THE SECOND DECADE OF FEDERAL BLACK LUNG BENEFITS—THE SIXTH CIRCUIT TIGHTENS THE REINS

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INTRODUCTION

Title IV of the Federal Coal Mine Health and Safety Act of 1969,[1] creating the first federal program affording black lung benefits to disabled miners, was conceived as stop-gap legislation to aid what was believed to be a relatively small number of disabled miners who were no longer employed in the coal industry.[2] From this rather inauspicious genesis, amendments embodied in the Black Lung Benefits of 1972[3] and the Black Lung Benefits Reform Act of 1977[4] have created an administrative network which paid in excess of $1.44 billion in benefits to 219,000 claimants in 1979 and 1980 alone![5] Moreover, as of 1980, the Black Lung Disability Trust Fund, established under the Black Lung Benefits Revenue Act of 1977,[6] has incurred a deficit of $9.55 million with an anticipated revenue deficit of $4.25 billion by 1990.[7] Further, a recent audit performed by the Inspector General of the Department of Health and Human Services reports that as much as $18 million has been erroneously distributed by the Social Security Administration in overpayments to claimants.[8]

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1. 30 U.S.C. §§ 901-941 (1970).

2. Congress initially believed that the number of potential black lung beneficiaries totalled only 50,000. *See generally*, Kilcullen, *Compensation Benefits for Coal Miners Under the Federal Black Lung Program*, THE FEDERAL MINE SAFETY AND HEALTH ACT, 213 PRACTICING LAW INSTITUTE 159, 162 (1979).

3. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153, 154 (codified at 30 U.S.C. § 901 (amended 1978)).

4. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 105 (codified in scattered sections of 30 U.S.C.) [hereinafter cited as Reform Act].

5. MINE SAFETY AND HEALTH RPTR., *Current Reports* (BNA) 381 (Jan. 28, 1981).

6. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (codified in scattered sections of 26, 30 U.S.C.).

7. *See supra* note 5.

8. MINE SAFETY AND HEALTH RPTR., *Current Reports* (BNA) 218 (Nov. 4, 1981).

The unwieldiness of this federal program, coupled with administrative abuses and the current economic crisis facing the federal government, has resulted in a hue and cry for a dramatic legislative overhaul of the federal black lung benefits program. The Reagan Administration's proposals for reform include doubling the tax on mined coal which funds the Black Lung Disability Trust Fund as well as severely tightening eligibility rules by eliminating three of the five statutory presumptions which form the backbone of the federal black lung benefits program.[9]

Perhaps mindful of the widespread sentiment to curtail the federal black lung benefits program, the Sixth Circuit's 1980 term saw the court effecting sweeping changes in only two published opinions which effectively halted the liberal position towards awarding benefits which were characteristic of the court's decisions in recent years.[10] Both opinions affirmed denials of benefits, however, the facts presented in these cases would have supported reversals awarding benefits under prior but recent decisions of the Court. At the outset, this article will discuss the ramifications on prior case law affected by *Moore v. Califano*[11] while posing the question of whether this case may have swept more broadly than the facts warranted. Following *Moore*, a synthesis of *Elkins v. Secretary of Health & Human Services*,[12] will be undertaken which is illustrative of the trend created by *Moore*. Through these analyses it will become apparent to the black lung practitioner that to avoid delay, claimants seeking benefits should refile claims under more liberal administrative regulations rather than seeking to establish entitlement at an earlier date through judicial review in the Sixth Circuit.

I. *Moore v. Califano*

To the extent that earlier decisions of the Sixth Circuit can be read as a demonstration of the court's willingness to retroactively

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9. THE COURIER JOURNAL (Louisville), Oct. 9, 1981 at B1, cols. 1-6.

10. For an analysis of the black lung decisions eminating from the Sixth Circuit in 1979 and 1980, see Stephens, *The Continuing Saga of Part B Black Lung Benefits: A Review of Recent Decisions From the Sixth Circuit*, 1980 DET. C.L. REV. 5; Stephens, *Another Gasp at Part B Black Lung Benefits: The Sixth Circuit Expands and Interprets Its Prior Decisions*, 1981 DET. C.L. REV. 321.

11. 633 F.2d 727 (6th Cir. 1980).

12. 658 F.2d 436 (6th Cir. 1981).

apply the liberalizing amendments embodied in the Reform Act,[13] *Moore* indicates the the court will no longer countenance such judicial license in the face of explicit legislative history to the contrary. However, in affirming the district court's denial of benefits, it is submitted that the Sixth Circuit failed to afford the claimant the benefit of a statutory presumption of entitlement which was applicable under the evidence presented.

