



Section-by-Section

COMMITTEE ON EDUCATION & THE WORKFORCE DEMOCRATS

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The Hon. Bobby Scott • Ranking Member

Black Lung Benefits Improvement Act of 2017 (H.R. ___)

TITLE I – BLACK LUNG BENEFITS

Part A – Improvement in the Process of Filing and Adjudicating Claims for Benefits

Section 101. Mandatory Disclosure of Medical Information and Reports – This section promotes the fair adjudication of claims under the Black Lung Benefits Act (“the Act”) and safeguards the health and well-being of coal miners, by providing coal miners, surviving spouses, dependents, and coal operators with full access to medical information relating to a miner’s Black Lung claim. If a coal operator requires a miner to submit to a medical examination, this section entitles the coal miner to receive a complete copy of the physician’s report within 30 days, including the physician’s diagnoses, conclusions, and the results of any tests performed on the miner. This section also requires each party to provide all other parties in the proceeding with a copy of medical information concerning the miner’s physical condition, regardless of whether the party intends to submit that information as evidence in the proceeding. The medical information that must be disclosed shall include the opinion of any examining physician, as well as any examining or non-examining physician’s interpretations of radiographs or pathology. This section is necessary to resolve issues surrounding previous revelations that coal operators and their attorneys withheld evidence of black lung disease from miners, survivors, judges, and physicians and medical experts that coal operators had retained to testify in these cases.

Section 102. Legal Fees – Recognizing the legal and medical complexities miners face when pursuing claims under the Act, and the well-documented difficulties that they face in securing legal representation, this section authorizes progress payments to provide miners’ attorneys with legal fees of up to \$1,500 at the District Director level and up to \$3,000 at the Administrative Law Judge level for a total of up to \$4,500, provided that the claimant prevails at each level. In addition, attorneys may seek reimbursement of up to \$1,500 for medical costs at each level. The legal fees and medical costs under this section would initially be paid from the Black Lung Disability Trust Fund; however, if the miner ultimately prevails in his or her claim for benefits, the responsible coal operator would be required to reimburse the Trust Fund for the legal fees and costs that were paid under this section and, consistent with existing law, would be required to pay any additional attorney’s fees and allowable costs that exceed the amount that was already paid from the Trust Fund. Current law prohibits coal miners’ attorneys from receiving any fees or costs for their representation of coal miners until the case becomes final, and only if the miner prevails. Black lung claims take several years to resolve and can take as long as a decade; thus, there is a financial disincentive for attorneys to represent coal miners in these cases. Over the past five years, only 33 percent of miners were represented by attorneys during proceedings before the District Directors, while another 19 percent were represented by non-attorney laypersons – leaving nearly half of all claimants without any representation at all.

Sec. 103. Clarifying eligibility for black lung benefits —The Black Lung Benefits Act establishes an irrefutable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner has been diagnosed with progressive massive fibrosis or complicated pneumoconiosis. However, the circuit courts have

split on what a claimant must prove when relying on biopsy or autopsy evidence to invoke the presumption. In the Fourth Circuit, the claimant must show that any pathology evidence of massive lesions, if X-rayed, would appear as large opacities sufficient to prove complicated pneumoconiosis. The Tenth and Eleventh Circuits have rejected this equivalency requirement and held that pathology evidence of massive lesions, standing alone, is sufficient to invoke the presumption. This section simplifies the presumption by adding the terms “complicated pneumoconiosis” and “progressive massive fibrosis” to more clearly define the disease that will invoke the presumption, and to eliminate any language that would give rise to an equivalency requirement. It also substitutes the term “radiograph” for the outmoded term “roentgenogram,” and clarifies that an opacity, mass or lesion is measured its “greatest diameter” that exceeds one centimeter, consistent with the revised *Guidelines for the Use of the ILO International Classification of Radiographs Of Pneumoconioses (2011)*.

