

TESTIMONY OF
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BEFORE THE
SUBCOMMITTEE ON EMPLOYMENT AND WORKPLACE SAFETY
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
UNITED STATES SENATE

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Chairman Casey, Ranking Member Isakson, and distinguished Members of the Subcommittee, thank you for inviting me to testify about the Department's administration of the Black Lung Benefits Act. The Department is committed to the Nation's coal miners and their families, and to ensuring fairness in the claims process.

You have asked us to address the steps the Department has taken in response to the October, 2013 Center for Public Integrity (CPI) and ABC News reports about difficulties miners and their survivors have encountered in pursuing black lung benefits. You have also asked us to address the backlog of black lung cases pending before the Office of Administrative Law Judges. We appreciate your ongoing interest in the Black Lung program and welcome the opportunity to discuss the program with you, Mr. Chairman, and the Subcommittee today. We look forward to your continuing leadership on these issues.

Introduction

Recognizing that coal miners were sacrificing both their health and economic futures to produce the coal necessary to meet the Nation's energy needs, and that State workers' compensation programs were inadequate for them, Congress enacted the Black Lung Benefits Act in 1969. Since then, the Act has provided compensation and medical-treatment benefits to thousands of disabled coal miners and compensation to their surviving family members. Currently, the Act provides benefits to coal miners who are totally disabled by black lung disease and to the survivors of miners who died due to the disease. The Byrd Amendments, enacted in 2010, also restored automatic entitlement to survivors of miners who were found entitled to benefits based on their own lifetime claims.¹

Generally, a miner must establish that he or she has a lung disease arising from coal mine employment, a totally disabling respiratory impairment, and that the lung disease contributed to the impairment. A survivor who cannot benefit from the Byrd automatic entitlement provisions must establish that the miner had a lung disease arising from coal mine employment, and that the

¹ Pub. L. No. 111-148, § 1556(c), 124 Stat. 260 (2010).

lung disease hastened the miner's death. Any claimant, miner, or survivor, must prove his or her case by a preponderance of the evidence.

In making his case, a claimant may be able to take advantage of two important statutory presumptions. First, if the claimant proves the miner has or had complicated black lung disease—an advanced form of the disease also known as progressive massive fibrosis—the claimant can invoke a presumption of entitlement that the liable party is not permitted to rebut.² Second, if the miner engaged in underground coal mine employment, or substantially similar above-ground coal mine employment, for at least 15 years and the claimant proves that the miner has or had a totally disabling respiratory impairment, the claimant can invoke a presumption that the miner has or had black lung disease and that the miner's disability or death was due to the disease. The liable party may rebut this presumption only by showing the absence of black lung disease and that no part of the miner's disability or death was related to coal mine employment.³

The Department's Office of Workers' Compensation Programs (OWCP) administers the program. OWCP's District Directors, whose offices are located around the country, develop claims and conduct initial adjudications. OWCP offers all miners who file claims a complete pulmonary evaluation at the Department's expense. OWCP then considers this evidence, along with that submitted by the private parties, in adjudicating the claim. Any claimant or coal company dissatisfied with the District Director's decision may request a *de novo* hearing before the Department's Office of Administrative Law Judges (OALJ). Before the administrative law judge, parties may offer additional evidence—within the limitations established by the Department's regulations—on contested issues. The judge will also conduct an oral hearing unless waived by the parties. After hearing the case and receiving evidence, the judge issues a decision either awarding or denying benefits. An aggrieved party may seek appellate review by the Department's Benefits Review Board, and thereafter by the United States Court of Appeals for the circuit in which the miner's coal mine employment occurred.

The Act originally divided responsibility for the program between the Social Security Administration, which administered early claims that were payable directly by the Federal government, and the Department of Labor, which administered all claims filed after 1973. Claims administered by the Department are payable by coal mine companies (or their insurance carriers) that employed the miner; if there is no liable coal mine company available, the Black Lung Disability Trust Fund pays benefits.

