Black Lung Claims and Appeal in the Third Circuit: Which Way Do I Go - Mancia v. Director, Office of Workers' Compensation Programs

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BLACK LUNG CLAIMS AND APPEALS IN
THE THIRD CIRCUIT: WHICH WAY DO I GO?
MANCIA v. DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS

I. Introduction

"A desperate disease requires a dangerous remedy."1

One effect of the worldwide industrial revolution during the past two centuries has been an increased demand for vast amounts of fossil fuel, namely coal. 2 The workers who mined this coal were confronted with many dangers along the way. 3 Although the reality of workers' injuries and the effect that industrialization had on cities has been chronicled by novelists and public commentators, many of the causal relationships between the working environment and the ill effects on employee health were not established until well into the twentieth century. 4 One specific danger that was not recognized by Congress until 1969 was the effect of


3. See Richard A. Vassallo, Note, Administrative Law—Interpreting 30 U.S.C. § 902(j)(2): What Are the “Criteria” of the Black Lung Amendment of 1977?, 10 W. NEW ENG. L. REV. 359, 360 (1988) (noting growth of lung disease problems associated with coal dust after mechanization of mining equipment). The English, as early as 1661, also recognized that there were health problems associated with working in mines. See id. at 359-60 n.6 (noting one 17th century commentator’s view that coal mining quickly destroyed miner and slowly destroyed those living near mine where coal was excavated). The actual cause of the sickness in miners, however, was not discovered until the mid 1800s. See id. at 360 n.7 (explaining that physicians in 1833 were first to posit that dust inhalation was cause of disease).


Coal dust harms miners' lungs by causing scarring that leads to fibrosis. See Robbins Pathologic Basis of Disease 707-08 (Ramzi S. Cotran et al. eds., 5th ed. 1995) (summarizing morphology of disease). Almost everyone that lives in a city today inhales enough carbon dust to produce some scarring, but not on the same level as the scarring that miners encountered in the past. See id. at 707 (noting that complex coal workers' pneumoconiosis is most severe form of this type of fibrosis).
coal dust, produced by the mining process, on the workers’ lungs.\(^5\) Prolonged exposure to coal dust can result in the development of pneumoconiosis, or black lung disease.\(^6\) Although Congress has acted several times to amend the rules, qualifications and procedures for reviewing denials of benefits under the federal Black Lung Benefits Act (the “Act”),\(^7\) there are still unresolved issues about how the circuits will resolve claims denied by an administrative law judge (“ALJ”).\(^8\)


6. See Mullins Coal Co. v. Director, Office of Workers’ Compensation Programs, 484 U.S. 135, 138 (1987) (noting that pneumoconiosis is commonly referred to as black lung disease, at least in coal mining context); Timothy F. Cogan, Is the Doctor Hostile? Obstructive Impairments and the Hostility Rule in Federal Black Lung Claims, 97 W. Va. L. REV. 1003, 1008 (1995) (characterizing latest legal definition of pneumoconiosis as confusing based on fact that silicosis is included within its definition); see also Lapp, supra note 4, at 722-23 (discussing development of theory that coal dust alone produces pneumoconiosis, even in absence of silica).


The federal black lung program is the result of an evolutionary process that began in 1969 and continued through congressional amendments in 1972, 1977, and 1981. The history of the program is one of repeated liberalization of the entitlement criteria, with the deliberate purpose of awarding more and more claims, until the program was tightened by [the Department of Labor’s (“DOL”)]’s adoption of permanent entitlement regulations in 1980 and congressional adoption of the 1981 amendments.

Id.; see Rita A. Massie, Note, Modification of Benefits for Claimants Under the Federal Black Lung Benefits Program, 97 W. VA. L. REV. 1023, 1023 (1995) (noting that progressive nature of disease is one reason initially denied claimants may reapply for benefits and appeal decisions). The complexity of the process is also apparent from the four revisions of the statute, two government agencies and three sets of regulations that govern the process. See id. at 1024-25 (referring to Act, including its four versions since 1969, governance by Department of Health and Human Services (“HHS”) (formerly Department of Health, Education and Welfare (“HEW”)) and Social Security Administration (“SSA”) and citing 20 C.F.R. §§ 410, 718 and 727 (1994)).

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This Casebrief focuses on two aspects of the black lung appeals process that the practitioner may encounter: (1) how a denial of benefits may be appealed and (2) how the United States Court of Appeals for the Third Circuit deals with the claims that come before it. Although there is much data on this subject in the legal media, there is not much information that specifically focuses on the Third Circuit's case law. 9 Specifically, Part II of this Casebrief discusses the statutory background for black lung claims and the appeals process. 10 Part III explains the case law that has developed over the past eight to ten years and which was most recently addressed again by the Third Circuit. 11 Part III also provides an examination of the policy considerations that have affected the courts' and legislature's decisionmaking process. 12 Finally, in Part IV, this Casebrief provides recommendations to practitioners in the Third Circuit trying black lung cases. 13

II. BACKGROUND OF STATUTORY LAW AND APPEALS PROCESS

The Black Lung Benefits Program (the "Program") is an example of a well-intentioned but poorly orchestrated attempt by the federal government to address the needs of a class of citizens that has suffered injury. 14 The original act, formulated in 1969 and intended to replace inadequate state workers' compensation programs, has undergone significant revision. 15 While some argue that the Program is a classic case of a govern-

9. See generally PENNSYLVANIA BAR INSTITUTE, BLACK LUNG BENEFITS PRACTICE & PROCEDURE UPDATE (1983) (discussing processing of black lung benefits claims from several different viewpoints). Most of the law review literature on the subject, quite predictably as a result of geological history, comes from West Virginia. See, e.g., Cogan, supra note 6, at 1010-20 (discussing physicians' role); Prunty & Solomon, supra note 8, at 672-84 (discussing evolution of program); Massie, supra note 8, at 1037-42 (describing process to obtain modification of benefits).

10. For a discussion of the statutory background and the appeals process, see infra notes 14-117 and accompanying text.

11. For a discussion of Third Circuit jurisprudence dealing with black lung claims, see infra notes 118-51 and accompanying text.

12. For a discussion of the relevant policy considerations bearing on the courts' and legislature's decisions, see infra notes 118-23, 148-51 and accompanying text.

13. For a discussion of recommendations for Third Circuit practitioners, see infra notes 152-56 and accompanying text.

14. See Nase, supra note 5, at 280-81 (studying why costs of program significantly surpassed original estimates and concluding that Congress' seemingly erratic history of adding to statute was essentially effort to monitor program and learn from experience). Even though many members of Congress were hesitant to federalize what was seen as a workers' compensation law, the law passed. See id. at 281-82 (noting that although some lawmakers saw law as workers' compensation, both Nixon and other supporters of bill denied that assertion).

15. Even today, the DOL is still attempting to combine the goals of the program with its efficient administration. See Labor Department Proposes Changing Rules Governing Black Lung Benefits, DAILY LAB. REP. (BNA), Jan. 22, 1997, at D-16 (describing proposed changes).

ment program spiraling out of control, others contend that it has yet to fulfill its original goal of aiding workers who were disabled as a result of black lung disease and the spouses that survive them. In any event, the Program has now cost billions of dollars and resulted in over a million claims filed.

Due to the complex statutory history of the Act, this background section will first address the historical development of the statutory law. Second, it will present a detailed outline of the Third Circuit’s most recent decision on black lung benefits. Third, it will outline several important Third Circuit cases on black lung disease that have been decided over the past decade. Finally, this section will both survey the role that Supreme Court jurisprudence has played in the development of the law and discuss the law in other circuits.

A. Statutory Overview

Although the medical definition of pneumoconiosis seems simple, the process of determining whether the definition is met to obtain benefits is complex. In part, this complexity arises from the difficulty in proving

reprinted in 1969 U.S.C.C.A.N. 2503, 2516 ("One of the compelling reasons... was the failure of the States to assume compensation responsibilities for the miners covered by this program."); Prunty & Solomons, supra note 8, at 666-72 (detailing reasons why program has had to be revised and concluding that incompatible expectations of groups involved play large role in controversy over program).

16. See Prunty & Solomons, supra note 8, at 667-68 (arguing that view of program rests largely on what side one comes from, industry or worker). It seems that there was no actual study of the relationship between pneumoconiosis and state worker compensation law before the 1969 Act was promulgated. See id. ("[N]ot a single serious study of workers’ compensation and pneumoconiosis had been undertaken by 1969. As a result, while the widely accepted notion that the system was not working may have been true, it was not documented at all." (quoting P. BARTH, THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE 280 (1987))). Instead, many members of Congress pushed the program as a way to compensate justly victims of the disease who were now suffering the effects of economic depression. See id. at 668 (explaining how different interest groups viewed benefits program).

17. See Nase, supra note 5, at 279 (noting enormous and unanticipated costs of program, but also allowing that program presents complex procedural problems that Congress and DOL have continued to deal with over years); Prunty & Solomons, supra note 8, at 666 (detailing costs of program).

18. For a further discussion of the historical development of the statutory law, see infra notes 22-37 and accompanying text.

19. For a further discussion of the Mancia decision, see infra notes 38-60 and accompanying text.

20. For a further discussion of recent Third Circuit case law in this area, see infra notes 61-99 and accompanying text.

21. For a further discussion of other circuits’ and Supreme Court case law, see infra notes 100-17 and accompanying text.

22. See STEDMAN’S MEDICAL DICTIONARY 1224 (William R. Hensyl et al. eds., 25th ed. 1990) (defining pneumoconiosis as “inflammation commonly leading to fibrosis [hardening] of the lungs caused by the inhalation of dust incident to various occupations; characterized by pain in the chest... fatigue after slight exertion;...
ing that a worker has black lung disease, which manifests itself slowly over time. It is also a result of both Congress’ failure to set up a clear benefits program in 1969 and the mining industry’s efforts to reduce the amount of their financial liability to former employees. The difficulties encountered in the process created a backlog that is especially troublesome in light of the fact that the miners were dying from the disease more quickly than appeals of claim denials could be processed. Since a 1981 legislative overhaul that followed several major revisions attempting to remedy

degree of disability depends on the type of particles inhaled, as well as the level of exposure to them”); Massie, supra note 8, at 1024-25 (illustrating complexity by noting that program is administered through two federal agencies, four statutes and three sets of regulations); see also Lango v. Director, Office of Workers’ Compensation Programs, 104 F.3d 573, 575 (3d Cir. 1997) (detailing case that took 14 years to come before Third Circuit); Smakula v. Weinberger, 572 F.2d 127, 131 (3d Cir. 1978) (demonstrating confusion in awarding surviving spouse benefits where death certificate was interpreted differently by administrative law judge (“ALJ”) and appeals council due to sparse information commonly included in death certificate); HARRISON’S PRINCIPLES OF INTERNAL MEDICINE 174-77 (Kurt J. Isselbacher et al. eds., 15th ed. 1994) (noting that pneumoconiosis can be cause of dyspnea, which is “an abnormally uncomfortable awareness of breathing”); ROBBINS PATHOLOGIC BASIS OF DISEASE, supra note 4, at 706-08 (characterizing coal worker’s pneumoconiosis resulting in fibrosis of lung as one of most serious types of pneumoconiosis and noting that development of disease was dependent on amount of dust retained in airways and possible cumulative effects of smoking and other environmental irritants).

