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June 29, 2015

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

Re: Office of Workers' Compensation Programs' Proposed Rule – RIN 1240-AA10
Black Lung Benefits Act: Disclosure of Medical Information & Payment of Benefits

Dear Mr. Chance:

I am writing in strong support of this proposed rule, especially section 725.413 requiring the disclosure of medical information. I offer these comments based on my experience as a black lung claimants' representative for nearly 25 years, as a lay representative from 1991 to 2005 and as a lawyer from 2005 to the present. From 1995 to 1999, I also screened and referred claimants to the black lung Legal Practice Clinic at Washington & Lee School of Law and jointly represented some claimants with the Legal Practice Clinic during that period. I also supervised legal practice students at W&L during the summer of 2002.

I. Section 725.413 Disclosure of medical information

Federal black lung claims differ from other forms of civil litigation because they are legal proceedings in the context of the Coal Mine Safety and Health Act, which has two primary purposes: (1) to protect the health and safety of miners,[1] and (2) for the victims of black lung, "to provide benefits to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease." 30 U.S.C. 901.

[1] Congress expressly declared that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. 801(a)

Allowing responsible operators to withhold medical evidence that reveals the presence and extent of a miner's black lung disease undermines both purposes of the Act. Withholding medical evidence of black lung obviously can have an adverse effect on a miner's health, particularly if the miner is still working and still being exposed to even more dust, because black lung "is recognized as a latent and progressive disease." 20 C.F.R. 718.201(c). Likewise, withholding medical evidence of the disease can result in the denial of compensation benefits to deserving victims of black lung. The Department is to be highly commended for proposing this rule.

Fox v. Elk Run Coal Co., 739 F.3d 131 (4th Cir. 2014)

As noted in the preamble to this proposed rule, the initial claim of Gary Fox, who became a client of mine during his second claim, is a tragic example of how the withholding of medical evidence can result in the denial of benefits and prolonged exposure to the harmful effects of coal mine dust, which is contrary to both purposes of the Act. Mr. Fox and I first met in January of 2007. He was only 56 years old, soft-spoken and thoughtful. He had been a West Virginia coal miner for 32 years, was severely impaired by black lung, and sincerely hoped that his case would help prevent the same thing from happening to other miners.

Four months later, Mr. Fox's pulmonologist recommended a double lung transplant, and he was still on the transplant list when he died of complicated black lung in 2009. In retrospect, it appears that Mr. Fox's fate could have been different if this proposed disclosure rule had been in effect when he first filed for federal black lung benefits in 1999.

In 1998, the West Virginia Occupational Pneumoconiosis Board advised Mr. Fox that he had only mild pulmonary impairment but his chest x-ray revealed changes consistent with "progressive massive fibrosis" or complicated black lung and urged him to follow up with his treating physician at the VA hospital to be certain that it was not cancer. In 1998, he underwent a lobectomy and the removal of a 5 cm mass from his right upper lung. The local pathologist said there was no sign of cancer and described the 5 cm mass as a *pseudotumor* with "numerous anthracotic [coal dust] deposits."

After recovering from the surgery, Mr. Fox went back to work in the mines but realized that he needed to get out of the dust and filed a claim for federal black lung benefits, which provides monthly benefits to miners with complicated black lung even if their pulmonary

impairment is not yet disabling.[2] Initially, Mr. Fox was awarded benefits based on his x-ray evidence of complicated black lung. His employer filed an appeal and then hired two expert pathologists to review the lung biopsy tissue along with other medical records. Both pathologists provided the employer with reports that supported a diagnosis of complicated black lung.

If those two expert pathology reports had been disclosed to the administrative law judge, the employer's appeal most likely would have failed, and Mr. Fox could have been awarded federal black lung benefits back in 2000 instead of 2009. Moreover, his exposure to the harmful effects of coal mine dust would have ended approximately seven years sooner, when he was still only mildly impaired. By withholding those two pathology reports, however, the employer was able to use the local pathologist's less probative finding of a pseudotumor to convince its four reviewing pulmonologists and in turn, the administrative law judge that Mr. Fox did not have black lung. Consequently, instead of getting out of the dust in 2000, Mr. Fox continued to work until 2007, and during that seven year period of ongoing exposure, his pulmonary impairment progressed from mild to severe.

