

**GAO**

Report to the Chairman, Subcommittee  
on Health Care, Committee on Finance,  
U.S. Senate

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October 2009

# **BLACK LUNG BENEFITS PROGRAM**

## **Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims**



**GAO**

Accountability \* Integrity \* Reliability

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Highlights of [GAO-10-7](#), a report to the Chairman, Subcommittee on Health Care, Committee on Finance, U.S. Senate

## Why GAO Did This Study

The Department of Labor (DOL) Black Lung Benefits Program provides medical and income assistance to coal miners who suffer total disability or death due to lung disease caused by coal dust. To provide insight into DOL's administration of the Black Lung Benefits Program, GAO is reporting on (1) how long it takes to process and resolve black lung benefits claims; (2) at what rate and for what reasons black lung claims and appeals are denied by DOL; and (3) what barriers, if any, confront miners or their survivors in pursuing their claims. GAO collected and analyzed black lung claims and appeals data and interviewed officials at relevant federal agencies, national organizations, and selected local organizations at two sites.

## What GAO Recommends

GAO recommends that DOL implement several administrative changes, including creating a measure to improve the agency's ability to track performance and improving the DOL form used to document claimant medical evaluations. GAO also recommends that DOL evaluate the potential for proposing, to Congress, several structural changes to the program, including strategies for increasing claimant representation and improving requirements for documenting evidence. DOL agreed with most of the recommendations and will begin to evaluate potential structural changes, but disagreed that DOL should track performance through the claims and appeals process.

[View GAO-10-7 or key components.](#)  
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# BLACK LUNG BENEFITS PROGRAM

## Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims

### What GAO Found

In fiscal year 2008, DOL issued decisions on claims in less than 1 year on average at each stage of adjudication, yet according to officials and experts, the appeals and remands (claims sent back to the prior stage of review for further consideration or development) that follow decisions can keep claims in the system for years. Although DOL does not track how long all claims remain in the claims and appeals process, we examined 763 miner claims filed between 2001 and 2008 that were ultimately awarded benefits by mine companies. We found that mine companies agreed to pay benefits for about 73 percent of these claims within 3 years from the date of the initial claim, roughly 24 percent of claims in 3 to 6 years, and the remaining 4 percent in 6 to 8 years. The program also contains financial incentives for both miners and mining companies to keep claims in the appeals process. For example, some miners may extend the appeals process to maintain their payment of interim benefits. Factors that add additional time to the appeals process also include allowing time for claimants to find legal representation and waiting until there are sufficient cases in rural areas before sending a judge to hold a hearing.

In 2008, most claims (87 percent) were initially denied. Few claimants are able to prove they meet all of the program's eligibility requirements, and for certain cases, required conditions are difficult to prove. For example, some miners—those with a history of smoking—develop lung disease associated with long-term exposure to coal mine dust but which frequently cannot be detected by X-ray. Though current science does not allow a medical distinction between lung disease caused by smoking and by coal mine dust, regulations require that claimants establish that their lung disease is significantly related to or substantially aggravated by coal dust. In such cases, judges told us they rely heavily on nonclinical evidence, such as physician credentials, length of depositions, and level of sophistication of evidence presented by claimants and mine operators to determine claimant eligibility. According to some DOL administrative law judges, mining company doctors are usually better credentialed and produce lengthier and more sophisticated medical reports and evaluations.

GAO found that coal miners face a number of challenges pursuing federal black lung claims, including finding legal representation and developing sound medical evidence to support their claims. DOL officials identified miners' lack of resources, the low probability of success, and high litigation costs for their cases as factors that contribute to the difficulties miners face in finding legal representatives. Miners also encounter challenges in developing sound medical evidence. DOL administrative law judges said medical evidence prepared by DOL-approved doctors for claimants does not always provide sound or thorough evidentiary support for their claims. Further, various practices of medical testing, a key measure of black lung-related disability, may contribute to inaccurate disability test readings.

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## Abbreviations

BRB	Benefits Review Board
COPD	Chronic Obstructive Pulmonary Disorder
CWP	Coal Workers' Pneumoconiosis
DOL	Department of Labor
HRSA	Health Resources and Services Administration
NIOSH	National Institute for Occupational Safety and Health
OALJ	Office of Administrative Law Judges
OWCP	Office of Workers' Compensation Programs
RO	responsible mine operator
UMWA	United Mine Workers of America

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United States Government Accountability Office  
Washington, DC 20548

October 30, 2009

The Honorable John D. Rockefeller IV  
Chairman  
Subcommittee on Health Care  
Committee on Finance  
United States Senate

Dear Mr. Chairman:

The Black Lung Benefits Program, created in 1969 by Congress,<sup>1</sup> provides medical treatment and monthly income assistance<sup>2</sup> to miners who can prove that they are totally disabled—unable to perform usual coal mine work due to pulmonary impairment—resulting from lung disease caused by coal dust. Their surviving dependents may also apply for compensation. Serving more than 40,000 beneficiaries and paying more than \$250 million in benefits in fiscal year 2008, the Black Lung Benefits Program remains a significant source of black lung compensation for the nation’s coal miners. However, with average claim approval rates historically below 15 percent and with reports of some cases that take years to resolve, concerns have been raised about the extent to which federal black lung benefits are accessible to miners or to their survivors and dependents.

The program is administered by the Division of Coal Mine Workers’ Compensation in the Office of Workers’ Compensation Programs (OWCP) within the Department of Labor (DOL). Claims are processed by nine OWCP district offices, and appeals are adjudicated by two DOL agencies: the Office of Administrative Law Judges (OALJ) and the Benefits Review Board (BRB). Claimants and mine operators may further appeal these agency decisions to the federal appellate courts. Awards are funded from two sources: mine operators who are identified as the responsible employers of claimants and, when responsible employers cannot be identified, the Black Lung Disability Trust Fund. The Trust Fund, which is

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<sup>1</sup>Title IV of the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. No. 91-173), as amended, 30 U.S.C. § 901, *et seq.*, commonly referred to as the Black Lung Benefits Act.