23. See Lapp, supra note 4, at 736 (noting that pneumoconiosis develops in coal workers “silently over the course of many years”); see also ROBBINS PATHOLOGIC BASIS OF DISEASE, supra note 4, at 706 (explaining that severity and development of disease depends on variety of factors, such as “(1) the amount of dust retained in lungs and airways; (2) the size, shape, and therefore buoyancy of the particles; (3) particle solubility and physiochemical reactivity; and (4) the possible additional effects of other irritants”). Specifically, it is rare for evidence of pneumoconiosis to appear in the early stages of the disease because symptoms do not appear unless the worker develops more complicated pneumoconiosis that affects lung function, which takes many years to develop. See id. at 707-08.

24. See Prunty & Solomons, supra note 8, at 667-69 (addressing Congress’ failure to do its homework before creating original act and coal industry’s subsequent reluctance to pay for government social program). But see Nase, supra note 5, at 280 (reasoning that at least Congress monitored program and made changes as “it learned from experience”).

25. See Nase, supra note 5, at 316 (explaining that Congress has taken action to correct “deplorable” situation (quoting Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 99th Cong. 20 (1986) (statement of Congressman Austin Murphy))). Due to the backlog of cases during the 1980s, Congress appropriated more funds to help the DOL process claims more quickly. See id. at 316-17 (noting that Congress authorized borrowing ALJs from other agencies and appropriated money to hire new ALJs and support personnel). In addition, Congress also “encouraged the development of new procedures to combat delay” and increased the size of the Benefits Review Board. Id. at 317.

The courts have also noted the problems that backlogs have caused over the years. See, e.g., Lango, 104 F.3d at 575 (criticizing 14-year delay between initial filing and hearing); Keating v. Director, Office of Workers’ Compensation Programs, 71 F.3d 1118, 1120 (3d Cir. 1995) (noting 17-year lapse before ALJ and Board treated claim).
these problems, Congress and the Department of Labor ("DOL") have made only relatively minor changes, allowing ALJs to develop the law. 26 Nevertheless, Congress and the agencies that carry out the benefits program have kept a keen eye on the situation. 27

The Act requires that claimants prove three things: (1) that they have pneumoconiosis; (2) that the disease was caused by exposure to coal dust encountered in the course of employment; and (3) that they are totally disabled as a result of the disease. 28 To file a claim for benefits initially, applicants must go to the Social Security Administration ("SSA") or DOL office in their state. 29 If benefits are denied to claimants, they may appeal

26. See William S. Mattingly & Martin E. Hall, Federal Black Lung Update: The Standard of Disability Causation for Federal Black Lung Benefits, 94 W. VA. L. REV. 787, 787 (1992) (noting that whereas "practitioner litigating black lung claims once relied upon [DOL's Review Board for guidance, now] the various [circuits and Supreme Court] define legal standards by which black lung claims are tried"); Prunty & Solomons, supra note 8, at 671 (stating that "since 1981, most black lung battles have been waged in the courts").

In most decisions, the party opposing the claimant is "Director, Office of Workers' Compensation Programs." This refers to the Director of the Office of Workers' Compensation Programs ("OWCP"), an office within the DOL. For ease of reading and to minimize confusion, the term DOL will be used to signify both the Department of Labor and the Director of the OWCP. See Department of Labor (visited March 15, 1998) <http://gatekeeper.dol.gov/dol/> (outlining structure of DOL and OWCP).


28. See Pittston Coal Group v. Sebben, 488 U.S. 105, 126 (1988) (explaining requirements of Act under interim presumptions); Cogan, supra note 6, at 1006 (describing test for pneumoconiosis, while also noting several agencies and several congressional acts have complicated entire procedure).

29. See Massie, supra note 8, at 1031 (stating where claimant should first file his or her claim). As a side note, the fact that two agencies initially had responsibility for administering the program caused problems. See Prunty & Solomons, supra note 8, at 670 (stating that while SSA saw this as disability program, DOL saw its role as establisher of fair system to decide claims). Eventually, the SSA changed its view, deciding that its role was simply to process claims. See id. (stating that "SSA finally came to appreciate the fact that its job was simply to approve claims").

Where the claimant files his or her claim will depend on when the claim was brought. See Massie, supra note 8, at 1025 n.7 (pointing out that claims brought before July 1, 1973, were processed by SSA and paid for by federal government, while claims brought after that date are processed by DOL and paid for by employers and trust fund). In addition, how the claims are handled and judged will depend upon when they were filed in relation to a number of interim presumptions and permanent criteria established by the DOL. See id. (describing process of applying interim presumptions) (citing Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 138 (1987)).
in turn to an ALJ, the Benefits Review Board ("Board"), their federal circuit court and finally the United States Supreme Court.  

When they initially promulgated the laws and regulations governing the black lung benefits programs, Congress and the agencies decided that certain coal mine workers should be presumed to have pneumoconiosis.  

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30. See Massie, supra note 8, at 1030-36 (summarizing benefits claim and appeals process). Turning to the actual procedure for applying for benefits, the claimant must first file a claim with the SSA or DOL office in his or her state. See id. at 1031 (describing how claims process is initiated); see also Longshore Act, 33 U.S.C. §§ 919, 939, 940 (1994) (governing claims procedure); 20 C.F.R. § 725.101(11) (1998) ("District Director" means a person appointed as provided in sections 39 and 40 of the Longshoremen and Harbour Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1994), or his or her designee, who is authorized to develop and adjudicate claims as provided in this subchapter."). A deputy director of the DOL handles the claim, orders medical tests and makes an initial determination of whether the claimant is qualified to receive benefits. See Massie, supra note 8, at 1032 (discussing DOL deputy director's responsibilities in processing claims) (citing 20 C.F.R. §§ 725.405(b), 725.412(a)-(b) (1994)). If the application is approved, the claimant's employer may either pay benefits or appeal. See id. ("If the evidence supports an initial finding of eligibility, and it has been determined that a coal mine operator may be liable for the claim, the deputy commissioner shall proceed. . . . If no operator can be identified, the deputy commissioner shall proceed.") (citing 20 C.F.R. § 725.410(b) (1994)). If the claimant is denied benefits, he or she may appeal to an ALJ after both parties have held informal conferences to try to settle the matter. See id. (citing 20 C.F.R. §§ 725.410(c), 725.413(b)(2), 725.415, 725.416 (1994)).

There are strict time limitations for the appeal that, if ignored, may disallow a future claim. See id. (citing 20 C.F.R. § 725.409 (1994)). But see 20 C.F.R. § 725.310 (1994) (allowing request for modification if filed within first year after denial); 20 C.F.R. § 725.309(c) (1994) (allowing duplicate claim to be filed if "material change in conditions" has occurred).

Generally, the ALJ will examine the record and render a decision. See 20 C.F.R. § 725.477 (1998) (specifying form and content of decisions). In some cases, the ALJ may remand the case to the deputy director if new issues, such as a change in condition, have occurred. See Massie, supra note 8, at 1033 (citing 20 C.F.R. § 725.465(b) (1994)). If the claimant remains unsatisfied after this step and alleges specific legal or factual errors, he or she may appeal to the Benefits Review Board ("Board"). See id. at 1033-34 n.60 (noting that Longshore Act, 33 U.S.C. § 921(b) (1994), governs appeals to Board).

The Board will look to the "substantial evidence in the record" to see if the finding was warranted. See id. at 1034 (citing 20 C.F.R. § 802.301 (1994)). If still dissatisfied, the claimant can appeal to the United States court of appeals in the jurisdiction where the injury occurred. See id. at 1035 (citing 20 C.F.R. §§ 725.482(a), 802.410(a) (1994)). Finally, the applicant can petition for certiorari to the United States Supreme Court if the applicant is still left unsatisfied. See id.

31. See Federal Coal Mine Health and Safety Act of 1969, § 411(c)(1-3), 30 U.S.C. §§ 921, 924 (1986 & Supp. 1998) (noting presumptions in favor of claimant if they had worked in coal mine for at least 10 years and proved pneumoconiosis was present, if they had worked in coal mine for at least 10 years and died of respiratory disease or if they showed they had complicated pneumoconiosis). Note that while simple pneumoconiosis is relatively benign, long-term exposure to coal dust can result in the disabling condition called complicated coal workers' pneumoconiosis, which is the disease that the acts are intended to address. See ROBINS PATHOLOGIC BASIS OF DISEASE, supra note 4, at 474 (teaching that simple pneumo-
Because of concern that not enough claims were being approved, later laws and regulations further liberalized the presumptions available to coal mine workers.\textsuperscript{32} After several years, however, the momentum had shifted the other way so that most presumptions have been eliminated.\textsuperscript{33}

The "modification" of an award decision presents a separate issue and can be instituted only through a deputy director of the DOL up to one year after the initial decision.\textsuperscript{34} A modification is only available in certain circumstances. Pneumoconiosis is sometimes precursor to later, complicated type that can cause fibrosis, or hardening of lungs. The first two of these three presumptions can be rebutted with adequate evidence to the contrary. See Prunty & Solomons, supra note 8, at 675 (citing 30 U.S.C. §§ 921, 924).

32. See Prunty & Solomons, supra note 8, at 678 n.62 (characterizing language in 20 C.F.R. § 410.490 as providing that x-rays, biopsy or autopsy, coupled with either 10 years of coal mine work experience or proof that pneumoconiosis was caused by employment, would invoke presumption) (citing Pittston Coal Group, 488 U.S. at 113-14). It is unclear whether these presumptions, enacted in 1972 for SSA claims analysis, were or are rebuttable. See id. at 680 (noting that although it seemed possible under law, it is unlikely that SSA ever intended to launch rebuttal inquiry).

The DOL’s low approval rate and huge backlog of cases encouraged Congress to pass a new act in 1977. See id. at 681-82 (providing, in part, for “a presumption of entitlement for the dependent survivors of miners who died prior to March 1, 1978 . . . and had at least twenty-five years of coal mine employment before June 30, 1971”) (citing Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 3(a), 92 Stat. 96 (codified as amended in 30 U.S.C. § 921) (1986 & Supp. 1998) [hereinafter 1977 Act]). The regulations regarding presumptions that were enacted in response to the 1977 Act are known as interim presumptions. See id. at 684 (citing 20 C.F.R. pt. 725 (1978)). For claims between 1978 and 1981, the presumption became less favorable to claimants, in general requiring more evidence. See id. at 684-710 (discussing legislative changes that resulted in more difficult path for claimants).

33. See id. at 710-13 (noting that most presumptions were eliminated by 1981 Act, in part because trust fund was in debt and nondisabled miners were receiving benefits). The presumptions in effect after 1981 included a presumption of entitlement if the claimant proved complicated pneumoconiosis. See 20 C.F.R. § 718.304 (1998) (evidencing that present-day irrebuttable presumptions are limited to certain medical diagnoses). Of course, these presumptions have been the subject of much judicial interpretation. See Prunty & Solomons, supra note 8, at 715 n.265 (rejecting “situs of coal” test) (citing Stroh v. Director, Office of Workers’ Compensation Programs, 810 F.2d 61, 64 (3d Cir. 1987)); see also Director, Office of Workers’ Compensation Programs v. Ziegler Coal Co., 853 F.2d 529, 533 (7th Cir. 1988) (choosing neither to accept nor reject test); Collins v. Director, Office of Workers’ Compensation Programs, 795 F.2d 368, 372 n.5 (4th Cir. 1986) (same).

