

**RECALIBRATING THE BLACK LUNG BENEFITS PROGRAM:
REMOVING SYSTEMATIC PROCEDURAL BARRIERS FROM
ADMINISTRATIVE PROCEEDINGS**

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A powerful explosion ripped through the Upper Big Branch coal mine on an April afternoon in 2010.¹ The blast sent an inferno through two and one-half miles of underground mines 1,000 feet below the surface, killing twenty-nine coal miners instantaneously.² This tragedy was horrific, but coal miners dying from a preventable disease, coal workers' pneumoconiosis—more commonly known as black lung disease—eclipse the single tragedy's death toll every year.³ And as the death toll rose, the underpinning due process rights afforded to black lung claimants eroded.

Black lung disease afflicts miners when they breathe excess amounts of coal dust, causing nodules to form in their lungs.⁴ This formation process causes internal scarring and stiffness, slowly reducing lung function and making breathing difficult.⁵ Miners suffering from the disease are overexerted with even the simplest tasks, such as walking up stairs.⁶ While black lung disease can, and indeed must be

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1 GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, UPPER BIG BRANCH 4 (2011), <http://www.nttc.edu/programs&projects/minesafety/disasterinvestigations/upperbigbranch/UpperBigBranchReport.pdf> [hereinafter INVESTIGATION PANEL]

2 *Id.*

3 Kentucky journalists may have best illustrated the sheer size of the problem facing miners: "It's as if the Titanic sank every year, and no ships came to the rescue. While that long-ago disaster continues to fascinate the nation, the miners slip into cold, early graves almost unnoticed." Gardiner Harris & Ralph Dunlop, *Dust, Deception & Death: Why Black Lung Hasn't Been Wiped Out*, COURIER-J., <http://archive.courier-journal.com/cjextra/dust/> (last visited Oct. 2, 2015).

4 See Michael D. Attfield & Gregory R. Wagner, *Respiratory Disease in Coal Miners*, in ENVIRONMENTAL OCCUPATIONAL MEDICINE 413, 413 (William N. Rom, ed., 3d ed. 1998) (describing the medical causes of black lung disease and the disease's physical impact).

5 *Id.*

6 *Id.* at 427–28.

prevented under federal regulations,⁷ its prevalence is increasing among coal miners,⁸ especially younger miners.⁹ Between the 1980s and the early 2000s, prevalence of the most severe form of the disease tripled, reaching levels similar to the early 1970s.¹⁰ Of the twenty-nine miners who died in the Upper Big Branch disaster, for example, only twenty-four had examinable tissue.¹¹ Seventeen of those twenty-four had black lung disease and four others showed the early signs of developing it.¹²

In 1969, Congress passed the Federal Coal Mine Health and Safety Act, the first congressional enactment exclusively providing workers' compensation benefits for victims of a specific occupational disease.¹³ Congress has altered the Black Lung Benefits Program ("the Program"), the workers' compensation scheme allowing miners with black lung disease to claim benefits, numerous times during the intervening decades.¹⁴ The Program, however, has failed to provide a fair adjudicative forum for claimants.

Black lung benefits claimants' success rates have been decreasing for the last decade.¹⁵ In 2012, that rate hit a low of 14% success on

7 The Federal Coal Mine Health and Safety Act of 1969 ("1969 Act") limits the concentration of coal dust in underground mines and sets out guidelines for regularly testing the concentration. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 202, 83 Stat. 742, 760-61 (1969) (codified as amended at 30 U.S.C. §§ 801-964 (2006)). Concentration levels can be controlled through the use of proper ventilation, personal dust masks, dust collectors, and water sprays. *Id.* § 202(a), (h).

8 David J. Blackley et al., Letter to the Editor, *Resurgence of a Debilitating and Entirely Preventable Respiratory Disease Among Working Coal Miners*, 190 AM. J. OF RESPIRATORY & CRITICAL CARE MED. 708, 708-09 (2014).

9 *Id.*

10 A. Scott Laney & Michael D. Attfield, *Coal Workers' Pneumoconiosis and Progressive Massive Fibrosis are Increasingly More Prevalent Among Workers in Small Underground Coal Mines in the United States*, 67 OCCUP. & ENVTL. MED. 428, 429 (2010) (noting the increase of black lung disease among miners, especially those in smaller underground coal mines).

11 INVESTIGATION PANEL, *supra* note 1, at 32.

12 *Id.* The youngest of the seventeen found with black lung was only twenty-five years old. *Id.*

13 See U.S. DEP'T OF LABOR, EMP. STANDARDS ADMIN., BLACK LUNG BENEFITS ACT OF 1972: FIRST ANNUAL REPORT ON ADMINISTRATION OF THE ACT DURING CALENDAR YEAR 1974 AND THE TRANSITIONAL PERIOD IN THE SECOND HALF OF 1973, at 5 (1975) (discussing the uniqueness of the program compared to other workers' compensation schemes).

14 For a detailed examination of the legislative history of the Program prior to the 1990s, see Jonathan P. Nase, *The Surprising Cost of Benefits: The Legislative History of the Federal Black Lung Benefits Program*, 4 J. MINERAL L. & POL'Y 277 (1988-89); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665 (1989).

15 See Chris Hamby, *'Breathless and Burdened' Will Examine Coal Industry's Efforts to Defeat Black Lung Benefits Claims*, CENTER FOR PUB. INTEGRITY (Oct. 28, 2013), <http://www.publicintegrity.org/2013/10/28/13620/breathless-and-burdened-will-examine-coal-industrys-efforts-defeat-black-lung> (describing the continued decrease in claimants' suc-

initial claims,¹⁶ with only half of those initial awards likely to result in permanent benefits after hearings and appeals.¹⁷ While claimants' low success rate does not independently demonstrate problems with the Program, it does prompt the need for further study to determine whether there are barriers inherent in the structure of the Program process that disfavor certain claimants and result in unjust adjudications violating basic due process rights accorded to litigants regardless even during administrative proceedings.¹⁸

This Comment argues that there are systematic barriers in the Black Lung Benefits Program that hinder the fair representation of miners' claims for workers' compensation benefits. In Part I, I will briefly discuss the Program's history, from the 1969 Act to the recent Department of Labor ("DOL") guidelines increasing miners' access to medical evidence, and then outline how the current benefits claim process works. Part II will focus on two aspects of the current Program that violate due process norms and create barriers to the fair determination of claims: the lack of adequate miner legal representation and claimants' lack of access to medical expert evidence.¹⁹

Part III will offer solutions to erode these procedural barriers.²⁰ First, allowing miners and operators to settle claims would likely lead to an increase in claimant representation. Such a settlement provision would address attorneys' concerns that the process is too costly,

cess rates); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-7, BLACK LUNG BENEFITS PROGRAM: ADMINISTRATIVE AND STRUCTURAL CHANGES COULD IMPROVE MINERS' ABILITY TO PURSUE CLAIMS 26 (2009) [hereinafter GAO 2009 REPORT] (providing a detailed analysis of claimants' success rates prior to 2009).