Golden Moore, a sixty-five year old former coal miner with twenty-five years of mine employment, filed his application for black lung benefits in January of 1971.[14] As such, his claim was designated a Part B claim which, if approved, would be paid by the federal government and adjudiciated according to regulations promulgated by the Social Security Administration.[15] After a hearing before an Administrative Law Judge (ALJ) in 1975, Moore was denied black lung benefits. The ALJ's decision became the decision of the Social Security Administration's Appeals Council and thus the final decision of the Secretary of Health, Education and Welfare (now, Health & Human Services). Upon judicial review by the United States District Court for the Western District of Kentucky, the court determined that the Secretary's decision denying black lung benefits was supported by substantial evidence. From this ruling, Moore appealed to the Sixth Circuit.[16]

In support of his claim, Moore submitted a plethora of medical evidence which had been primarily derived as a result of his extensive treatment for arteriosclerotic cardiovascular disease. Indeed, as a result of this condition, Moore was awarded Social Security disability benefits in 1973.[17]

The x-ray evidence submitted by Moore was conflicting. X-ray

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13. *See, e.g.*, Miniard v. Califano, 618 F.2d 405 (6th Cir. 1980); Dickson v. Califano, 590 F.2d 616 (6th Cir. 1978).

14. 633 F.2d at 728.

15. *See* 30 U.S.C. § 921(a) (Supp. IV 1980). A Part B claim initially adjudicated by the Social Security Administration must have been filed before July 1, 1973. 30 U.S.C. § 925 (1976). The Social Security Administration review procedure provided for an initial determination, reconsideration, a hearing before an administrative law judge, review by the appeals council, appeal to the federal district court in which the claim arose, and finally, appeal to the appropriate United States Circuit Court of Appeals. *See generally* 20 C.F.R. §§ 410.601-.670(a) (1981); *see also* 28 U.S.C. § 1291 (1976).

16. 633 F.2d at 728.

17. *Id.* This prior award of diability benefits played more than a minor role in the Sixth Circuit's decision to deny black lung benefits. *See infra* text accompanying notes 70-73.

interpretations rendered between 1966 and 1969 failed to disclose coal workers' pneumoconiosis (CWP), however an x-ray taken on March 8, 1971 by Dr. Selby Coffman, a certified "A" reader of coal miners' x-rays, was interpreted by him as positive for simple CWP.[18] The Social Security Administration submitted this x-ray for review by three physicians who were certified "B" readers all of whom interpreted it as negative for CWP.[19] Further, x-rays taken on June 5, 1974, by Dr. Neal Calhoun, a specialist in general practice, were interpreted by him as disclosing CWP as well as thickening typical of emphysema. These x-rays were re-read by Dr. Robert Coleman, a radiologist, as demonstrative of pulmonary fibrosis. Although CWP was not ruled out, the Social Security Administration, as is customary, ultimately obtained the opinions of two "B" readers interpreting the films as negative for CWP.[20] On the basis of these negative re-readings, the ALJ concluded that the x-ray evidence did not support Moore's claim of total disability due to CWP.[21]

Likewise, pulmonary function studies performed on the claimant

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18. 633 F.2d at 729; Record at 89; *Moore*. This x-ray was interpreted as positive because it met the criteria specified in 20 C.F.R. § 410.428 (1979). 42 C.F.R. §§ 37.51, .52 (1973) set up a hierarchy of proficiency for physicians who desire to be certified by the Social Security Administration as readers of coal miners' x-rays. A physician desiring to be certified as a first or "A" reader must submit six sample x-rays two of which he shall have diagnosed as showing no pneumoconiosis, two showing simple pneumoconiosis and two showing complicated pneumoconiosis. In addition, such physician must have completed a course in examining coal miners' x-rays specified by the Social Security Administration. *Id.*

19. 633 F.2d at 729. To attain the status of a final or "B" reader, additional proficiency above that required for an "A" reader must be demonstrated by taking and passing a specifically designed proficiency examination. Thus, 42 C.F.R. §§ 37.51, .52 provides that the interpretation of a "B" reader is final and controlling over an "A" reader's interpretation.

The practice of having "B" readers re-read the x-rays initially interpreted positive by "A" readers was highly condemned as "administrative one upsmanship" in a variety of forums. *See, e.g.*, Stewart v. Mathews, 412 F. Supp. 235, 238 (W.D. Va. 1975). This practice, however, was held not to violate due process per se in Hill v. Califano, 592 F.2d 341, 344-45 (6th Cir. 1979). Nevertheless, 30 U.S.C. § 923(b) (Supp. IV 1980) now provides that a board certified or board eligible radiologist's determination that an x-ray shows CWP is binding on the Secretary in the absence of fraud if coupled with "other evidence that [the] miner has a pulmonary or respiratory impairment. . . ."

20. 633 F.2d at 729. The professional qualification forms filed in the administrative record do not disclose whether Drs. Calhoun and Coleman are certified "A" readers of coal miners' x-rays.