34. See Massie, supra note 8, at 1037 n.73 (defining modification in this context as meaning reconsideration of terms of award). A modification claim is presented or instituted only through a deputy director of the DOL. See id. at 1038 (noting process that is followed to institute modification procedure). But see id. at 1039 (stressing that Board has decided that director’s role in modification is limited to transferring petition to ALJ) (citing Yates v. Armco Steel Corp., 10 B.L.R. 1-132 (1987)). In general, though, the applicant goes through the same steps as in the normal application and appeals process. See id. at 1040 (noting that modification claims process in ALJ, Board and circuit court is similar to regular process, but director has power to correct mistake of fact or change in condition).
instances: (1) if a mistake of fact is discovered or (2) if the claimant's physical condition changes so that he or she is totally disabled.\textsuperscript{35} After the one year period following the initial decision, a worker can file a "duplicate claim" to which new rules apply.\textsuperscript{36} For the coal mine worker to have his or her claim readjudicated after the first year, the worker needs evidence of a material change in condition from the point at which the ALJ decides that the disease presented itself at the time of the first application or evidence that the disease progressed to the point of being totally disabling.\textsuperscript{37}

B. Most Recent Third Circuit Decision:
Mancia v. Director, Office of Workers' Compensation Programs

In the latest black lung case in the Third Circuit, \textit{Mancia v. Director, Office of Workers' Compensation Programs},\textsuperscript{38} the original claimant, Angelo Mancia, died while sitting in his car without the engine running.\textsuperscript{39} The main issue before the court was whether his heart stopped due to a myocardial infarction, commonly called a heart attack, or cardiopulmonary arrest, in which the heart stops because it is not receiving enough oxygen.\textsuperscript{40} If cardiopulmonary arrest caused the death, then it could be linked

\textsuperscript{35} See id. at 1040-42 (outlining requirements to receive modification of award, but noting that some circuits have limited powers of deputy directors). Note that while a modification due to a mistake of fact provides for benefits that are retroactive to the initial hearing, a modification because of a change in condition only provides for benefits from that date of change in condition. \textit{See id.} at 1042 (explaining distinction) (citing Jarka Corp. v. Hughes, 299 F.2d 534, 536-37 (2d Cir. 1962)).

\textsuperscript{36} See id. at 1042-43 (noting difference between duplicate and modified claims); \textit{see also} 20 C.F.R. § 725.309(c)-(d) (1998) (explaining that modifications and duplicate claims are treated differently, with modifications often more advantageous to claimant).

\textsuperscript{37} \textit{See} Massie, \textit{supra} note 8, at 1043-46 (noting that although claims and appeals procedures remain same for modifications, modifications may be more advantageous to claimant because claimant eligibility criteria will be determined by original filing date—\textit{i.e.}, more liberal interim presumptions may be available). Deciding what a material change in condition means has been the subject of a dispute among several circuits and commentators. For a further discussion of this dispute, see \textit{infra} notes 86-91 and accompanying text.

\textsuperscript{38} 130 F.3d 579 (3d Cir. 1997).

\textsuperscript{39} \textit{See} id. at 581 (explaining that engine was not running, which helps to rule out any suggestion of suicide). Mr. Mancia worked in the coal mines for eight years and was awarded benefits during his lifetime, after appealing to an ALJ, because of his total disability. \textit{See id.} at 580. Because the test for survivor's benefits is different than that for a living, disabled miner to receive benefits, Mrs. Mancia was forced to reapply for benefits. \textit{See id.} at 585.

\textsuperscript{40} \textit{See} id. at 582-84 (describing evidence available and ALJ's finding of fact that death was not due to pneumoconiosis). The physician who signed the death certificate, Dr. Manganiello, was Mr. Mancia's treating physician. \textit{See id.} at 581. Dr. Manganiello later testified that "\textit{[n]o where [sic] in my death certificate or in my opinions do I feel that I have ever expressed a myocardial infarction as his cause of death.}" \textit{Id.} at 582.
to his black lung disease and Mrs. Mancia, the widow, would be able to collect survivor's benefits.\textsuperscript{41}

After a lengthy examination of the evidence, the ALJ ruled in the DOL's favor, and the Board affirmed the decision.\textsuperscript{42} The Third Circuit, however, reversed the findings of the ALJ and the Board and ruled in favor of awarding benefits to the surviving widow.\textsuperscript{43} Interestingly, the court noted that only after the 1981 amendments to the Act did a surviving spouse have to prove the decedent died from black lung disease.\textsuperscript{44} Before those amendments were adopted, the only requirement was that the decedent was receiving benefits at the time of death.\textsuperscript{45} According to the post-1981 test though, Mrs. Mancia had to prove by a preponderance of the evidence that pneumoconiosis hastened her husband's death.\textsuperscript{46}

\textsuperscript{41} See id. at 584-85 (noting that test to receive benefits was whether Mrs. Mancia could show, by preponderance of evidence, that spouse's death was hastened by pneumoconiosis). Specifically, note that benefits were available to Mrs. Mancia, under the DOL regulations, because she was an "eligible survivor" of a miner whose death was due to pneumoconiosis." See 20 C.F.R. § 718.205(a) (1998).

\textsuperscript{42} See Mancia, 130 F.3d at 583-84 (outlining ALJ's decision and Board's affirmance). The ALJ had two main difficulties with Mrs. Mancia's evidence: (1) there were statements from Dr. Manganiello that Mr. Mancia had suffered from cor pulmonae and (2) there was a note from the physician noting the cause of death as acute myocardial infarction. See id. (discussing reasons claim was denied). Cor pulmonae is a form of pulmonary heart disease that has no necessary tie to exposure to coal dust. See ROBBINS PATHOLOGIC BASIS OF DISEASE, supra note 4, at 542-43 (noting that term is synonym for pulmonary hypertensive heart disease).

Although the physician rejected both the testimony and letter, the ALJ found that this evidence demonstrated that Dr. Manganiello "simply assumed that black lung disease played a part in the miner's death." Mancia, 130 F.3d at 583-84.

\textsuperscript{43} See Mancia, 130 F.3d at 593-94 (noting that "totality of the evidence does not support the conclusion that Mancia suffered a heart attack"). Furthermore, the court criticized the ALJ for requiring objective means to prove pneumoconiosis when the DOL had already conceded that fact. See id. at 593 (noting that according to DOL regulations, objective tests for pneumoconiosis can include x-rays, pulmonary function and blood gas tests) (citing 20 C.F.R. §§ 718.202, 718.204(c) (1-2) (1998)).

\textsuperscript{44} See id. at 585 n.6 (explaining that before effective amendments, which was January 1, 1982, Mrs. Mancia would have "been entitled to derivative benefits based upon the benefits that had been awarded to [Mr. Mancia] during his lifetime"). As it was, however, because of the 1981 amendments, she had to prove that her husband's death was caused by pneumoconiosis. See id. For a further discussion of those amendments, see Pothering v. Parkson Coal Co., 861 F.2d 1321, 1322-31 (3d Cir. 1988) (discussing 1981 amendments to Act).

\textsuperscript{45} See Mancia, 130 F.3d at 585 n.6 (noting pre-1982 regulations, which would have allowed Mrs. Mancia to receive benefits without demonstrating that husband's death was caused by pneumoconiosis). For a further discussion of the pre/post-1981 amendments in this context, see supra note 44 and accompanying text.

\textsuperscript{46} See Mancia, 130 F.3d at 585 (noting that Mrs. Mancia must prove "that her husband's death was hastened by pneumoconiosis"); 20 C.F.R. § 718.205(c) (2) (1998) (explaining that survivor could receive benefits "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis").
One important reason why the ALJ denied the claim was that the ALJ believed that the death certificate indicated a heart attack as the cause of death, but the Third Circuit took a different view of the testimony of the physician who signed the death certificate.47 Relying on its own precedent, the court noted that it was common practice to note such things as "coronary occlusion" on a death certificate and that the mention of this inherently unreliable cause of death would not serve as substantial evidence that the miner died of heart disease.48 In addition, as in a past case, the court relied on the lay testimony of the decedent's widow and brother to establish his increasing breathing problems leading up to the time of death.49

The court also concluded that the ALJ erred in treating an admittedly inadequate medical explanation as simply an assumption.50 In other words, the court decided that the ALJ required "too much" medical certainty.51 The court asserted that the ALJ ignored the fact that much of

47. See Mancia, 130 F.3d at 582, 587 (noting that physician who signed death certificate listing cause of death as cardiopulmonary arrest meant that heart stopped as result of underlying lung problem caused by anthrasilicosis). The court noted that the statutory definition of pneumoconiosis includes anthrasilicosis. See id. at 581 n.9 (discussing breadth of legal definition as compared to medical definition) (citing Labelle Processing Co. v. Swarrow, 72 F.3d 308, 312 (3d Cir. 1996)).

48. See id. at 586-87 (discussing past cases and finding that holdings are helpful in determining probative value of death certificate versus signing physician's testimony regarding cause of death); Hillibush v. United States Dep't of Labor, 853 F.2d 197, 204 (3d Cir. 1988) ("[A] death certificate listing 'coronary occlusion' and [not] listing any other contributing conditions [does not rule out] widow's entitlement to survivor's benefits."); Smakula v. Weinberger, 572 F.2d 127, 132 (3d Cir. 1978) (noting that merely listing "coronary occlusion" as cause of death on death certificates is common).

49. See Mancia, 130 F.3d at 587-88 (explaining that even with current restrictive regulations, ALJ cannot ignore lay testimony); Hillibush, 853 F.2d at 204-05 (considering all relevant evidence even in face of death certificate's conclusion). The lay testimony here consisted of Mrs. Mancia's comments that her husband had complained of breathing problems during the previous week and that he turned white when experiencing shortness of breath. See Mancia, 130 F.3d at 587. In addition, Mr. Mancia's brother noted Mr. Mancia's inability to engage in any physical activity. See id. These statements are consistent with what happens to persons with this disease, because their lungs become so scarred and hardened that air exchange eventually becomes impossible. See Robbins PATHOLOGIC BASIS OF DISEASE, supra note 4, at 706-08 (noting that when complicated pneumoconiosis develops, pulmonary dysfunction increases).

50. See Mancia, 130 F.3d at 588-89 (explaining that physician's "assumption" was in fact based on knowledge of decedent's ongoing lung problem); Plesh v. Director, Office of Workers' Compensation Programs, 71 F.3d 103, 107 n.8 (3d Cir. 1995) (noting that reasoned medical judgments are to be accepted as evidence); Risher v. Director, Office of Workers' Compensation Programs, 940 F.2d 327, 330 (8th Cir. 1991) (concluding that opinion of physician constituted sufficient medical evidence); Peabody Coal Co. v. Helms, 859 F.2d 486, 490 (7th Cir. 1988) (requiring only reasoned medical judgment); Drummond Coal Co. v. Freeman, 735 F.2d 1523, 1526 (11th Cir. 1984) (same).

51. See Mancia, 130 F.3d at 589 (noting that assumptions are not inconsistent with reasoned medical judgments) (citing Director, Office of Workers' Compensa-
medical decisionmaking is based on instinct, developed through years of practice. The court distinguished this case from *Lango v. Director, Office of Workers' Compensation Programs*, in which the doctor’s statements were completely conclusory and could truly be termed an assumption.

