation programs, where a physical injury is a prerequisite for compensation, the Court in Turner could justify the program as a rational scheme to provide compensation for injuries suffered on the job.

In Turner, however, the Court expressed concern for the fact that, in the case of employees who terminated their employment and died before the Act became effective, the irrebuttable presumption of section 411(c)(3) could be viewed as requiring compensation to their survivors for damages resulting from a death unrelated to the employment. If that were the case, the presumptions would be unconstitutional if applied retroactively. However, by characterizing the benefits authorized by section 411(c)(3) as deferred compensation for injury suffered during the miner's lifetime as a result of his illness itself, and not as compensation for his death, the Court upheld the constitutionality of the presumption. Although it was suggested that the payment of benefits to dependent survivors was irrational as a scheme of compensation for injury suffered as a result of a miner's disability, the Court explained that such a scheme was not "wholly unreasonable," because it provided benefits to those who were most likely to have shared the miner's suffering, which would actually have occurred in most cases of complicated pneumoconiosis.

To the extent that the presumption of section 411(c)(5) does not require a showing of injury, its retroactivity does present a constitutional problem under the Turner test. Such problem was noted in Turner in connection with the section 411(c)(3) presumption of death due to pneumoconiosis. The Court specifically stated that it would face a more difficult problem if the presumption authorized benefits to the survivors of a miner who did not die from pneumoconiosis after the enactment of the 1969 Act and who, during his life, was completely unaware of and unaffected by

92 Id.
93 Id. at 25-26.
his illness. The same difficulty was also noted in the case of a miner who, although aware of his pneumoconiosis, died from other causes before the Act was passed if the presumption were to authorize benefits for survivors who were completely unaware of and unaffected by his illness. However, because the operators did not make these arguments, the Court declined to "engage in speculations as to whether such cases may arise."

The Court also specifically noted that its analysis of the retrospective application of section 411(c)(3) was "fully applicable to the retrospective application of any other provision that might be construed to authorize benefits in the case of miners who die with, but not from, totally disabling pneumoconiosis." Thus, to the extent that the presumption of section 411(c)(5) provides for retroactive benefits for the survivors of miners under those circumstances, it can be argued that under the Turner standard this presumption is unconstitutional. The fact that claimants need no medical evidence to qualify for the survivor's entitlement does certainly amount to a pension on a retroactive basis.

C. Is the Twenty-Five Year Presumption Unconstitutional if Applied to Previously Denied and Pending Cases?

The presumption requires that the twenty-five years of employment be accrued prior to June 30, 1971, and it is applicable only to the survivors of miners who died prior to the effective

---

94 Id.
95 Id. at 26.
96 Id. at 26-27.
97 Id. at 27, n. 25 (emphasis added).
98 Interestingly enough the survivors of a miner who died before the 1977 Act was enacted are entitled to receive more retroactive benefits than any living miner prior or subsequent to the 1977 Act. No living miner is entitled to benefits on the sole fact that he worked in the mines for twenty-five years prior to June 30, 1971 (or any other date). Furthermore, no living miner is allowed to receive benefits for partial disability. Proof of a totally disabling condition is a prerequisite to eligibility for benefits for any living miner. See BLA § 411, 30 U.S.C.A. § 921 (West Supp. 1979). It should also be noted that although the survivor of a miner may recover for partial disability, coal mine operators are required to pay the same amount of benefits to the survivors of partially and totally disabled miners. If, as held in Turner, black lung benefits can be characterized as deferred compensation for injury suffered on the job, the degree of injury suffered should be taken into account to compute allowable benefits. To require equal benefits for unequal injuries further underlines the arbitrariness of the twenty-five-year presumption.
date of the 1977 Amendments. Accordingly, it is reasonable to expect that the majority of the claims under this presumption are those which were filed before the effective date of the 1977 Amendments and which are now being reviewed under the review provisions of the 1977 Act.99 Indeed, the four cases currently presenting this issue before the Board are claims which are being reconsidered under those provisions of the 1977 Act.100 The Department of Labor maintains that all reviewed claims must be paid by the responsible mine operator, if extant.101 Given such position, it is pertinent to ask whether the retroactive application of the twenty-five year presumption to claims filed before the effective date of the Act is constitutionally permissible.


Section 15 of the 1977 Act102 requires the Secretary of Health, Education and Welfare to notify all claimants whose claims under Part B were pending on March 1, 1978, or denied on or before then. The notice must inform such claimants that, upon request, their claims will either be reviewed by the Secretary of Health, Education and Welfare for a determination under the 1977 Amendments based on the evidence on file or will be referred to the Secretary of Labor for a determination of eligibility for benefits under the 1977 Amendments, in which event the claimant is given the opportunity to present additional evidence.