¹⁶ Hamby, *supra* note 15.

¹⁷ The most recent information on success rates post-appeal is from the GAO 2009 Report, which found the final award rate in 2008 to be approximately half the initial reward rate. GAO 2009 REPORT, *supra* note 15, at 26.

¹⁸ The Federal Courts of Appeals have previously addressed due process concerns in the Black Lung Program context. *See, e.g.,* Fox *ex rel.* Fox v. Elk Run Coal Co., 739 F.3d 131, 133 (4th Cir. 2014) (holding that the coal company's failure to disclose relevant medical evidence did not demonstrate fraud on the court or a due process violation, but was "hardly admirable"); Roberts & Schaefer Co. v. Dir., Office of Workers' Comp. Programs, 400 F.3d 992 (7th Cir. 2005) (denying employer's argument that due process rights violated by delay in naming responsible operator); Strike v. Dir., Office of Workers' Comp. Programs, 817 F.2d 395 (7th Cir. 1987) (ruling on the Secretary of Labor's ability to apply interim medical standards under Section 902(f)(2) of the Black Lung Benefits Act).

¹⁹ Although other aspects of the Program may create an unfair procedural barrier to claimants, such as the lengthy backlog of claims, this paper will focus solely on problems arising from representation and medical evidence disparities between parties.

²⁰ The Secretary of Labor has full authority to implement new regulations and guidelines to address these very due process concerns concerning evidentiary disparity. *See* Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 869 (D.C. Cir. 2002) (interpreting 30 U.S.C. §§ 902(f)(1), 932(a)).

lengthy, and uncertain by making a potentially inexpensive and short proceeding possible. By increasing representation, claimants will have a better chance of clearly articulating their legal position, both in settlement discussions and hearings. Second, I will argue that there should be a presumption of disclosing all medical expert evidence, even non-testifying expert evidence, between parties before hearings. This would increase claimants' access to medical expert evidence without placing any additional financial costs on either party. The Comment will conclude by emphasizing that these are important, but preliminary steps toward removing systematic procedural barriers from Program proceedings.

I. THE DEVELOPMENT OF THE BLACK LUNG BENEFITS PROGRAM

A disaster similar to the explosion at the Upper Big Branch mine spurred support for what would become the Federal Coal Mine Health and Safety Act of 1969.²¹ After the explosion, miners were outraged with the lack of state and federal oversight of underground mining operations.²² Congressional leadership, many of whom were from traditional coal mining states, successfully passed the bill, withstanding substantial opposition from the executive branch.²³ These efforts resulted in an enormous expansion of health and safety regulations affecting the mining industry, but also included the initial iteration of the Black Lung Benefits Program providing workers' compensation benefits to coal miners suffering from black lung disease.²⁴

A. *The Federal Coal Mine Health and Safety Act of 1969 and the Black Lung Benefits Program*

The 1969 Act actually created two benefits programs, one administered by the Social Security Administration and another overseen by

²¹ The similar explosion took place in 1968 outside Farmington, West Virginia and killed seventy-eight miners. See H.R. REP. NO. 91-563 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2503, 2503 (citing the disaster as a reason for enacting the 1969 Act).

²² See ALAN DERICKSON, *BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER*, at xii (1998) (discussing the social movements and forceful advocacy that "fostered advances in recognition of coal workers' lung disorders").

²³ In 1969, legislators from mining states held multiple important congressional positions. For example, Robert Byrd of West Virginia was the Senate Majority Whip, Hugh Scott of Pennsylvania was the Senate Minority Leader, and Carl Perkins of Kentucky was the Chair of the House Committee on Education and Labor. For a detailed analysis of the effort to pass the 1969 Act and President Richard Nixon's attempts to derail its passage, see Nase, *supra* note 14, at 290 & n.83.

²⁴ *Id.* at 282.

the DOL.²⁵ Compromising in order to include any benefits program in the 1969 Act, Congress created one program under Part B of the legislation for miners who filed requests before 1973 to claim benefits funded by the federal government.²⁶ Part C of the 1969 Act created the other program, which is now known as the Black Lung Benefits Program, covering all claims filed from 1973 onward.²⁷

Benefits claimed under Part C of the 1969 Act were funded by a miner's last employer, or if the mine operator no longer existed, federal funds.²⁸ If successful, a claimant was entitled to medical care and a certain percentage of his former pay.²⁹ In order to successfully gain benefits, the 1969 Act required a claimant to establish: (1) he had pneumoconiosis; (2) the disease had arisen at least in part out of his coal mining employment; (3) he was totally disabled from performing his normal coal mining work; and (4) the disease was a contributing cause of the total disability.³⁰ To establish the existence of black lung disease, claimants could use medical expert opinions, other medical evidence such as chest x-rays or biopsy reports, or invoke statutory presumptions.³¹

The 1969 Act included three statutory presumptions. If a claimant had worked in an underground coal mine for at least fifteen years, or had worked at least fifteen years in a mine before dying, and could show he suffered from black lung disease, then the disease was presumed to have arisen out of mining employment.³² Also, if a medical examiner found a specific type of mass in a claimant's X-ray, then

25 The 1969 Act, Pub. L. No. 91-173, §§ 413(b), 421(a), 83 Stat. 742, 794-95 (codified at 30 U.S.C. §§ 923(b), 931(a) (1969)).

26 *Id.* § 414(a), 83 Stat. 795 (codified at § 923(a)).

27 *Id.* § 421(a), 83 Stat. 795 (codified at § 931(a)).

28 *Id.*

29 *Id.* § 412(a)(1), 83 Stat. 794 (codified at § 922(a)(1)). Benefit pay is currently based on 37.5% of the minimum monthly payment to a federal employee who is a Grade GS-2 on the federal pay scale. 30 U.S.C. § 922. As of January 2014, this is approximately \$631.78 per month, although it is increased if the miner has dependents. See OFFICE OF PERS. MGMT., 2014 GENERAL SCHEDULE (GS) LOCALITY PAY TABLES (2014), available at <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2014/general-schedule>.

30 The 1969 Act, Pub. L. No. 91-173, § 422(h), 83 Stat. 797 (codified at § 932(h)). The Secretary of Labor, however, currently has the authority to establish the medical criteria to determine proof of total disability. See *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 869 (D.C. Cir. 2002) (interpreting 30 U.S.C. §§ 902(f)(1), 932(a)).