Other Examples of Employers Withholding Probative Evidence

1. In *Caldwell v. Hobet Mining Inc.*, (Case No. 1994-BLA-1401), the employer submitted the "report of Dr. George L. Zaldivar" but only included Dr. Zaldivar's History & Physical and pulmonary test results. As in the claim of Elmer Daugherty, which gave rise to *Lawyer Disciplinary Board v. Smoot*, 716 S.E.2d 491 (W.Va. 2010), the employer had disassembled Dr. Zaldivar's "report" and withheld his narrative conclusion that Mr. Caldwell had "complicated pneumoconiosis." Mr. Caldwell was *pro se* at the time and had no idea that the "report" was incomplete.

2. In *Harris v. Westmoreland Coal Co.*, (Case No. 1998-BLA-0188), the employer submitted Dr. Jerome Wiot's reading of an x-ray as simple black lung with coalescence but withheld Dr. Wiot's subsequent more probative reading of a CT scan as <u>complicated</u> black lung even though Dr. Wiot had testified that a CT scan would "prove that these are or are not large opacities."

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[2] The West Virginia workers' compensation program would pay a small lump sum benefit for his 15% impairment but not monthly benefits and only limited medical coverage.

3. In *Carroll v. Westmoreland Coal Co.*, (Case No. 2007-BLA-5142), the employer submitted Dr. Harold Spitz's reading of an x-ray dated December 30, 1999, as simple black lung with coalescence and not complicated black lung but withheld Dr. Spitz's prior more probative reading of the very same x-ray as part of a series of five (5) x-rays taken as over a period of three years that Dr. Spitz had interpreted as complicated black lung.

4. In *Eller v. Elk Run Coal Co.*, (Case No. 2003-BLA-5316), the employer received an interpretation of a CT scan by Dr. Jerome Wiot that unequivocally found that the CT scan incomplete and, "Therefore, evaluation for the presence or absence of pneumoconiosis cannot be made." Despite Dr. Wiot's expert opinion that the pertinent images were missing, the employer obtained and submitted additional interpretations of the same CT scan by Dr. Paul Wheeler and Dr. William Scott who both concluded that the CT scan showed no pneumoconiosis without clearly stating that the incomplete CT scan could not rule out coal workers' pneumoconiosis.

5. In *DeShazo v. Consolidation Coal Co.*, Case No. 2003-BLA-5626, the employer tried to defeat the claim of a *pro se* widow by submitting only the negative x-ray readings by Drs. Wheeler, Scott, and Scattarige from Johns Hopkins and withholding the *positive* readings of at least simple if not complicated pneumoconiosis by Drs. Ranavaya, Gaziano, Cole, Binns, Hayes, Duncan, Wershba, and Abramowitz.

6. In *Miller v. Marfork Coal Co.*, Case No. 2012-BLA-5002, the employer tried to defeat the claim of a *pro se* miner by submitting Dr. Jerome Wiot's ILO reading of a 1994 x-ray as negative for black lung and withholding his interpretation of a 2004 x-ray as positive for both simple and complicated black lung, Category B, even though Dr. Wiot read both x-rays as part of a joint report on the same day.

It also is important to recognize that these examples do not represent the scope of the problem because the withholding of evidence goes undetected whenever:

a. The claimant is *pro se* and does not know how to pursue discovery.
b. The claimant is represented by an attorney who does not pursue discovery.

c. The claimant has an attorney who does pursue discovery, and an ALJ denies the claimant's motion to compel discovery. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-233, 1-243 (Jan. 26, 2007), and

d. The claimant has an attorney who pursues discovery; the ALJ grants a motion to compel discovery; but then, the employer accepts liability to avoid discovery.

Moreover, there has been no practical remedy, particularly when an employer can avoid disclosure by simply agreeing to accept liability for the claim.

Without the Disclosure Rule, Discovery of Medical Information will be prohibitive.

