A FOURTH GLIMPSE OF BLACK LUNG CASES FROM THE SIXTH CIRCUIT: *DICKSON V. CALIFANO* REVISITED

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INTRODUCTION

Since its inception more than a decade ago, the Federal Black Lung Benefits Program has been rocked by drastic shifts in entitlement philosophy. The most telling evidence of this philosophical shift is, of course, the fact the program has undergone three congressional amendments in only nine years.[1] Although the courts have yet to render opinions on most of the major ramifications of the 1977 and 1981 amendments, the view that the Black Lung Benefits Program should not be a coal miners' relief act is evident in judicial opinions construing even pre-amendment entitlement provisions.

The black lung cases emanating from the Sixth Circuit during its 1981 term, however, provide procedural instruction as well as give substantive clarification and new meaning to entitlement rules espoused in earlier opinions.[2] Through an initial analysis of the recent opinions affecting substantive entitlement, the case espousing procedural niceties can be analyzed with more clarity.

THE DECISIONS

A. *Lawson v. Secretary*, HHS

The facts presented to the court in *Lawson v. Secretary, HHS*[3]

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1. *See, e.g.*, Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153, 154 (codified as amended at 30 U.S.C. § 901 (1976 & Supp. V 1981)); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 1978 U.S.CODE CONG. & AD. NEWS (92 Stat.) 105 (codified in scattered sections of U.S.C.) [hereinafter cited as 1977 Reform Act]; Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 1981 U. S. CODE CONG. & AD. NEWS (95 Stat.) 163 (codified in scattered sections of 26 U.S.C.).

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

3. 688 F.2d 436 (6th Cir. 1982).

afforded the Sixth Circuit the unique opportunity to reconcile two earlier decisions that, at first blush, appear to be as inconsistent as sin and salvation. Although *Dickson v. Califano*[4] had expressly awarded Part B black lung benefits on the basis of "a single x-ray interpreted as positive for coal workers pneumoconiosis"[5] (CWP), the court in *Moore v. Califano*[6] declined to award Part B benefits, despite a positive chest x-ray. In *Lawson*, the court disclosed the thread of reason linking these seemingly disparate decisions.

Claimant Lawson attempted to validate his entitlement to benefits under regulations that provide for a presumption of total disability upon the presentation of evidence establishing the existence of CWP by chest x-ray.[7] The Administrative Law Judge (ALJ) was presented with an x-ray taken in 1971 that had been originally read as negative for CWP and re-read as negative by certified B

4. 590 F.2d 616 (1978).
5. *Id.* at 621-22. *See* 20 C.F.R. § 410.490(b) (1981).
6. 633 F.2d 727 (6th Cir. 1980).
7. 20 C.F.R. § 410.490 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, or his death will be presumed to be due to pneumoconisis, as the case may be, if:
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> (1) One of the following medical requirements is met:
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> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis . . .; or
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> (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:

readers.[8] Lawson also introduced reports of two x-rays taken in 1974 and read as positive for CWP by an internist specializing in pulmonary disease. The ALJ sent one 1974 x-ray to a certified A reader who also found it positive for CWP.[9] Relying principally on the 1974 report of the A reader, the ALJ found Lawson entitled to the benefit of the regulatory presumption that arises where a chest x-ray establishes the existence of CWP.[10] Moreover, the ALJ determined that the presumption had not been rebutted in the manner

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[miner's height in inches]		Equal to or Less than — 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 paragraph (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 toally 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 phsyical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work . . . .

*"FEV1" stands for one second forced expiratory volume and "MVV" stands for maximum voluntary ventilation. *See* 20 C.F.R. § 410.426(b) (1979).

8. 688 F.2d at 437.

9. *Id.*

10. *Id. See supra* note 7.

provided in such regulations.[11]

Although the ALJ found the claimant entitled to benefits, the Appeals Council decided to review this decision *sua sponte* and sent the x-ray that the A reader had interpreted and all other x-rays to a certified B reader. The B reader found the x-rays either unreadable or negative for CWP.[12] Accordingly, the Appeals Council reversed the decision of the ALJ, holding that "the preponderance of the medical and other relevant evidence did not establish, prior to July 1, 1973, the presence of CWP or any totally disabling chronic respiratory disease."[13] The secretary of HHS adopted the action of the Appeals Council, and the district court affirmed.[14]

The issue joined for resolution by the Sixth Circuit was whether the Appeals Council had erred in ordering the x-rays re-read. If the positive 1974 x-ray had triggered the presumption of disability provided by the regulations, the court reasoned that a subsequent negative re-reading of the same x-ray would not be sufficient to rebut the presumption.[15] If, on the other hand, substantial evidence existed for the secretary to find that a presumption of CWP had not arisen he was not barred from ordering a re-reading.[16]

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11. 688 F.2d at 437.