31 The 1969 Act, Pub. L. No. 91-173, § 411(c), 83 Stat. 793 (codified at § 921(c)).

32 *Id.*

the claimant was also presumed to have the disease.³³ All of these presumptions were rebuttable by the mine operator.³⁴

The process for claiming benefits under Part C was largely incorporated from the Longshore and Harbor Workers' Compensation Act.³⁵ While the claim process has changed slightly since the 1969 Act, the present process is significantly similar. Currently, a miner files a claim with a district director, who makes the initial decision of whether to award benefits.³⁶ In making this decision, the director relies on the claimant's complete medical history, previous mining employment, and a DOL-arranged pulmonary examination with a physician's diagnosis and medical opinion.³⁷ If there is an identifiable mine operator that would be liable for benefits under Part C, the operator may submit evidence objecting to its liability and the claimant may produce additional evidence supporting his claim.³⁸

After the district director makes a decision whether to award benefits, either party may request a hearing with an Administrative Law Judge ("ALJ").³⁹ If the director awarded the claimant benefits, that miner is awarded interim benefits through a separate fund.⁴⁰ If the claimant is eventually successful after a hearing or appeal, the liable operator is responsible for reimbursing the interim benefits as well as providing future benefits.⁴¹ After the ALJ hearing, either party can appeal the decision to the Benefits Review Board, whose decision can

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* § 422(a) (codified at § 932(a)). Notably, although the Longshore and Harbor Workers' Compensation Act's procedural components were mostly incorporated, the 1969 Act did not incorporate the Longshoremen's Act's settlement provision. Instead, the 1969 Act specifically prohibited those provisions. 30 U.S.C. § 932(a); *see also* Ramey v. Dir., Office of Workers' Comp. Programs, 326 F.3d 474, 476–77 (4th Cir. 2003) (finding that the 1969 Act did not incorporate the settlement provisions from the Longshoremen's Act).

³⁶ 20 C.F.R. § 725.401 (2014). The statute of limitations under 30 U.S.C. § 932(f) (codified at 20 C.F.R. § 725.308) applies both to initial *and* subsequent claims, although significant events may re-toll the pertinent timing. *Westmoreland Coal Co. v. Amick*, No. 04-1147, 2004 WL 2791653, at **1–4 (4th Cir. Dec. 6, 2004); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 606–08 (6th Cir. 2001).

³⁷ 20 C.F.R. §§ 725.404, 406, 414.

³⁸ *Id.* § 725.456. Even if there is a significant delay in identifying the employer responsible, courts have held this does not constitute a due process violation. *See Roberts & Schaefer Co. v. Dir., Office of Workers' Comp. Programs*, 400 F.3d 992, 996–98 (7th Cir. 2005) (denying employer's argument that due process rights were violated by delay in naming responsible operator).

³⁹ 20 C.F.R. § 725.450.

⁴⁰ *Id.* § 725.483.

⁴¹ *Id.* § 725.420.

be further appealed to a Federal Court of Appeals and then to the U.S. Supreme Court.⁴²

B. The Early Amendments to the Black Lung Benefits Act

The Black Lung Benefits Act of 1972 was the first of the four major amendments to the Program.⁴³ The 1972 Amendment, spurred by a concern that the agencies were denying too many claims,⁴⁴ expanded coverage of the 1969 Act to include surface miners operating in similar conditions to underground coal mines.⁴⁵ Congress also expanded eligible claimants to incorporate orphaned children.⁴⁶ In addition to expanding the reach of the Program's benefits coverage, the 1972 Amendment added a new provision presuming that a miner claiming benefits who had spent at least 15 years mining had black lung disease, regardless of a negative chest X-ray, as long as the miner also showed other signs of the disease.⁴⁷

Congress again amended the Program under the 1977 Black Lung Benefits Revenue Act to transfer more financial responsibility to coal companies for subsidizing claimants' benefits.⁴⁸ The 1977 Revenue Act created the Black Lung Disability Trust Fund, which was funded from a tax levied on operators based on the amount of coal produced.⁴⁹ If the district director responsible for a claimant's initial determination found that no coal mine operator was responsible for paying the claimant's benefits or if the responsible operator was de-

⁴² *Id.* § 725.481–82.

⁴³ BLACK LUNG BENEFITS ACT OF 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified as amended at 30 U.S.C. § 922 (2000)) [hereinafter 1972 Amendment].

⁴⁴ See S. REP. NO. 92-743 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2307 (reporting that the rate of denial “suggests strongly that the solution has not been nearly as complete as Congress believed and expected it would be.”).

⁴⁵ 1972 Amendment, *supra* note 43, at § 153 (codified as amended in various sections of 30 U.S.C.).

⁴⁶ *Id.* § 150 (codified at § 922).

⁴⁷ *Id.* § 154 (codified at § 921).

⁴⁸ BLACK LUNG BENEFITS REVENUE ACT OF 1977, Pub. L. No. 95-227, 92 Stat. 11 (codified at 26 U.S.C. § 4121 (1978)) [hereinafter 1977 Revenue Act]. Congress also passed the 1977 Black Lung Benefit's Reform Act, which made the 1969 Act's Part C benefits program a permanent workers' compensation program. BLACK LUNG BENEFITS REFORM ACT OF 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified at 30 U.S.C. § 932). The Program was initially intended to only last until the mid-1970s, however, Congress' 1969 projections that states would provide similar schemes and that black lung disease would mostly be eliminated did not materialize. See H.R. REP. NO. 91-563, *supra* note 21, at 14, *reprinted in* U.S.C.C.A.N. 2503, 2516.

⁴⁹ 1977 Revenue Act, *supra* note 48, at §§ 2, 3.

funct, money from the Trust Fund would fund the workers' compensation benefits.⁵⁰

The 1977 Amendment also altered the attorney's fee provision to its current form. An attorney's fee is now contingent on the successful reward of benefits; otherwise, the attorney is not permitted to seek any fees from the claimant.⁵¹ If benefits are awarded, then the mine company or the Trust Fund pays the attorney's fees.⁵²

The Program steadily grew in the years following the 1977 Amendment, both in terms of the number of claimants and cost to the federal government. Between 1977 and 1981, the Program operated under a budget deficit of one and a half billion dollars.⁵³ In direct response to this increase in cost, Congress, under the Black Lung Benefits Revenue Act of 1981,⁵⁴ repealed three former statutory presumptions. First, there was no longer a presumption that a miner's black lung disease arose out of mining employment if he could show signs of the disease and had worked in coal mines for fifteen years.⁵⁵ Furthermore, Congress made it more difficult for surviving spouses and dependents to collect benefits by eliminating all presumptions that the deceased miner suffered from black lung disease and requiring a reapplication for the continuation of survivor's benefits if the miner previously received them.⁵⁶

C. *The Patient Protection and Affordable Care Act and Recent DOL Actions*

The Patient Protection and Affordable Care Act of 2010 ("ACA") reinstated much of what was eliminated from the Program in 1981. Under the ACA, a miner who has spent fifteen years working in coal mines and is able to prove he suffers from a disabling respiratory condition is entitled to a rebuttable presumption that black lung disease caused his full disability.⁵⁷ The ACA also reinstated the automat-

⁵⁰ *Id.* § 2(d).

⁵¹ 20 C.F.R. § 725.366.

