Chapter 1

Introduction to the Claims Process and Research Tools

I. Filing the claim and adjudication by the district director

The adjudication process begins when the claimant (miner or survivor) files a Form CM-911 at the nearest Social Security office, or with the Department of Labor's district director at the local Office of Workers' Compensation Programs. The Form CM-911 contains general information, such as the miner's physical characteristics, educational and employment background, age, and dependents, is recorded.

A claim is considered "filed" on the date the district director's office date-stamps the CM-911 (as opposed to the date the claimant signs or mails the form). The record in the claim is then initially developed under the supervision of the district director.

A. The Director, OWCP and district director

The district director (formerly called a "deputy commissioner") is the first adjudicating officer at the Department of Labor to decide the claim. The district director should not be confused with the Director, Office of Workers' Compensation Programs (also known as "Director" or "Director, OWCP"), who is a party-in-interest in every claim. The Director, OWCP is part of the Department's Solicitor's Office and represents the interests of the Black Lung Disability Trust Fund, which may be held responsible for the payment of benefits in the event that there is no responsible operator (employer) or the named operator is not financially able to pay the benefits. *See Boggs v. Falcon Coal Co.*, 17 B.L.R. 1-62 (1992).

For further discussion of the designation of a responsible operator, *see* Chapter 7.

B. Development of the record

Once a *miner* files a claim, the district director must provide him/her with a complete medical evaluation at no cost to the miner. 20 C.F.R. § 725.406 (2008)[1]. Moreover, the amended regulations provide that the miner may select the physician who will conduct the examination from a list provided by the district director and the results of the evaluation "shall not be counted

[1] Formerly 20 C.F.R. § 725.405(b) (2000). *See also Hodges v. Bethenergy Mines, Inc.*, 18 B.L.R. 1-84 (1994).

as evidence submitted by the miner under § 725.414." 20 C.F.R. § 725.406(b) (2008).

Usually this independent medical evaluation will be reported by the physician on a Form CM-787. If the physician's opinion is not credible or is incomplete, then the district director has not complied with the requirements of 20 C.F.R. § 725.406 and the case must be remanded for a complete medical evaluation. *Pettry v. Director, OWCP*, 14 B.L.R. 1-98 (1990); *Hall v. Director, OWCP*, 14 B.L.R. 1-51 (1990) (administrative law judge may require district director to provide complete pulmonary evaluation to miner who files a duplicate claim). *See also Cline v. Director, OWCP,* 917 F.2d 9 (8th Cir. 1990) (case remanded to the administrative law judge for hearing wherein the Department's physician would be asked to comment on the etiology of the miner's pneumoconiosis); *Newman v. Director, OWCP, 745* F.2d 1162 (8th Cir. 1984).

For additional discussion of the Department's obligation to provide a complete pulmonary evaluation, *see* Chapter 26.

During processing of the claim at the district director and administrative law judge levels, a miner may be evaluated by physicians of his/her choice as well as physicians designated by the responsible operator. Medical evidence constitutes the core of a black lung claim and, therefore, the record will normally contain a number of chest roentgenograms (x-rays), pulmonary function studies, blood gas studies, and physicians' reports. Many claim files also contain autopsy or biopsy reports as well as "other evidence" under 20 C.F.R. § 718.107 such as CT-scans and digital x-rays.

For black lung claims filed on or before January 19, 2001, there were very few restrictions on the admission of medical evidence. However, under the amended regulations (which apply to claims filed after January 19, 2001), the submission of medical evidence is restricted. 20 C.F.R. § 725.414(a) (2008).[2] These restrictions have been upheld on challenge to the D.C. Circuit Court of Appeals. *National Mining Ass'n., et al. v. Dep't. of Labor*, 292 F.3d 849 (D.C. Cir. 2002)[3].

For a discussion of these evidentiary limitations, *see* Chapter 4.

C. The notice of initial finding

[2] The amended provisions at 20 C.F.R. Part 725 are applicable to claims filed after January 19, 2001. These provisions do not apply to petitions for modification (§ 725.310) filed after January 19, 2001 that relate back to claims filed on or before January 19, 2001.