The Black Lung Benefits Act, as amended by Section 1556 of the Affordable Care Act (commonly referred to as the “Byrd Amendments”), restored the 15-year presumption of total disability or death caused by pneumoconiosis for coal miners who worked for at least 15 years underground (or comparable surface) mining and who suffer or suffered from a totally disabling respiratory impairment. This section would provide clarity to the Byrd Amendments by (1) making it clear that the presumption is equally available to surface and underground coal miners; (2) making the rebuttal methods equally applicable to all liable parties; and (3) establishing a clear rebuttal standard (*i.e.*, in “no part”) when the liable party seeks to rebut by severing the presumed causal connection between the miner’s disability and coal mine employment. Although Office of Workers’ Compensation Programs’ (OWCP) current regulations resolve the latter two issues, coal mine operators continue to raise them in litigation.

Section 104. Restoring Adequate Benefit Adjustments for Miners Suffering from Black Lung Disease and for Their Dependent Family Members – This section restores cost-of-living adjustments for beneficiaries that were blocked or reduced as a result of federal employee pay freezes in 2011, 2012, 2013, and 2014. This section also ensures that future payments to individuals receiving benefits under the Act will keep pace with the increasing cost of living. Under the Act, basic benefit payments are equal to 37-½ percent of the monthly rate of pay for federal employees in grade GS-2, step 1, with additional payments provided to claimants with one or more dependents.

Because these benefit payments are tied to the pay rate for federal employees, when Congress blocks cost-of-living adjustments for federal employees in a given year, beneficiaries similarly do not receive increases in their benefit payments that year. As a result, coal miners, surviving spouses, and dependents were deprived of cost-of-living adjustments of 0.9% in 2011, 1.1% in 2012, 1.2% in 2013, and a partial adjustment of 0.3% in 2014 (the adjustment in 2014 should have been 1.3%, but only 1.0% was provided). Adjustments were reinstated with a 1.0% increase for 2015 and a 1.0% increase for 2016.

Had beneficiaries received the full amount of each of these cost of living adjustments, their annual benefit payments would be equal to \$7,951 per year in 2015, as opposed to \$7,657, a difference of nearly \$300. To remedy this problem, this section sets the annual rate of benefit payments for Black Lung claimants at \$7,980, or \$665 per month, beginning in 2015, instead of \$638.10. After 2015, this section ties yearly increases in benefit payments to the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-U), so that benefits will increase according to the cost of living and cannot be frozen if Congress blocks cost-of-living adjustments for federal employees in the future.

Section 105. Treatment of Evidence in Equipose – This section reinstates a longstanding legal doctrine applied in Black Lung Benefits Act and Longshore and Harbor Workers’ Compensation Act claims known as the

“true doubt” rule. The rule functions as an evidentiary tie-breaker, whereby a fact-finder who determines the evidence to be evenly balanced on an issue would resolve the issue in the claimant’s favor. The “true doubt” rule was previously adopted as a regulation promulgated by the Department of Labor until it was invalidated in 1994 by the Supreme Court in a 6-3 decision in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*. The Court did not invalidate the policy underlying the rule, but instead found that the regulation conflicted with the Administrative Procedure Act’s (APA) assignment of burden of proof (i.e., an administrative regulation could not contradict a statute). The statutory reinstatement of the “true doubt” rule, as provided for in this section, does not conflict with the Supreme Court’s ruling or the APA because a specific statutory burden of proof provision under the Black Lung Benefits Act would trump the APA’s general burden of proof requirements.

Section 106. Providing Assistance with Claims for Miners and their Dependent Family Members – This section improves the claims process under the Act by authorizing black lung clinics to use a portion of their federal grant funding to assist miners, surviving spouses, and dependents as they pursue claims for benefits. This assistance would be provided in addition to the clinics’ existing role of treating respiratory and pulmonary impairments in active and inactive coal miners.

Section 107. False Statements or Misrepresentations, Attorney Disqualification, and Discovery Sanctions – This section strengthens criminal penalties for anyone knowingly and willfully making false statements or misrepresentations, provides guidelines for making determinations as to whether attorney behavior warrants disqualification, and grants Administrative Law Judges (ALJ) the authority to issue sanctions when a party fails to comply with a discovery order. Specifically, this section makes it a felony for a claimant, operator, examining physician, or any other person to (1) knowingly and willfully make a false statement or misrepresentation, or (2) threaten, coerce, intimidate, deceive, or knowingly mislead a party, representative, witness, potential witness, judge, or anyone participating in a proceeding. Any attorney found guilty of this conduct is also permanently disqualified from representing any party or appearing in any further proceedings under the Act. Current law imposes a misdemeanor penalty on persons willfully making a false statement for the purpose of obtaining a benefit or payment, but is silent with regard to persons willfully making a false statement with the purpose of preventing a claimant from receiving a benefit for which the claimant would otherwise be eligible. The Secretary of Labor is also required to promulgate regulations to provide procedures for disqualifications and discovery sanctions.