21. *Id.* Many cases have held that it is the function of the Secretary and not the courts to resolve conflicts in medical evidence. *See, e.g.*, Owens v. Mathews, 435 F. Supp. 200, 206 (N.D. Ind. 1977); McLane v. Califano, 435 F. Supp. 120, 123 (E.D. Va. 1977); Hill v. Weinberger, 430 F. Supp. 332, 334 (E.D. Tenn. 1976).

failed to demonstrate a case for entitlement. Having filed his claim before July 1, 1973,[22] the claimant sought an award of benefits under an "interim presumption" of entitlement afforded by Social Security Administation regulations which presumes CWP if a chest x-ray, biopsy or autopsy establishes its existence or ventilatory studies fall within the medical evidence criteria employed in this regulation.[23] The negative x-ray re-readings caused the ALJ to con-

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22. *See supra* note 16.

23. 20 C.F.R. § 410.490. This regulation provides in pertinent part:

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

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

(i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .; or

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

	Equal to or less than —	
[miner's height in inches]	FEV_1 and	MVV*
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more; and	2.7	108

(2) The impairment established in accordance with paragrpah (b)(1) of this section arose out of a coal mine employment. . . .

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

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

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

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the indi-

clude that the claimant had failed to present a chest x-ray showing the existence of CWP within the meaning of the regulations.

By the same token, ventilatory studies performed in August of 1971 and August of 1973 did not produce numerical values low enough to qualify for the interim presumption. Although a June 5, 1974 study did meet the table of numerical values employed in the interim presumption, in order to qualify for Part B benefits, the claimant must demonstrate the existence of total disability on or before June 30, 1973.[24]

The ALJ ruled that the August, 1973 ventilatory study was more probative of the claimant's condition as it existed on June 30, 1973 than the 1974 ventilatory study. Therefore, the ALJ held that the ventilatory studies did not establish the claimant's entitlement to benefits.[25]

The claimant also submitted several medical reports rendered by examining and treating physicians. Dr. C. M. Van Hooser, an internist, examined Moore on August 25, 1971 as a result of Moore's complaints of chest pain, difficult breathing accompanied by pain and a cough productive of white sputum. Since Dr. Van Hooser's examination of the claimant disclosed that his lungs were free of wheezes and rales, he diagnosed the claimant as suffering from arteriosclerotic heart disease with angina pectoris, Class II.[26] However, on October 15, 1973, Dr. Charles R. Fisher, a colleague of Dr. Van Hooser's, examined the claimant and found inspiratory and expiratory wheezing but no rales. He confirmed Dr. Van Hooser's diagnosis of arteriosclerotic heart disease coupled with angina but also diagnosed chronic lung disease, chronic bronchitis and pulmonary fibrosis. On June 4, 1974, Dr. William G. West, a general practitioner, examined the claimant noting that the chest was clear to percussion and auscultation but noted diminished bilateral breath sounds. This finding, coupled with his interpretation of an x-ray taken the same date, as showing CWP, caused him to state

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vidual is able to do his usual coal mine work or comparable and gainful work. . . .

*"FEV_1," stands for one second forced expiratory volume and "MVV" stands for maximum voluntary ventilation. *See* 20 C.F.R. § 410.426(b).

24. 633 F.2d at 729. *See* Begley v. Mathews, 544 F.2d 1345, 1352-53 (6th Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

25. 633 F.2d at 729.

26. *Id.* at 729-30.

that Moore was disabled from coal mining due to CWP.[27] The following day, June 5, 1974, Dr. Neal Calhoun, a specialist in general practice examined the claimant and noted low, distant breath sounds with fine moist rales and wheezes characteristic of chronic pulmonary disease. Dr. Calhoun, the claimant's treating physician for approximately eighteen years, concluded that the patient was suffering from chronic lung disease as a result of complicated CWP which was 100% disabling to the claimant. He further opined "that this patient's heart disease has developed secondary to a high pulmonary system resistance caused by coal miner's pneumoconios."[28]

Despite the existence of non-qualifying ventilatory studies and negative x-rays, prior decisions of the Sixth Circuit seemed to support Moore's claim of entitlement to the interim presumption. In *Dickson v. Califano*,[29] the court was confronted with the claim of a miner with fewer than fifteen years of coal mine employment who submitted an x-ray, initially read as positive by a certified "A" reader, albeit subsequently re-read as negative.[30] Notwithstanding the subsequent re-reading of this x-ray, the court held that the x-ray evidence entitled the claimant to the interim presumption as well as the statutory irrebuttable presumption embodied in 30 U.S.C. section 921(c)(3).[31] In so holding, the court implicitly retroactively applied a provision of the Reform Act which prohibits the Secretary from re-reading an x-ray, initially interpreted positive by a board certified radiologist, in the absence of fraud, if the claimant presents other evidence of pulmonary or lung disorder.[32]

Notwithstanding the existence of rulings from other circuits,[33] as well as opinions from the Sixth Circuit more recent than *Dickson*, all of which declined retroactive application of the Reform Act's prohibition on re-reading x-rays,[34] the court paralleled the analysis

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27. *Id.* at 730. This x-ray was later read as negative for CWP by two "B" readers. *See supra* notes 20-21.