12. *Id.* 42 C.F.R. §§ 37.51-52 (1982) 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. 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 number 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) (1982) 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 . . . ." Accordingly, the House of Representatives originally intended that this amendment have retroactive effect. H.R. REP. No. 151, 15th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 237, 256-57. However, the amendment does not apply to the instant case, in which the Secretary made his final determination in December 1975, for the provisions of the amendment are not retroactive. *See Moore*, 633 F.2d at 733.

13. 688 F.2d at 437.

14. *Id.*

15. *Id.*, citing Moore v. Califano, 633 F.2d 727, and Ansel v. Weinberger, 529 F.2d 304 (6th Cir. 1976).

16. 688 F.2d at 438. *See supra* note 12.

Referring to the regulation affording the presumption of CWP,[17] the court noted that that regulation incorporated 20 C.F.R. § 410.428g which sets forth the qualitative standard necessary for a single x-ray to establish the existence of CWP.[18] The court noted, however, that this x-ray quality regulation does not consider what evidence is necessary to establish the existence of CWP when contradictory x-ray results exist.

Following this analysis, the court reached the central holding of the case. It held that a single positive x-ray establishes CWP as a matter of law only when it is uncontradicted by prior readings.[19] In explaining the rationale of its ruling, the court stated:

> To hold otherwise would mean that a claimant could have an x-ray that has been read as negative repeatedly re-read until he achieves a positive reading and that he could then invoke the presumption of § 410.490.[20]

In seeking to reconcile its holding with those of earlier cases, the court noted that in *Dickson v. Califano*[21] the claimant established CWP through positive x-rays. Accordingly, a subsequent negative re-reading of this x-ray by a non-examining physician did not constitute substantial evidence once the presumption had arisen by the positive reading of a qualified examining physician.[22]

The court explained that its examining/non-examining physician distinction was dictum to *Dickson* as well as the case at bar and all other cases where entitlement to benefits is sought to be established on the basis of x-ray evidence. Since x-ray interpretations do not depend upon an examination of the patient for their reliability, the fact that the B reader who rendered the subsequent negative interpretation of the 1974 x-ray did not examine the claimant was deemed irrelevant.[23]

The court noted that to the extent that Dickson would seem to mandate entitlement to benefits on the basis of a single positive x-ray, as in the instant case, such reliance was misplaced. The court noted that in *Dickson* only one x-ray had been introduced in evi-

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17. *See supra* note 7.
18. 688 F.2d at 438.
19. *Id.*
20. *Id.*
21. 590 F.2d 616.
22. 688 F.2d at 438.
23. *Id.* at 438-39.

dence. This x-ray had been read as positive twice, once by a certified A reader. Accordingly, since there was no conflict between the initial readings, the secretary of HHS had erred in ordering a rereading of the x-ray and basing a denial of benefits on subsequent negative results.[24] In the case at bar, however, the court reasoned that a conflict could be seen to exist in the x-ray evidence due to the existence of x-rays taken prior to 1974 that had been uniformly read as negative.[25]

While this analysis would seem to shed rationality upon denials of benefits subsequent to *Dickson*, notwithstanding the existence of positive x-ray interpretations,[26] the court made no mention of *Miniard v. Califano*,[27] a case decided subsequent to *Dickson* that awarded benefits on the basis of x-ray evidence and interpretations virtually identical to those found in *Lawson*. In *Miniard* the court held that the medical evidence submitted by Mr. Miniard posed a proper case for application of the 1977 Reform Act's x-ray re-reading prohibition.[28] Presumably, the court made no mention of *Miniard* in *Lawson* due to its ruling in *Moore*. The court, in *Moore*, succumbed to the great weight of authority,[29] and relying on extensive legislative history, declined to retroactively apply the 1977 Reform Act's re-reading prohibition to cases pending prior to the enactment of the 1977 Reform Act.[30]

Nevertheless, inconsistencies remain. While *Moore* stands for the proposition that the court will no longer engage in retroactive application of the 1977 Reform Act's re-reading prohibition, *Lawson* sees the court willing to indulge in at least a partial application of the Reform Act's rereading prohibition at least where one x-ray initially interpreted as positive is presented.

Thus, while denying benefits, *Lawson* brings a harmonious note to the discord wrought by earlier decisions. Moreover, it evinces a willingness on the part of the Sixth Circuit to apply the spirit, if

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24. *Id.*

25. *Id.* at 439.

26. *See, e.g.*, Moore v. Califano, 633 F.2d 727.

27. 618 F.2d 405 (6th Cir. 1980).