⁵² *Id.*

⁵³ See H.R. REP. NO. 97-406, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 2671, at 2673 (stating that the cumulative deficit between 1977 and 1981 totaled \$1.5 billion and in 1981 alone totaled \$522 million). The rising cost of the Program was mostly due to continued benefits being paid under Part B of the 1969 Act. *Id.*

⁵⁴ Pub. L. No. 97-119, 95 Stat. 1635 (codified as amended at 30 U.S.C. § 921(c)(4) (2012)) [hereinafter 1981 Revenue Act].

⁵⁵ 30 U.S.C. §§ 202(b), 203(a)(5).

⁵⁶ *Id.*

⁵⁷ PATIENT PROTECTION AND AFFORDABLE CARE ACT, Pub. L. No. 111-148, § 1556, 124 Stat. 119, 260 (2010) (amended as codified at 30 U.S.C. §§ 921(c)(4)).

ic continuation of benefits to surviving dependents after a miner's death and presumptions relating to survivor's benefits.⁵⁸

Although there has not been any legislative action since the ACA, the DOL issued a notice of proposed rulemaking in December of 2012⁵⁹ and official guidance on Program operations to regional directors in February of 2014.⁶⁰ The December 2012 Proposal is currently under review, and if promulgated in its proposed form would revise and reorganize the practice and procedures for administrative hearings before ALJs to more closely resemble the current Federal Rules of Civil Procedure ("FRCP").⁶¹ The current administrative guidelines were closely modeled after the 1983 FRCP without substantial revision since.⁶² The new rule would adopt the FRCP with only slight modifications aimed at managing the specific types of cases that often come before the DOL ALJs, including black lung benefits disputes.⁶³

Patricia Smith, Solicitor of the DOL, also issued official guidelines in February of 2014, effective immediately, in an effort to combat the perceived unfair advantage of coal mine operators with superior resources in administrative hearings.⁶⁴ The 2014 Guidelines, which were issued in a memorandum to regional solicitors, outlined a pilot initiative for the Program to develop additional medical evidence and provide appellate support in a limited number of cases.⁶⁵ The pilot program created a system for reviewing and developing additional medical evidence for certain black lung benefits claimants. Only those pro se claimants that a district director initially awarded benefits and have at least fifteen years of coal mining employment would qualify.⁶⁶ If a mine operator contests the original medical evidence of

58 *Id.* § 1556 (codified at § 932(I)).

59 Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges, 77 Fed. Reg. 72142 (proposed Dec. 4, 2012) (to be codified at 29 C.F.R. Part 18) [hereinafter December 2012 Proposal].

60 Letter from Patricia Smith, Solicitor, Dep't of Labor, to Regional Solicitors, Black Lung Benefits Act Program Initiatives (Feb. 24, 2014), <http://bit.ly/1ig9oVu> [hereinafter 2014 Guidelines].

61 December 2012 Proposal, *supra* note 59, at 72142 (stating that the goal of the rule would be to "harmonize administrative hearing procedures with the current FRCP").

62 *Id.*

63 *Id.* (noting that occupational disease, whistleblower, and workplace retaliation claims require "more structured management and oversight by the presiding administrative law judge and more sophisticated motions and discovery procedures" than the current ALJ hearing rules and the FRCP provide).

64 2014 Guidelines, *supra* note 60.

65 *Id.*

66 *Id.*

a qualifying claimant, then the DOL will provide an additional medical examination and opinion.⁶⁷

Most recently, the DOL has proposed a rule that would assist in giving miners greater access to their health records and assist in balancing the equities between coal miners and operators. The proposal would require the impacted parties, including employers, claimants, attorneys, and other representatives, to disclose to parties all medical information developed in connection with the benefits claim.⁶⁸ The information disclosed would include medical evidence a party does not intend to submit as evidence at trial.⁶⁹ The exact contours of this rule and how it would determine what medical evidence would be covered is in flux as the rule is currently in the proposal stage at the time of writing.⁷⁰ It is uncertain whether the rule will exist in any form, although based on the outline in the notice of proposed rulemaking the rule would meaningfully assist miners in their information disparity compared to operators.

II. BLACK LUNG BENEFITS PROGRAM PROCEDURAL BARRIERS TO THE FAIR ADJUDICATION OF CLAIMS

Congress's and the DOL's recent actions suggest their acknowledgement that the Program's current administrative hearing process unfairly disadvantages miners seeking benefits. Comparing claimants' success rates in the past decade to the increase in the prevalence of the disease emphasizes the difficulty of defeating a mine operator's objection to a benefit award. From 2001 to 2012, for example, district directors awarded initial benefits to claimants at rates of 15% or less,⁷¹ while studies during the same period noted a substantial increase in the prevalence of black lung disease.⁷² If all other factors

⁶⁷ *Id.*

⁶⁸ See Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits, 80 Fed. Reg. 23743 (proposed Apr. 29, 2015) (to be codified at 20 C.F.R. pt. 725), <https://www.federalregister.gov/articles/2015/04/29/2015-09573/black-lung-benefits-act-disclosure-of-medical-information-and-payment-of-benefits>.

⁶⁹ *Id.* at 23748.

⁷⁰ This proposal embodies parts of a significant overhaul of the Black Lung Benefits Program that Senator Bob Casey and former Senator Jay Rockefeller had rallied for under the Black Lung Benefits Improvement Act of 2014 and its previous iterations. The Senators' bill, however, has never gained political traction. See generally Brandon Kenney, *Legislative Changes May Improve the Black Lung Benefits Program*, REGBLOG (Feb 2, 2015), http://www.regblog.org/2015/02/02/kenney_black_lung_act.

⁷¹ See GAO 2009 Report, *supra* note 15, at 19, 2009; Hamby, *supra* note 15. The success rates of claimants have slightly varied by year in the last decade, although the average annual success rate among claimants during that time is approximately thirteen percent. *Id.*

⁷² Laney & Attfield, *supra* note 10, at 429.

were constant, one would reasonably expect the success rate to increase if medical studies found an increase in a disease that almost exclusively affects coal miners.

Low success rates, of course, do not necessarily support the inference that the process is unfair to claimants. This evidence alone equally supports the assumption that too many claimants are applying for benefits without the proper qualifications and wasting resources that could be focused on more deserving claims. Regardless of whether the low success rates accurately reflect the number of qualified claimants it is clear that there are procedural aspects of the Program that do unfairly give an advantage to mine operators contesting miners' benefits claims. While other administrative problems with the Program impact the fair determination of claims,⁷³ this part will focus on issues arising from inadequate representation and claimants' lack of access to crucial medical evidence.