Section 108. Development of Medical Evidence by the Secretary – This section expands the Secretary’s current obligation to offer a coal miner a complete pulmonary evaluation to substantiate a claim for benefits, by further requiring the Secretary to supplement the medical evidence in cases where a party opposing the claim provides evidence that could be considered contrary to the initial report of the pulmonary examination, or such party’s evidence has been submitted to an ALJ that had not been previously considered by the Secretary in making an award. To develop the supplemental evidence, the Secretary shall request the physician who developed the initial medical report for the claimant to review any medical evidence submitted after the initial report, and to update the opinion of such physician in a supplemental report, if warranted. If the original physician who examined the miner is no longer available, the Secretary shall select another qualified physician. In diagnosing whether a miner has complicated pneumoconiosis, but for which a conventional lung X-ray fails to provide a definitive image, the Secretary is authorized to provide a high-quality, low-dose or standard CT scan if a chest radiograph reveals advanced pneumoconiosis (ILO category 2/1 or greater) or a coalescence of small opacities; or if a certified B reader has a reasonable belief that there may be a large opacity in the upper lungs that has been obscured by bony structures.

This section codifies the Secretary's practice of creating and maintaining a list of qualified physicians to perform pulmonary examinations of coal miners, but enhances quality assurance by requiring that the Secretary pre-screen physicians for adverse professional actions involving medical licensure, certifications, hospital privileges, or professional societies. This section precludes the use of physicians from the list maintained by the Secretary who have a potential or actual conflict of interest through current or recent employment or contractual arrangements with a private party opposing an individual's claim, unless the claimant knowingly waives such conflict. The Secretary shall update such list annually by reviewing the suitability of the listed qualified physicians and assessing any potential conflicts of interest.

Section 109. Establishment of a Pilot Program to Provide Impartial Classifications of Chest Radiographs –

Competing interpretations of chest radiographs are subject to dispute in claims proceedings, and some physicians routinely fail to ever diagnose complicated pneumoconiosis or progressive massive fibrosis, the most severe form of black lung disease, or they exhibit a pattern of bias in their interpretations. This section requires the Director of the National Institute for Occupational Safety and Health (NIOSH) to establish a one year pilot program to provide unbiased classifications of findings in chest radiographs using certified B readers where there is a question or dispute regarding a diagnosis of complicated pneumoconiosis. In establishing the program, the Director of NIOSH shall: (1) establish criteria for the selection of B readers to be used in the program, (2) develop protocols for preparing reports, (3) establish a quality assurance program to assure accuracy and consistency, (4) develop a code of ethics, and (5) establish the rate of pay for physicians who are hired under contract to serve as B readers. Such quality assurance program shall ensure readers are blinded from the origin of the X-ray and shall utilize pre-read X-rays that are borderline positive or negative for complicated pneumoconiosis or progressive massive fibrosis in order to evaluate the accuracy with which B readers classify X-rays.

NIOSH shall establish panels made up of three B readers, and issue panel reports within 45 days for digital chest radiographic images and 90 days for film-based chest radiographs. NIOSH shall establish a fee for preparing a B reader panel report which must be based on direct costs. Claimants, operators, or their representatives may request a B reader panel report where there is a question regarding a diagnosis of complicated pneumoconiosis. The fee for such report shall be deposited in the Black Lung Disability Trust Fund. A report may also be requested by individuals authorized by the Secretary of Labor to hear and determine claims for benefits, and no fee shall be charged.