28. *Id.* at 409-10.

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

30. 633 F.2d at 733-35.

not the letter, of the 1977 Reform Act's re-reading prohibition at least where a single x-ray is initially interpreted as positive for CWP.[31]

B. *Smith v. Califano*

The annals of federal black lung history are replete with travesties of justice such as those apparent in *Smith v. Califano*.[32] As in previous cases, claimant Smith endured a decade of denial of benefits as a result of the ALJ and the Appeals Council having placed greater weight on negative interpretations of x-rays and non-qualifying ventilatory studies than on testimony of examining physicians which concluded that Smith suffered from a totally disabling respiratory impairment.

Smith filed his Part B claim for benefits on June 20, 1972[33] and established 15 years of underground coal mine employment.[34] In addition to Smith's own testimony, his claim of total disability, due to a chronic respiratory impairment, was supported by reports of five examining physicians all of whom concluded that he was disabled to the point of not being able to engage in further work in the coal mines, some specifically diagnosing CWP. Notwithstanding this abundance of evidence from examining physicians, pulmonary function studies were interpreted as normal and all x-rays were re-read as negative for CWP.[35]

As a consequence, the ALJ, the Appeals Council and the district court found that Smith did not qualify for benefits under an spe-

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31. Lawson made two broadside attacks on the actions of the Appeals Council. The court rejected both of these arguments.

First, it was claimed that the regulation that allows the Appeals Council to obtain new evidence, 20 C.F.R. § 410.664(b), violated 42 U.S.C. § 405(b), which provides for a decision by the Secretary based on evidence adduced at the hearing. Although the Seventh Circuit adopted this view in Lonzollo v. Weinberger, 534 F.2d 712 (7th Cir. 1976), the Sixth Circuit gave the argument short shrift since the regulation provides for the Appeals Council to obtain new evidence only where the rights of the claimant are protected. 688 F.2d at 440.

Further, the claimant argued that the Appeals Council abused its discretion by failing to remand. Finding no prejudice to the claimant by such failure, the Sixth Circuit dismissed this contention as well. *Id.*

32. 682 F.2d 583 (6th Cir. 1982). *See also* Singleton v. Califano, 591 F.2d 381 (6th Cir. 1979); Cunningham v. Califano, 590 F.2d 635 (6th Cir. 1978).

33. 682 F.2d at 584.

34. *Id.* at 586.

35. *Id.* at 585.

cific regulation affording entitlement.[36] However, only the Sixth Circuit recognized that Smith would be entitled to benefits under the provisions of 30 U.S.C. § 921(c)(4), which provides a rebuttable presumption of entitlement in favor of miners employed for 15 years or more where evidence demonstrates a totally disabling respiratory or pulmonary impairment notwithstanding the existence of negative x-ray interpretations.[37] Ignoring the provisions of the § 921(c)(4) rebuttable presumption has been accomplished in many cases by ALJs relying 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,[38] there is an inference that the miner is not totally disabled. Since the Sixth Circuit had previously held that this construction of the ruling rendered the § 921(c)(4) a nullity,[39] the court had no difficulty in finding Smith entitled to the benefit of this presumption on the basis of the abundance of testimony from examining physicians.[40] Having afforded Smith the benefit of this presumption, the court further found that it had not been rebutted in light of prior case holdings which indicated that where the presumption has arisen on the basis of testimony from an examining physician, it is rebutted only by testimony from an examining physician indicating that the claimant does not suffer from a totally

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36. *Id.* at 584.

37. 30 U.S.C. § 921(c)(4) (1976).

38. *See supra* note 7. This practice has been severely criticized in prior decisions of the Sixth and Third Circuits and has caused the Fourth and Eighth Circuits to invalidate the ruling in its entirety. *See* 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); Gober v. Mathews, 574 F.2d 772, 777-78 (3d Cir. 1978); Schaaf v. Mathews, 574 F.2d 157, 160 (3d Cir. 1978); Hubbard v. Califano, 582 F.2d 319, 325-26 (4th Cir. 1978); Bozwich v. Mathews, 558 F.2d 475, 480 (8th Cir. 1977).

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.

39. 591 F.2d at 385.

40. 682 F.2d at 586-87.

disabling respiratory or pulmonary impairment.[41] Accordingly, the court reversed the judgment of the district court and remanded with instructions to the secretary of HHS to enter an award of benefits.[42] Of consequence is the court's observation that "[t]his appears to be yet another case where due deference has not been accorded the manifest congressional intent."[43]

C. *Blevins v. Director,* Office of Workers' Compensation Programs

The procedural instruction provided by the Sixth Circuit in *Blevins v. Director, Office of Workers' Compensation Programs*[44] may be succinctly stated. In order to vest the Benefits Review Board with jurisdiction to hear an appeal from an ALJ, a Notice of Appeal *must* be filed within thirty days of the date of the ALJ's decision.