28. 633 F.2d at 729; Record at 157, *Moore*.

29. 590 F.2d 616.

30. 590 F.2d at 622-23.

31. *Id.*

32. *See* 30 U.S.C. § 923(b) (Supp. IV 1980).

33. *See, e.g.*, Freeman v. Califano, 600 F.2d 1056, 1060 (5th Cir. 1979); Vakim v. Califano, 587 F.2d 149, 150-51 (3d Cir. 1978); Treadway v. Califano, 584 F.2d 48, 49-52 (4th Cir. 1978); Ohler v. Secretary, HEW, 583 F.2d 501, 506 (10th Cir. 1978).

34. Back v. Califano, 593 F.2d 758, 763 (6th Cir. 1979); Hill v. Califano, 592 F.2d 341,

it had rendered in *Dickson* two years later in *Miniard v. Califano*.[35] Miniard submitted his Part B claim for black lung benefits after approximately twenty-eight years of coal mine employment and sought entitlement under the interim presumption.[36] Only one of Miniard's chest x-rays was interpreted as positive for CWP by a board certified radiologist although this x-ray was subsequently re-read negative by a "B" reader.[37] A physical examination performed by a general practitioner disclosed inspiratory squeaks and other concomitant abnormalities which caused this physician to diagnose CWP and chronic bronchitis as well as hypertension, arrhythmia and cardiomegaly.[38] The court held that the medical evidence submitted by Miniard posed a proper case for application of the Reform Act's x-ray re-reading prohibition: Miniard presented an x-ray initially interpreted positive by a board certified radiologist and the diagnosis of the general practitioner provided "other evidence of a pulmonary or respiratory impairment" and there was no claim of fraud.[39]

These cases thus seemed to indicate that Moore would be entitled to the interim presumption as well. The March 8, 1971 x-ray taken by Dr. Selby Coffman, a certified reader of coal miners' x-rays,[40] was interpreted positive for CWP, albeit subsequently re-read negative by "B" readers.[41] Moreover, the reports of Drs. Calhoun, Fisher and West certainly provided "other evidence of a pulmonary or respiratory impairment" and no fraud was claimed.[42] Therefore, had the Reform Act's x-ray re-reading prohibition been retroactively applied to this evidence, Moore would have presented "a chest x-ray" indicating the presence of CWP and therefore would have been entitled to the interim presumption under *Miniard* and *Dickson*.

Nevertheless, the court in a lengthy dissertation of legislative history succumbed to the great weight of authority[43] and declined

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35. Miniard v. Califano, 618 F.2d 405.
36. *Id.* at 406.
37. *Id.* at 407.
38. *Id.* at 408.
39. *Id.* at 409-10.
40. Record at 89, *Moore*.
41. *See supra* notes 20, 21.
42. *See supra* text accompanying note 33.
43. *See supra* notes 34, 35.

to retroactively apply the Reform Act's re-reading prohibition. The court noted that *Dickson* relied on language contained in the House Report to the Black Lung Benefits Reform Act[44] which indicated that the x-ray re-reading prohibition was to be made retroactive to December 30, 1969[45] and thus applicable to pending cases undergoing judicial review. However, the Senate bill had no similar provision for retroactive effect of any of its provisions. It merely limited retroactive award of benefits under the amendments to periods after January 1, 1974 and provided that the Act would take effect generally upon the date of enactment.[46] The Conference bill, passed by both Houses without amendment, followed the Senate version by allowing payment of benefits awarded under the amendments retroactive to January 1, 1974 but did not provide for retroactive application of the amendments by the courts to pending cases.[47] The court, however, noted that the Reform Act required all pending and denied Part B claims to be reviewed by the agencies under the more liberal criteria. Any claim subsequently allowed under this procedure would receive retroactive benefits for no period earlier than January 1, 1974. Accordingly, the court reasoned that reviewing courts should not undertake retroactive application of the Reform Act's x-ray re-reading prohibition to allow a claimant to claim benefits from the date an approved claim was filed.[48]

Having so held, it logically followed that Moore's x-ray evidence, re-read as negative, did not entitle him to the benefits of the interim presumption. However, the court also denied Moore the benefit of a statutory presumption of entitlement, in effect ignoring earlier decisions of the court which militated for its application.[49] This ruling produced a well-reasoned vigorous dissent by Judge Merritt.[50]

The rebuttable presumption denied Moore is found in 30 U.S.C. section 920(c)(4). It provides that a miner employed for fifteen years or more is entitled to a rebuttable presumption of total disa-

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44. H. R. REP. No. 95-151, 95th Cong., 1st Sess. at 20-21, *reprinted in* 1978 U.S. CODE CONG. & AD NEWS 237, 256-57.