A. *Inadequate Representation for Black Lung Claimants*

The DOL's Office of Administrative Law Judges advises claimants that adjudications in front of ALJs "vary widely in complexity and in many instances it may be wise to obtain legal counsel."⁷⁴ That the DOL believes it is important for claimants to have representation for Program proceedings, both initially and throughout the appeals process, is apparent by this statement and the 1977 Amendment's inclusion of an attorney's fee provision.⁷⁵ The attorney's fee provision has not been enough to entice lawyers to represent miners in front of

⁷³ The immense backlog of cases pending in front of ALJs, for example, is one problem that causes claimants to wait, on average, three years to resolve a benefits claim. GAO 2009 Report, *supra* note 15, at 26. In 2013, there were 11,325 cases, only part of which were Program claims pending in front of DOL ALJs, nearly double the number in the previous decade. See Jim Morris, *Rising Caseload, Fewer Labor Department Judges Triggers Painful Mix for Suffering Laborers*, CENTER FOR PUBLIC INTEGRITY (Dec. 19, 2013), <http://www.publicintegrity.org/2013/12/19/14035/rising-caseload-fewer-labor-department-judges-triggers-painful-mix-suffering>. Notably, the Obama administration has included an additional \$2 million in its proposed 2015 budget to hire more employees, including ALJs, for the DOL's Office of Administrative Law Judges ("OALJ") in hopes of tempering the backlog. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, FISCAL YEAR 2015 BUDGET OF THE U.S. GOVERNMENT 105-9 (2014). While an influx of money will assist in alleviating the backlog, lack of adequate staffing is only one reason for the problem. Another, lack of representation, will be addressed in detail in this paper and could indirectly have a meaningful impact on the average duration of claims. See *infra* Part II.A.

⁷⁴ *Do I Need Representation?*, U.S. DEP'T OF LABOR, http://www.dol.gov/appeals/how_to_find_legal_representation.htm (last visited Oct. 5, 2015).

⁷⁵ 20 C.F.R. § 725.366.

ALJs. While the DOL does not collect data on claimant representation,⁷⁶ Program officials have cited “claimants’ lack of representation, particularly in the early stages of a claim, as a significant barrier to successful claims.”⁷⁷

Attorneys note the few financial incentives as the main reason they decline to take on black lung benefits cases.⁷⁸ While the Program does have an attorney’s fee provision, those fees are contingent on success.⁷⁹ If the claimant is unsuccessful, then the attorney is not permitted to charge any fee for legal services.⁸⁰

Furthermore, litigating a black lung benefits case is a costly and potentially lengthy process. As previously mentioned, the process takes three years on average from the initial filing to resolution.⁸¹ The average three-year case costs approximately \$18,000 and those lasting over seven years normally cost more than \$70,000.⁸² The costs are predominantly from developing evidence, especially medical expert evidence, for use at hearings.⁸³

While the current low probability of success in black lung benefits claims is likely in part due to inadequate representation, the low success rates combined with contingent attorney’s fees deter attorneys from representing claimants except on a pro bono basis. As a result, a substantial number of miners are not represented when they file their claim or subsequently at a hearing or on appeal.⁸⁴ Instead, these pro se litigants must determine how to properly file a claim with a district director and then, when the operator requests a hearing, convince an ALJ that technical medical evidence shows not only that they have black lung disease, but also that it was caused by mining employment. In attempting to argue their case, claimants are generally opposing mine operators with vastly superior resources.⁸⁵ As DOL officials have stressed the importance of representation in these proceedings, miners appear to be at a significant disadvantage as they

76 See GAO 2009 Report, *supra* note 15, at 25 (noting that the DOL does not “track, evaluate, or report on claimants’ access to legal representation throughout the claims and appeals process”).

77 *Id.* at 26. The GAO 2009 Report found that DOL and OALJ officials considered representation to be crucial to successfully filing claims. *Id.*

78 *Id.*

79 20 C.F.R. § 725.367.

80 *Id.*

81 GAO 2009 Report, *supra* note 15, at 26.

82 *Id.* at 26–27.

83 *Id.* at 26.

84 *Id.*

85 *Id.* at 31.

both lack representation and confront a superiorly financed opponent.

B. Claimants' Limited Access to Medical Evidence

The DOL's February 2014 Guidelines, which expanded access to medical evidence for a limited number of claimants, were a direct response to growing concern in Congress⁸⁶ and from the public⁸⁷ that miners lack adequate access to a key piece of evidence in administrative hearings.⁸⁸ As discussed in the previous section, claimants usually lack legal representation and, even if they know stronger medical evidence would bolster their case, claimants normally lack the resources to seek out and obtain results beyond what the DOL provides. The DOL-provided medical evidence, even after the 2014 Guidelines, is inadequate to give miners a fair chance in administrative proceedings. Claimants must rely on inferior resources that hinder their ability to successfully acquire benefits.

Under the Act, the DOL provides all claimants with one medical examination, which includes a complete pulmonary evaluation and a doctor's medical opinion on the basis of the testing.⁸⁹ The 2014 Guidelines, which make available a second examination and expert opinion, illustrate the DOL's belief, at least in some circumstances, that a single medical review is not enough to succeed in a hearing. Indeed, in opposing a miner's claim for benefits, operators often obtain multiple medical opinions, but present only those that support a denial of benefits during administrative proceedings.

Medical evidence, including exams and medical expert opinions, is a crucial factor in awarding benefits. This evidence not only supports whether a claimant has black lung disease, but also whether mining employment caused the disease. Current science is not able to make a medical distinction between black lung disease caused by coal dust and lung disease caused by smoking.⁹⁰ When a miner who

⁸⁶ Recently, former Senator John D. Rockefeller IV, Senator Robert P. Casey, Senator Joe Manchin, and others sent a letter to DOL Secretary Thomas Perez emphasizing their concerns that the OALJ unfairly limited claimants' access to medical evidence. Letter from John D. Rockefeller IV, Senator, U.S. Congress, et al., to Thomas E. Perez, Secretary, Dep't of Labor (Feb. 28, 2014) (on file with author).

⁸⁷ See Hamby, *supra* note 15 (noting the increasing concern with the Program and its treatment of miners).

⁸⁸ GAO 2009 Report, *supra* note 15, at 28 (noting that the DOL ALJs view medical evidence, especially medical expert opinions, as a "key element" in determining whether a claimant should be awarded benefits).

⁸⁹ 20 C.F.R. § 725.406(a).

⁹⁰ GAO 2009 Report, *supra* note 15, at 22.

was also a smoker is seeking benefits, operators argue smoking, not breathing coal dust, caused the disease.⁹¹ Determining whether the miner's disease is caused by coal dust or smoke inhalation is a common occurrence in administrative proceedings because of the high prevalence of smoking in areas where underground coal mining, and black lung disease, are also most prevalent.⁹²

The DOL-provided medical evidence is not only inadequate quantitatively, but qualitatively as well. The GAO 2009 Report found: "According to some [DOL] [ALJs], mining company doctors are usually better credentialed and produce lengthier, more sophisticated, and comprehensive medical reports and evaluations" than claimants.⁹³ The report found that although "doctors' medical opinions are a key element of evidence in claims adjudication" medical expert opinions "submitted by DOL's approved doctors did not provide claimants with sound evidentiary support for their cases."⁹⁴ In response, DOL doctors claimed that the Agency failed to provide clear guidance on how to document their findings and opinions.⁹⁵