Although the *Mancia* court acknowledged that it will consider a nontreating physician’s statements, it concluded that the DOL expert’s testimony was not sufficient here. Pointedly, the nontreating physician was the DOL’s only witness. The court found that his testimony was contradicted by reports from at least two physicians who examined Mr. Mancia.

In concluding that the widow deserved survivor’s benefits, the court found that there was not enough evidence to support the ALJ’s rejection of the treating physician’s testimony that black lung disease hastened Mr. Mancia’s death. In fact, the court went so far as to direct an award for damages immediately, based on its past decisions to do so when the “result is foreordained.” Although the court stressed that awarding benefits

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52. *See id.* (explaining value of physician’s medical judgment); *Mangifest*, 826 F.2d at 1327 (“[M]edical judgment is sometimes based upon instinct . . . .”). As one medical textbook stated, “This combination of medical knowledge, intuition, and judgment is termed the art of medicine. It is as necessary to the practice of medicine as a sound scientific base.” *See Harrison’s Principles of Internal Medicine, supra* note 22, at 1.

53. 104 F.3d 573 (3d Cir. 1997)

54. *See Mancia*, 100 F.3d at 590 (noting that in this case, physician presented testimony that explained his reasoning). *But see Lango*, 104 F.3d at 576 (demonstrating that claimant offered no testimony from treating physician to show that pneumoconiosis hastened survivor’s husband’s death).

55. *See Mancia*, 100 F.3d at 590-91 (explaining that court will consider nontreating physician’s testimony in some cases); *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 1028 (3d Cir. 1986) (utilizing nontreating physician’s testimony where it corroborated opinion of treating physician).

56. *See Mancia*, 100 F.3d at 590 (noting that “Dr. Candor’s report is the only medical conclusion consistent with the ALJ’s finding that Mancia’s death was not caused by complications related to his black lung disease”).

57. *See id.* at 592 (describing weakness of DOL’s case). One other physician, Dr. E.J. Biancarelli, had conducted a physical examination of Mr. Mancia. *See id.* (demonstrating that exam showed evidence of pneumoconiosis). In addition, although Dr. Candor mentioned several other x-rays that showed no evidence of the disease, he did not rely on these in his testimony. *See id.* Importantly, Dr. Biancarelli stated that there was at least one x-ray that showed pneumoconiosis. *See id.*

58. *See id.* at 593 (holding for claimant and relying on analysis of Dr. Manganiello’s testimony and lack of support for ALJ’s finding). The court also stated that in cases such as this, where there was enough evidence to render a decision, it would not require an autopsy to be performed. *See id.* (suggesting that some other cases may require autopsy).

59. *See id.* at 593-94 (noting that widow had met burden and Director’s evidence was inconsistent with decedent’s medical history). This ruling was based not only on past case law, but also on federal regulations. *See 20 C.F.R. § 718.205(d) (1997)* (noting that survivor will receive benefits if evidence shows that miner’s
without remand will not be appropriate in every case, it concluded that this was the best choice here. 60

C. Other Third Circuit Decisions

The Third Circuit has heard many appeals involving black lung cases as a result of the vast amounts of anthracite coal found in Pennsylvania and the numerous mining operations engaged in its extraction. 61 A brief introduction to some of the cases decided in the past decade will help the reader or practitioner understand the analysis of the Third Circuit’s approach to black lung benefits cases. 62

In one recent case, Penn Allegheny Coal Co. v. Williams, 63 the court decided that the DOL’s regulations that establish four methods to demonstrate that pneumoconiosis exists should be considered “in their totality.” 64 The court decided that although the Board erred in considering only one part of the evidence, the radiological findings, the error was harmless in light of the other evidence establishing that the respondent

decision was due to pneumoconiosis and Director’s evidence does not disprove this assertion); see also Keating v. Director, Office of Workers’ Compensation Programs, 71 F.3d 1118, 1123-25 (3d Cir. 1995) (choosing to award damages immediately, without remand, where result is foreordained).

60. See Mancia, 130 F.3d at 593-94 (describing widow’s advanced age, length of appeal and strength of case as rationale for expediting award of benefits to survivor); see also Kowalchick v. Director, Office of Workers’ Compensation Programs, 893 F.2d 615, 624 (3d Cir. 1990) (awarding benefits immediately where there could be only one conclusion).

61. For a further discussion of several Third Circuit cases, see infra notes 63-99, supra notes 38-60 and accompanying text. A Westlaw search using the terms “Black Lung” or “pneumoconiosis” resulted in over 100 records.

62. For a further discussion of several Third Circuit cases that will help the practitioner to obtain an overall picture of the Third Circuit’s jurisprudence, see infra notes 63-99, supra notes 38-60 and accompanying text. In addition, there is a web site that provides information on new and important case law in each circuit. See Federal Black Lung Benefits Clinic (visited Sept. 21, 1998) <http://liberty.uc.wlu.edu/~coalmine/>.

63. 114 F.3d 22 (3d Cir. 1997).

64. See id. at 25 (noting that although regulations propose four distinct methods of establishing black lung disease, ALJ should weigh all evidence together); 20 C.F.R. § 718.202(a) (1998) (enumerating four methods to establish existence of pneumoconiosis: (1) x-rays; (2) biopsies or autopsies; (3) available presumptions; and (4) physician diagnosis based on available tests). Because no disjunctive “or” separates the provisions, the court agreed with the DOL that all aspects should be considered together, finding that the Board committed an error in concluding that the disease existed based solely on x-ray evidence. See Penn Allegheny, 114 F.3d at 25 (concluding that Board should have looked at all available evidence).
had pneumoconiosis.\textsuperscript{65} Therefore, the court denied the coal company's petition to review the case.\textsuperscript{66}

In \textit{Lango}, the court was confronted with a surviving spouse who petitioned the court after the Board had affirmed the ALJ's denial of benefits.\textsuperscript{67} As in \textit{Mancia}, the Board and ALJ had found that the widow had not established that her husband's pneumoconiosis contributed to his death.\textsuperscript{68} In this case, however, the court upheld the denial of benefits because of the lack of evidence proffered by the claimant.\textsuperscript{69}

Although there was a death certificate that listed the cause of death as pneumoconiosis, the failure of Mr. Lango's physician to present an explanation of his reasoning fatally damaged Mrs. Lango's claim for survivor's benefits.\textsuperscript{70} Interestingly, in \textit{dicta}, the \textit{Lango} court criticized the DOL for its careless handling of this and other black lung cases.\textsuperscript{71} The court's

\textsuperscript{65} See \textit{Penn Allegheny}, 114 F.3d at 25 (explaining that because ALJ had correctly considered doctor's reports, biopsies and x-rays, Board's error in upholding finding of pneumoconiosis was harmless). In addition, the court agreed that it was proper for the ALJ to give more credence to the two physicians who actually performed the biopsy on the claimant. \textit{See id.} (explaining that this was within ALJ's prerogative).

\textsuperscript{66} See \textit{id}. at 24-26 (disagreeing with coal company's argument that Board should have been precluded from considering x-ray evidence and that this fact alone resulted in reversible error).

\textsuperscript{67} See \textit{Lango} v. Director, Office of Workers' Compensation Programs, 104 F.3d 573, 574 (1997) (noting that sole issue on review was whether "there was substantial evidence to support the decision reached by both the [Board] and the ALJ that Mrs. Lango failed to establish that her husband's pneumoconiosis was a contributing cause of his death"); 20 C.F.R. § 718.205(c)(2) (1998) (explaining that "[w]here pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis," survivor could receive benefits).

\textsuperscript{68} See \textit{Lango}, 104 F.3d at 574 (explaining that ALJ and Board failed to find that widow established that her husband's death was due to pneumoconiosis). The court also noted that it was an undisputed fact that Mr. Lango died of lung cancer. \textit{See id.} at 576. Somewhat surprisingly, this fact does not make it more or less likely that his pneumoconiosis had contributed to his death. \textit{See ROBBINS PATHOLOGIC BASIS OF DISEASE, supra note 4, at 476 (detailing findings that suggest, once cigarette smoking is factored out, that lung cancer is no more or less prevalent in victims of black lung disease).}

\textsuperscript{69} See \textit{Lango}, 104 F.3d at 576 (adding that "only evidence introduced by the claimant in an effort to show that [black lung disease hastened death] was his death certificate"). The death certificate, prepared 14 years after the death of Mr. Lango, listed black lung disease as a "significant condition contributing to death." \textit{Id.} Nevertheless, the court was perplexed by the claimant's failure to offer evidence by the physician who signed the certificate, Dr. DiNicol. \textit{See id.} ("Inexplicably, at the 1995 hearing before the ALJ the claimant did not proffer any evidence by Dr. DiNicol, who was still available to testify about the basis of his opinion."). Without evidence of the medical reasoning behind the death report, the certificate was not sufficiently probative to prove causation. \textit{See id.} at 577-78 (noting that claimant failed to meet required burden).

\textsuperscript{70} For a discussion of the problems with the death certificate evidence, see \textit{supra} note 69 and accompanying text.

\textsuperscript{71} See \textit{Lango}, 104 F.3d at 575-76 (lamenting 14-year delay between filing and initial hearing, but acknowledging that it could not award benefits solely on those
opinion and the DOL's brief suggest that the widow may still have an opportunity to receive benefits if she applies for a modification and has Mr. Lango's physician present evidence to support his conclusion concerning the cause of death. 72

In yet another case where a surviving widow's claim for benefits was denied, Keating v. Director, Office of Workers' Compensation Programs, 79 the Third Circuit addressed the modification issue that it had touched on in Lango. 74 In discussing the seventeen-year lapse between her initial claim and the ALJ's and Board's treatment of her claim, the court rejected the suggestion that Mrs. Keating was "shopping for a friendly factfinder." 75 Importantly, the court also noted that the purpose of the statute required construing the language liberally. 76 The court found not only that the ALJ's initial ruling was incorrect, but also that a subsequent ALJ made an error in not reconsidering new evidence pursuant to a modification request. 77 Finally, in a move similar to the Mancia court, this court decided

grounds); see also Nase, supra note 5, at 316 (explaining that General Accounting Office report in 1980s estimated that, without increased funding, DOL's ALJs would face backlog of cases that would result in even longer processing delays). The most unconscionable aspect of these delays would be that claimants who die of the very disease they were complaining about before their claims could be resolved. See id. at 317 (emphasizing practical problems with system).

72. See Lango, 104 F.3d at 578 (noting that timely appeal will allow DOL to reconsider case). All Mrs. Lango would need is a more complete medical rationale for the ALJ to consider. See id. (suggesting that widow procure testimony from Dr. DiNicola).

73. 71 F.3d 1118 (3d Cir. 1995).
74. See id. at 1120 (discussing history of present claim and noting that claim has been before three ALJs and three Boards); see also Lango, 104 F.3d at 578 (noting that surviving spouse has option of pursuing benefits under modification clause). The court noted that in a modification situation, such as the one here, benefits would be awarded back to the date of the miner's death or January 1, 1974, whichever is later. See Keating, 71 F.3d at 1120 n.2 (explaining survivor benefits clause in 20 C.F.R. § 725.503(c) (1995)). Therefore, after the court decided to award Mrs. Keating survivor benefits, it pointed out that they would be retroactive to July 1978. See id. at 1120 (awarding benefits beginning in first full month after miner's death).