[3] In its *writ for certiorari* in *Peabody Coal Co. v. Director, OWCP [Groves]*, 277 F.3d 829 (6th Cir. 2002), Employer states at footnote 1 that "[n]o petition for writ of certiorari will be filed" with regard to the D.C. Circuit Court's decision in *National Mining*.

1. Prior to applicability of 20 C.F.R. Part 725 (2008)

In the adjudication process, the district director first issues a Notice of Initial Finding (Form CM-971) concluding that the claimant is, or is not, entitled to benefits. If the district director initially determines that the claimant is not entitled to benefits, then a Form CM-1000a (a report usually prepared by the claims examiner) is included with the Notice of Initial Finding. This report will point to deficiencies in the claim and notify the claimant of any additional evidence that needs to be submitted. If the district director initially determines that the claimant is entitled to benefits, then the employer will be notified in writing and may commence to pay such benefits. At that point, Employer may commence the payment of benefits or continue to contest entitlement.

2. After applicability of 20 C.F.R. Part 725 (2008)

The provisions at 20 C.F.R. § 725.410 have been revised. Rather than issuing an initial finding, the district director issues a proposed decision and order after completion of record development at that level. 20 C.F.R. § 725.418 (2008). In cases where there is no responsible operator and the pulmonary evaluation provided by the Department supports a finding of entitlement, then the district director must issue a proposed decision and order in compliance with 20 C.F.R. § 725.418 (2008).

D. Determination of the responsible operator

If it is initially determined that the claimant is entitled to benefits, or if the claimant contests a denial of benefits, the district director must determine which employer(s) is/could be responsible for the payment of benefits. A Notice of Claim and a Notice of Initial Finding is/are served upon the potential employer(s). If a finally designated employer disputes responsibility over the claim or the claimant's entitlement to benefits, then it must submit a Notice of Controversion. 20 C.F.R. § 725.412 (2000) and (2008). Typical grounds of controversion include the following: (1) inability to pay benefits; (2) assertion that the claimant is not entitled to benefits; and (3) dispute as to whether the miner was last employed by the employer for one year as required under the Act.

1. Before applicability of 20 C.F.R. Part 725 (2008)

If there are multiple employers listed, the district director should make a factual determination as to the single employer, which is responsible for the payment of benefits. Occasionally, a case filed on or before January 19, 2001 will reach the administrative law judge with multiple employers listed. This is

because the Benefits Review Board held that, where one employer is designated by the district director as the responsible operator and is subsequently dismissed by the administrative law judge who determines that another operator should have been so designated, the Black Lung Disability Trust Fund becomes responsible for the payment of benefits. *Crabtree v. Bethlehem Steel Corp.*, 7 B.L.R. 1-354 (1984). *See also Director, OWCP v. Trace Fork Coal Co. [Matney]*, 67 F.3d 503 (4th Cir. 1995), *rev'g. in part sub nom.*, *Matney v. Trace Fork Coal Co.*, 17 B.L.R. 1-145 (1993) (on appeal to the Fourth Circuit, Case No. 93-2379); *England v. Island Creek Coal Co.*, 17 B.L.R. 1-141 (1993); *Sisko v. Helen Mining Co.*, 8 B.L.R. 1-272 (1985); *Director, OWCP v. Oglebay Norton*, 877 F.2d 1300 (6th Cir. 1989) (the Sixth Circuit modified the application of *Crabtree* to permit a redetermination of the responsible operator at any time prior to a hearing by the judge). The rationale underlying the Board's holding in *Crabtree* is that the employer who should have been designated was prejudiced in that it did not have notice and an opportunity to be heard at the level of the district director and administrative law judge and, therefore, did not participate in the development of the record.

For a discussion regarding naming the proper responsible operator, *see* Chapter 7.