<sup>2</sup>Monthly income payments can range from \$616 to \$1,232.60 and vary by the number of dependents claimed by a miner. Black lung income payment amounts may only be offset by other state workers’ compensation or other federal disability payments, which are awarded for the same disease.

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administered by OWCP, is supported through an excise tax levied on all underground coal mine operators.

To gain insight into the administration of the Black Lung Benefits Program, you asked that we determine (1) how long it takes to process and resolve black lung benefit claims; (2) at what rate and for what reasons black lung claims and appeals are denied by DOL; and (3) what barriers, if any, confront miners or their survivors in pursuing their claims.

To answer these questions, we interviewed officials from the three DOL agencies responsible for claims processing and adjudication—OWCP, OALJ, and BRB. To learn how long it takes to process and resolve black lung benefit claims, we collected and analyzed case processing data from OWCP, OALJ, and BRB. To determine the rate and reasons that OWCP denied black lung claims, we collected and analyzed data from OWCP's case management system. To determine the rate that OALJ and BRB decisions resulted in the denial of black lung claims, we reviewed OALJ and BRB appeals cases decided in fiscal year 2008 and calculated the number of denials and the total number of cases and then computed a denial rate. To determine the reasons that OALJ and BRB have denied black lung claims, we selected and analyzed random samples of OALJ and BRB cases denied in fiscal year 2008 and projected the results onto the population. We assessed OWCP, OALJ, and BRB processing and denial data for reliability. On the basis of this assessment, we concluded that the data were sufficiently reliable for the purposes of our report. To describe the barriers that miners and survivors face, we interviewed Health Resources and Services Administration (HRSA) officials to get more information about the Black Lung Clinics program, a program that provides grants to public and private nonprofit organizations to provide specialized diagnosis, treatment, benefit counseling, and outreach services to miners suffering with black lung disease. We also interviewed officials from the National Institute for Occupational Safety and Health (NIOSH) to learn about the state of science related to identifying black lung disease and its cause. We also conducted site visits to West Virginia and Kentucky, black lung-affected regions. These two sites were selected because they are (1) located in a state with a high level of black lung mortality, (2) located in an OWCP district with a high volume of black lung claims filings, and (3) identified by black lung experts as demonstrative of factors that impede or facilitate claimants' pursuit of federal black lung claims and appeals. During the site visits, we conducted a small group interview with local black lung stakeholders at each site, toured black lung clinic facilities, and met with officials from OWCP district offices responsible for adjudicating a claimant's initial claim. In addition to our site visits, we also

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interviewed spokespeople at national organizations related to black lung, including the National Mining Association, an organization that represents the mining industry, as well as the United Mine Workers of America (UMWA), a union that represents coal miners. In addition, we reviewed relevant federal statutes, regulations, administrative cases, and court cases. We conducted this performance audit from October 2008 to October 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. For additional information on our scope and methodology, see appendix I.

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## Background

According to NIOSH, coal workers' pneumoconiosis (CWP), also known as black lung disease,<sup>3</sup> has been a contributor or underlying cause of death for more than 73,800 United States workers since 1968 (see fig.1).<sup>4</sup> Following the passage of the Federal Coal Mine Health and Safety Act of 1969, which established the first comprehensive respirable dust standards for coal mines, the prevalence of black lung disease among mine workers decreased about 90 percent from 1969 to 1995. However, after 1995, the prevalence of black lung disease rose. The increase was more marked in specific parts of the country, such as the Appalachian region.<sup>5</sup> By 2006 the prevalence of black lung disease had more than doubled among underground coal miners who had worked 25 to 29 years—increasing from 3.4 percent in 1995 to 7.9 percent. The rate of black lung disease among underground coal miners with 20 to 24 years of experience increased from

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<sup>3</sup>Black lung is a term that includes coal workers' pneumoconiosis and any other chronic respiratory or pulmonary impairment arising out of coal mine employment. 30 U.S.C. § 902 (b). The statistics on black lung disease included in the background section of this report refer to CWP only.

<sup>4</sup>These data were extracted from the National Occupational Respiratory Mortality System administered by the U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, and the Surveillance Branch of NIOSH's Division of Respiratory Disease Studies at <http://webappa.cdc.gov/ords/norms.html> (accessed, August 3, 2009). The Web site provides data on deaths from 1968 to 2005.

<sup>5</sup>NIOSH collects information on the prevalence of black lung disease among underground coal miners through its Coal Workers' Health Surveillance Program and Enhanced Coal Workers' Health Surveillance Program. According to NIOSH, about 30 percent of underground coal miners participate in these black lung screening programs.

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2.5 percent in 1995 to 6 percent in 2006.<sup>6</sup> According to NIOSH officials, black lung disease may be occurring for a number of reasons, including weaknesses in the current coal mine dust regulations, noncompliance with those regulations, new risk factors associated with changing mining conditions, longer work hours, and missed opportunities to prevent severe disease through periodic medical screening.

According to NIOSH, significant progress has been made toward improving the health conditions in our nation's coal mines; however, with coal currently mined in 27 states<sup>7</sup> and coal mines employing an average of 117,082 workers,<sup>8</sup> coal miners continue to be at risk of developing occupational lung disease. While miners across the country remain at risk for lung disease, incidence of black lung-related deaths are more concentrated in the Appalachian region (see fig. 1), where the coal mined has high carbon content. To address these issues, the DOL's Mine Safety and Health Administration intends to publish a proposed rule to lower the coal mine dust permissible exposure limit in April 2011.