---


100 Marinelli v. North American Coal Corp., Case No. 76-BLA-971; Guadiano v. U.S. Steel Corp., BRB No. 79-114 BLA; Freeman v. Old Ben Coal Co., BRB No. 79-435 BLA; Jackson v. North American Coal Corp., Case No. 80-BLA-210 (Decision dated March 28, 1980). See also, supra, note 47. On March 28, 1980, the Board ordered the consolidation of these cases with eight other cases involving the 25 year presumption for additional briefing on the issue of Trust Fund liability for benefits to survivors of miners who completed the 25 years or more of coal mine employment prior to January 1, 1970, and July 1, 1971, but continued to work in the mines thereafter. The other cases are: Battaglia v. Peabody Coal Co., BRB No. 79-633 BLA; Bishop v. Peabody Coal Co., BRB No. 79-635 BLA; Chrislip v. Bethlehem Mine Corp., BRB No. 79-733 BLA; McKemore v. Amax Coal Co., BRB No. 79-714 BLA; Soulay v. Consolidation Coal Co., BRB No. 79-686 BLA; Stivers v. Peabody Coal Co., BRB No. 70-739 BLA; Trugillo v. Kaiser Steel Corp., BRB No. 78-398 BLA; Turchi v. Amax Coal Co., BRB No. 79-758 BLA.


If, upon review, the Secretary of Health, Education and Welfare determines that the claimant is eligible under Part B, the approval is certified to the Secretary of Labor to "make or otherwise provide for the payment of the claim."\(^{103}\) However, if the Secretary of Health, Education and Welfare does not approve the claim, he must refer it to the Secretary of Labor for a second determination under Part C standards. For Part C purposes, the date of the request for review by the claimant is considered as the date of the filing of the claim.\(^{104}\)

Under section 15 of the 1977 Act, the Secretary of Labor is also required to review each claim denied on or before March 1, 1978, under Part C or under section 415,\(^{105}\) and all claims pending on that date, taking into account the 1977 Amendments. Since the review is automatic, the Secretary need not notify the claimant that he will be entitled to it. If approved, the Secretary makes or otherwise provides for the payment of the claim. Individuals whose claims are reviewed and approved by either the Secretary of Health, Education and Welfare or the Secretary of Labor are entitled to retroactive benefits for a period beginning no earlier than January 1, 1974.\(^{106}\) Payments for reviewed claims will be made either from the Trust Fund or by the identifiable coal operator.\(^{107}\) Under the regulations issued by the Secretary of Labor, "denied" and pending claims as used in the 1977 Act include claims denied by or pending before a federal court of appeals.\(^{108}\)

2. Legislative History of the Review Provisions of the 1977 Act

House Bill 4544 contained a provision requiring the Secretaries of Health, Education and Welfare and Labor to review all denied or pending claims under Parts B and C, respectively, to determine whether there had been any initial error or inappropriate denial and to adjudicate them under the 1977 Amendments.\(^{109}\) If approved, they were to be paid by the Department of Health, Ed-

---

\(^{103}\) Id. at § 945(a)(2)(A).

\(^{104}\) Id. at § 945(a)(4).

\(^{105}\) Id. at § 925.


ucation and Welfare, in the case of Part B claims, or by the Department of Labor under Part C.\textsuperscript{110} The House bill did not provide for retroactive awards in claims approved upon review. The Senate bill contained a provision which allowed individuals whose Part B and C claims had been denied to refile under Part C for a consideration of their claims under the new medical criteria established by the 1977 Act.\textsuperscript{111} The Secretary of Labor was required to notify all individuals whose claims were denied under Part B and Part C of their right to refile. Retroactive benefits allowed under the review provisions were to be paid as follows: Part B claims denied by the Social Security Administration were to be paid retroactively to January 1, 1974; section 415 and Part C denied claims were to be paid retroactively to January 1, 1974, or the date the original claim was filed, whichever was later.\textsuperscript{112}