75. See Keating, 71 F.3d at 1120 (stating that "[i]t is not apparent from the record whether she was shopping for a friendly factfinder or just a fair one"). The court characterized this case as having "a shamefully long history." Id. In addition, the court noted that "it is painfully obvious that she found neither [a fair factfinder nor a friendly one]." Id.

76. See 30 U.S.C. § 901(a) (1986 & Supp. 1998) (stating that purpose of statute is "to ensure that in the future adequate benefits are provided to coal miners and their dependents [if death or disability was due to] pneumoconiosis"); Keating, 71 F.3d at 1122 (recognizing that remedial nature of statute requires broad interpretation); Kline v. Director, Office of Workers' Compensation Programs, 877 F.2d 1175, 1180 n.15 (3d Cir. 1989) (same).

77. See Keating, 71 F.3d at 1122 (explaining that according to pre-1982 regulations, widow should have been allowed to have her claim considered solely on basis of lay testimony where medical evidence was unavailable and 10-year presumption was unavailable). In addition, the second ALJ to consider the case, under a modification provision, had erred when he refused to consider new evidence found in a
to award benefits to the widow, remanding only so that the DOL could carry out this order.\textsuperscript{78}

In \textit{Plesh v. Director, Office of Workers' Compensation Programs},\textsuperscript{79} the court reversed the ALJ's ruling terminating benefits of a retired coal miner.\textsuperscript{80} In \textit{Plesh}, a miner who had been receiving benefits for approximately seven years received a letter from the DOL informing him that a review of his file showed "certain deficiencies" and instructing Plesh, the miner, to have testing done at DOL expense.\textsuperscript{81} After the conclusion of the testing, which demonstrated that Plesh was not totally disabled from pneumoconiosis, the DOL issued an "order to show cause" as to why the original award should not be modified.\textsuperscript{82} In response to the letter, Plesh returned the order, handwriting a note on the last page signifying his intention to appeal and stressing that the benefits were his only means of support.\textsuperscript{83}

certificate that demonstrated the number of years that Mr. Keating had worked in the coal mine. \textit{See id.} at 1121-23 (analyzing ALJ's decision under applicable regulations). The third ALJ had erred when he did not consider whether the first ALJ had erred when he did not consider the lay testimony. \textit{See id.} (noting that third ALJ erred "by refusing to render de novo factual findings based on the lay evidence").

\textsuperscript{78} \textit{See id.} at 1124-25 (following decisions in past cases awarding benefits without remand where result was foreordained); \textit{see e.g.}, Kowalchick v. Director, Office of Workers' Compensation Programs, 893 F.2d 815, 621, 624 (3d Cir. 1990) (deciding that directing benefits immediately was best course where result is foreordained).

\textsuperscript{79} 71 F.3d 103 (3d Cir. 1995).

\textsuperscript{80} \textit{See id.} at 115 (remanding for purpose of reinstating benefits, which DOL had erroneously terminated). Here, the court concluded that because the ALJ had not rebutted the interim presumption available to the claimant, he was still presumed to be disabled by pneumoconiosis. \textit{See id.} at 114 (holding that physician's opinion was insufficient to rebut presumption); \textit{see also} 20 C.F.R. § 727.203(a) (1978) (providing interim presumption for claimant).

\textsuperscript{81} \textit{See id.} 1121-23 (3d Cir. 1995).

\textsuperscript{82} \textit{See Plesh}, 71 F.3d at 105 (establishing that radiologists who read chest x-rays concluded they were negative for pneumoconiosis). The radiologists who read the films were both "B-readers," which is a designation a physician may earn after passing a test administered by the U.S. Department of Health and Human Services. \textit{See id.} at 105 n.2 (providing for B-readers) (citing 20 C.F.R. § 718.202(a)(ii)(E) (1995); 42 C.F.R. § 37.51 (1995)).

\textsuperscript{83} \textit{See Plesh}, 71 F.3d at 105-06 (according to order, Mr. Plesh had 30 days to demonstrate why DOL should not terminate his benefits payments). To show cause, Mr. Plesh would have had to prove that he was totally disabled from pneumoconiosis caused by working 17 years in a coal mine. \textit{See id.} at 106 (illustrating standard demanded of Plesh).

\textsuperscript{84} \textit{See id.} (noting that DOL never responded to letter and there was no official appeal filed by Plesh for some time). It is evident from the text of the letter that Mr. Plesh believed that his note served as an appeal:

\textit{Dear Sir—I am appealing this as of now.} Having went to the Howard Hospital, for my Pulmonary Medical Records and I was told they were sent to Mt. Sterling KY Labor Dept—and having taken another exam at Dr. Corrazza [the DOL physician] [sic]—Now I am going to get another exam and will give you further med. evidence of my health for Black Lung after 26 years in coal mines. I will send this to you as soon as possible—thank you . . . P.S. . . . this is the only means of survival that my wife and I have to live on now—thank you.
When Plesh finally submitted a formal claim for benefits two years later, it was initially treated as a duplicate claim instead of a request for modification because Plesh had filed his second claim more than one year after the first claim was denied.84 In the end, the court reinstated his benefits, finding that the handwritten appeal had been valid and that the presumption in favor of Plesh was not rebutted by substantial evidence.85

In Labelle Processing Co. v. Swarrow,86 the main dispute was whether the ALJ had used the correct standard in reviewing a new claim application after rejecting a previous claim.87 Swarrow’s claim was denied twice, and he was then precluded from submitting additional evidence because the time for appeal had passed.88 After the claimant filed a duplicate claim, the ALJ found that Swarrow had suffered a “material change in conditions” that made it necessary to award him benefits.89 While the Third Circuit found that the ALJ had used the correct standard, its construction has been the subject of much debate among the circuits.90 Ultimately, the

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84. See id. (explaining standard that DOL utilized in reviewing second claim). Because the DOL utilized the more stringent duplicate claim test, Plesh appealed again, and a second ALJ agreed with him that he should have the protection of the original presumption in his favor. See id. (noting that this ALJ agreed that Plesh’s letter constituted valid appeal). Nevertheless, this ALJ found that a second physician’s report rebutted that presumption. See id. at 107-08 (finding that interim presumption under 20 C.F.R. § 727.203(b) (3) was rebutted). The Third Circuit reversed this finding, however, because it disagreed that the report constituted substantial evidence that would rebut the presumption in favor of Plesh. See id. at 109, 114 (finding that party opposing benefits had not ruled out possible causal connection between employment and disability, as required by precedent). Therefore, Plesh’s benefits were reinstated. See id. at 114-15.

85. See id.

86. 72 F.3d 308 (3d Cir. 1995).

87. See id. at 310 (deciding that ALJ had applied wrong standard in deciding whether miner established material change in condition).

88. See id. at 311-12 (describing evidence submitted by DOL and Swarrow, including conflicting reports from agency-qualified “B-readers” of chest x-rays). The new evidence that was not admitted included testimony from two physicians who concluded that Swarrow was now totally disabled from pneumoconiosis. See id. at 311 n.4 (noting that this evidence demonstrated that Swarrow was totally disabled).

89. See id. at 312 (noting that Board later affirmed ALJ’s grant of benefits to claimant). Although the court decided that the “material change in conditions” standard was correct, the ALJ’s application of the standard was problematic. See id. at 316-18 (noting that error was in application, not choice of test).

90. See id. (analyzing debate among circuits over interpretation of correct standard in duplicate claims situations). In interpreting the relevant provision, one Board decided on a “reasonable possibility that it would change the prior administrative result.” Spese v. Peabody Coal Co., BRB No. 86-3316 BLA, 1988 WL 232660, at *2 (Dep’t Lab. Benefits Rev. Bd. Sept. 30, 1988); see 20 C.F.R. § 725.309(c) (1998) (discussing merger, automatic denial and modification possibilities for duplicate claims depending on when original claim was entered). The Seventh Circuit decided that the standard means that either the miner did not have the disease upon first application, but subsequently developed it, or that the
claim was remanded so that the ALJ could consider it under the correct interpretation of the standard.91

In a final example of the often lengthy benefits adjudication process, the Third Circuit reversed the Board’s denial of benefits to a retired coal miner in Kowalchick v. Director, Office of Workers’ Compensation Programs.92 In Kowalchick, the Third Circuit addressed which standard of review the Board should have used in reviewing the ALJ’s decision.93 Here, the court noted that it independently reviewed the record to decide if the ALJ’s finding was supported by substantial evidence.94 According to the court, the exact definition of substantial evidence is “‘more than a mere scintilla’”—it meant that there is relevant evidence that a “‘reasonable mind might accept as adequate to support a conclusion.’”95

disease has progressed to disable the miner totally. See Labelle, 72 F.3d at 317 (noting that Seventh Circuit rejected Spese standard and suggested different standard) (citing Sahara Coal Co. v. Director, Office of Workers’ Compensation Programs, 946 F.2d 554, 556 (7th Cir. 1991)). The Seventh Circuit standard states that:

A material change in conditions means either that the miner did not have black lung disease at the time of first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application.

Sahara Coal, 946 F.2d at 556. The Fourth Circuit also adopted the Sahara Coal formulation. See Lisa Lee Mines v. Director, Office of Workers’ Compensation Programs, 57 F.3d 402, 407 (4th Cir. 1995) (adopting Sahara standard), reh’g en banc, 86 F.3d 1358 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997). In contrast, the Sixth Circuit and the Third Circuit have adopted the DOL’s formulation, which is that a miner must show that he or she can disprove an element that previously denied him or her entitlement. See Labelle, 72 F.3d at 317 (adopting DOL formulation) (citing Sharondale v. Ross, 42 F.3d 993, 997-98 (6th Cir. 1994)).

91. See Labelle, 72 F.3d at 318 (remanding case to ALJ for determination of whether benefits should be awarded). The main value that can be derived from this case, however, is the test for “material change” in this context. See id. at 317 (discussing material change issue in some detail).

92. 893 F.2d 615, 616, 624 (3d Cir. 1990). The court reversed the denial of benefits to the retired coal miner because interim presumptions were not rebutted, and the court also noted that it will construe the Act liberally. See id. at 624.

93. See id. at 619-20 (noting that “Board is bound by an ALJ’s findings of fact if they are supported by substantial evidence”). The ALJ had found that the interim presumptions were rebutted and that, in fact, he was not even sure that the claimant was entitled to the presumptions. See id. at 619.

94. See id. (establishing that Board should defer to factual findings of ALJ if supported by substantial evidence); see also Kertesz v. Crescent Hills Coal Co., 788 F.2d 158, 162 (3d Cir. 1986) (“The findings of fact made by the ALJ are conclusive upon the [Board] if they are supported by substantial evidence.”); Old Ben Coal Co. v. Prewitt, 755 F.2d 588, 589-90 (7th Cir. 1985) (announcing court’s role as limited to deciding if Board made error in scope of review).