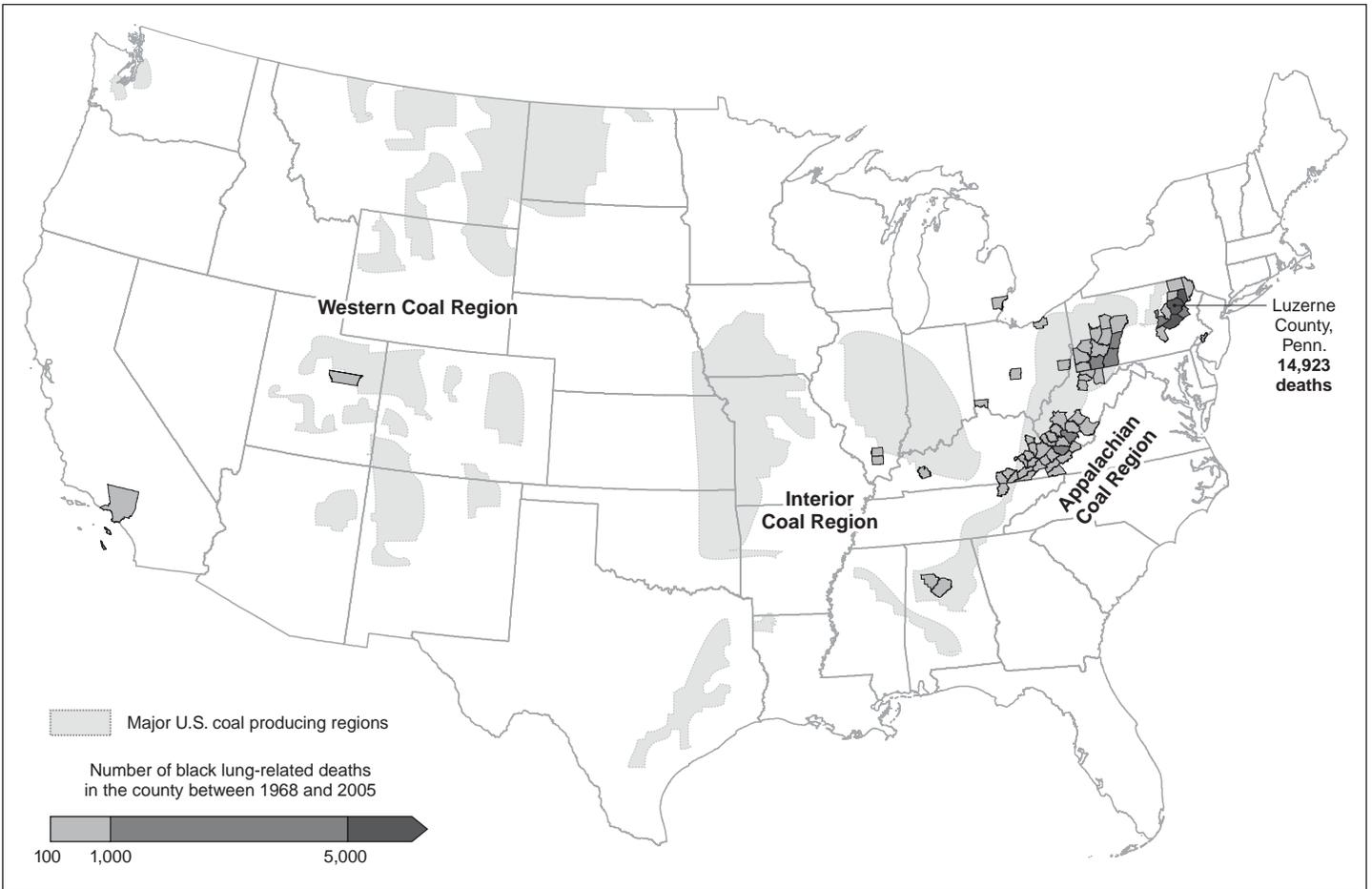
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<sup>6</sup>These percentages represent underground coal miners who participated in the Coal Workers' Health Surveillance Program.

<sup>7</sup>According to the Department of Energy, the state of Wyoming mines the most coal, followed by West Virginia, Kentucky, Pennsylvania, and Texas.

<sup>8</sup>These data reflect the number of coal mine workers in 2007. This number includes mine contractors and excludes office employees working at coal mines.

**Figure 1: Deaths Related to Black Lung Disease from 1968 to 2005**



Sources: Energy Information Administration's Annual Coal Report, 2007; NIOSH Occupational Respiratory Disease Surveillance program.

Note: The statistics used to create this graphic only refer to CWP, not other chronic respiratory or pulmonary impairments arising out of coal mine employment.

The Black Lung Benefits Program provides medical and income assistance to coal mine workers who suffer disability or death due to black lung

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disease.<sup>9</sup> To be eligible for black lung benefits, a coal miner must prove total disability due to pneumoconiosis (a chronic disease of the lung) arising from coal mine employment. Specifically, the miner must establish each of the following elements: (1) the miner has pneumoconiosis; (2) the lung disease arose from coal mine employment;<sup>10</sup> (3) the miner suffers from a totally disabling respiratory or lung impairment (a miner is considered totally disabled if black lung prevents him from engaging in his usual coal mine work); and (4) the miner's pneumoconiosis is a substantially contributing cause of his disability.<sup>11</sup>

If a claimant<sup>12</sup> is awarded benefits, the mine company that is determined to be the responsible employer of the miner generally must provide for the payment of benefits, either directly or through insurance. The Black Lung Disability Trust Fund pays the cost of black lung claims when no coal mine operator can be held liable for payments.<sup>13</sup> The Black Lung Disability Trust Fund is financed by coal mine companies through an excise tax. Under the Black Lung Benefits Revenue Act of 1977, each coal mine operator is required to pay an excise tax to support payment of benefits to claimants and to cover the cost of administering the program.<sup>14</sup>

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<sup>9</sup>Benefits are also provided to eligible survivors of miners whose death was due to black lung disease. 20 C.F.R. § 718.205 (2009). Federal black lung benefits are offset by state workers' compensation benefits for the same disease. If state black lung benefits are less than federal black lung benefits, then the federal black lung program covers the difference. Social Security disability benefits are also reduced by the amount of black lung benefits received. 20 C.F.R. § 725.535 (2009).