45. 633 F.2d at 733, *citing* 590 F.2d at 623 n.2.

46. 633 F.2d at 733, *citing* S. REP. No. 95-209, 95th Cong., 1st Sess. 21.

47. 633 F.2d at 733 n.2, *citing* 124 CONG. REC. S1448 (daily ed. Feb. 7, 1978).

48. 633 F.2d at 733-35.

49. *Id.* at 729-31.

50. *Id.* at 735-37 (Merritt, J., dissenting).

bility or death due to CWP where, notwithstanding the existence of negative x-rays, if other evidence demonstrates a totally disabling respiratory or pulmonary impairment. Once established, this presumption may be rebutted only by establishing either that the miner does not or did not have CWP or his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.[51]

Presumably, the ALJ held that Moore was not entitled to this presumption as implemented by regulations of the Social Security Administration.[52] In so holding the ALJ relied heavily on Social Security Ruling 73-37 which provides that where x-rays or pulmonary function tests fail to meet the medical criteria required for application of the interim presumption,[53] there is an inference that the miner is not totally disabled. For many years, ALJs, in making claim determinations, have utilized this ruling and weigh heavily negative x-rays and non-qualifying pulmonary function studies while discounting the testimony of examining physicians. This practice has been severely criticized in prior decisions of the Sixth[54] and Third[55] Circuits and has caused the Fourth[56] and Eighth[57] Circuits to invalidate the ruling in its entirety. Nevertheless, the Sixth Circuit made no mention of the ALJ's reliance on Social Security Ruling 73-37. Ostensibly, the court felt that this

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51. 30 U.S.C. § 921(c)(4) (1976).

52. 633 F.2d at 730-31. Although these regulations are mentioned in the ALJ's decision, he seemed more concerned with whether Moore qualified for the interim persumption. *See* Record at 9-12, *Moore*, 20 C.F.R. § 410.414.

53. Record at 12, *Moore*. *See supra* note 24 & accompanying text.

54. *See, e.g.*, Caraway v. Califano, 623 F.2d 7 (6th Cir. 1980); Maddox v. Califano, 601 F.2d 920 (6th Cir. 1979); Singleton v. Califano, 591 F.2d 383, 385 (6th Cir. 1979); Cunningham v. Califano, 590 F.2d 635 (6th Cir. 1978).

The Sixth Circuit first encountered this ruling in Prokes v. Mathews, 559 F.2d 1057 (6th Cir. 1977), where the ALJ had applied the ruling, and based a denial of the application of the § 921(c)(4) presumption on the existence of negative x-ray interpretations and pulmonary function studies while ignoring evidence of total disability rendered by the claimant's treating physician. 559 F.2d at 1060. Thus *Prokes* held that to the extent that the ruling "recognizes an inference which logically flows from consideration of proven facts, it does no violence to the Act." *Id.* at 1062. However, the use of the ruling to limit the ability of a miner to establish entitlement to benefits by means of "other evidence" constitutes error and renders the § 921(c)(4) rebuttable presumption a nullity. 591 F.2d at 385.

55. *See* Gover v. Mathews, 574 F.2d 772, 777-78 (3d Cir. 1978); Schaaf v. Mathews, 574 F.2d 157, 160 (3d Cir. 1978).

56. *See* Hubbard v. Califano, 582 F.2d 319, 325-26 (4th Cir. 1978).

57. *See* Bozwich v. Mathews, 558 F.2d 475, 480 (8th Cir. 1977).

was not a proper case to criticize the utilization of this ruling since the ALJ had considered the reports of examining physicians although he concluded that such reports disclosed a heart condition rather than a totally disabling pulmonary or respiratory impairment.[58] Thus the question presented for the Sixth Circuit was whether there was substantial evidence in the record to support the ALJ's determination that the conclusions of examining physicians did not establish the existence of a totally disabling respiratory or pulmonary impairment prior to June 30, 1973.[59]

In holding that the medical reports furnished substantial evidence that the claimant did not suffer from a totally disabling pulmonary or respiratory impairment as of June 30, 1973, the court ruled that the ALJ had properly relied on Dr. Van Hooser's August 3, 1973 report while discontinuing Dr. Fisher's October, 1973 report and the 1974 reports furnished by Drs. West and Calhoun.[60] Judge Merritt, in dissent, vehemently argued that Dr. Van Hooser's August, 1973 report, which affirmatively diagnosed arteriosclerotic heart disease, was not substantial evidence that the claimant did not suffer from a totally disabling pulmonary or respiratory impairment. This was particularly the case when Dr. Van Hooser's report was viewed in light of the subsequent reports of Drs. West, Fisher and Calhoun which were consistent with Dr. Van Hooser's diagnosis, but noted disabling pulmonary disorders as well.[61] Indeed, Judge Merritt concurred with Dr. Calhoun's finding that the patient's heart disease was probably brought on by CWP which produced his labored breathing.[62] Thus, the majority reached the illogical conclusion that disabling heart disease could not have been brought about by disabling CWP! Judge Merritt would have remanded for an award of benefits.[63]

Central to the court's affirmance of the denial of benefits was its unwillingness to conclude that evidence adduced in October, 1973 and June, 1974 could demonstrate total disability as of June 30,

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58. Record at 11, *Moore*.