95. Kowalchick, 893 F.2d at 620 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).
The court noted that despite its limited role in review, it would construe the black lung entitlement program liberally.96 Although the DOL argued that the court should remand the case to the ALJ, the claimant argued that the medical evidence in the record established that he should receive benefits.97 Ultimately, the Kowalchick court relied on the “true doubt” rule, which states that contradictory but equally probative evidence shall be construed in favor of the claimant.98 Therefore, benefits were awarded without remanding to the ALJ.99

D. United States Supreme Court Decisions

Familiarity with the Supreme Court jurisprudence on this topic, including the issues addressed and its holdings, is beneficial to an analysis of Third Circuit case law. Accordingly, significant Court decisions on this issue are set forth below.100 In Mullins Coal Co. v. Director, Office of Workers’ Compensation Programs,101 the Court confronted the most complex component of the claims and appeals process: claims are subject to different regulations depending on which set of regulations was in effect when the claim was initially brought.102 In this case, the Court agreed with the DOL’s reading of one regulation, deciding that the “preponderance of the evidence test” was correct for determining whether the claimant should be granted an interim presumption in his or her favor.103 In contrast, the Court characterized the United States Court of Appeals for the Fourth Circuit’s less exacting test in granting a presumption in the claimant’s

96. See id. (noting that court was mindful of how to construe act); see also Bozwich v. Mathews, 558 F.2d 475, 479 (8th Cir. 1977) (stating that legislative history of program suggested liberal analysis in favor of claimants).

97. See Kowalchick, 893 F.2d at 620-21 (analyzing evidence on both sides and deciding that evidence is about equal).

98. See id. at 621-22 (relying in part on true doubt rule). This rule was later cast aside by the United States Supreme Court in Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 280-81 (1994). For a further discussion of the true doubt rule, see infra notes 136-38 and accompanying text.

99. See Kowalchick, 893 F.2d at 624 (invoking “result is foreordained” test that allows court to award benefits immediately, without remand). Here, the court decided that the record only supported one conclusion—an award of benefits to the claimant. See id. (noting that no purpose would be served by remand).

100. For a further discussion of the Supreme Court cases, see infra notes 101-17 and accompanying text.


102. See id. at 138 (illustrating that “[b]ecause [the Act] has been developed through several statutory enactments, different rules govern claims filed during different periods of time”) (footnote omitted). Here, the interim regulations for claims filed prior to 1980 are invoked and discussed. See id. at 139.

103. See id. at 152, 159-60 (agreeing with Secretary of Labor’s view that claimant must prove by preponderance of evidence that at least one of four medical conditions exists to trigger presumption).
favor as "compelled by neither the text nor the history of the regulation."\textsuperscript{104}

In \textit{Pittston Coal Group v. Sebben},\textsuperscript{105} the Court analyzed the differences between regulations promulgated by the Department of Health, Education & Welfare ("HEW") and those formulated by the DOL.\textsuperscript{106} The Court decided that DOL regulations made the criteria required to prove causation more restrictive than those of the HEW and, therefore, the DOL regulations violated the 1977 version of the Act.\textsuperscript{107}

In \textit{Pauley v. Bethenergy Mines, Inc.},\textsuperscript{108} the Court addressed the question, which it had alluded to but left unanswered in \textit{Pittston}, of whether the DOL rebuttal provisions were valid.\textsuperscript{109} A majority of the Court, in finding that the DOL regulations were no more restrictive than the original HEW provisions, allowed the DOL to rebut the presumption of entitlement to benefits if the evidence showed the miner did not have pneumoconiosis or that the pneumoconiosis was not caused by coal mine employment.\textsuperscript{110}

Turning to the issue of attorney fees in black lung cases, the Court upheld the DOL's fee limitation program as not being violative of due process in \textit{United States Department of Labor v. Triplett}.\textsuperscript{111}

\textsuperscript{104} \textit{Id.} at 156-57. The Fourth Circuit test was viewed as failing to conform to both the text of the regulation and the legislative history surrounding it. \textit{See id.} at 157 ("[T]hat conclusion is compelled by neither the text nor the history of the regulation.").

\textsuperscript{105} 488 U.S. 105 (1988).

\textsuperscript{106} \textit{See id.} at 105-06, 119 (holding that interim regulation by DOL violated part of 1977 Act). The "DOL interim regulations were found more restrictive than HEW regulations to the extent that the DOL invocation provision did not permit invocation of the presumption without ten years of coal mining experience." Cogan, supra note 6, at 1007.

\textsuperscript{107} \textit{See Pittston Coal Group}, 488 U.S. at 106 (holding that interim DOL regulation was more restrictive than HEW regulations in that DOL regulations only allowed invocation of presumption with 10 years of employment in coal mines). The HEW regulations had also provided that a presumption could be invoked if proof existed that the coal mine caused the pneumoconiosis. \textit{See id.} Therefore, the DOL regulations were only more restrictive as applied to miners with less than 10 years experience. \textit{See Mattingly & Hall, supra} note 26, at 789-90 (stating that 10-year requirement further restricted presumption for short-term workers).


\textsuperscript{109} \textit{See id.}, at 689-90 (presenting question of whether DOL rebuttal provisions are "more restrictive" than HEW counterparts); Mattingly & Hall, supra note 26, at 790 (noting that failure to address question of whether DOL's rebuttal provisions were more restrictive than HEW's regulations invited controversy among circuits).

\textsuperscript{110} \textit{See Pauley}, 501 U.S. at 706 (affirming Third Circuit's judgment that DOL has not acted inconsistently with 30 U.S.C. § 902(f)(2) (1986 & Supp. 1998)). Although this case resolved the question of disability causation in pre-1981 cases, it left open the causation question for claims filed after March 31, 1980. \textit{See Mattingly & Hall, supra} note 26, at 797 ("A conflict presently exists among the circuits concerning the standard of disability causation to employ in evaluating claims filed after 31 March 1980.").

\textsuperscript{111} 494 U.S. 715, 726 (1990). The disciplined attorney in this case tried to make the claim that the fee scheme resulted in an unavailability of attorneys, but
In the most recent major case, Director, Office of Workers' Compensation Programs v. Greenwich Collieries, the Court used the black lung context to strike down the true doubt rule and resolve a conflict among the circuits over the validity of the rule. Normally, this issue arises when the claimant and the party opposing entitlement produce evidence that is equal on both sides. In this situation, ALJs have traditionally shifted the burden of proof to the party opposing entitlement. The Court put an end to this practice by invalidating the rule due to a conflict with the Administrative Procedure Act and thereby made it more difficult for a claimant to prevail in this situation.

III. Analysis of Third Circuit Approach to Claims for Entitlement to Benefits Under the Black Lung Acts

In approaching the Third Circuit to appeal a denial of benefits to a miner or a grant of benefits that the former employer believes was made in error, it is essential for the practitioner to have an idea of how the court may rule on the issue. While the court has been sympathetic to the interests of potentially diseased miners, as a general proposition, it has not neglected its duty to follow the law.

the Court rejected that argument. See id. (stating that evidence did not establish that black lung claimants could not retain qualified counsel). The attorney in this case was disciplined for entering into an unapproved, contingent-fee arrangement with the claimant. See id. at 718 (describing sanctions imposed by Committee on Legal Ethics of West Virginia State Bar).


13. See id. at 280-81 (deciding that true doubt rule "runs afoul" of Administrative Procedures Act [APA] and holding that rule violates § 7(c) of APA).


15. See Greenwich Collieries, 512 U.S. at 272 (noting that when rule is invoked, party opposing payment of benefits is charged with burden of persuasion). According to the APA, this would violate the tenet that the burden of persuasion should always be on the one seeking benefits. See id. (discussing interplay between § 7(c) of APA and true doubt rule).


17. See Greenwich Collieries, 512 U.S. at 280-81 (invalidating true doubt rule). For a further discussion of the rationale behind this decision, see supra notes 112-16 and accompanying text.

18. See, e.g., Greg Geisman, Comment, Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities, 38 S.D. L. Rev. 568, 601 (1993) (noting that case law can provide hints to practitioner on how to litigate future cases); Kristen Hay O'Neal & Andrew Weber, Comment, Procedural Problems Under the Texas Administrative Procedure Act When Seeking Judicial Review of Contested Case Decisions or Orders, 48 Baylor L. Rev. 883, 895 (1996) (stating that “[t]he practitioner must carefully examine all of the relevant case law . . . noting the subtle differences in both the facts of each case and the analysis of each court”).

19. See Lango v. Director, Office of Workers’ Compensation Programs, 104 F.3d 573, 574, 576-78 (3d Cir. 1997) (deciding that despite DOL's unseemly han-
By examining Third Circuit law in contrast to the other circuits, this section will provide an overview of the court’s approach to several different issues in the appeals process.120 This section will analyze Third Circuit case law in terms of how other circuits and the Supreme Court have ruled on the same issue.121 Importantly, this analysis will demonstrate what role public policy and a common sense idea of justice play in Third Circuit jurisprudence.122

As a preliminary matter, it is evident from the case law that the Third Circuit has struggled to achieve a balance between recognizing the parade of horribles that claimants bring before them and remaining faithful to the language and purpose of the statute and regulations governing the black lung claims and appeals process.123

In Mancia, the court confronted the difficult task of interpreting a death certificate that conflicted with the testimony of the miner’s treating physician who had signed the certificate.124 Although the court recognized that the ALJ had the power to reject a medical opinion “that does not adequately explain the basis for its conclusion,” the Third Circuit decided that the ALJ went too far in categorizing the treating physician’s opinion as a mere assumption and thus allowing the death certificate to

dating of case, claimant did not present enough evidence to allow court to reverse denial of benefits in this instance). Even in upholding the denial of benefits, however, the court suggested an alternate course that the claimant might take to reapply for benefits. See id. at 578 (suggesting that modification request may be successful if claimant can procure another opinion from treating physician that meets requirements of statutory scheme).

120. For a further discussion and examples of the Third Circuit’s reasoning in this complex area, see supra notes 38-99 and accompanying text.

121. For a further discussion of the Third Circuit’s analysis as applied by other circuits and the Supreme Court, see infra notes 122-51 and accompanying text.

122. For a further discussion of the Third Circuit’s analysis in terms of public policy and equitable concerns, see infra notes 123-51 and accompanying text.

123. Compare Mancia v. Director, Office of Workers’ Compensation Programs, 130 F.3d 579, 593-94 (3d Cir. 1997) (using length of appeal process as factor in awarding immediate benefits without remand, but not without deciding on basis for award according to precedent and statutory language), and Keating v. Director, Office of Workers’ Compensation Programs, 71 F.3d 1118, 1120 (3d Cir. 1995) (describing “shamefully long” 17-year lapse in appeal process, but basing decision to award benefits on ALJ’s error in not admitting evidence), with Lango, 104 F.3d at 576-78 (upholding denial of benefits where claimant offered no testimony other than death certificate, even where court had extensively discussed in dicta sad state of appeals process).

124. See Mancia, 130 F.3d at 581-82 (describing treating physician’s opinion that he had not ascribed cause of death to myocardial infarction in death certificate). In fact, the death certificate did list myocardial infarction as the cause of death, but the court chose to believe the treating physician’s testimony that he used that designation as a matter of convenience. See id. at 582 (describing treating physician’s opinion that decedent’s “heart stopped on the basis of his underlying lung deterioration”).
trump it. This lack of clarity in death certificates provided a problem for the Third Circuit in the past. Here, the Mancia court correctly decided that the probative value of the physician’s testimony and his credibility as a witness outweighed the value given to his judgment by the ALJ.