<sup>10</sup>For a miner with 10 years of coal mine employment and who suffers from CWP, there is a rebuttable presumption that the miner's lung disease resulted from coal mine employment.

<sup>11</sup>For miners who have X-ray evidence of lesions and/or scarring on their lungs greater than 1 centimeter, there is an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis.

<sup>12</sup>Claimant refers to the miner or the miner's eligible survivor. For the purposes of this report, we will use the word "claimant" to refer to both miners and the miners' eligible survivors, unless otherwise noted.

<sup>13</sup>The trust fund pays the cost of black lung claims: (1) where the miner's last coal mine employment was before January 1, 1970; (2) where no responsible coal mine operator has been identified in claims where the miner's last coal employment was after December 31, 1969; or (3) where the responsible mine operator has defaulted on the payment of such benefits.

<sup>14</sup>Until recently, the trust fund was in chronic deficit—expending more than what it collected in taxes—but the Emergency Economic Stabilization Act of 2008 (Pub. L. No. 110-343) provided an appropriation to repay a portion of the fund, and permitted DOL to restructure and retire the remaining debt.

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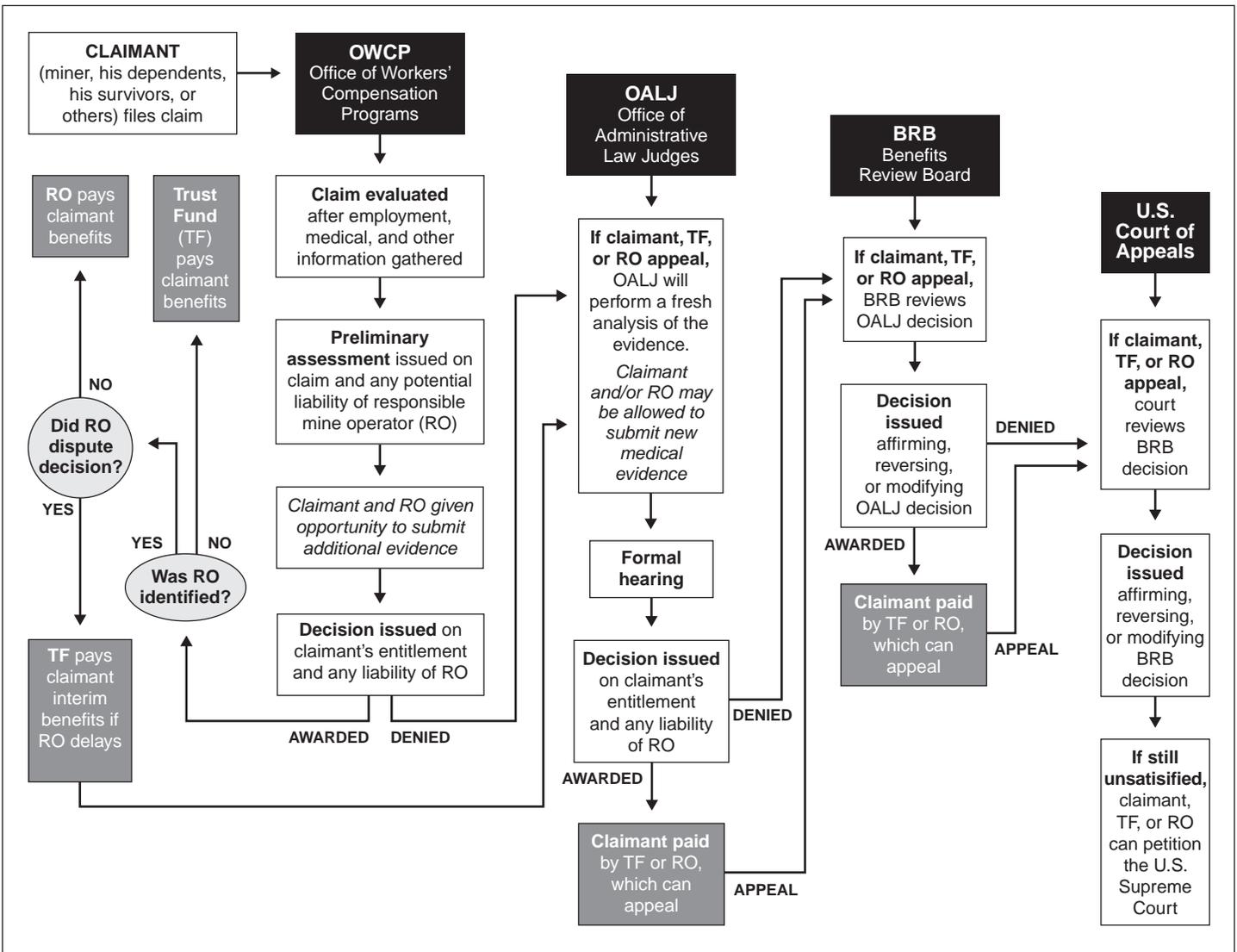
The Black Lung Benefits Program is administered by the Division of Coal Mine Workers' Compensation in OWCP. OWCP, OALJ, and BRB are three independent bodies within DOL that process claims, adjudicate cases, and issue decisions (see fig. 2).<sup>15</sup> Once OWCP issues a decision, either the claimant, responsible mine operator (RO), or Black Lung Disability Trust Fund officials can request a hearing<sup>16</sup> by OALJ. The administrative law judge provides a fresh review of the evidence and issues a decision. Any findings or conclusions by OWCP are not relevant or binding on the administrative law judge. Parties can appeal OALJ decisions to BRB, BRB decisions can be appealed to the appropriate United States Circuit Court of Appeals, and finally, Circuit Court of Appeals decisions may be appealed to the Supreme Court of the United States. Both OALJ and BRB can remand—send claims back—to lower adjudicative bodies for additional review. Cases may be remanded for procedural errors or for further development of evidence.