The Conference Report basically adopted the House Bill provisions pertaining to review of all denied or pending Part B and Part C claims taking into account the changes made by the amendments.\textsuperscript{113} It established a notification system for the review of Part B claims\textsuperscript{114} and automatic review for Part C claims.\textsuperscript{115} The Conference Report specifically states that for "purposes of payment of benefits all claims under review shall be treated as Part C provisions which require payment of benefits by a coal mine operator, other employer, or by the Trust Fund established by the Black Lung Benefits Revenue Act of 1977."\textsuperscript{116} The Conference substitute adopted the Senate amendment which precluded any retroactivity of benefits for a period prior to January 1, 1974.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{110} Id.
\item \textsuperscript{111} S. Rep. No. 95-209, supra note 22, at 15-16, 32, 52.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} H.R. Rep. No. 95-864, supra note 41.
\item \textsuperscript{114} Most Part B claims covered by the 1977 Act had already been reviewed once under the provisions of the 1972 Amendments which required the Secretary of Health, Education and Welfare to review all pending and denied Part B claims under the 1972 standards. See § 431 of the 1969 Act, as amended by the 1972 Act.
\item \textsuperscript{115} The number of claims to be reviewed by the Secretary of Health, Education and Welfare and the Secretary of Labor under the 1977 provisions was estimated as 200,000. Senate Debate on H.R. 4544, 124 Cong. Rec. S1443, S1444 (daily ed. February 7, 1978), reprinted in Legislative History of 1977 Amendments, supra note 19, at 901.
\item \textsuperscript{116} H.R. Rep. No. 95-864, supra note 41, at 22.
\item \textsuperscript{117} There is no significant debate or other congressional materials on this issue at either the time when the House bill was passed or when the Conference
3. Unconstitutional Retroactivity

An analysis of the retroactivity of the 1977 Amendments must begin with the Turner opinion's discussion concerning similar provisions in the 1972 Amendments. Specifically, the issue in Turner was whether the 1972 Amendments violated the due process clause of the fifth amendment by requiring mine operators to compensate former employees who had terminated their work in the industry before the 1969 Act was passed. Although the Court declared them to be constitutional, it emphasized the fact that, although the 1972 Act had some retroactive effect, it did not impose any liabilities on operators until 1974, two years after its enactment. Thus because the application of the 1972 Amendments would be limited to claims subsequently filed, such legislation was permissible. In addition, even though the new law was not expected by employers, the Court stated that prior cases were clear in holding that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." To the extent that the 1972 Amendments imposed liabilities for the effects of disabilities bred in the past, the Court found that the its provisions were justified as "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor — the operators and the coal consumers." This statement, however, was qualified by the repeated assertion by the Court that "a substantial portion of the burden for disabilities stemming from the period prior to the enactment is borne by the Federal Government."

To the extent that the Court based its decision upon the fact that the employer's liabilities were limited to a specific period of time (i.e., to a period beginning January 1, 1974) and that the government had rationally and equally split the cost of the benefits between the federal government and private industry, Turner does support the proposition that, in order to satisfy due process requirements, liability for claims filed prior to June 30, 1973, cannot be imposed upon coal mine operators by reason of the 1978

Report was adopted.
119 Id. at 16.
120 Id.
121 Id. at 18.
122 Id.
Amendments. Thus, any Part B claims which are reviewed now should be paid out of the Black Lung Trust Fund. At the very least, Turner should stand for the proposition that any liabilities imposed upon coal operators by the 1977 Act can only begin after the effective date of the 1977 Amendments.

The conclusions suggested by the Turner opinion are sup-

132 See 30 U.S.C.A. §§ 934, 934(a)(West Supp. 1979). In Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), a case involving amendments to the bankruptcy law which operated to take substantive rights of the mortgagee for the benefit of the mortgagor, the United States Supreme Court stated:

[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.

At 602 (emphasis added).

To the extent that the 1977 Amendments were enacted to facilitate eligibility for benefits, they can be fairly characterized as enacted to "relieve the necessities" of individual claimants who prior to the 1977 Amendments were unable to qualify for benefits. Under the Louisville Joint Stock Land Bank test such relief should be provided through the Trust Fund, which is funded by a tax imposed upon the coal mine operators. See Black Lung Benefits Revenue Act of 1977, 30 U.S.C.A. §§ 934-934(a)(West Supp. 1979).

Further, under the 1977 review provisions, the Secretary of Labor is required to treat claims referred by the Secretary of Health, Education and Welfare as if they were Part C claims. BLA § 435(a)(3)(A), 30 U.S.C.A. § 945(b)(1)(West Supp. 1979). Under the regulations issued by the Secretary of Labor under the 1977 Act, mine operators are held responsible for benefits allowed in reviewed Part B claims. 20 C.F.R. § 727.304(1979). Thus, although all Part B claims approved prior to the 1977 Act are now being paid out of the Trust Fund, coal mine operators are required to pay benefits for reviewed Part B claims. This unequal treatment of equally situated claims appears to violate the Equal Protection Clause of the United States Constitution, which is applicable to the federal government through the Due Process Clause. Johnson v. Robinson, 415 U.S. 361 (1974); Truax v. Corrigan, 257 U.S. 312 (1921); Hayes v. Missouri, 120 U.S. 68 (1887).