At times, lay testimony can be important, especially in the case of a survivor who is making a claim for benefits when the correct tests were not necessarily performed during the deceased miner’s lifetime. In spite of a change in the regulations that would seem to have changed the criterion from considering “all relevant evidence” to a less broad standard, the court admitted lay testimony in Mancia. At least one other circuit dis-

125. Id. at 588 (quoting Risher v. Director, Office of Workers’ Compensation Programs, 940 F.2d 327, 331 (8th Cir. 1991) and citing Brazzalle v. Director, Office of Workers’ Compensation Programs, 803 F.2d 934, 936 (8th Cir. 1986)). The court also cited the Eighth Circuit in concluding that medical opinions do not need to be “expressed in terms of reasonable degree of medical certainty.” See id. at 589 n.11 (concluding that reasonable medical judgment is sufficient) (citing Drummond Coal Co. v. Freeman, 733 F.2d 1523, 1526 (8th Cir. 1984)); see also Peabody Coal Co. v. Helms, 859 F.2d 486, 489 (7th Cir. 1988) (same). For a further discussion of medical judgments, see supra note 50 and accompanying text.

126. See, e.g., Hillibush v. Benefits Review Bd., 853 F.2d 197, 204 (3d Cir. 1988) (holding that death certificate does not invalidate presumption in favor of claimant in absence of autopsy); Smakula v. Weinberger, 572 F.2d 127, 132 (3d Cir. 1978) (noting all too common practice of filling out death certificates with general designation of cardiopulmonary arrest or “coronary occlusion”); see also Lango, 104 F.3d at 576-78 (stating that death certificate listed pneumoconiosis as cause of death, but did not offer evidence of physician’s reasoning).

127. See Mancia, 130 F.3d at 588-89 (concluding that medical “assumptions” based on medical history constitute “objective medical means” that ALJ mistakenly claimed were not present); Tennessee Consol. Coal Co. v. Crisp, 866 F.2d 179, 185 (6th Cir. 1989) (finding that ALJ must accept physician’s reasoned medical judgments, even if not meeting some arbitrary standard of certainty).

128. See Mancia, 130 F.3d at 588 (noting that relevant lay testimony should be considered, especially in face of conflicting medical opinions); Hillibush, 853 F.2d at 203 (same).

129. See Mancia, 130 F.3d at 588 (noting that in spite of change in regulation, court will not allow ALJ to “ignore uncontradicted relevant lay testimony where it corroborates the medical testimony of a treating physician and is consistent with the medical records”); see also 20 C.F.R. § 718.205(c) (1998) (enacting stricter post-1981 regulations). The regulations state:

For the purpose of adjudicating survivors’ claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

1. Where competent medical evidence established that the miner’s death was due to pneumoconiosis, or
2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death or where the death was caused by complications of pneumoconiosis, or
3. Where the presumption set forth at § 718.304 is applicable.
4. However, survivors are not eligible for benefits where the miner’s death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

Id.
agreed with this reasoning, finding that the ALJ did not err in failing to consider lay testimony in a claim that arose after the change in regulations.\textsuperscript{130} The Third Circuit's somewhat more liberal interpretation of the change in regulations seems at odds with the post-1980 regulations' emphasis on more discrete tests for pneumoconiosis and causation.\textsuperscript{131}

In the case of a duplicate claim, a miner can only receive benefits if there has been a material change in condition.\textsuperscript{132} Exemplifying the confusion among the various circuits over this regulation, the Third Circuit in \textit{Labelle} decided that in reviewing duplicate claims, an ALJ should construe the test of "a material change in condition" as meaning that miners could now disprove an element that had previously denied them entitlement.\textsuperscript{133} Other circuits, specifically the United States Court of Appeals for the Seventh Circuit, have construed "a material change" as meaning that either the miner did not have the disease at the time of the first claim, but now has contracted it and become totally disabled by it, or the miner had the disease at the time of the first claim, but it has now progressed to disable the miner totally.\textsuperscript{134} Although neither test is "better" on its face, the Seventh Circuit test seems to blur the lines between the standards for a modification and those of a duplicate claim.\textsuperscript{135}

Relying partly on the true doubt rule in \textit{Kowalchick}, the Third Circuit decided that "equally probative but contradictory evidence in the record is

\textsuperscript{130} See \textit{Risher}, 940 F.2d at 330 (deciding that post-1980 claims are governed by regulation that does not mandate consideration of lay testimony).

\textsuperscript{131} See \textit{Nase}, supra note 5, at 312-13 (stating that 1981 amendments to Act "attempted to reduce outlays by tightening eligibility and even eliminating entitlement in certain cases").

\textsuperscript{132} See \textit{Labelle Processing Co. v. Swarow}, 72 F.3d 308, 316 (3d Cir. 1995) (stating that if first claim is denied and duplicate claim is filed, material change in condition must have taken place) (citing 20 C.F.R. § 725.309(d) (1995); 20 C.F.R. § 725.309(d) (1998)).

\textsuperscript{133} See id. at 317 (agreeing with standard suggested by DOL that miners could now disprove element that had previously denied them entitlement); see also \textit{Sharondale v. Ross}, 42 F.3d 993, 997-98 (6th Cir. 1994) (same).

\textsuperscript{134} See \textit{Sahara Coal Co. v. Director, Office of Workers' Compensation Programs}, 946 F.2d 554, 556 (7th Cir. 1991) (construing material change as whether disease had occurred after initial claim was denied or whether it had progressed to stage of complex pneumoconiosis by time of duplicate claim); see also \textit{Lisa Lee Mines v. Director, Office of Workers' Compensation Programs}, 57 F.3d 402, 407 (4th Cir. 1995) (adopting similar test), reh'g en banc, 86 F.3d 1358 (4th Cir. 1996), cert. denied, 519 U.S. 1090 (1997).

\textsuperscript{135} See \textit{Labelle}, 72 F.3d at 317 (noting confusion that results from applying Sahara standard and instead adopting recommendation of DOL). Nevertheless, the Third Circuit cited the Sixth Circuit in noting that the Seventh Circuit standard in Sahara was reasonable. See \textit{id.} (noting that Sixth Circuit adopted Seventh Circuit material change standard in \textit{Sharondale}, 42 F.3d at 997); see also \textit{Keating v. Director, Office of Workers' Compensation Programs}, 71 F.3d 1118, 1121-23 (3d Cir. 1995) (noting that new evidence affecting presumptions that should have been available to miner at time of first claim should have been analyzed by second ALJ in modification hearing).
to be resolved in the favor of the claimant. In applying the rule to a
different provision of the Act, however, the Third Circuit subsequently
abandoned the rule as applied to black lung cases in Greenwich Collieries.
Although courts and commentators have criticized the effect of the
Supreme Court’s affirmation of Greenwich Collieries, at least one author has
supported the Court’s legal reasoning while suggesting that Congress codify the rule.

Several commentators have noted the difficulty attached to interpreting
the rebuttal provisions that accompany the interim presumptions of the 1972 and 1977 Acts. Even when it has appeared as though the analysis is well understood, some circuits have deviated from the accepted line of reasoning. For example, while most circuits have held that the

136. Kowalchick v. Director, Office of Workers’ Compensation Programs, 893 F.2d 615, 621 (3d Cir. 1990) (disagreeing with DOL’s argument that evidence was not “equal” because court looked to most recent x-ray as per Supreme Court direction). Because the evidence on both sides was deemed “equal,” the court employed the true doubt rule and awarded the claimant benefits. See id. (stating that evidence allowed miner to invoke presumption of disability).

137. See Director, Office of Workers’ Compensation Programs v. Greenwich Collieries, 990 F.2d 730, 734 (3d Cir. 1993) (noting that rule conflicted with regulation placing burden of proving by preponderance of evidence on party making allegation), aff’d, 512 U.S. 267 (1994); 20 C.F.R. § 718.403 (1998) (“Except as provided in this subchapter, the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegation.”).

138. See Greenwich Collieries, 512 U.S. at 281 (holding that true doubt rule, which allows claimant to win when evidence is evenly balanced, violated § 7(c) of APA). The Supreme Court, in affirming a denial of benefits, agreed that the rule was invalid, but on more general grounds. See id. (choosing not to address true doubt rule’s conflict with 20 C.F.R. § 718.403); see also Allan W. Brown, Comment, Director, OWCP v. Greenwich Collieries: The End of the True Doubt Rule, 97 W. Va. L. Rev. 1053, 1078 (1995) (“[T]he fate of the true doubt rule now rests with Congress, which has the power to codify the true doubt rule and overrule Greenwich.”).

In an article written before the Supreme Court decision was handed down, one commentator was interested in discovering how the Court would weigh the apparently clear burden of proof on the claimant against the “humanitarian” aspects of the act. See Mattingly, supra note 114, at 821 (summarizing split among circuits). He also cited the split among the circuits, with the Sixth and Seventh Circuits coming out differently than the Third Circuit. See id. (discussing disparity among circuits prior to Greenwich Collieries decision) (citing Skukan v. Consolidated Coal Co., 993 F.2d 1228, 1236 (6th Cir. 1993), vacated, 512 U.S. 1231 (1994); Freeman United Coal Mining Co. v. Director, Office of Workers’ Compensation Programs, 988 F.2d 706, 709-11 (7th Cir. 1993), vacated sub nom. Freeman United Coal Mining Co. v. Jones, 512 U.S. 1231 (1994)).

139. See Mattingly, supra note 114, at 833 (stating that most recent confusion stemmed from what was previously thought to be clear language of 20 C.F.R. § 727.203(b)(3) (1994)); Nae, supra note 5, at 280 (noting that adoption of changes over years was result of Congress learning from experience); see also 20 C.F.R. § 727.203(b)(3) (stating that rebuttal of presumption is possible when “establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment”).

140. See Cort v. Director, Office of Workers’ Compensation Programs, 996 F.2d 1549, 1551-53 (3d Cir. 1993) (deciding that 20 C.F.R. § 727.203(b)(3) only dealt with whether disability resulted in whole or in part from employment, not
miner must have a pulmonary impairment to rebut one particular section of the interim presumptions, the Third Circuit has held otherwise.\textsuperscript{141}

In \textit{Pauley}, another Third Circuit case invoking the rebuttal criteria that was eventually resolved by the Supreme Court, the Court settled a conflict among several circuits regarding the type of proof that could be used to rebut a presumption of disability.\textsuperscript{142} This conflict arose because, according to the 1977 version of the Act, the DOL interim regulations could not be more restrictive than the HEW regulations governing pre-1973 claims.\textsuperscript{143} In agreeing with the Third Circuit, the Supreme Court held that the rebuttal criteria in the DOL regulations were no more restrictive than the HEW regulations.\textsuperscript{144}

whether miner had pulmonary or respiratory disability); Mattingly, supra note 114, at 834-37 (noting that Third Circuit decision is illogical in allowing "applicants with no pulmonary or respiratory disability to be shielded from rebuttal evidence proving there is neither impairment nor disability arising out of coal mine employment").