The Director of NIOSH or a designee shall be available to respond to interrogatories or to appear and testify about the conclusion of a B reader panel report, or the process used to prepare such report. To the extent that additional information is reasonably necessary for the full development of evidence in a case, a member of a B reader panel may be required to respond to interrogatories, if so ordered by an Administrative Law Judge. However, a panel member may not be required to appear and testify under subpoena, unless the party making the request shows that the B reader panel report is incomplete, and responses to interrogatories are unclear or incomplete, or there is an extraordinary circumstance where other additional information that is reasonably necessary for the full development of the evidence in the case cannot be provided by the Director. The General Counsel for the Department of Health and Human Services, in consultation with the Solicitor of Labor, shall represent the Director, his designee, or panel members in any claims proceeding.

The costs of establishing and operating the program shall be paid from the Fund. Interim final rules shall be issued within 180 days of enactment. NIOSH shall, in consultation with the DOL, prepare a report to Congress after the one year pilot is concluded, with recommendations on whether it should be continued, and if so, whether modifications are needed.

Section 110. Medical Evidence Training Program – This section requires the Secretary, in coordination with NIOSH, to establish a training program within 60 days of enactment to educate Administrative Law Judges who hear and decide cases under the Act on medical evidence relevant to such cases. This shall include new developments in pulmonary medicine relating to pneumoconiosis, medical and other relevant evidence sufficient to support a claim for benefits, and weighing conflicting medical evidence and testimony. Currently-employed ALJs hearing cases under the Act shall complete the training program within 60 days after the training program has been established. ALJs who are newly-assigned to hear cases under the Act after the date of enactment shall complete such training prior to hearing such cases.

Section 111. Technical and Conforming Amendments – The “Byrd Amendments”, which were enacted as part of the Affordable Care Act, (1) restored the 15-year presumption of total disability or death caused by pneumoconiosis for coal miners who worked for at least 15 years in underground mining and who suffer or suffered from a totally disabling respiratory impairment; and (2) restored surviving spouses’ and dependents’ automatic entitlement to survivor benefits if the coal miner died while receiving federal Black Lung benefits. While the Byrd Amendments clearly reinstated the 15-year presumption for miners along with an automatic entitlement to benefits for surviving spouses, several other sections of the code referencing benefits for these miners and surviving spouses were left un-amended. Consistent with the clear language and intent of the Byrd amendments, as well as decisions from circuit courts that have interpreted those provisions (Third, Fourth, Sixth, and Eleventh), this section makes technical corrections to ensure that the Byrd amendments are applied consistently throughout Act.

This section also makes a series of technical amendments to render the Black Lung Benefits Act gender neutral. For example, it replaces the terms “wife” and widow with the terms “spouse” or “surviving spouse”, as appropriate. It modifies current law regarding eligibility for survivor benefits to provide that marital status is determined by the courts of the state where the marriage was celebrated, rather than determining the validity of the marriage based on state of domicile.

Section 112. Readjudications for Cases Involving Certain Chest Radiographs – This section allows claimants, including coal miners and their survivors, to file a new claim for benefits if such claim had been denied prior to the date of enactment and such decision involved a chest radiograph that had been interpreted as negative for simple pneumoconiosis, complicated pneumoconiosis, or progressive massive fibrosis by a physician with respect to whom the Secretary of Labor has directed that such physician’s medical opinions be given no weight in evaluating a claim of benefits. A new claim may be refiled within 1 year after the date of enactment.

For example, on June 2, 2014, the Secretary directed its claims examiners not to credit negative chest x-ray readings for x-ray readings covering pneumoconiosis performed by Dr. Paul S. Wheeler of Johns Hopkins University Hospital in the absence of persuasive evidence rehabilitating his negative readings. This action by the Secretary followed an October 2013 report issued by the Center for Public Integrity which found that in more than 3,400 x-ray readings involving more than 1,500 cases, Dr. Wheeler had never once interpreted an x-ray as positive for complicated pneumoconiosis. In response to these reports, Johns Hopkins began an internal investigation and subsequently terminated its Black Lung x-ray reading program. A June 2, 2014, DOL Bulletin states “Such a consistent record of never diagnosing complicated pneumoconiosis and almost never diagnosing simple pneumoconiosis undermines the credibility of his conclusions and renders them less credible than a positive reading. In addition, the reports demonstrate that Dr. Wheeler’s diagnoses have been wrong many times.”