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<sup>15</sup>OWCP, OALJ, and BRB also administer and review claims arising under other statutes and programs, including the Longshore and Harbor Workers' Compensation Act.

<sup>16</sup>For ease of discussion, this report will refer to requests for an administrative law judge hearing as an "appeal."

**Figure 2: Overview of the Black Lung Claims Adjudication Process**



Source: GAO analysis of federal regulations, agency documents, and discussions with agency officials.

Notes: This figure is intended to present a basic overview of the Black Lung Benefits Program's claims process. For clarity, some steps, processes, and legal options for any party to a claim are omitted.

Modification of a claim may be requested up to one year after a decision denying benefits or by any party up to one year after the last payment of benefits.

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To ensure that claimants can properly develop evidence for their claim, DOL is required by law to give miners the opportunity to receive a complete pulmonary evaluation, which is paid for by the program.<sup>17</sup> DOL provides the miner with a list of doctors and medical facilities that DOL has authorized to perform complete pulmonary evaluations that are located in the state of the miner's residence and bordering states.<sup>18</sup> If a miner fails to undergo a required medical examination without good cause, the claim may be denied.<sup>19</sup> In addition, a miner<sup>20</sup> may submit a medical report (obtained at the miner's expense) from a personal doctor or a physician.<sup>21</sup>

In addition, mine workers afflicted with black lung disease may have access to some resources that help monitor their health and provide access to black lung benefits. For example, the Black Lung Clinics program, a federal program administered by HRSA, provides grants to 15 public and private nonprofit organizations, known as "Black Lung Clinics," which provide specialized diagnosis and treatment services, outreach, and educational programs to help patients and their families deal with the disease. Black Lung Clinic benefit counselors also help provide clients with information about additional sources of social, medical, and legal assistance, specifically on where to obtain legal representation to establish a federal black lung benefits claim. In addition, some nonprofit organizations provide resources and support for coal miners and their survivors. For example, UMWA advocates for improving coal mine health and safety laws and regulations, and the Washington and Lee University Black Lung Legal Clinic provides legal assistance to coal miners and their survivors in pursuing federal black lung benefits.

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<sup>17</sup>30 U.S.C. § 923 and 20 C.F.R. § 725.406 (2009).

<sup>18</sup>Currently, there are 177 doctors practicing in 111 different medical facilities on DOL's authorized list.

<sup>19</sup>20 C.F.R. § 725.409 (2009).

<sup>20</sup>DOL regulations also direct how claims are to be handled in the event that the miner dies of pneumoconiosis before a claim is filed. See, e.g., 20 C.F.R. § 718.104 (c) and 20 C.F.R. § 718.205 (d).

<sup>21</sup>20 C.F.R. § 725.414 (2009).

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**DOL Issued Claims  
Decisions at Each  
Stage of the Process,  
on Average, in 1 Year  
or Less, but High  
Rates of Appeal and  
Remand, Among  
Other Factors, Delay  
Resolution of Many  
Claims**

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**DOL Issued Claims  
Decisions at Each Stage of  
the Claims Process, on  
Average, in 1 Year or Less**

According to department data for fiscal year 2008, DOL decided claims at each stage of the claims process, on average, in 1 year or less, meeting its respective performance goals<sup>22</sup> (see table 1). At the initial stage of claim processing, it took an average of 205 days for OWCP to issue a decision from the date the claim was received.<sup>23</sup> OWCP receives the largest number of claims for miners or their dependents annually. At the first and second stages of appeal, OALJ averaged within 365 days to issue a decision on a claim from the date a transcript of the hearing was prepared, while BRB averaged 341 days to make a decision from the date the claim was received.

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<sup>22</sup>Performance goals vary across OWCP, OALJ, and BRB because, according to DOL officials, the goals are independently established.

<sup>23</sup>According to an independent study commissioned by DOL, in recent years OWCP has reduced the average time it takes to decide claims from 323 days in FY 2004 to 250 days in 2006.

**Table 1: Performance Data for Each Stage of Claims Processing and Adjudication in Fiscal Year 2008**

Level of claims and appeals	Total new claims	Total decisions <sup>a</sup>	Average days to issue decision	
			Performance goal	Actual performance
Office of Workers Compensation (OWCP)	4,269	4,416	220 <sup>b</sup>	205
Office of Administrative Law Judges (OALJ)	1,357 <sup>c</sup>	1,367	≤365 <sup>d</sup>	≤365
Benefits Review Board (BRB)	573 <sup>e</sup>	727	≤365	341

Source: Workload and performance data from OWCP, OALJ, and BRB, as well as from OWCP's Automated Support Package claims tracking system.

Notes: The annual number of claims received at first and second appeals tends to be less than those received at the initial claims processing stage because many claims at OWCP are withdrawn, abandoned, or awarded or denied without appeal.

<sup>a</sup>Total decisions are greater than the total number of new claims at each stage, because the total workload at each stage is not captured solely with new claims (e.g., these data only represent the new claims filed in fiscal year 2008 and do not include claims yet to be decided from previous fiscal years). For OWCP, data on pending claims from the previous fiscal year were not available. However, pending claims carried over from the previous fiscal year for OALJ and BRB are detailed below.

In addition, these data for the number of claims do not include a number of claims for which OWCP provides services for claimants currently receiving benefits (e.g., miners receiving benefits may submit a claim requesting modification of medical benefits provided).

<sup>b</sup>This performance goal is for all types of claims, including claims with and without an identified RO and claims that are withdrawn or abandoned.

<sup>c</sup>In fiscal year 2008, OALJ also had 1,938 pending claims carry-over from the previous fiscal year.