141. See Mattingly, supra note 114, at 833-34 n.83, 835 (noting that while several circuits allow opposing party to rebut 20 C.F.R. § 727.203(b)(3) presumption if there is no pulmonary impairment, Third Circuit recently denied opportunity to rebut even where there was no impairment); see, e.g., Rosebud Coal Sales Co. v. Weigand, 881 F.2d 926, 928 (10th Cir. 1987) (requiring presence of disability and ruling out any relationship requirement between disability and coal mine employment to rebut presumption); Palmer Coking Coal Co. v. Director, Office of Workers’ Compensation Programs, 720 F.2d 1054, 1058 (9th Cir. 1983) (noting that disability must be present). \textit{But see }\textit{Cort}, 996 F.2d at 1551-53 (deciding that 20 C.F.R. § 727.203(b)(3) only dealt with whether disability resulted in whole or in part from employment, not whether miner had pulmonary or respiratory disability).


143. See Mattingly & Hall, supra note 26, at 788 n.6 (stating that Reform Act of 1977 provided that DOL regulations be no more restrictive than HEW regulations).

144. See Pauley, 501 U.S. at 706 (holding that Secretary of Labor did not act unreasonably in permitting "the presumption of entitlement to black lung benefits to be rebutted with evidence demonstrating that the miner does not, or did not, have pneumoconiosis or that the miner’s disability does not, or did not, arise out of coal mine employment"). One commentator noted that this case was decided correctly because in spite of the fact that the dissent characterized the DOL regulations as less favorable to the claimant, Congress never intended the regulations to be unrebuttable. See Mattingly & Hall, supra note 26, at 796 (listing ways regulations can be rebutted) (citing \textit{Pauley}, 501 U.S. at 709-11 (Scalia, J., dissenting)). In the end, the claimant is still entitled to a strong presumption that will be difficult for an opposing party to rebut. \textit{See id.} at 796-97 (noting that analysis applies only to claims filed before March 31, 1980); \textit{see also} Cogan, supra note 6, at 1010 (illus-
Although this conflict has been resolved for claims filed before March 1, 1980, claims filed after that time are still subject to conflicting views on the standard of disability causation.145 This controversy, which revolves around whether the court will require proof that either pneumoconiosis was a substantial contributor to the miner’s death or disability or simply that a disabling impairment was caused in part by pneumoconiosis, should be resolved by the Supreme Court or Congress.146 It should be noted that the Third Circuit has adopted the more exacting test.147

One final aspect that is evident across the circuits is the air of frustration regarding black lung cases affecting some of the judges serving on the United States court of appeals level. One example of this frustration, evidenced by the Third Circuit in Plesh and in other circuits, is the courts’ problem with agencies that ignore difficult situations, hoping that they will go away.148 The Mancia and Keating courts also criticized the DOL, noting the

trating role that other factors, such as physician’s philosophy conflicting with purpose of rebuttal rules, may play in denying claimant’s benefits.

145. See Mattingly & Hall, supra note 26, at 797 (stating that main conflict is over what death or disability “due to pneumoconiosis” means); see also 20 C.F.R. § 718 (1994) (defining standard); Grant v. Director, Office of Workers’ Compensation Programs, 857 F.2d 1102, 1105-07 (6th Cir. 1988) (validating judgment that miner’s breathing problems were not due to pneumoconiosis); Director, Office of Workers’ Compensation Programs v. Mangifest, 826 F.2d 1318, 1321-24, 1332-34 (3d Cir. 1987) (deciding standard of disability causation).

146. See Mattingly & Hall, supra note 26, at 798-99 (describing two main interpretations of “due to pneumoconiosis” provision and noting that Third and Eleventh Circuits will not award benefits when evidence shows that pneumoconiosis played small role in disability); see also Lollar v. Alabama By-Products Corp., 893 F.2d 1258, 1267 (11th Cir. 1990) (adopting and finding substantial evidence); Bonessa v. United States Steel Corp., 884 F.2d 726, 734 (3d Cir. 1989) (“[A] miner must show that pneumoconiosis is a substantial contributor to the disability.”). But see Peabody Coal Co. v. Smith, 127 F.3d 504, 506-07 (6th Cir. 1997) (rejecting substantial evidence test in Bonessa); Robinson v. Pickands Mather & Co., 914 F.2d 35, 38 (4th Cir. 1990) (finding that miner must prove by preponderance of evidence that his pneumoconiosis was at least “contributing cause” of his totally disabling respiratory impairment); Shelton v. Director, Office of Workers’ Compensation Programs, 899 F.2d 690, 693 (7th Cir. 1990) (same); Mangus v. Director, Office of Workers’ Compensation Programs, 882 F.2d 1527, 1531-32 (10th Cir. 1989) (same).

147. For a further discussion of the test adopted by the Third Circuit for post-1980 claims, see supra note 137 and accompanying text.

148. See Plesh v. Director, Office of Workers’ Compensation Programs, 71 F.3d 103, 110 (3d Cir. 1995) (finding that handwritten note on letter sent back to DOL constituted appeal of order of termination of benefits). In this case, the DOL terminated a miner’s benefits and then ignored a note on a letter that was returned to them. See id. at 106. When a final order was issued terminating his benefits, Mr. Plesh, the miner in that case, then submitted a new appeal that was treated as a duplicate claim instead of a modification. See id. at 107. The court, noting that it is more difficult for a claimant to prevail on a duplicate claim, decided that it constituted a modification. See id. at 112 (holding Plesh’s handwritten appeal valid).

In an Eleventh Circuit case with similar facts, the widow of a deceased miner wrote a letter to the Board informing them that she wished to appeal a denial of benefits to the court of appeals. See Cooley v. Director, Office of Workers’ Com-
the protracted appeals process that had brought the widow of the diseased miner before them. Several commentators have also pointed out the faults of the DOL appeals system, criticizing the courts, Congress and the DOL regulations. It is evident from the ranking on both sides of the issue that the Act and its associated regulations have failed.

IV. CONCLUSION AND PRACTITIONER RECOMMENDATIONS

Although the DOL has attempted to continue improving the Black Lung Benefits Program through various changes in regulations and requests for public comment, there is seemingly little hope for the resolution of all of the outstanding issues. Despite this fact, as well as the fee limitations set by the DOL, it is important that attorneys in the Third Circuit respond to the needs of claimants. As is apparent from this brief

pensation Programs, 895 F.2d 1301, 1302 (11th Cir. 1990). Although the court was forced to deny her filed petition because it was untimely, the court criticized the Board for not calling the widow and advising her on how to proceed. See id. at 1303 n.2 ("[W]e can only hope that administrative agencies will act with greater interest and vigilance in protecting a petitioner's right to appeal . . . ."). In addition, the court lamented the fact that it could not, at least at that time, consider equitable considerations in deciding jurisdictional questions. See id. at 1303 (expressing view that something had gone wrong with system in this case).

149. See Mancia v. Director, Office of Workers' Compensation Programs, 130 F.3d 579, 593-94 (3d Cir. 1997) (describing widow's advanced age after protracted appeals process as one rationale for expediting award of benefits to survivor); Keating v. Director, Office of Workers' Compensation Programs, 71 F.3d 1118, 1120 (3d Cir. 1995) (criticizing Board's contention that 17-year lapse between claims demonstrated that widow was "shopping for a friendly factfinder").

150. See Mattingly, supra note 114, at 841 (describing exasperation of various circuits with black lung program); Robert A. Campbell, Note, United States Department of Labor v. Triplett: Black Lung Claimants Will Continue to Suffer from a Lack of Legal Representation, 93 W. Va. L. Rev. 713, 713-14 (1991) (disagreeing with Supreme Court decision in stating that black lung claimants will continue to suffer from inadequate representation as result of mandatory DOL fee structure in black lung cases). Even members of Congress, such as Austin Murphy, have criticized the program. See Field Hearing on Improving the Federal Black Lung Benefits Program, 105th Cong. 1-2 (1993) (statement of Rep. Austin Murphy) (stating that he has heard complaints that program ignores "those it was meant to protect").

151. See Black Lung Amendments, WORKERS' COMPENSATION MONTHLY, Nov. 1997, at 22 (stating that Alliance of American Insurers has come out strongly against proposed "burdensome, complicated, ambiguous, and costly" amendments to Act). But see Black Lung Program Dying, WORKERS' COMPENSATION MONTHLY, May 1997, at 22 (noting dismal four percent claim-approval rate and stating that proposed regulations altering definition of pneumoconiosis would make bad situation even worse).


153. See Earl F. Martin III, Comment, Limiting Attorney's Fees in Black Lung Benefits Cases: A Violation of Procedural Due Process?, 2 J. MIN. L. & POL'Y 375, 388-89 (1987) (arguing that present DOL attorney fee structure is so discretionary that it is unreasonable and fearing that eventually there will be no attorneys left to take cases). But see United States Dep't of Labor v. Triplett, 494 U.S. 715, 726 (1990) (holding that DOL's fee scheme does not violate claimants' due process rights).
summary of the appeals process and case law of this circuit, a claimant proceeding pro se has an almost insurmountable amount of twists and turns through which to maneuver.\textsuperscript{154}

Because of the Third Circuit’s depth of experience in this area, practitioners in the Third Circuit who accept black lung cases can be confident that they will have a fair and knowledgeable panel if they appeal a denied claim.\textsuperscript{155} The Third Circuit not only has experience in confronting the difficult legal issues, but also in dealing with the equities of these cases.\textsuperscript{156} While attorneys can be confident in the Third Circuit’s legal analysis and respect for precedent, they can also be sure that the Third Circuit will respect the purpose of the Act and consider the effect of its ruling on the claimant.

\textit{Joseph N. Frabizzio}

\textsuperscript{154} See Plesh v. Director, Office of Workers’ Compensation Programs, 71 F.3d 103, 106 (3d Cir. 1995) (illustrating difficulty claimant may have with appeals process). In Plesh, the claimant believed that he could appeal by sending in a handwritten note. See id. (discussing process that claimant went through). If not for the decision of the Third Circuit to treat the letter as an appeal, the claimant might not have started receiving benefits again. See id. at 111-12 (discussing ease with which claimant can become confused); see also Martin, supra note 153, at 388 (noting great “risk of erroneous deprivation to the claimant’s rights if counsel is removed”).

\textsuperscript{155} See, e.g., Penn Allegheny Coal Co. v. Williams, 114 F.3d 22, 25 (3d Cir. 1997) (finding that all four criteria for establishing pneumoconiosis should be considered together); Labelle Processing Co. v. Swarrow, 72 F.3d 308, 317 (3d Cir. 1995) (adopting test for “material change in condition” standard); Greenwich Collieries v. Director, Office of Workers’ Compensation Programs, 990 F.2d 730, 734 (3d Cir. 1993) (deciding to eliminate true doubt rule), aff’d, 512 U.S. 267 (1994).

\textsuperscript{156} See, e.g., Mancia v. Director, Office of Workers’ Compensation Programs, 130 F.3d 579, 593-94 (3d Cir. 1997) (awarding benefits immediately due to long appeals process and age of widow); Lango v. Director, Office of Workers’ Compensation Programs, 104 F.3d 573, 575-76, 578 (3d Cir. 1997) (criticizing DOL for delays in appeals process and suggesting alternative way to appeal claims); Keating v. Director, Office of Workers’ Compensation Programs, 71 F.3d 1118, 1120 (3d Cir. 1995) (rejecting accusation that claimant was “ALJ shopping” after 17-year delay and awarding her benefits); Plesh, 71 F.3d at 111-12 (reinstating benefits to miner even after nontraditional, handwritten appeal was ignored by Board).