Claimant Blevins was denied benefits after hearing by an ALJ in a decision dated October 29, 1980. The applicable regulations provided that he should have filed a Notice of Appeal with the Benefits Review Board within thirty days of that date in order to obtain review.[45] The claimant filed his Notice of Appeal on December 3, 1980, five days late.[46] The Benefits Review Board denied claimant's appeal as untimely on January 30, 1981. The claimant appealed to the Sixth Circuit alleging that the Benefits Review Board abused its discretion by failing to hear his appeal.[47]

While the Sixth Circuit's decision provides an excellent review of the procedure employed in filing and adjudicating a black lung claim, its affirmance of the Benefits Review Board's decision denying the appeal is also well reasoned and clear. At the outset, the court noted that the Black Lung Benefits Act adopted the hearing and review procedures of §§ 19 and 21 of the Longshoremen's and Harbor Workers' Compensation Act for the processing of claims.[48] The court noted that § 21 of the Longshoremen's and Harbor

41. *See* Ansel v. Weinberger, 529 F.2d 304, 309-10 (6th Cir. 1976).
42. 682 F.2d at 587.
43. *Id.*
44. 683 F.2d 139 (6th Cir. 1982).
45. *See* 20 C.F.R. § 725.481 (1982).
46. 683 F.2d at 140.
47. *Id.*
48. *See* 30 U.S.C. § 932(a) (Supp. IV 1980).

Workers' Compensation Act clearly provides that unless proceedings for review are instituted, a compensation order becomes effective at the expiration of the thirtieth day thereafter.[49] Moreover, the court noted that the Benefits Review Board's own regulations buttressed this statutory provision and provided for summary dismissal of an untimely appeal for lack of jurisdiction.[50] Accordingly, the court reasoned that unless the Benefits Review Board could be found to possess some discretion to enlarge the period for filing an appeal, it lacked jurisdiction to entertain the appeal and properly dismissed the case.[51] Although the claimant pointed to authority indicating that the Benefits Review Board had discretion to enlarge the time period for filing petitions for review, he was unable to find authority in the Board to enlarge the period for filing a Notice of Appeal, which precedes a Petition for Review.[52]

Finally, after raising a laundry list of statutory sections granting discretion to review cases in need of modification, the claimant saw these arguments rejected as well, the court reasoning that the untimely filed Notice of Appeal could not be deemed a petition for modification.[53]

As a last ditch effort, the claimant raised the doctrine of excusable neglect at oral argument to mitigate the failure to timely file his appeal. The court, dismissing this contention as well, quoted the Second Circuit stating that "[t]he policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it." The LHWCA, like many other administrative review statutes, does not seem to encompass the "excusable neglect" escape hatch provided for untimely appeals from district courts.[54] Since by his own neglect, the claimant had failed to exhaust his administrative remedies, the Sixth Circuit declined to review the ALJ's decision on the merits.[55]

Smith makes clear that procedural tardiness will not be tolerated under the review scheme encompassed by the federal Black

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49. 683 F.2d at 140-41.
50. *See* 20 C.F.R. § 802.205 (1980).
51. 683 F.2d at 141.
52. *Id.*
53. *Id.* at 142.
54. *Id., citing* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom.*, Northeast Marine Terminal v. Caputo, 432 U.S. 249 (1977).
55. 683 F.2d at 142.

Lung Benefits Act. While seemingly strict, this position is necessary if the voluminous workload of the Benefits Review Board is to be administered soundly.

CONCLUSION

The substantive decisions rendered by the Sixth Circuit during its 1981 term exhibit the trend apparent in earlier decisions of the court of affording benefits to miners who are truly disabled notwithstanding the existence of negative x-ray or pulmonary function studies. To the extent that *Lawson* can be read as a directive to miners seeking circuit court review of denied Part B claims, miners with single x-ray readings stand in far better stead than those with multiple readings notwithstanding the fact that the single x-ray may have been re-read as negative. *Smith* underscores the notion that the testimony of an examining physician is the single most determinative factor in awarding benefits to a miner with more than 15 years experience even though test results standing alone may not be indicative of disability.

While the decision in *Smith* certainly has value to miners currently filing claims for benefits, *Blevins* drives home the notion that procedure may well control over substance in cases where time periods are not strictly adhered to. With this procedural warning, the Sixth Circuit awaits review of decisions on the merits initially reviewed by the Benefits Review Board under Part C of the federal Black Lung Benefits Act.