<sup>d</sup>OALJ does not calculate the average time to issue a decision on claims, but for fiscal year 2009, it established a new performance goal: that 80 percent of decisions are to be issued within 365 days from the time a hearing transcript was prepared. For this report, OALJ applied the new performance goal retroactively to fiscal year 2008 and found that about 84 percent of decisions were issued within 365 days.

<sup>e</sup>In fiscal year 2008, BRB also had 617 pending claims carry-over from the previous fiscal year.

## DOL Does Not Track How Long Claims Remain in the Process, but Some Claims Spent 3 Years or More in the Process

DOL does not track how long all claims remain in the claims and appeals process, but we calculated that about 28 percent of the claims of miners awarded benefits from mine companies spent 3 years or more in the process. DOL officials gave the following reasons for not tracking how long claims may remain in the claims and appeals process:

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- The adjudicating bodies at each stage of the Black Lung Benefits Program's claims and appeals process maintain independence and do not share similar administrative processes or computer systems.
  - OWCP's claimant tracking system was designed, in part, to ensure that eligible claimants are ultimately paid, not to determine how long claims remain in the process.
  - Determining how long claims persist in the claims and appeals process can be challenging because it is difficult to determine what constitutes a claim's resolution. For example, claims can be appealed up to 30 or 60 days after a decision, and a modification of a claim may also be requested up to one year after a decision denying benefits or by any party up to one year after the last payment of benefits.

Given this, we chose to measure how long cases persisted in the claims and appeals process by using OWCP's data and looking only at when an identified RO agreed to pay benefits to a miner, which we believe was the best available indicator of cases that had been resolved.<sup>24</sup> Yet, this approach has some limitations as noted above.<sup>25</sup>

For the claims we examined, which were filed between 2001 and 2008, mine companies agreed to pay benefits for the majority of claims within 3 years from the date of the initial claim, while a minority of claims remained in the process for as many as 8 years before an RO agreed to pay<sup>26</sup> (see fig. 3). We only focused on those claims where a miner was

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<sup>24</sup>Using these data, our analysis could not determine whether or not further action had been requested within 1 year of the decision date. Under the program, any party (claimant or mine operator) may petition an OWCP district director for modification within 1 year of the last payment of benefits or denial of a claim. 20 C.F.R. § 725.310 (2009). Our examination did not determine whether or not a claim was modified after a RO agreed to pay benefits.

<sup>25</sup>For additional information on the analysis conducted, see appendix I.

<sup>26</sup>We also examined 3,073 claims submitted between 1982 and 2000, where a miner was ultimately awarded benefits by an RO. Mine companies agreed to pay benefits in 3 years or less for about 47 percent of claims, between 3 and 6 years for 34 percent, and between 6 and 20 or more years for roughly 19 percent of claims. However, using the data that DOL provided, we were not able to determine if, or how many, claims were subsequently modified. According to DOL officials, some claimants may have been receiving payments from an RO for several years, only then to have those payments challenged in court. For example, a claimant may have begun receiving payments from an RO in 1982, but in 2002, the mine company filed a modification alleging that they should not have been designated as the company responsible for the payment of benefits. In such a case, under our analysis, it may appear that an RO did not agree to pay benefits for 20 years.

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ultimately awarded benefits by an RO because, according to DOL officials, these claims are likely to be the most litigated.<sup>27</sup> We also focused on claims made between 2001 and 2008 because DOL officials said that several changes in the regulatory and statutory structure of the program before then negatively impacted the rate at which claims moved through the process and that major regulatory revisions implemented in 2001<sup>28</sup> heavily affected the current program's procedures. For about 73 percent of the 763 examined claims filed between 2001 and 2008, ROs agreed to pay in less than 3 years. For roughly 24 percent of the 763 claims, ROs agreed to pay within 3 to 6 years from the time the claim was filed. For the few remaining claims, about 4 percent, ROs agreed to pay within 6 to 8 years from the time a claim was filed.<sup>29</sup> However, the results of our analysis may represent a best-case scenario because some claims filed between 2001 and 2008 are still in the claims and appeals process and the length of time necessary for a RO to agree on payment could not be measured. In addition, these findings cannot be generalized to miners who were denied benefits or other types of claimants.

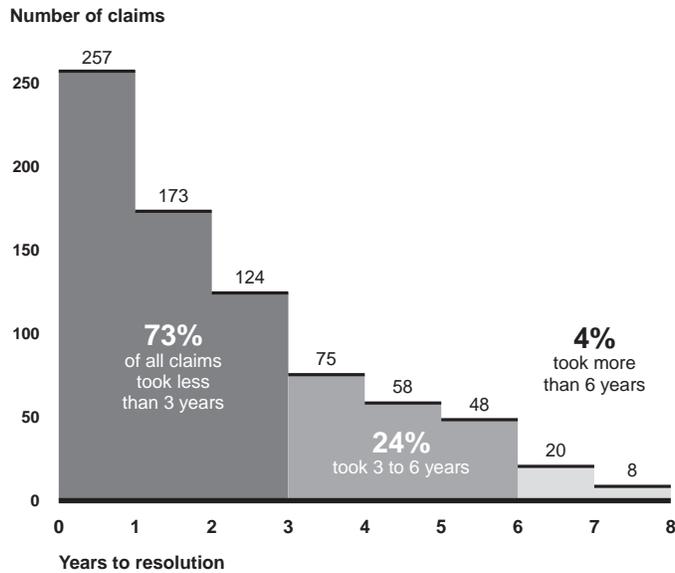
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<sup>27</sup>DOL officials said that awarded claims—where an RO is identified—are often appealed by mine companies.

<sup>28</sup>DOL officials also said that the adjudication of all claims in the program was held up for nearly a year because of a judicial stay issued in 2001. Consequently, the processing and adjudication of claims in 2001 was delayed due to circumstances beyond DOL's control. 65 *Fed. Reg.* 79920 (Dec. 20, 2000).