2. After applicability of 20 C.F.R. Part 725 (2008)

Under the amended regulations, the provisions at 20 C.F.R. § 725.418(c) (2008) require that the district director name a single responsible operator that is potentially liable for the payment of benefits. All other potentially responsible operators are dismissed by the district director. Therefore, a claim that is referred to this Office under the amended regulations will have only one operator named. If there is no responsible operator, then the Trust Fund may be held liable for the payment of benefits. It is also noteworthy that the amended regulations at 20 C.F.R. § 725.465(b) (2008) provide, in part, that "[t]he administrative law judge shall not dismiss the operator designated as the responsible operator by the district director, except upon the motion or written agreement of the Director." Therefore, if the judge awards benefits and finds that the operator was not properly designated, then s/he would order payment of benefits by the Black Lung Disability Trust Fund.

E. The notice of an award/denial of benefits

Upon receipt of any additional evidence, the district director will issue a proposed decision and order of an award or denial of benefits (*i.e.*, the CM-1098 for an Award of Benefits), which constitutes his or her final adjudication of the matter. 20 C.F.R. § 725.418 (2000) and (2008). Once the district director issues the proposed decision, the unsuccessful party has 30

days in which to request a formal hearing before an administrative law judge. 20 C.F.R. § 725.419(a) (2000) and (2008). In those cases where the employer requests a formal hearing and continues to dispute the claimant's entitlement to benefits or its designation as the responsible operator, then the Director, OWCP will make payments from the Black Lung Disability Trust Fund until the claim is finally adjudicated. 20 C.F.R. § 725.420(c) (2000) and (2008).

II. The request for a formal hearing

If the employer or claimant is dissatisfied with the district director's proposed decision and order, a request for a formal hearing may be made. 20 C.F.R. § 725.419(a) (2000) and (2008). If the request is timely filed, then the district director will transmit the file to the Office of Administrative Law Judges with a list of parties on the Form CM-1025a and a list of contested issues on a Form CM-1025. 20 C.F.R. § 725.421 (2000) and (2008).

Given the informal nature of the black lung claims process, considerable latitude is afforded claimants in construing hearing requests. Specifically, almost any informal communication submitted to the district director at any point during the pendency of the claim at that level may be considered a hearing request. In *Plesh v. Director, OWCP*, 71 F.3d 103 (3d Cir. 1995), the Third Circuit held that a letter, wherein the miner stated, "I am appealing this as of now," constituted a formal hearing request thus, triggering the district director's duty to refer all contested issues to the Office of Administrative Law Judges for resolution. This is so, according to the court, even where the hearing request is "premature." In *Plesh*, the hearing request was filed after issuance of an order to show cause, but prior to entry of the district director's proposed decision and order. The court found that the letter preserved the claimant's right to a hearing such that it was unnecessary that he file a second request.

The amended regulations at 20 C.F.R. § 725.418(c) (2008) have codified the *Plesh* decision to make clear that any premature hearing request will be considered valid and the district director will forward the claim to this Office upon completion of the development of the record at his or her level. 20 C.F.R. § 725.418(c) (2008).

Once a claim file is received by this Office, it is assigned a docket number based on the fiscal year and sequential order in which it was received. For example, the 201st miner's or survivor's black lung benefits claim received in fiscal year 2008 would be docketed as "2008-BLA-201." The case is then assigned to an administrative law judge who schedules the case for a hearing and issues a decision and order after conducting a *de novo* review of the record and deciding all questions of fact and law.

The issues listed on the CM-1025 may be amended within the discretion of the administrative law judge provided the opposing party is given adequate notice and an opportunity to develop evidence with regard to the issues. *Perry v. Director, OWCP*, BRB No. 91-1197 BLA (Apr. 28, 1993)(unpublished) (citing *Carpenter v. Eastern Assoc. Coal Corp.*, 6 B.L.R. 1-784 (1984)).

For a discussion regarding amending issues listed on the CM-1025, *see* Chapter 26.