While the DOL's 2014 Guidelines providing an additional medical review does attempt to solve the evidentiary disparity between parties, and may prove somewhat effective if the quality of medical analysis improves, the scope of the pilot program's application is too narrow. The exclusion of miners with less than fifteen years of mining experience is in tension with recent reports that the disease is becoming more prevalent in younger miners.⁹⁶ Indeed, of the seventeen miners who died in the Upper Big Branch explosion with black lung disease,

⁹¹ *Id.*

⁹² West Virginia and Kentucky have, respectively, the most and second most number of underground coal mines in the United States as well as the two highest smoking rates in the country. The mines are highly concentrated in the Appalachian region within both states, which includes the eastern portion of Kentucky and southern portion of West Virginia. The Appalachian region contains most of the nation's coal mines generally, with Virginia, the next most populous area, having nearly a hundred fewer underground mines than Kentucky. See U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2012, at 2-5 (2013) (noting that West Virginia has the most underground coal mines in the United States with 160 and Kentucky has the second most with 150, with nearly all of these mines concentrated in the Appalachian region); see also CENTERS FOR DISEASE CONTROL AND PREVENTION, BEHAVIORAL RISK FACTOR SURVEILLANCE SYSTEM 2012 CODEBOOK REPORT: LAND-LINE AND CELL-PHONE DATA (2013), available at <http://apps.nccd.cdc.gov/brfss/list.asp?cat=TU&yr=2012&qkey=8161&state=All> (finding that West Virginia and Kentucky have the two highest rates of smoking in the country with at least 25% of residents smoking from high school onward.).

⁹³ GAO 2009 Report, *supra* note 15, at 21.

⁹⁴ *Id.* at 28.

⁹⁵ *Id.*

⁹⁶ See Laney & Attfield, *supra* note 10, at 430 (noting that black lung disease is more prevalent among mines with fewer than fifty employees, which tend to have younger miners).

five had less than ten years of mining experience and would not have been covered under the new guidelines.⁹⁷

Technically, claimants are not confined to one, or now in some instances two medical reviews even if cost would prohibit funding an additional analysis. Claimants may obtain evidence prepared for trial from an operator, including copies of medical reports from non-testifying experts, as long as miners can show a “substantial need of the materials in the preparation” of the case and that the claimant “is unable without undue hardship” to acquire substantially equivalent materials.⁹⁸ Practically, claimants do not often use this mechanism likely due to their pro se status and lack of legal knowledge to successfully win a motion to obtain non-testifying expert evidence. This provision, however, has been used and leaves open an opportunity for claimants to narrow the evidentiary gap.⁹⁹

The DOL 2012 Proposal to harmonize the ALJ hearing practices and procedures with the FRCP would significantly alter this potential opening. The proposed rule would change the standard to obtain an opponent’s expert evidence prepared for trial to what is currently FRCP 26(b)(4)(D)(ii). Under the new rule, miners would be required to show “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.”¹⁰⁰ By forcing miners to show the higher threshold of “exceptional circumstances” before obtaining non-testifying expert evidence, the DOL would effectively preclude miners from obtaining this evidence from operators. A higher barrier to overcome in accessing crucial medical evidence, which otherwise would be out of the reach of claimants, would only further hinder miners from adequately proving their cases at a hearing.

III. REMEDYING PROCEDURAL PROBLEMS IN THE BLACK LUNG BENEFITS PROGRAM: ALLOWING SETTLEMENT AND PRESUMPTIVELY DISCLOSING NON-TESTIFYING MEDICAL EXPERT EVIDENCE

The lack of claimant representation and access to adequate medical evidence significantly hinders the fair determination of benefits. Without a lawyer familiar with the Program’s process, claimants with-

97 See GOVERNOR’S INDEPENDENT INVESTIGATION PANEL, *supra* note 1, at 32 (noting that the Upper Big Branch victims were a random sample of miners and that “71 percent of them show[ing] evidence of [black lung disease] is an alarming finding given the ages and work history”).

98 29 C.F.R. § 18.14(c) (1989).

99 GAO 2009 Report, *supra* note 15, at 26.

100 December 2012 Proposal, *supra* note 59, at 72183 (to be codified at § 18.51(d)(4)(B)).

out any legal experience struggle to navigate initial determinations and hearings while being opposed by experienced practitioners with superior resources. While the DOL attempts to provide claimants with basic evidence, a medical exam and expert opinion, this is ineffective in persuading judges when competing against an operator's curated list of expert evidence, which is generally selected from a large pool including non-testifying expert opinions that may fully support awarding the miner benefits.

In proposing solutions to these problems, the primary goal is not to increase the success rate of claimants or unfairly disadvantage operators. Indeed, the latter would only present a similar set of problems to a different party. Rather, this part seeks to offer solutions that ensure operators can effectively defend themselves while also preventing miners from being overwhelmed solely by superior resources. With the goal of procedural fairness, it is crucial to eliminate unfair barriers. The achievement of complete procedural fairness is beyond the scope of this paper, but I will argue that altering the Black Lung Benefits Program to allow settlement between claimants and miners, and creating a presumption of disclosing non-testifying medical expert evidence prepared for trial will move the Program's adjudicatory process toward this ideal.¹⁰¹

A. *Allowing Settlement to Increase Access to Representation in Black Lung Benefits Hearings*

Lawyers cite cost, duration, and uncertainty of success as the main reasons for not representing claimants in Program proceedings.¹⁰² An effective procedural solution should aim to address these complaints while also ensuring the fairness of the adjudication process. Enabling settlement between claimants and workers in Program proceedings meets these criteria. It will entice more representation through the mechanism's potential for quick and efficient resolution of claims, which will create a significant decrease in the legal costs for both parties. Whether settlement will actually occur is an empirical claim that cannot be adequately assessed before implementing a settlement provision, but an opportunity for quick and relatively inexpensive resolution would likely prompt at least some operators and

¹⁰¹ For an earlier and briefer formulation of these proposals, see Brandon Kenney, *Achieving Procedural Fairness in Black Lung Benefits Hearings*, REGBLOG (Aug. 14, 2014), <http://www.regblog.org/2014/08/14/14-kenney-procedural-fairness-in-black-lung-hearings>.

¹⁰² GAO 2009 Report, *supra* note 15, at 26.

claimants to settle. And regardless of whether claimant representation increases, pro se claimants will be in a better position to successfully acquire some form of payment as opposed to the current high rate of complete failure.

Before discussing in detail the merits of a settlement provision, it is necessary to briefly describe how such a provision would function. As settlement provisions already exist in other federal¹⁰³ and state¹⁰⁴ worker's compensation schemes, these provide a template for a new Program provision. Most provisions allow for settlement at any point after filing a claim, and the claimant usually receives a single lump sum payment as opposed to the Program's monthly payment.¹⁰⁵ In exchange for the settlement payment, claimants forgo any future claims against the company for the particular injury.¹⁰⁶ My proposed settlement provision would follow this basic structure with the addition of an administrative review of the settlement. The ALJ would review the settlement agreement and all available evidence to ensure it fairly treats both parties and is in accordance with the public interest.