The CPI/ABC News Reports

Last fall, CPI and ABC News published a series of reports highlighting hurdles claimants face in seeking black lung benefits. They focused primarily on two areas. First, the reports described litigation tactics used by attorneys representing coal companies. These tactics included selective disclosure of company-developed medical evidence to the adjudicator as well as to the company's other medical experts and the miner. The reports used miner Gary Fox's case, among others, to illustrate the problem. In that particular case, the coal company's attorney did not

² 30 U.S.C. § 921(c)(3).

³ 30 U.S.C. § 921(c)(4) (2006 & Supp. V 2011).

share medical evidence that was indicative of complicated pneumoconiosis—an advanced form of black lung disease that when proved, establishes entitlement to benefits—with either the coal miner or the company’s other medical experts who ultimately testified that Mr. Fox did not have black lung disease. The company’s evidence resulted in denial of Mr. Fox’s initial claim for benefits.

Second, CPI and ABC News looked at coal companies’ routine use of certain physicians in developing medical evidence to defend against claims. The reports mainly focused on the Johns Hopkins Medical Center B-reader program, led by Dr. Paul Wheeler. (A “B-reader” denotes a physician who has passed the National Institute for Occupational Safety and Health’s examination on proficiency in using the International Labor Office (ILO) classification system to describe or “classify” the presence or absence of, and the severity of, radiographic opacities visible on chest X-rays, that are consistent with black lung or other dust-induced diseases.) Many employers, including coal companies, use B Readers to classify miners’ chest X-rays and serve as expert witnesses in contested proceedings. The CPI and ABC News reports stated that Dr. Wheeler had failed to diagnose complicated pneumoconiosis in over 1500 cases, while other experts who evaluated the same cases had found complicated pneumoconiosis in 390 of them. The stories also documented that Dr. Wheeler was failing to properly classify chest X-rays showing obvious large opacities because he argued that the opacities were due to diseases other than Black Lung. Johns Hopkins suspended the program shortly after the CPI and ABC News stories were published and launched an internal review. To our knowledge, the program remains suspended today.

The Department’s Response

The Department took these reports seriously. We conducted an extensive review of the program to look for innovative ways to address the disparity in resources between coal companies and benefits claimants within the existing statutory and regulatory framework. The Department also looked for other changes that could be made to improve the fairness of the claims process and increase the accuracy of decisions made on claims.

I would like to share with you some of the actions the Department has taken as a result of this review.

1. Pilot program to develop supplemental medical evidence

On February 24, 2014, the Department launched a pilot project to strengthen the complete pulmonary evaluation given to miners. When a miner files a claim, the miner picks a doctor to conduct an examination from an approved list the Department maintains. The physician examines the miner, conducts medical tests to determine whether the miner is disabled from black lung disease, and prepares a written report of his or her findings. OWCP then bases its initial entitlement determination on the report. All claims filed by miners follow this procedure.

But these initial medical reports do not always hold their value as a claim moves through the adjudication process. They are often rejected because they are outdated or do not consider all of the medical data added later to the record by miners and coal companies. The Department

launched the pilot program to help alleviate these problems. In a small subset of claims—generally those where the miner worked 15 or more years in the mines (and thus might be able to invoke the 15-year statutory presumption of entitlement) and whose initial medical report supports an award of benefits—the Department is developing additional medical evidence. We ask the doctor who conducted the initial examination to review any evidence submitted by the miner or the coal company and update his or her initial opinion by drafting a supplemental report. Depending on the particular circumstances of any given case, we may ask for supplemental reports during both the OWCP and administrative law judge adjudication phases.

The Department chose this approach in response to the CPI and ABC News stories because it had multiple advantages. Developing additional medical evidence at no expense to the miner would: (1) address concerns about disparate resources; (2) improve decision making; and (3) fit within the existing legal framework, making speedy implementation possible.

The pilot project is still in its early stages. OWCP has sent out 79 requests for supplemental reports in cases being adjudicated by District Directors and has received 42 in response. OWCP has issued 37 decisions: 25 awards, 11 denials, and 1 claimant withdrew his application for benefits. We have also requested supplemental opinions in several cases set for hearing before an administrative law judge, but these cases have not yet been decided.