59. 633 F.2d at 730, *citing* Richardson v. Perales, 402 U.S. 389, 401 (1971). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *id.*

60. *Id.*

61. 633 F.2d at 736-37 (Merritt, J., dissenting).

62. *Id.* at 736.

63. *Id.* at 737.

1973. In its earlier decision in *Begley v. Mathews*,[64] the court held that evidence of total disability discovered a relatively short time after June 30, 1973 may be relevant in determining whether CWP existed on or before that date.[65] In *Begley*, the court had been persuaded by the testimony of Dr. William F. Schmidt, a noted authority in the black lung field, who stated that due to the progressive character of the disease, it would be logical to assume that recent positive evidence of CWP would allow the inference that the miner had been suffering from the disease for at least two years.[66] In *Moore*, the court distinguished *Begley*, where ventilitory studies conducted after the June 30, 1973 cutoff indicated disability under the interim presumption. In the instant case, Moore's ventilitory studies performed in August, 1973 did not qualify for the interim presumption.[67] However, the court failed to recognize that the June 5, 1974 ventilitory study, which would have qualified the claimant for the interim presumption,[68] could constitute "other evidence" of a totally disabling pulmonary or respiratory impairment one year earlier due to the progressive nature of the disease. Had this analysis been employed, the June, 1974 ventilitory study would have constituted "other evidence" of a totally disabling pulmonary or respiratory impairment thus giving rise to the invocation of the section 921(c)(4) presumption.[69]

The court's seemingly jaundiced view of Moore's evidence of total disability due to CWP was predictable in light of prior decisions and is easily reconciled with prior decisions if one salient fact is born in mind: Moore obtained Social Security disability benefits in 1973 as a result of arteriosclerotic cardiovascular disease.[70] Thus Moore was prosecuting his claims for diability benefits under the

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64. 544 F.2d at 1352-53.

65. *Id.*

66. *Id.* at 1354-55.

67. 633 F.2d at 730.

68. *Id.* at 729.

69. Even "negative" ventilatory studies, *i.e.*, those that do not qualify for the interim presumption may constitute "other evidence" for purpose of invoking the § 921(c)(4) presumption if such studies yield values close to those that do qualify for the interim presumption so as to indicate reduced ventilatory capacity. *See* Henson v. Weinberger, 548 F.2d 695, 698-99 (7th Cir. 1977); Hoffman v. Califano, 450 F. Supp. 1313, 1324 (E.D. Pa. 1978); Stefanowicz v. Mathews, 443 F. Supp. 109, 111-12 (E.D. Pa. 1977); Jeffries v. Mathews, 431 F. Supp. 1030, 1034 (E.D. Tenn. 1977).

70. 633 F.2d at 728.

Social Security Act and black lung benefits under the Federal Coal Mine Health and Safety Acts simultaneously.

The Sixth Circuit has long manifested a reticence to award black lung benefits, notwithstanding compelling evidence, where the claimant has also received a recent award of Social Security disability benefits.[71] As stated by Judge Weick, writing for the panel in *Gastineau v. Mathews*: "[W]e do not know how a claimant can be totally and permanently disabled more than once."[72] This reasoning flies squarely in the face of regulations employed by the Social Security Administration in adjudicating black lung claims which specifically provide that the mere fact that a claimant has been determined disabled due to some other cause has no bearing on whether such person is also disabled from coal mine employment or other comparable and gainful work due to CWP.[73] Thus, all the rhetoric and rationalization in *Moore* is easily distilled: The court followed its gut level reaction that one dip into the federal till, particularly in difficult economic times, is enough.

The court's ruling in *Moore* that the Reform Act's x-ray re-reading prohibition should not be retroactively applied is analytically correct and is in accord with the great weight of authority.[74] However, regarding Moore's entitlement to the section 921(c)(4) rebuttable presumption, its analysis is strained and works much confusion in light of prior cases which have afforded the presumption on seemingly lesser showings. Golden L. Moore will receive benefits, if at all, when his denied claim is reviewed by the Social Security Administration or the Department of Labor. Benefits will be awarded, however, for no period before January 1, 1974.[75]

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71. *See, e.g.*, Back v. Califano, 593 F.2d 758; Hill v. Califano, 592 F.2d 341; Gastineau v. Mathews, 577 F.2d 356.