This type of settlement provision would offer the potential of a relatively quick trial and lower both parties' associated costs.¹⁰⁷ Settlement in other workers' compensation programs is most likely to occur in the proceedings' early stages,¹⁰⁸ and, for example, would likely occur in Program proceedings during the beginning of the ALJ hearing. While parties will still need to develop evidence to prepare for settlement negotiations and for a potential trial, it would be against a firm's financial interest to initially spend a substantial amount of time and resources to oppose a miner's claim when settlement may not cost significantly more and provides less of a future financial risk. Also, assuming settlement attracts greater rates of miner representation and that this improves claimants' likelihood of success, an operator's risk of losing its opposition to granting benefits increases. An increased chance of liability to provide a worker life-

103 See, e.g., Longshoremen's Act, 20 C.F.R. § 702.241-43 (1995) (laying out the settlement provisions of the Longshoremen's Act).

104 See, e.g., David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience*, 16 WIDENER L.J. 199 (2007) (describing workers' compensation settlement provisions in Pennsylvania and other states).

105 *Id.* at 208-11.

106 *Id.* at 211.

107 These trials will likely last far less than the average three years and, as a byproduct, have a significant impact on reducing the number of pending cases in front of ALJs.

108 See Terry Thomason, *Correlates of Workers' Compensation Claims Adjustment*, 61 J. RISK & INS. 59, 66-76 (1994) (finding that workers are more likely to receive a settlement in the early stages of a workers' compensation process as opposed to going through adjudication).

time medical benefits, combined with an opportunity for decreased legal costs and quick resolution would make settlement an attractive solution for operators.¹⁰⁹

Whether a new settlement provision will create a significantly fairer adjudication process, however, depends on attorneys' believing settlement is a potential outcome. Attorneys previously thought that there was a low probability of success in Program claims, which was likely based on the historically low success rates of claimants, most of whom were pro se.¹¹⁰ As attorney's fees are contingent on success, attorneys reasonably decline to represent claimants because of the low likelihood of remuneration. But this low likelihood may actually be a product of inadequate representation. The previous section discussed how having legal representation impacts claimants, forcing them to confront an operator with superior legal resources, and emphasized the ALJs' belief that representation could assist claimants in effectively presenting their claims. Whether legal representation *will* change miners' rate of success is not within the scope of this paper. Rather, it is enough to conclude that lawyers will likely be enticed to represent claimants when the potential for a quick and relatively low-cost proceeding is an option, and that this representation will give claimants a fair chance to present their case.¹¹¹

Even if I am incorrect that a settlement provision will lead to increased claimant representation, pro se miners will still be in a more advantageous position to acquire some payment. In providing settlement as an option, pro se miners can leverage the operator's potential cost savings from not litigating the claim for multiple years into an early lump sum settlement. Regardless of whether the claimant is represented, settlement may be the financially optimal solution for an operator seeking to reduce cost and risk, and the best chance for a miner to receive any award.

While settling a miner's claim may be the best choice for operators and increase pro se claimants' chance to receive any form of payment, the primary benefit of a settlement provision is not necessarily that settlement will occur. The major benefit is that the poten-

109 Even after implementing a settlement provision, operators should retain enough power that they would refuse to settle completely frivolous claims. Indeed, an entirely frivolous claim should be relatively inexpensive to litigate, as costs related to expert testimony would be minimal because few expert opinions would be necessary for success.

110 Again, the DOL does not keep representation records for ALJ hearings, but ALJ and DOL officials' comments suggest pro se claimants are the norm in Program hearings). See GAO 2009 Report, *supra* note 15, at 26–28.

111 Additionally, the current attorney's fee provision will need to be altered to allow attorneys to receive payment for legal services if a settlement is reached between parties.

tial for a settled claim will lead to greater rates of representation. This increase in representation may lead to a high percentage of settlements, but it will also likely lead to more adjudications where claimants have legal counsel. In either scenario, settlement or full adjudication, the increased prevalence of representation ensures claimants are able to present their cases in a more effective manner, which enables a fairer administrative determination of whether benefits should be awarded.

Many legislators and courts, however, argue that settlement in workers' compensation programs is antithetical to the public policy concerns these programs were created to address.¹¹² Critiques of settlement provisions usually focus on three concerns: (1) lump sum settlements will lead to a quick dissipation of funds;¹¹³ (2) once the settlement funds are gone, the worker will rely on welfare to survive;¹¹⁴ and (3) the worker lacks the knowledge to enter into a fair settlement agreement.¹¹⁵

These concerns are rooted in paternalism and a distrust of workers' ability to judge the best solution for their particular situation. Claimants without representation, however, will certainly be ill equipped to determine whether a settlement agreement is fair. As a basic layer of protection, my proposed provision makes the ALJ a gatekeeper against operators taking advantage of claimants, which should protect against at least the most egregious agreements.¹¹⁶ Beyond the anti-paternalist sentiment that injured workers should be given the chance to determine whether to accept a settlement, these agreements in Program claims will objectively be a better outcome for claimants than what nearly 87% of them currently receive. Especially in the black lung context, where scientific evidence struggles to differentiate between black lung disease and severe smoking-induced

112 See Torrey, *supra* note 104, at 208–10 (noting the longstanding legislative and judicial opposition to workers' compensation program settlement provisions).

113 See *id.* at 208–09 (discussing several state cases where the courts stress settlement leads to "improvident investments"); see also *Reeves v. La. State Prob. & Parole*, 684 So. 2d 1112, 1117 (La. Ct. App. 1996) (Lobrano, J., concurring) (emphasizing that workers' compensation laws are "intended to protect the claimant from the proverbial 'lump sum' of money which may be squandered shortly thereafter leaving the out of work employee destitute").

114 See *Riesenecker v. Ark. Best Freight Sys.*, 798 P.2d 1040, 1041 (N.M. Ct. App. 1990) (arguing that lump sum settlements "create[] a risk that the worker will need to rely on welfare during the time that periodic disability payments would otherwise be available.").

115 See *Jacob Hartz Seed Co. v. Thomas*, 485 S.W.2d 200, 202 (Ark. 1972) ("The employee is seldom as well informed in these matters as the employer or carrier.").

116 The proposed provision could also stipulate that settlement amounts would be dispensed monthly unless the claimant specifically requested otherwise.

pulmonary damage, it is reasonable for claimants not to want to risk a hearing where they could lose any chance at payment. Furthermore, if this part is correct in assuming an increase in claimant representation via the settlement provision, miners will not be making the settlement decision alone but with counsel and only after an ALJ has reviewed the agreement.

By enacting a settlement provision, claimants will not only have a better chance of receiving payment but, more importantly, will entice lawyers to represent their claims. This will give those represented a significantly better chance in hearings and on appeal to litigate claims against superiorly financed operators. And although there are public policy concerns with settling workers' compensation claims, these concerns are misplaced in the Program context. The vast majority of claimants never receive any form of payment and, in the proposed provision, an ALJ would protect against operators attempting to abuse the provision.

