Via Fax (202-693-1395) and U.S. Mail

June 26, 2015

Michael Chance
Director, Division of Coal Mine Workers' Compensation
Office of Workers' Compensation Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Suite N-3520
Washington, DC 20210

Re: U.S. Department of Labor
Office of Workers' Compensation Programs
RIN 1240-AA10

Dear Mr. Chance,

I am writing to support the Department of Labor's addition of section 725.413 as proposed in "Black Lung Benefits Act: Disclosure of Medical Information and Payment of Benefits", published in the Federal Register at 80 FR 23743-01.

I represented black lung claimants as a lawyer in private practice from 1974 until I assumed my present position as Commissioner at the Federal Mine Safety and Health Review Commission in April, 2008. (I am writing this letter as a private individual.) I had a great deal of experience in litigating against coal companies and law firms which gathered enormous amounts of medical evidence, particularly x-ray and pathology slide interpretations, and then cherry-picked which evidence to use, with the non-used evidence left in their files. Among my clients was Calvin Cline, the claimant in Cline v. Westmoreland Co., 21 Black Lung Rep. 1-69 (Ben. Rev. Bd. 1997), and Elmer Daugherty, whose claim gave rise to Lawyer Disciplinary Board v. Smoot, 716 S.E.2d 491 (W.Va. 2010). I was also deeply involved in the promulgation of OWCP's amendments to Parts 718 and 725 of 20 CFR which were published in the Federal Register, Vol. 65, pages 79920 et seq. (Dec. 20, 2000). My involvement in those amendments included submitting written comments, testifying at hearings in both Charleston, WV and Washington, DC, meeting with Division of Coal Mine Workers' Compensation Director James DeMarce and others from OWCP and the Solicitor's Office, and representing the National Black Lung Association in the ensuing litigation by operators and insurers challenging the regulations.

I support proposed section 725.413 for two primary reasons. First, the suppression of evidence about a miner's pneumoconiosis has potential adverse consequences to the miner's health. The classic illustration of this is the case of Gary Fox, noted in the preamble to the proposed rules. When he filed his first claim, Mr. Fox had complicated pneumoconiosis, as demonstrated on his lung biopsy, but Elk Run's lawyers suppressed this evidence. As a result Mr. Fox had his claim denied, causing him to return to work, incur additional coal mine dust exposure, and suffer an untimely death. Mr. Fox's death was not hastened by his pneumoconiosis as much as it was hastened by the immoral suppression of early evidence of complicated pneumoconiosis by Elk Run's lawyers.

I don't recall whether I had any cases where the suppression of evidence could be said to have directly injured a miner's health, but I certainly saw cases where the extent of a miner's disease did not become known to him until a later point in time. For example, when Calvin Cline filed his first claim for benefits, lawyers gathered, and then suppressed, interpretations of complicated pneumoconiosis from a preeminent radiologist. When I came to represent Mr. Cline, in his second claim for benefits, I was able to uncover these interpretations through discovery. Since early diagnosis is important in treating chronic disease, the disclosure of the suppressed interpretations could have been useful in treating Mr. Cline's complicated pneumoconiosis.

Second, the withholding and suppression of medical opinions and interpretations by operators, insurers and their lawyers puts claimants at a deep disadvantage in the litigation of black lung claims. There are several patterns which this withholding and suppression of medical evidence takes. In my experience, the most common pattern was that lawyers representing coal operators would secure a miner's chest x-rays (using medical authorizations which claimants are required to sign) and then have them interpreted for pneumoconiosis by a battery of Board-certified B readers. Those interpretations which showed no pneumoconiosis were used directly and indirectly as evidence, while the interpretations which showed some degree of pneumoconiosis were suppressed.

The phrase "used . . . indirectly as evidence" is important. A crucial type of medical evidence in black lung cases, used both by claimants and operators, involves having an expert pulmonologist review a miner's medical records and then write a report based on his findings. Since the resolution of black lung claims usually turn on a judge's weighing of expert medical opinions, such reports are very important in that they reflect an expert's opinion based on a great deal of data. The pattern I observed time and again was that operators' lawyers would omit x-ray interpretations of pneumoconiosis from the material which they sent to their pulmonary experts for review. Obviously, this skewed the data base available to the expert, and made a report finding pneumoconiosis much less likely. I doubt that the experts themselves were aware of this practice. Indeed, I recall seeing numerous reports which began with a phrase such as "I have reviewed all of the information about miner X which you have been able to assemble." But the expert had not actually reviewed all of the information which the lawyers had been able to assemble. Rather, the expert had reviewed only the evidence which the lawyers chose to send, and that evidence was skewed in favor of the conclusions the lawyers sought.

Similar patterns occurred with pathology evidence if the miner had had a lung biopsy or was deceased and had had an autopsy. Pathology slides and other relevant information (hospital reports and – for deceased miners – autopsy reports) were assembled and sent to pathologists who were expert in occupational lung disease. The reports from such pathologists were then used directly and indirectly if they supported the operator's theory of the case, and otherwise suppressed. Thus, for example, in Gary Fox's case reports by two expert pathologists were suppressed.[1]

[1] Another pattern, illustrated by the Elmer Daugherty case, involved operator lawyers physically taking apart a medical report written by a doctor they had retained, and submitting part of it while suppressing the rest. I do not know how pervasive this practice was since I personally observed it only in Mr. Daugherty's case.