The propriety and constitutionality of imposing liability upon operators for Part B claims where the miner last worked in a coal mine prior to July 1, 1973, and his survivors elected to have the claims reviewed by the Secretary of Health, Education and Welfare have been raised by coal mine operators in Bordas v. Republic Steel Corp., BRB No. 79-753 BLA; Mrosko v. U.S. Steel Corp., BRB No. 79-776 BLA; Paulion v. Consolidation Coal Co., BRB No. 79-687 BLA; Ruston v. Allegheny River Mining Co., BRB No. 79-684 BLA; Sakatini v. U.S. Steel Corp., BRB No. 79-777 BLA; Ward v. U.S. Steel Corp., BRB No. 79-778 BLA; and Yakubco v. Republic Steel Corp., BRB No. 79-674 BLA.
ported by a long line of United States Supreme Court cases that have addressed the retroactive imposition of new liabilities similar to those imposed by the Black Lung Act. For example, in New York Central Railroad v. White, a case involving the constitutionality of a New York workers’ compensation statute which abolished certain employer common law defenses, the Court upheld its constitutionality, inter alia, on the grounds that it had “no retrospective effect, and applied only to cases arising some months after its passage.” In another decision handed down on the same day, the Court upheld the constitutionality of a state’s workers’ compensation statute which in like fashion substantially altered the rights and duties between employees and employers on the grounds that, although the Act was approved on March 14, 1911, it was not to take effect until October 1 of that year, with actions pending and causes of action existing through September 30 being expressly saved. “It therefore disturbed no vested rights, its effect being confined to regulating the relations of employer and employee in the hazardous occupations in futuro.”

Similarly, in cases involving the review of final orders after the period for review of the award had expired, the United States Supreme Court has held that retroactive legislation may not impose liabilities where none existed before. In Paramino Lumber Co. v. Marshall, a private Act of Congress which authorized and directed the review of a Longshoremens & Harbor Workers’ Compensation Act claim after an award for disability thereunder had become final was held not violative of the Due Process Clause of the Fifth Amendment because it did not create a new liability. The defendant commissioner in Paramino Lumber Co. had determined on August 26, 1931, that a claim by plaintiff’s employee was allowable for the period January 17, 1931, to August 26, 1931. The order became final 30 days thereafter, when the period for review expired. Almost five years later, Congress passed a private act ordering the Compensation Commission to review the case and to issue a new order. Additional medical facts, discovered after payments under the Act had ended, would have entitled the claimant to benefits for an extended period if they had been

---

124 243 U.S. 188, 202 (1917).
126 309 U.S. 370 (1940).
known at the time the original claim was filed. The Commissioner, however, had no jurisdiction under the Act to readjust his claim after the discovery. On those facts, the Court held that the immunity obtained by the lapse of time was not the type which protects its beneficiary from retroactive legislation authorizing review of the claim:

This private act does not set aside a judgment, create a new right of action or direct the entry of an award. . . . It does not operate to create new obligations where none existed before. It is an act to cure a defect in administration developed in the handling of a compensable claim. If the continuing injury had been known during the period of compensation, payments of the same amount due under the award authorized by this act would have been due to the employee. In such circumstances we see no violation of the due process clause.\(^{127}\)

The principle underlying the conclusion reached in *Paramino Lumber Co.* is well illustrated by a series of cases involving curative statutes which, unlike the twenty-five year presumption, seek to remedy administrative defects or mistakes. In *United States v. Heinszen & Co.*,\(^{128}\) the United States had imposed a system of tariff duties on goods coming into the Philippine Islands after they came under the military control of the United States on July 12, 1898. The tariffs were in force when the Treaty of Peace was signed on December 10, 1898, and when the Treaty was ratified on April 11, 1899. They were continued by the Philippine Commission in April, 1900. In 1902, the tariffs were expressly approved and continued by an Act of Congress. Between 1901 and

---

\(^{127}\) Id. at 378. See also New Amsterdam Casualty Co. v. Cardillo, 108 F.2d 492 (D.C. Cir. 1939) (a case involving an amendment to the Longshoremen's Compensation Act), where an employee who had been granted compensation for temporary partial disability between March 2, 1932, and August 9, 1937, filed for a modification of the award in September, 1937, to provide for compensation for permanent partial disability pursuant to the provisions of a 1934 amendment authorizing the reopening of cases at any time prior to one year after the date of the last payment of compensation. The carrier opposed this claim on the ground that the 1934 amendment could not be applied to injuries sustained and awards made prior to the amendment. The court rejected this argument on the ground that the amendment "neither creates new, nor destroys old rights. It applies only to the remedy . . . [and] Congress had the power to extend or to contract the period of limitation as applicable to an indemnity claim either pending or subsequently brought." At 493 (emphasis added).