Singleton v. Califano, 591 F.2d 383, held the claimant entitled to the § 921(c)(4) presumption notwithstanding an award of Social Security disability benefits; however, Social Security disability benefits were awarded eighteen years prior to filing the claim for black lung benefits and were premised on back and pelvis injuries suffered in a mine accident rather than disease. 591 F.2d at 384.

72. 577 F.2d at 360.

73. *See* 20 C.F.R. § 410.470.

74. *See supra* note 34.

75. *See supra* text accompanying notes 47-49.

II. *Elkins v. Secretary of Health & Human Services*

The notion that the Sixth Circuit is irrevocably committed to avoiding retroactive application of the Reform Act's x-ray re-reading prohibition is made indelibly clear in *Elkins v. Secretary of Health & Human Services.*[76] Other than *Moore, Elkins* is the only other black lung decision the Sixth Circuit chose to report during its 1980-81 term. *Elkins* also illustrates that black lung claimants will appeal district court denials of benefits in an effort to seek retroactive benefits for periods earlier than January 1, 1974, even though the agencies administering the black lung program have awarded benefits after that date under the liberalizing provisions of the Reform Act. Accordingly, the court's decisions in *Elkins* and *Moore* are easily harmonized.

The claimant, Mike Elkins, filed an application for Part B black lung benefits on September 15, 1972, alleging disability due to CWP.[77] After a hearing on December 1, 1976, the ALJ found that the claimant was not entitled to black lung benefits.[78] On February 17, 1977, the Appeals Council, acting on claimant's request, reviewed the ALJ's decision and approved his findings. This ruling became the final decision of the Secretary of Health and Human Services.[79] On March 14, 1977, Elkins sought judicial review of the Secretary's decision denying benefits in the United States District Court.[80] However, on November 2, 1978, Elkins was notified that the Secretary had reviewed his denied claim and had awarded benefits retroactive to January 1, 1974 under recent amendments embodied in the Black Lung Benefits Reform Act of 1977.[81]

Seeking benefits retroactive to the date his claim was filed, Elkins moved the district court to order the Secretary "to demonstrate the distinction in fact and law between the claim for earlier benefits and those now granted. . . ."[82] On February 27, 1980, the district court adopted its magistrate's report which; (1) recommended affirming the Secretary's denial of pre-Reform Act bene-

76. 658 F.2d 437 (6th Cir. 1981).
77. *Id.* at 438.
78. Record at 10-15, *Elkins.*
79. *Id.* at 4.
80. 658 F.2d at 438.
81. *See supra* text accompanying notes 47-49.
82. 658 F.2d at 438.

fits, (2) denied Elkins' motion to order the Secretary to specify the basis for the decision to grant benefits under the Reform Act, and (3) denied attorney fees. Accordingly, on that date, the district court granted the Secretary's motion for summary judgment. From that ruling, Elkins appealed to the Sixth Circuit.[83]

The medical evidence submitted in support of Elkins' claim consisted primarily of x-rays and pulmonary function studies.[84] There was no attempt to demonstrate Elkins' entitlement to the section 921(c)(4) rebuttable presumption on the basis of "other evidence" such as blood gas studies, exercise tolerance tests and reports of examining physicians. A March 7, 1973 x-ray was interpreted by Dr. Norman Adair as positive for CWP.[85] This x-ray was subsequently re-read negative by two certified "B" readers.[86] On February 3, 1975, Dr. William Elswood interpreted an x-ray taken on that date as positive for CWP; this x-ray was not re-read.[87] Pulmonary function studies were conducted on January 29, 1973 and February 3, 1975. Although the 1973 test was interpreted as showing normal spirometry, the 1975 study produced values low enough to qualify for the benefit of the interim presumption.[88] Thus the question before the court was whether the ALJ's finding that Elkins was not totally disabled due to CWP on or before June 30, 1973 was supported by substantial evidence.

Had the Reform Act's x-ray re-reading prohibition been retroactively applied to this pending Part B case, the March 7, 1973 x-ray would have qualified Elkins for the benefit of the interim presumption.[89] Moreover, had the 1975 x-ray and pulmonary function study been interpreted as showing total disability due to CWP on or before June 30, 1973, Elkins would have qualified for pre-Reform Act benefits under Part B. However, consistent with the position as is taken in *Moore*, the court declined to retroactively apply the Reform Act's re-reading prohibition and did not follow *Begley v.*

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83. *Id.*

84. *Id.*

85. *Id.* The record does not disclose whether Dr. Adair, a radiologist, is a certified "A" reader of coal miners' x-rays. *See* Record, at 97, *Elkins.*

86. 658 F.2d at 438.