B. Expanding Access to Medical Evidence in Black Lung Benefits Hearings: Creating a Presumption of Disclosure

While a settlement provision will increase claimant representation, a significant number of pro se miners will likely still seek benefits. In ALJ hearings, the key pieces of evidence are medical expert opinions and associated medical tests.¹¹⁷ As discussed previously, the quality of medical evidence is often the determinative factor for ALJs, especially in cases involving multiple potential sources of causation. As pro se claimants only have minimal access to this type of evidence provided by the DOL, operators with superior resources are able to selectively amass medical opinions that support their position while withholding non-testifying expert evidence. This part proposes giving claimants greater access to medical expert evidence by creating a rebuttable presumption that parties are entitled to all opposing party medical evidence prepared for trial, including evidence parties do not intend to use at hearings.

The current non-testifying expert evidence disclosure provision requires miners to show a "substantial need" of the evidence and that they would be unable to obtain substantially similar materials without "undue hardship."¹¹⁸ The 2012 DOL Proposal would require a claimant to show "exceptional circumstances," an even higher threshold,

¹¹⁷ GAO 2009 Report, *supra* note 15, at 28.

¹¹⁸ 29 C.F.R. § 18.14(c) (1989).

to obtain an opposing party's evidence.¹¹⁹ As discussed previously, both of these approaches make it difficult for claimants to access potentially crucial evidence. In order to address this disparity in access to medical evidence, I propose altering the current provision to a rule that presumes the disclosure of medical evidence in ALJ hearings. It would require both parties, before an ALJ hearing, to provide the opposing party with all relevant medical expert evidence prepared in connection with the case, unless the producing party shows that it would be unfairly prejudicial or overly burdensome to do so. Currently, parties do not often utilize the disclosure provision likely due to either claimants' lack of knowledge that it is available or the high burden that must be overcome to access the evidence. By shifting the burden to the producing party, claimants, regardless of legal knowledge, will presumptively have access to this evidence.

The expansion of available expert evidence would also allow the ALJ to better determine whether to award benefits considering all available evidence. This would give the ALJ more than the claimant's one or two DOL-supplied medical opinions and a selection of pre-screened operator evidence. Instead, highly relevant and high quality medical evidence may potentially be available at trial without increasing the cost either party would have accrued otherwise.

Although this provision would require a party, most likely the operator, to provide an opposing party with evidence that may help its case, this does not destroy the adversarial nature of the process. While there is already a provision under which claimants may obtain non-testifying expert evidence,¹²⁰ a substantial burden rests on the non-disclosing party to access the information. Furthermore, the new presumption of disclosure is rebuttable if the operator believes disclosing the evidence would be unfairly prejudicial or overly burdensome. And even if the operator loses its rebuttal, the party can still explain the evidence at the hearing, offering reasons why other medical evidence should be dispositive.

Moreover, this will not cause parties to stop developing medical evidence for trial, as this type of evidence is often what determinations are based upon. The new provision would be narrowly tailored to only include medical evidence, such as medical tests and expert opinions. All other evidence will continue under the current standard if a party seeks to acquire it. This ensures the likely disclosure of

119 77 Fed. Reg. 72142, 72161 (proposed Dec. 4, 2012) (to be codified at 20 C.F.R. § 18.51(d)(4)(B)).

120 29 C.F.R. § 18.14(c) (1989).

evidence that supports a critical element of the claim and that is most often practically unavailable to a claimant due to its high cost.

Admittedly, this will only provide assistance to claimants in the subset of cases where the operator has additional medical evidence from a non-testifying expert. To further improve claimants' access to medical evidence and ability to fully present their cases, claimants need multiple high quality medical tests and opinions. Allowing access to operators' non-testifying expert evidence is the initial step, but this could be further improved. These additional steps could include the DOL providing higher quality medical evidence and offering at least two examinations and opinions to a wider range of claimants. Furthermore, the previously proposed settlement provision will indirectly increase access to medical expert evidence. If there is an increase in representation rates, it will likely lead to representatives investing more money in developing expert evidence in order to successfully settle or litigate a claim. Regardless of other potential approaches, changing the expert evidence disclosure provision to one that presumptively discloses medical evidence between parties is an important move toward creating a fair hearing process for miners.

CONCLUSION

Horrific explosions such as those at the Upper Big Branch and Farmington mines rarely occur in the mining industry, but the ongoing black lung disease epidemic continues to kill over 1,000 miners per year.¹²¹ As that number continues to grow, more miners will file for benefits through the Black Lung Benefits Program. These miners, however, will confront a Program with systematic procedural barriers to the fair determination of their claims. Two of the most pressing barriers were discussed in detail in this paper: the lack of representation and inadequate access to medical evidence. Most miners file claims pro se and struggle to present their cases against superiorly financed operators. Furthermore, when miners present their claims they lack adequate access to what DOL officials and ALJs consider the key piece of evidence in most proceedings—medical expert opinions. Instead of selecting from a pool of high quality medical expert opinions, the DOL provides claimants with only one or two relatively low quality medical exams and expert opinions.

¹²¹ David J. Blackley, Cara N. Halldin & A. Scott Laney, *Resurgence of a Debilitating and Entirely Preventable Respiratory Disease Among Working Coal Miners*, 190 AM. J. RESPIRATORY & CRITICAL CARE MED., 708, 708–09 (2014); Gardiner Harris & Ralph Dunlop, *Dust, Deception & Death: Why Black Lung Hasn't Been Wiped Out*, Courier-J., Apr. 19, 1998, at A1.

This paper proposed initial steps to remove some of the procedural barriers from Program administrative proceedings. I first proposed that a settlement provision would increase claimant representation by assuaging attorney concerns that Program claims are too costly, lengthy, and uncertain. Instead of resolution taking on average three years and costing nearly \$18,000, claims could be resolved within the first year for a fraction of the cost. This increased representation would allow claimants to better articulate their legal position, both in settlement discussions and hearings.

Realistically, even if representation rates increase some miners will continue to file claims *pro se*. Although claimants' representatives will likely pay for additional medical evidence to ensure a settlement or victory at a hearing, *pro se* claimants would still lack this crucial component of their case. To remedy this disparity, I argued there should be a presumption of disclosing all medical expert evidence, even non-testifying expert evidence, between parties before hearings. Changing the expert evidence disclosure provision will increase claimants' access to medical expert evidence without placing any additional financial costs on either party and foster a fairer determination process where ALJs can consider all available evidence.

Creating a settlement provision and revising the expert evidence disclosure rule are important preliminary steps toward removing systematic procedural barriers facing miners in claiming benefits. These changes will provide the foundation for a fairer determination process, one that allows miners to more fully and clearly articulate their legal positions while not hampering operators' efforts to effectively defend themselves. As coal miners continue to suffer from black lung disease at increasingly alarming rates, a fair determination process will be integral to justly resolving their claims.