<sup>29</sup>If an award is contested, claimants receive interim benefits while their claims are in the appeals process. 20 C.F.R. § 725.420 (2009). However, according to DOL officials, claimants who appeal denied claims typically do not receive interim benefits.

**Figure 3: Time to Resolve Claims Filed between 2001 and 2008 for Miners Awarded Benefits from Mine Companies**



Source: GAO analysis of data from the Department of Labor's Automated Support Package claims tracking system.

Notes: Percentages may not add to 100 due to rounding. In addition, this analysis measured the time from the application date of a claim to the time an RO agreed to pay benefits as measured by OWCP's Automated Support Package claims tracking system. However, OWCP may not have received some claims for several months after the claim was originally submitted by a claimant. Moreover, according to DOL officials, the time taken for a miner to receive the first benefits payment from the RO may actually take as much as a month longer for administrative reasons. Finally, this analysis did not include miners who were denied benefits, deceased miners' widows or other dependents, or miners who were granted awards from the Black Lung Disability Trust Fund. For more information on this analysis, see appendix I.

According to DOL officials, far fewer claims end up in the appeals process now than was the case historically due to a decline in the number of claims and the fact that presently, for the majority of claims, there is no request for further action beyond OWCP's decision. According to DOL officials, on average, about 80 percent of all claims decided by OWCP annually have no requests for further action. For example, in fiscal year 2006, OWCP decided about 81 percent of all claims with no requests for further action pending after one year. In addition, DOL officials said that for a number of reasons—including a decline in the number of miners in the United States—they receive far fewer claims annually than in prior years. For example, according to data provided by DOL, in fiscal year 1985, 12,250 new claims were filed at OWCP, while there were only 4,269 new claims filed in fiscal year 2008.

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## A Significant Number of Claims Are Appealed and Many Claims Are Remanded

Although a majority of claims are resolved with OWCP, we found that a significant number of claims—approximately 20 percent—request further action, many of which are appeals to OALJ. Both miners and mine operators frequently seek appeals,<sup>30</sup> and a significant number of claims are appealed after a decision is issued by OWCP either awarding or denying benefits.<sup>31</sup> For example, in fiscal year 2008, for claims where an RO was identified and OWCP awarded benefits to a claimant, mine operators appealed OWCP's decision approximately 80 percent of the time.<sup>32</sup> In the same fiscal year, approximately 15 percent of all miners' claims denied at OWCP were appealed by miners. In addition, according to BRB officials, between fiscal years 2004 and 2008, approximately 43 percent of all claims decided by OALJ were appealed to BRB, and about 10 percent of all BRB decisions were appealed to federal appellate courts.

In addition to the significant number of claims that are appealed, many are remanded back to the prior review stage by DOL adjudicators, according to DOL officials. Officials said remands can extend appeals for less than 1 month to up to 1 year, depending on why a claim is remanded and other factors. In fiscal year 2008, BRB remanded one-third of all claims referred to it back to one of the two lower bodies, while OALJ remanded 13 percent of claims it considered back to OWCP. Claims are remanded for several reasons. At the first stage of appeal (OALJ), remands are made when evidence needs to be developed further or when the appeal is withdrawn by the litigant or dismissed by the judge.<sup>33</sup> At the second stage of appeal (BRB), remands are made to either OWCP for the resolution of issues,

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<sup>30</sup>A claim may be appealed by a miner or a miner's eligible survivors (e.g., a surviving spouse or dependents), an RO, the insurance carrier, or by a district director. 20 C.F.R. § 725.360 (2009). According to DOL officials, a third-party administrator may also appeal a claim on behalf of a mine company. Third-party administrators manage the claims process for insurance carriers or self-insured employers by providing services such as claims administration, investigation, insurance negotiations, accounting, legal, and claim loss analysis.

<sup>31</sup>DOL officials said that miners or their dependents occasionally appeal claims awarding benefits because of disputes over the size of the monetary award, the timing of payment, or other issues.

<sup>32</sup>The percentage of claims appealed for fiscal year 2008 do not include claims that were abandoned, withdrawn, or where no RO was identified.

<sup>33</sup>OALJ may also issue remands when the RO agrees to pay benefits without further litigation. In these instances, claims are sent back to OWCP for the implementation of an agreement to pay benefits.

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such as the proper development of evidence, or to the OALJ for reconsideration.

Officials at DOL offered divergent opinions on why cases were remanded. Some administrative law judges said claims are sometimes remanded to OWCP because medical evidence submitted by DOL's approved doctors was incomplete and required clarification or further development. BRB judges said claims are commonly remanded to OALJ for reconsideration because of certain legal deficiencies, such as errors in weighing evidence. However, several administrative law judges said that they believed that BRB sometimes remands claims for further review by the administrative law judge to avoid the potential review of a BRB decision by a United States Circuit Court of Appeals, and others said that in their view, certain remands are the result of BRB reweighing evidence, which is beyond the narrow scope of BRB review.<sup>34</sup> In 2007, an independent program reviewer examined the number of OALJ remands to OWCP and concluded that further study of the causes of remands could help DOL identify policies and procedures that reduce this source of delays.<sup>35</sup> No study has been conducted to determine the causes of remands by any of DOL's adjudicators back to the prior review stage, whether from adjudicatory bodies back to OWCP or from BRB to OALJ, according to DOL officials.<sup>36</sup>

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<sup>34</sup>BRB is not empowered to engage in an initial consideration of evidence or unrestricted review of a case brought before it. Pursuant to section 21(b)(3), 33 U.S.C. § 921(b)(3) of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Act by section 422, 30 U.S.C. § 932. BRB is authorized to review the findings of fact and conclusions of law of administrative law judges in cases on appeal before it, on which the decision or order appealed from was based, and such findings may be set aside only if they are not, in the judgment of the BRB, supported by substantial evidence in the record considered as a whole or in accordance with law. 20 C.F.R. § 802.301 (2009). For example, in one case, the U.S. Court of Appeals for the Sixth Circuit held that in requiring the administrative law judge to re-evaluate the evidence, the BRB had evaluated each fact and thus exceeded the narrow scope of review, which it is accorded under 20 C.F.R. § 802.301 (2009). *Campbell v. Consolidation Coal Co.*, 811 F.2d 302 (6th Cir. 1987).