The Department hopes the pilot project gives deserving miners stronger medical reports that strengthen OWCP's initial entitlement decisions and that withstand scrutiny when weighed against the coal companies' contrary evidence. Stronger OWCP decisions may lead to fewer hearing requests in the future. While it is too soon to assess the pilot's effectiveness, the Department will consider expanding this procedure to all claims filed by miners if the pilot is judged successful.

2. New regulatory initiative

In addition to the pilot project, the Department announced a new black lung rulemaking initiative on May 23, 2014, motivated in part by Gary Fox's case and the CPI and ABC News reports. The Department plans to address three important issues in a proposed rule: whether all parties involved in a claim must disclose medical evidence they obtain in connection with a claim; the fee schedule used for payment of a miner's medical expenses related to black lung disease; and a liable coal company's responsibility to pay benefits under an effective award while seeking modification of the award.

The first of these issues—the medical-evidence disclosure rule—is the most relevant here. We want to ensure that coal miners have full access to information about their health. We also want to render accurate decisions in adjudicating claims. Having access to medical evidence developed by all parties can help us accomplish both of these goals.

The Department invited stakeholders to comment on all three rulemaking topics during outreach sessions held earlier this month on July 8 and 9. Both sessions were well attended and productive. The information the Department gathered will be of great assistance in drafting a proposed rule.

3. X-ray interpretations made by Dr. Wheeler

The Department also responded quickly to the allegations made in the CPI and ABC News reports about Dr. Paul Wheeler's potentially incorrect X-ray readings. We immediately verified that OWCP was not employing Dr. Wheeler for any purpose. Shortly thereafter, OWCP's National Office shared the news reports with their District Directors, instructed them to closely scrutinize any evidence offered by Dr. Wheeler and to consult with National Office staff on cases involving Dr. Wheeler's X-ray readings.

The CPI and ABC News reports continued to be discussed in routine bi-weekly management meetings involving OWCP National Office and District Director staffs. Not surprisingly, coal companies, for the most part, stopped submitting X-ray readings made by Dr. Wheeler. One attorney who represents coal companies asked a District Director to disregard any earlier requests he had made for OWCP to forward radiographs to Dr. Wheeler for re-reading. When OWCP's National Office learned that one of its district offices was not following these oral instructions, the Department issued more detailed, written guidance.

The Department made the judgment that the CPI and ABC News reports and Hopkins' suspension of its B-reader program were sufficiently trustworthy and reliable to warrant consideration when weighing X-ray interpretations made by Dr. Wheeler. Accordingly, on June 2, 2014, OWCP issued a bulletin instructing its District Directors to consider this information when weighing Dr. Wheeler's negative X-ray interpretations, and not to credit Dr. Wheeler's interpretation in the absence of persuasive evidence either challenging the CPI and ABC News conclusions or otherwise rehabilitating Dr. Wheeler's readings. The Solicitor's Office is also asking administrative law judges and the Benefits Review Board to take official notice of the CPI and ABC News reports in appropriate cases.

In addition to issuing this guidance, OWCP searched its records to identify denied claims that contained X-ray interpretations made by Dr. Wheeler. The search included claims filed from 2001 to the present. OWCP broke these claims into two groups: those denied within the past year that could be reopened under the Act's one-year modification provision, and those denied more than one year ago.

OWCP identified 83 claims that had been denied within the past year and sent a letter to those claimants alerting them to OWCP's new guidance on Dr. Wheeler's X-ray readings. The letter informed the claimants that they could request reopening of their claims, included the date by which they had to make the request, and told them that the request could be made either by telephoning or writing OWCP. In four instances, the one-year modification deadline was quickly approaching, so OWCP telephoned the claimants in addition to sending the letter. To date, 13 claimants have sought modification in response to OWCP's letter.

OWCP also identified approximately 1,000 claims filed by miners between 2001 and 2013 that contained Dr. Wheeler X-ray interpretations and had been denied for more than one year. Although modification is no longer available to these miners, a miner may always file a new claim because his or her condition may significantly deteriorate over time. Black lung disease

can be latent and progressive, appearing after a miner's coal mine employment ends or progressing to total disability with or without continued mining exposure. OWCP sent letters to these miners advising them of the new guidance regarding Dr. Wheeler's X-ray interpretations and that they could file new claims. The letter told them that the Department would once again provide each miner with a complete pulmonary evaluation at no expense. Because the letters were sent earlier this month, we do not yet know whether any miners will file new claims in response.