III. The appellate process

A. Circuit court jurisdiction

In *Shupe v. Director, OWCP,* 12 B.L.R. 1-200, 1-202 (1989)(en banc), the Board held that the location of the miner's last coal mine employment is determinative of the circuit court jurisdiction. Similarly, *Broyles v. Director, OWCP*, 143 F.3d 1348 (10th Cir. 1998), the Tenth Circuit held that a survivor's appeal must be filed in the jurisdiction where the miner's coal mine employment, and therefore his harmful exposure to coal dust, occurred. In so holding, the Tenth Circuit cited to *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), wherein the Fourth Circuit held that "jurisdiction is appropriate only in the circuit where the miner's coal mine employment, and consequently his harmful exposure to coal dust, occurred." The *Kopp* court found that, based upon the record before it, the miner's "only exposure to coal dust occurred in the Seventh Circuit" such that the case would be transferred to that court for adjudication pursuant to 28 U.S.C. § 1631.

The circuit courts of appeals have accepted cases where the miner was engaged in coal mine employment in their jurisdiction, even if he last worked in the mines in another jurisdiction. For example, in *Hon v. Director, OWCP*, 699 F.2d 441 (8th Cir. 1983), the Eighth Circuit held that "black lung disease is a 'cumulative' injury" that is "caused by extensive exposure to coal dust, and it is impossible to say that any one exposure 'caused' the miner to get black lung." Consequently, the court rejected the "'last injurious contact'" rule to state that the "appeal lies in any circuit in which claimant worked and was exposed to the danger, prior to manifestation of the injury." *See also Consolidation Coal Co. v. Director, OWCP [Kramer]*, 305 F.3d 203 (3d Cir. 2002) (appeal accepted where the miner last worked in the mines in West Virginia, but he had previous coal mine employment in Pennsylvania).

B. Appeal is untimely

In *Mining Energy, Inc. v. Director, OWCP [Powers]*, 391 F.3d 571 (4th Cir. 2004), the court dismissed Employer's appeal as untimely where Employer filed a petition for review with the court on October 28, 2002, which was 151 days after the Benefits Review Board denied relief requested by Employer on

reconsideration by order dated May 30, 2002.

The court noted that, under 33 U.S.C. § 921(c), a petition for review must be filed within 60 days of the date the Board issues its decision. Employer maintained that it did not have *actual* notice of the May 2002 order until September 23, 2002, "when it received notification from the Department of Labor . . . regarding payment of benefits." Indeed, the court noted that Employer was not properly served with the Board's May 2002 order. Employer argued that a Board decision is not properly served under Section 921(c) "until and unless it has been both filed with the Board *and* properly served on the parties via certified mail, or until the party has received actual notice." (italics in original).

Citing to the plain language of the regulations at 20 C.F.R. § 802.410(a), the court held that the 60 day period for filing a petition for review commences to run "when a Board decision is *filed* with the Clerk of the Board," without regard to whether the parties receive *actual* notice of the decision. As a result, the appeal was dismissed as untimely. However, in so holding, the court stated that "[o]ur conclusion on this point does not negate the seriousness of the Board's failure to properly conduct its affairs, nor our disapproval of it."

C. Claims processing

Writ of certiorari to the United States Supreme Court
I
Appeal to United States Circuit Court of Appeals
for the circuit in which the miner last engaged in coal mine work
(substantial evidence review)
I
Appeal to the Benefits Review Board
(substantial evidence review)
I
Hearing and *de novo* record review
at the Office of Administrative Law Judges
I
Timely request for hearing
I
Final proposed determination by the district director

If a claimant is **finally adjudicated** to be entitled to benefits, then the employer must commence the payment of benefits. In those cases where the Director, OWCP made interim payments out of the Black Lung Disability Trust Fund, then the employer will be required to reimburse the Trust Fund for all such monies paid with interest. If there is no designated employer, or the responsible operator is financially incapable of paying the benefits, then the Director, OWCP will continue to pay benefits out of the Black Lung Disability

Trust Fund. Finally, where the Director, OWCP or employer made interim payments to a claimant who is finally adjudicated as not entitled to such benefits, then a claim for the recovery of the overpayment may be filed with the district director. *See* Chapter 17 for a discussion of overpayment claims.