Without the proposed Black Lung Disclosure Rule set forth in Section 725.413, the discovery of undisclosed medical evidence will be governed by the "exceptional circumstances" standard set forth in the newly revised OALJ procedural rules and become virtually impossible to discover. *See* 29 C.F.R. § 18.51(d)(4).[3] Although the Preamble to the new OALJ rule states that the new "exceptional circumstances" standard is only intended to be "somewhat narrower" than the previous "substantial need" standard, I believe that the revised wording is actually *much* narrower because it requires a showing of "*exceptional circumstances* under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." 29 C.F.R. 18.51(d) (77 Fed. Reg. 72183) (emphasis added). The underlined portion closes the door on a critical justification for discovery in black lung litigation, i.e. that there is a *substantial need* to discover when an employer has withheld pertinent medical evidence as in *Fox* and other cases referenced above. The new rule completely overlooks the need for discovery when an employer is cherry picking the evidence and intentionally skewing the so-called "medical" opinions of its own reviewing experts in an attempt to mislead the ALJ.

The Proposed Disclosure Rule will help restore the integrity of the litigation.

There is no question that the integrity of black lung litigation has been damaged by employers who withheld highly probative evidence in order to defeat meritorious claims, and the problem has been compounded by the fact that claimants are too often *pro se* and lack the

[3] Responsible operators consistently assert that physicians who render interpretations of radiographs and pathology that do not favor the RO are "non-testifying" and "employed *only* for hearing preparation."

financial resources to present a strong case.[4] We have learned, however, from the prior cases of Mr. Fox, Mr. Daugherty, Mr. Caldwell, Mr. Harris, Mr. Carroll, Mr. Eller, Mrs. DeShazo, and Mr. Miller that implementing the proposed disclosure rule will help protect the health and safety of miners and help insure that the claims process will be fair.

II. Sub-section 725.413(a) – defining "medical information" and "medical data"

Subsection 725.413(a) would require the disclosure of "any medical data about the miner that a party develops in connection with a claim for benefits," and the preamble states that "Treatment records are not information developed in connection with a claim and thus do not fall within this definition." 80 Fed. Reg. at 23,747. The undersigned strongly agrees with the exception for treatment records and recommends that it be included in the final version of the rule itself.[5]

III. Sub-section 725.413(a)(1)

Subsection 725.413(1) would require the parties to disclose "Any examining physician's written or testimonial assessment of the miner," and the undersigned completely agrees.

III. Sub-section 725.413(a)(2)

Subsection 725.413(2) would require the parties to disclose "Any other physician's written or testimonial assessment of the miner's respiratory or pulmonary condition."

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[4] Common features of the federal black lung claims process include "adversarial proceedings between a corporation with experienced legal counsel and a miner who may or may not be represented…dominance by the coal operator in producing medical evidence; [and] the operator's suppression of evidence favorable to the miner until forced to produce it by an order of an ALJ." Brian C. Murchison, *Due Process, Black Lung, and Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1030 (2002).

"Currently, in establishing their eligibility to benefits, claimants must confront the vastly superior economic resources of their adversaries: coal mine operators and their insurance carriers. Often, these parties generate medical evidence in such volume that it overwhelms the evidence supporting entitlement that claimants can procure". William S. Mattingly, *If Due Process is a Big Tent, Why Do Some Feel Excluded from the Big Top?* 15 W. Va. L. Rev. 791, 792 (2003).

[5] Requiring disclosure of treatment records is unnecessary because both claimants and employers can obtain them with a standard medical release

The undersigned agrees but recommends clarification that this sub-section does not require the disclosure of "draft reports or disclosures" or "communications between a party's attorney and expert witnesses" currently protected under Rule 18.51(d)(2) and (3) of the Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges and Rule 26(b)(4)(B) and (C) of the Federal Rules of Civil Procedure (noting that the protection of "communications" does not include information about the expert's compensation, facts or data provided and considered by the expert, or assumptions provided and relied upon. *Id.*)

IV. Sub-section 725.413(b) – timing of disclosure

Subsection 725.413(c) would require each party to "disclose medical information… within 30 days after receipt." The undersigned agrees with the 30-day time limit and also suggests that the Department impose a 30-day time limit for examining physician to produce a report because the findings may have a bearing on the miner's health and because longer delays can limit a claimant's opportunity to obtain a timely response.

Thank you for considering my comments.

Respectfully,

John Cline

John Cline