87. *Id.*

88. *Id. See also* Brief of Defendant-Appellee at 5, *Elkins.*

89. *See supra* text accompanying notes 23, 24.

Mathews[90] and ruled that the 1975 evidence showed disability on or before June 30, 1973.[91] Accordingly, the court ruled that the March 7, 1973 x-ray as re-read, coupled with the non-qualifying January, 1973 pulmonary function study, were more probative of Elkins' condition on June 30, 1973 than the 1975 evidence. As a consequence, the court ruled that substantial evidence supported the ALJ's decision denying pre-Reform Act benefits.[92]

Elkins, through his attorney, inartfully argued that because post-Reform Act benefits had been awarded retroactively to January 1, 1974, pre-Reform Act benefits retroactive to the date CWP was initially discovered should have been awarded since the medical evidence and applicable law was the same in both cases. The court quickly disposed of this argument noting that the Reform Act's x-ray re-reading prohibition, effective March 1, 1978, prevented the Secretary from again denying Elkins' claim upon review of the initial denial and the 1973 chest x-ray. Since the Reform Act's x-ray re-reading prohibition was not to be retroactively applied *by the courts* under *Moore*, it was not error for the Secretary to have initially denied Elkins' claim by having x-rays re-read. The court thus noted that there was a distinction in the law applicable to Moore's claim as initially filed compared with the more liberal provisions of the Reform Act applicable to the claim when reviewed by the Secretary of Health and Human Services after it was initially denied.[93]

Finally, the claimant's attorney moved for an award of attorney fees. The claim for fees was denied because counsel had failed to comply with the regulations governing approval of attorney fees mandated by the Reform Act[94] when post-Reform Act benefits have been awarded. Moreover, since counsel had failed to establish the claimant's entitlement to pre-Reform Act benefits, no fee attributable to making that claim could be awarded.[95]

Elkins solidifies the posture of the court evidenced in *Moore* respecting retroactive application of the Reform Act's x-ray re-reading prohibition. It is now clear that appeals from district court de-

90. 544 F.2d 1345. *See supra* text accompanying notes 65, 66.
91. 658 F.2d at 439.
92. *Id.*
93. *Id.* at 439-40.
94. *See, e.g.*, 20 C.F.R. §§ 725.365, .366 (1980).
95. 658 F.2d at 440, *citing* 42 U.S.C. § 406 (1976).

nials of benefits to the Sixth Circuit will not be well received where the claimed error is the Secretary's re-reading of x-rays before March 1, 1978 which are interpreted positive. Moreover, *Elkins* and *Moore* indicate that claimants seeking to establish entitlement to benefits before June 30, 1973 on the basis of evidence adduced after that date will find the Sixth Circuit generally unwilling to relate such evidence back in time to find that disability existed on an earlier date.

CONCLUSION

The Sixth Circuit's decisions during its 1980-81 term which limit the mechanisms by which Part B claimants may obtain an award of benefits are but a foreboding of what lurks ahead for potential black lung claimants. The 1970's marked significant expansions in miners' entitlements in an effort to eradicate nearly a century of neglect; that decade is at an end—the pendulum is swinging in the other direction.

While *Moore* settled the nagging question of retroactive application of various provisions of the Reform Act, its analysis of evidence necessary to demonstrate entitlement to the section 921(c)(4) rebuttable presumption raises as many questions as it attempts to answer. In a confused and seemingly offhand manner, *Moore* strikes a telling blow at the logic of *Begley v. Mathews*[96] which recognized the inability of both courts and medical science to fix a time certain for the onset of CWP due to the slowly progressive nature of the disease.

Clear and precise application of the law governing entitlement to the section 921(c)(4) rebuttable presumption is needed more now than at any time in the history of the federal black lung benefits program. Claims filed after March 30, 1980 are adjudicated under permanent medical standards without the benefit of any interim presumptions. The primary change accomplished by these permanent medical standards is to shift the burden back to the claimant to prove that he has CWP and that he has a totally disabling respiratory or pulmonary impairment as a result of that disease.[97] A

96. 544 F.2d 1354. *See supra* text accompanying notes 65, 66.

97. *See generally*, J. McClaugherty & J. Query, *Federal Black Lung Claims Administration under the Black Lung Benefits Reform Act of 1977*, in EASTERN MINERAL LAW FOUNDATION, PROCEEDINGS OF THE FIRST ANNUAL INSTITUTE § 12-7, at p. 11 (1980).

circuit court ruling construing this rebuttable statutory presumption which was specifically designed to aid disabled miners notwithstanding negative x-ray interpretations[98] will be most helpful to the agencies administering the new permanent medical standards. Accordingly, these decisions should serve as a lighthouse of clarity rather than a benchmark of obfuscation.

98. *See* S. REP. No. 92-743, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 2312-13.