IV. Research tools

The following is a list of research tools to assist in the adjudication of black lung claims. Many of these tools are available through the Office of Administrative Law Judge's website at http://oalj.dol.gov/.

The Statute

The Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §§ 901 - 962 (commonly referred to as the "Black Lung Benefits Act").

The Regulations

The implementing regulations are found at 20 C.F.R. Parts 410, 718, 725, and 727. Most claims presented for adjudication were filed after 1982 such that the procedural provisions at 29 C.F.R. Part 18 and 20 C.F.R. Part 725 as well as the entitlement provisions at 20 C.F.R. Part 718 will be applicable. These regulatory provisions are available on the website.

For a discussion of applicability of the amended regulations, *see* Chapters 4 and 5.

The *Black Lung Reporter*

This is a multi-volume set of binders issued by Juris Publishing and it constitutes the official reporter for published decisions of the Benefits Review Board. The *Reporter* also contains published Supreme Court and circuit court of appeals decisions as well as select decisions from Administrative Law Judges.

WESTLAW

This is an on-line research tool for researching published (and some unpublished) Supreme Court, circuit court, and Benefits Review Board (Board) decisions in black lung. To research published black lung and longshore decisions of the Benefits Review Board using WESTLAW, you must access the "FWC-BRB" database.

Judges' Benchbook: Black Lung Benefits Act

This book contains a summary of important statutory and regulatory

provisions as well as case law. A supplement to the *Benchbook* is updated almost monthly and is available on the website.

Additional resources on the website

The Black Lung Library on the website includes a "Standardized Evidence Summary Form," which may be downloaded and used for claims filed under the amended regulations. The website also contains a subpoena form for parties to download.

In addition, the website has links to other databases that provide information on physicians' qualifications. One link is the NIOSH B-reader list for chest x-ray readers that is prepared and updated by the Office of Workers' Compensation Programs at the Department of Labor as well as by NIOSH.

There are two approaches for using the NIOSH B-reader list, and similar website sources of information. Some administrative law judges will consider evidence presented in the four corners of the record. If evidence regarding a physician's qualifications has not been submitted, then the judge will not look at the website sources of information; rather, s/he will conclude that the physician's qualifications are unknown.

Other administrative law judges will look outside the formal record to ascertain physicians' qualifications. In such instances, the administrative law judge must give notice of his or her intention to look outside the record for this information in the hearing notice or other appropriate document. Moreover, a copy of the relevant portion of the source of information must be attached to the judge's decision and order. *Maddaleni v. The Pittsburgh and Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990); *Pruitt v. Amax Coal Co.*, 7 B.L.R. 1-544, 1-546 (1984).

V. Use of claimants' initials in final orders and decisions

On January 30, 2007, the Department of Labor amended the black lung provisions at 20 C.F.R. § 725.477(b) to remove the requirement that parties' names be included in black lung decisions:

> A decision and order shall contain a statement of the basis of the order, findings of fact, conclusions of law, and an award, rejection or other appropriate paragraph containing the action of the administrative law judge, his or her signature and the date of issuance . . ..

72 Fed. Reg. 4,204 (Jan. 30, 2007). The amendment is primarily designed to protect the privacy interests of black lung claimants whose decisions are now published to the Department's web site. In its comments, the Department

further noted that existing regulations implementing the Longshore and Harbor Workers' Compensation Act at 20 C.F.R. Part 702 do not contain any requirement that the parties' names be included in decisions.

As a result, the Office of Administrative Law Judges has adopted a policy that only the claimants' initials will be used in final orders and decisions that are published to our website to protect the Privacy Act rights of the claimants.

VI. Audio-visual coverage of hearings

The regulatory provisions at 29 C.F.R. § 2.13(c) provide that, upon objection by any party, the Department "shall not permit audiovisual coverage" of "[a]dversary hearings under the Longshoremen's and Harbor Workers' Compensation Act . . . and related Acts, which determine an employee's right to compensation"