\(^{128}\) 206 U.S. 370 (1907).
1906, several United States Supreme Court decisions had held that the duties paid after the ratification of the Treaty but before the 1902 Congressional Act were illegal. The suit at issue, involving payment of the illegal tariffs, had been brought after the first 1901 decision but before the 1902 Congressional Act and it was pending in 1906 when the last United States Supreme Court decision was rendered in the other related cases. On June 20, 1906, after the last decision, Congress passed an act for the purpose of ratifying the collection of duties previously declared illegal by the United States Supreme Court.

The Court held that because the illegality of the tariff was not the result of an inherent want of power by the United States but simply arose from a failure to delegate the official authority to validate the tariffs, it was proper for the Congress to ratify acts of his agents. The Court added that the mere fact that the suit was pending when the act was enacted did not change the nature of the right.

If the legislature, however, does not have the power to create a duty at the time when the suit was filed, the retroactive features of a statute would not satisfy the due process clause. In Forbes Pioneer Board Line v. Board of Commissioners, the plaintiff had brought suit in 1917 to recover tolls unlawfully collected for passage through the lock of a canal. In 1919, on the day of a decision in favor of plaintiff by the Florida Supreme Court, the Legislature passed an act purporting to validate the collection. The new act was pleaded by the defendant and the Florida Supreme Court rendered judgment for the defendant. The United States Supreme Court reversed, stating:

The argument that prevailed below was based on the supposed analogy of United States v. Heinszen & Co., 206 U.S. 370, (Rafferty v. Smith, Bell & Co., 257 U.S. 226,) which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if instead of calling it a ratification Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner v. Baltimore, 239 U.S. 207, 216, 217. Stockdale v. Atlantic Insurance Co., 20 Wall. 323. But gener-

---

129 258 U.S. 338 (1922).
ally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. *Bird v. Brown*, 4 Exch. 786, 799. If we apply that principle this statute is invalid. For if the Legislature of Florida had attempted to make the plaintiff pay in 1919 for passages through the lock of a canal, that took place before 1917, without any promise of reward, there is nothing in the case as it stands to indicate that it could have done so any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls.\(^{120}\)

In reaching this decision, the Court emphasized that the expectations of the parties is one of the relevant factors to consider in order to determine the constitutionality of a retroactive statute:

Defendant owed the plaintiff a definite sum of money that it had extorted from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the Court below that the transaction was not one for which payment naturally could have been expected. To say that the Legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights, and it is not to be deprived of them because the Legislature forgot.\(^{121}\)

Although prior to 1977 Congress may have had the power to impose upon coal mine operators the same liabilities it has imposed in 1977, the fact remains that it did not exercise its power until 1977. In addition, the 1977 Amendments do not operate to ratify prior actions or to correct administrative mistakes, they simply impose new liabilities. Thus, under the authorities discussed above, the retroactive application of the 1977 Amendments as applied to coal mine operators is patently unconstitutional.\(^ {122}\)

\(^{120}\) *Id.* at 339.

\(^{121}\) *Id.* at 340.

\(^{122}\) The difference between administrative mistakes and new rights was fur-
V. Conclusion

The 1977 Amendments to the Black Lung Act impose new standards and liabilities on coal mine operators. The twenty-five year presumption is the most onerous of these new liabilities and the most difficult "rebuttable" presumption for an operator to overcome. The lack of any rational connection between the fact presumed (total disability or death due to pneumoconiosis) and the fact proven (length of employment), the effective operation of the presumption as a pension for survivors of coal miners, and the retrospective application of the provision all present serious constitutional issues which should not be ignored by coal mine operators in the defense of black lung claims.

ther explained in Graham & Foster v. Goodcell, 282 U.S. 409 (1931), a case involving a retroactive Act of Congress which barred recovery by taxpayers of payment for taxes properly owing but collection of which was barred by limitation. The taxpayer had paid its taxes under protest when the Internal Revenue Service, under a mistaken view of the law, insisted on collecting them after the time for its collection had expired. After the taxpayer had brought suit to enforce its right to recover the taxes, Congress enacted the Act barring recovery. The United States Supreme Court upheld its constitutionality on the ground that the purpose of the statute was to correct administrative mistakes. The Court stated:

This is not a case of an attempt [to] retroactively create a liability in relation to a transaction as to which no liability had previously attached. There is no question here as to the original liability of the taxpayers. The tax was a valid one [when imposed]. . . . At 426 (emphasis added).

It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. At 429 (emphasis added).