When I was representing black lung claimants, these were pervasive patterns. I began using interrogatories and requests for production in the 1990's to seek to discover withheld evidence. I would estimate that I uncovered withheld evidence in over 50% of the cases where I used such discovery.

I don't know the true extent of the medical evidence which was actually withheld. What often happened -- after the operator refused my discovery requests, I filed a motion to compel, and the administrative law judge granted the motion to compel – was that the operator agreed to pay the claim rather than disclose the evidence it had withheld. In some of those cases, I made continued attempts to obtain the withheld evidence (arguing, *inter alia*, that the claimant ought to be able to have such information to fully understand his medical condition) despite the operator's agreement to pay the claim. In most such cases, the judge denied my continued request for the claimant's withheld medical information.[2] However, in Mr. Daugherty's claim, Judge Michael P. Lesniak ordered the operator, Westmoreland Coal Company, to turn over the withheld evidence even after it agreed to pay the claim. Westmoreland's lawyers continued to disobey this order, and Mr. Daugherty was never able to discover the medical opinions and interpretations about his pneumoconiosis which had been suppressed.[3]

I would like to emphasize the importance of proposed section 725.413 in view of the representation of claimants. An unrepresented claimant has no idea that the operator opposing his claim may possess, and is not revealing the existence of, highly probative medical evidence regarding his medical condition. A represented claimant may not be much better off. When I was representing black lung claimants, very few other lawyers sought discovery of undisclosed medical information in the possession of the operator or insurer or their lawyers. The process was difficult, involving as it did discovery requests, motions to compel and additional litigation. I am not aware that claimant representatives are using discovery tools any more frequently now, and their use may become more difficult in view of recent rules promulgated by DOL's Office of Administrative Law Judges.

In Fox v. Elk Run Coal Company, Inc., 739 F.3d 131 (4th Cir. 2014), the Court held that the nondisclosure of the pathology reports did not constitute fraud on the court, as had been found by the administrative law judge. The Fourth Circuit's holding was predicated on the following principle:

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[2] In one such claim, involving a miner named Mike Renick, the operator, Consolidation Coal Company, agreed to pay the claim after the administrative law judge ordered it to give us the withheld medical evidence. Consolidation Coal continued to refuse to disclose the withheld evidence, and the judge denied my request that it be ordered to turn over the withheld evidence despite the agreement to pay benefits. Some years later, Mr. Renick died. Within a year of his death, Consolidation Coal made a request, pursuant to section 725.310, to reopen his claim and modify it to a denial of benefits based on an alleged mistake in a determination of fact – that Mr. Renick had disabling pneumoconiosis. Consolidation Coal made this request despite the fact that it continued to withhold evidence about Mr. Renick's pulmonary condition and despite the judge's order to disclose the withheld evidence prior to the agreement to pay benefits.

[3] Administrative Law Judges lack the authority to enforce their orders through coercive measures. Judge Lesniak granted my request to refer the matter to the United States District Court for the Southern District of West Virginia for possible sanctions, but the Court determined that civil contempt was moot in view of the payment of the claim. The Court did, however, refer the matter to the West Virginia Lawyer Disciplinary Board, which led to the decision suspending attorney Smoot's law license referenced above.

> Thus it falls to each party to shape and refine its case, subject of course to the risk that its adversary will discredit it. One elementary component of the adversary system is cross-examination, which the Supreme Court has recognized as the "greatest legal engine ever invented for the discovery of truth." Cross-examination helps to safeguard against the ALJ's concern that, if parties were free to withhold probative medical evidence from their experts, "an expert medical opinion could never be accepted as a reliable diagnosis." A party relying on weak evidence to sustain its case runs the risk that its experts will crumble upon cross-examination or otherwise be impeached by the opposing party. The presence of that deterrent means, however, that routine evidentiary disputes such as this cannot clear the high bar for an action for fraud on the court.

739 F. 3d at 137 (citations omitted). The principle enunciated by the Court in Fox only works if the claimant has a genuine ability to obtain evidence which is being withheld by an operator or insurer. At the present time, claimants' access to withheld information is pretty rare. The proposed section 725.413 will make it the rule, not the exception. This will greatly improve the black lung litigation process.

Finally, I would like to address the justifications used by operators, insurers and their lawyers for not turning over undisclosed medical evidence. In my experience, this was usually couched in terms of "attorney work product". The analogy was made to "non-testifying experts" in civil litigation where a party retains an expert not as a testifying witness but to consult with and advise the lawyer as to highly technical aspects of the evidence as it unfolds and is developed. It is understood that the "non-testifying expert" has been retained as an advisor from the beginning of the relationship. This is, of course, a time-honored and justified practice. Discussions between the lawyer and the "non-testifying expert" got to matters of strategy and should not be disclosed to opposing counsel. However, it has nothing to do with what goes on in black lung cases. My experience was that operators' "non-testifying experts" were designated as such only after the operators' lawyers reviewed the experts' reports and decided that they would not be helpful to the operator's case. Indeed, this fact was explicitly recognized in a colloquy between Judge Lesniak and counsel during the Daugherty case litigation. Judge Lesniak asked Westmoreland's lawyers when the decision was made to withhold the reports of the alleged "non-testifying experts", and the response was that such decisions were made after the reports were received and reviewed. Hence, the justifications involved in the attorney work product doctrine are simply not applicable in the context of black lung claim litigation.

Thank you for your consideration of these comments.

Sincerely,

Robert F. Cohen Jr.

Robert F. Cohen Jr.
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Morgantown, WV 26501