Unfortunately, most survivors (unlike miners) whose claims were denied more than one year ago have no avenue of relief. These survivors cannot ask for modification because the one-year period has expired. And under the current statutory and regulatory scheme, such survivors cannot be found entitled to benefits based on a new claim.

I can assure you that if a claimant files a timely modification request or a miner files a new claim, OWCP intends to follow its stated policy and not credit Dr. Wheeler's X-ray interpretations without persuasive evidence either challenging the CPI/ABC News conclusions or otherwise rehabilitating Dr. Wheeler's readings. The Solicitor's Office will also continue to ask administrative law judges and the Benefits Review Board to take official notice of the CPI/ABC News stories where appropriate.

In addition, to address any similar issues that may arise going forward, the Department has begun exploring with the National Institute for Occupational Safety and Health (NIOSH) the feasibility of establishing an inter-agency quality assurance program for B-readers whose X-ray classifications are submitted and considered in black lung claims adjudications.

4. Training initiatives

The Department has also launched a new training initiative to further improve the quality of its decisions in black lung claims. We have worked closely with NIOSH to develop advanced training for Department personnel who adjudicate claims and physicians who examine miners on behalf of the Department. The program will keep staff up-to-date on medical developments relevant to black lung claims. A potential curriculum for the program was reviewed and evaluated by a broad range of participants—including physicians and other medical providers, coal miners, claimant representatives and attorneys, OWCP staff, and Solicitor's Office staff—at the West Virginia Black Lung Clinics Program Conference in Pipestem, West Virginia, last month. The curriculum will be refined based on the feedback received at that session. We have engaged a contractor, Dr. Robert Cohen from the University of Illinois, to develop the training program with input from NIOSH. We believe the training will increase the quality of the medical evaluations the Department provides to miners and enhance the Department's evaluation of the medical evidence when adjudicating claims.

OWCP is committed to ongoing training, and, in addition to entering into the contract noted above, recently added a training coordinator to its National Office black lung staff.

5. Communications and Outreach

OWCP has used a variety of forums to communicate the steps that it is taking to improve the program. OWCP leaders have discussed the pilot project, the agency's expanded consultations with NIOSH, and the new training program at several conferences attended by miners and their representatives, doctors, and other medical providers who are involved with the program. OWCP has also placed on its website information about the pilot project, OWCP's guidance on Dr. Wheeler's X-ray readings, and a set of Questions and Answers about the rights of claimants whose claims were potentially impacted by Dr. Wheeler's readings. OWCP also shared the Questions and Answers with interested congressional offices and OWCP's District Offices.

6. Looking forward

In addition to the actions already taken, the Department is planning for the future. We have committed to consult regularly with NIOSH on recurring medical issues raised in claims litigation. If science resolves a particular issue, the Department will consider promulgating a rule to address it. Promulgating rules where the science is clear can lead to less litigation and help resolve miners' and survivors' claims more quickly. Both OWCP staff and the Solicitor's Office attorneys who litigate black lung cases are on the lookout for recurring medical and scientific issues so that we can consult with NIOSH in a timely manner.

We will also be enhancing our accountability review process within OWCP. OWCP's National Office staff performs onsite reviews of its District Offices and assesses their performance on critical program activities such as initial claim adjudications, administering benefit payments, and performing related activities associated with financial management and program administration. Each District Office is reviewed based on a sample of approximately 450 case files and other documents reflecting the work of the particular office.

We are considering adding spot audits that would require District Directors to review a sample of awards and denials after lower management reviews have been completed but before the award or denial is issued. The spot audits will be used as a quality enhancement tool and address whether the decision is appropriate, well-reasoned and in compliance with applicable statutes, regulations and policies.