Section 113. Disclosure of Employment and Earnings Information to Carry out the Black Lung Benefits Act —

This section requires the Social Security Administration (SSA) to provide the Department of Labor with access to miners’ employment information in electronic form. It takes an average of 58 days to obtain miners’ earnings records from SSA according to an April 2015 DOL-Inspector General (IG) report. DOL still uses a manual, paper-based system to request the employment records from SSA “because it does not have the statutory authority to directly access SSA’s database,” according to the IG. Because paper forms have to be mailed back and forth between DOL and SSA, each iteration of this process introduces delays and additional time is required when SSA rejects and returns forms for minor clerical errors. Online access to SSA earnings records would simplify and speed up the DOL’s process of verifying claimants’ employment histories. The IG recommended this legislative change.

Part B – Reports to Further Improve the Administration and Benefits under the Black Lung Benefits Act

Section 121. Strategy to Reduce Delays in Adjudication – This section requires the Secretary of Labor, within 90 days, to submit to Congress a comprehensive strategy to reduce the backlog of cases pending before the Office of Administrative Law Judges (OALJ). The strategy must identify, among other things, the resources necessary to ensure that claims brought under the Black Lung Benefits Act are decided within 12 months from the date they are received by the OALJ.

Section 122. GAO Report on Black Lung Program – Building on the findings of an October 2009 Government Accountability Office (GAO) report on administrative and structural problems in the Black Lung Benefits Program, this section requires GAO to conduct an assessment of barriers to accessing health care services that exist for miners suffering from Black Lung disease, and to make recommendations to address issues relating to patients’ access to health care services. At a July 22, 2014 hearing held by the Senate Committee on Health, Education, Labor, and Pensions Subcommittee on Employment and Workplace Safety, one miner testified that, even after being awarded benefits, he was denied a lung transplant by the insurance company of the coal operator who was liable for providing his health care benefits under the Black Lung Benefits Act. This section also requires GAO to evaluate whether monetary benefits paid to coal miners, survivors, and dependents, as increased through this legislation, are sufficient to meet their living expenses.

TITLE II – STANDARD FOR RESPIRABLE DUST CONCENTRATION

Sec. 201. Standard for respirable dust concentration – In May 2014, the Secretary of Labor issued a final rule to reduce miners’ exposure to respirable coal mine dust and prevent new cases of Black Lung disease. Operators were required to phase in requirements for the use of continuous personal dust monitors and reductions in the maximum airborne dust concentration levels by August 1, 2016. This section requires that beginning 5 years thereafter, on August 1, 2021, the Secretary shall conduct a retrospective study to determine the effectiveness of the rule, to review data that was collected from continuous personal dust monitors (CPDMs), and to assess the increase the rate of progressive massive fibrosis to determine whether to further lower the applicable respirable dust standards in the revised rule to protect the health of miners; whether to modify the engineering controls and work practices used by mine operators to comply with the applicable standard for respirable dust concentration; and whether to increase the frequency of sampling. The Secretary of Labor is required to report its findings to Congress within one year, and to conduct a subsequent evaluation every three years thereafter.

If any of the Secretary’s reports concludes that either (1) the applicable standard for respirable dust concentration should be lowered to protect the health of coal miners or (2) that the incidence of

pneumoconiosis among coal miners in the United States (as monitored and reported by the National Institute for Occupational Safety and Health) has not been reduced since the implementation of the most recent applicable standard for respirable dust concentration, then the Secretary shall, consistent with existing requirements under the Mine Act, revise the standard and any applicable sampling or testing procedures within 24 months.

TITLE III – ESTABLISHING THE OFFICE OF WORKERS’ COMPENSATION PROGRAMS AND APPOINTMENT OF THE DIRECTOR

Sec. 301. Office of Workers’ Compensation Programs. This section codifies the Office of Workers’ Compensation Programs in the Department of Labor, which shall be directed by a Director, who shall be appointed by the President, by and with the advice and consent of the Senate. The Office of Workers’ Compensation Programs administers the Black Lung Benefits Act, as well as the Federal Employees’ Compensation Act, the Longshore and Harbor Workers’ Compensation Act, and the Energy Employees Occupational Illness Compensation Program Act.