Cases Pending Before the Office of Administrative Law Judges

As the Committee has recognized, there is a backlog in black lung claims awaiting hearing and decision by the Office of Administrative Law Judges. The number of judges available to hear cases has gone down over the past ten years from 45 to 36 due to retirement and other departures. We are working on replacing those that we have lost, but that process has been hindered by sequestration reductions. In addition, the President's FY 2015 budget provides funding for OALJ to hire additional staff to address the backlog. The budget proposes a programmatic increase in OALJ for 10 full-time employees, \$2,027,000 in general funds and \$693,000 in Black Lung resources. In total, the budget reflects an 11.5 percent increase for OALJ over the FY 2014 enacted budget and is the largest increase the Department has sought in ten years. The FY 2015 budget also includes a plan for fully replacing the automatic sequester cuts with smarter, better targeted reductions. If allowed to continue, sequestration will further reduce available Black Lung funding for OALJ's administrative needs. These additional

resources proposed in the President's budget will increase OALJs' ability to hear and decide claims more quickly.

OALJ is also tackling the black lung case backlog in other ways. Some actions are directly related to adjudicating black lung cases while others are designed to free administrative law judges in other areas so that they have more time to devote to black lung cases. These actions include:

- Hiring two new administrative law judges for OALJ's Pittsburgh District Office in FY 2015 to adjudicate black lung cases predominantly. In the meantime, an administrative law judge who had previously retired will be brought back as a Senior ALJ in the Pittsburgh office, where he will focus predominantly on black lung cases. OALJ will also be hiring two new administrative law judges for the National office in Washington. The Washington office has the largest staff of judges and disposes of more black lung claims than any individual district office.
- Hiring a Senior Attorney in each OALJ District Office, instead of relying solely on law clerks who serve two-year terms. A Senior Attorney would develop greater expertise in black lung law and thus be better able to assist administrative law judges faced with difficult issues. Given the funding issues involved, OALJ is launching this as a pilot program only.
- Exploring the use of contract attorneys, who are usually former law clerks, to draft black lung decisions on a fixed cost per case. In the past, this has proved a cost-effective method of reducing decision backlogs.
- Routinely advising represented parties in black lung cases that a decision may be made on the documentary record, without an oral hearing, if all parties agree. Where the parties do agree, OALJ will be able to proceed more quickly to a final disposition of the claim.
- Monitoring the productivity of all administrative law judges with regard to the disposition of black lung cases, and counseling judges who are less productive.
- Using rehired annuitants to form additional Board of Alien Labor Contract Appeals panels to dispose of Permanent Labor Certification (PERM) cases. This will free up administrative law judges to hear and decide more black lung cases.
- Continuing to explore using electronic systems for hearings. This could reduce travel costs and conserve valuable administrative law judge time that could be devoted to decision making.
- Developing 10-15 training modules in conjunction with NIOSH to help administrative law judges and staff better understand the medical issues typically presented in black lung claims. This training could speed up the disposition of these claims.

You have also asked whether the Department's actions taken in response to the CPI and ABC News reports might have an impact on the backlog. The Department's outreach efforts to miners whose claims contained Dr. Wheeler X-ray interpretations are likely to result in a significant number of new claim filings. We project approximately 330 new claims will be filed in FY 2014 with an additional 300 to 400 in FY 2015 in response to the 1,000 letters sent to miners whose claims were denied. In addition, new claim filings thus far in FY 2014 have exceeded earlier estimates. OWCP now projects 7,100 new claim filings (not including any new claims filed in response to the letters sent about Dr. Wheeler) by the end of this fiscal year, a 10.6 percent increase over claim filings in FY 2013. Although the reason for this increase is difficult to determine, drivers likely include OWCP's publication of regulations in September, 2013, implementing the Byrd Amendments; the increased publicity the program has received; and OWCP's outreach efforts to the coal-mining community. The increase in new claim filings will, of course, be reflected in the Department's workload at all adjudication levels, including OALJ.

Conclusion

Coal miners who have sacrificed their health because of their occupation deserve a fair process when they file claims for black lung benefits. The actions the Department has taken will further that goal. We look forward to continuing to work with you to improve the program and the lives of coal miners and their families.