<sup>35</sup>ICF International, *Evaluation of the Efficiency and Effectiveness of the Black Lung Program* (June 13, 2007).

<sup>36</sup>OWCP officials noted that the reasons for remands to OWCP are well understood and primarily occur because claims require further development of medical evidence; therefore, no formal study was necessary for OWCP to focus on reducing this source of delays.

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## Stakeholders Say There Are Financial Incentives to Extend Appeals and Prolong the Adjudication of Claims

The structure of the Black Lung Benefits Program creates financial incentives for claimants to appeal denials of claims. According to DOL officials, some miners extend appeals in an attempt to have interim benefits reinstated or to maintain their payment of interim benefits. Specifically, for miners whose claims are initially awarded but then appealed, the program provides interim benefit payments that cover medical expenses and a roughly \$600 to \$1,200 monthly stipend. Consequently, if an award is overturned by OALJ or BRB, the claimant has a major incentive to appeal again in an attempt to reinstate these benefits. Moreover, according to DOL officials, some sick miners never expect to win their claim by filing appeals; rather, the approach is to keep their black lung claim alive—for example, by requesting numerous continuances—until their death, with the expectation that DOL will not seek to recoup interim benefit payments from their surviving spouse or dependents.<sup>37</sup>

DOL officials also said that mine companies have financial incentives to prolong the adjudication of claims. First, according to DOL officials, mine companies often skip the initial stage of the claims process altogether and do not begin to develop a defense until the hearing before OALJ, which may delay a definitive decision. Under the program, mine companies are not required to submit evidence during initial claims processing at OWCP, and as discussed earlier, any findings or conclusions by OWCP are not relevant or binding on the administrative law judge. DOL officials said that because some claims lack merit and many claims are abandoned or withdrawn, mine companies see no need to develop a defense and submit evidence for these cases. Second, according to some administrative law judges, when mine companies do submit evidence during appeals, it is sometimes submitted after the claimant has first submitted his own evidence and just prior to a hearing. Doing so may afford the mine companies the opportunity to evaluate and most effectively counter claimants' evidence, according to some administrative law judges and claimant attorneys. Some administrative law judges said that this tactic may delay the issuance of a decision because judges may allow claimants the opportunity to develop the record after the hearing if they did not have sufficient time prior to the hearing to address the newly submitted evidence.

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<sup>37</sup>DOL officials said that it is not their practice to seek the repayment of interim benefits from the surviving family members of deceased miners ultimately denied benefits.

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OWCP officials said that a provision in a 1997 proposed rule would have addressed such delays and other concerns, by requiring parties to submit all evidence at the initial claim stage.<sup>38</sup> According to these officials, this proposed provision would have allowed OWCP to make more informed decisions up front and avoid some of the protracted and expensive appeals.<sup>39</sup> The proposal received much criticism during the public comment period and was not adopted in the final rule.<sup>40</sup> According to DOL officials, one concept from this proposal has been implemented through an administrative procedure: prior to issuing a decision on a claim, OWCP now issues a preliminary assessment concerning the claimant's eligibility for benefits based on the information gathered to that point. DOL officials said that this has helped to address mine operator concerns about the costs of developing a defense for every claim because many claimants withdraw when OWCP's preliminary assessment does not favor eligibility.

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### Some Hearings Are Delayed by the Need for Judges to Travel to Remote Locations and to Grant Claimants Additional Time to Seek Representation

Some hearings are delayed because claimants reside in rural and remote locations. According to administrative law judges, when claimants live in remote locations, hearings are delayed until several cases can be scheduled at the same time in one region, which limits lengthy travel required of judges.<sup>41</sup> According to one Black Lung Clinic official, in some cases, scheduling hearings for miners who live in remote locations can take more than 2 years. On the other hand, when asked whether video technology—such as that employed by the Social Security Administration's Disability Determination Services—might reduce hearing delays by eliminating the need to travel, some of DOL's administrative law judges said it might accelerate hearings for miners or their dependents in rural and remote settings.

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<sup>38</sup>62 *Fed. Reg.* 3338 (Jan. 22, 1997).

<sup>39</sup>According to DOL, in fiscal year 2008, 43 percent of funds appropriated for administrative activities from the Black Lung Disability Trust Fund were provided to the Office of the Solicitor, BRB, and OALJ.

<sup>40</sup>65 *Fed. Reg.* 79920 (Dec. 20, 2000), effective January 19, 2001. According to officials, criticism centered on the following: (1) mine operators' costs to develop a defense for every claim were expensive and unnecessary, (2) limited opportunities to appeal may have violated some due process rights, and (3) unrepresented claimants may have been disadvantaged. Some officials at DOL also expressed concern that claims adjusters at OWCP may not be appropriately qualified to make decisions about the submission of evidence that would have been required under the proposal.

<sup>41</sup>To conduct hearings, administrative law judges attempt to travel to locations convenient for claimants, typically within 75 miles of a claimant's residence.

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Hearings can also be delayed because claimants lack legal representation. Administrative law judges said that in some cases, the first appearance by miners or their dependents at the OALJ hearing is without legal counsel. In such cases, administrative law judges said that it is standard practice for the judge to ask if the claimant has legal representation or if the claimant has sought representation. If a claimant needs more time to obtain legal counsel, the judge typically grants a hearing continuance.<sup>42</sup> According to OALJ, continuances may delay claims adjudication between 5 and 6 months. Administrative law judges said that it is not uncommon to grant one or two continuances to unrepresented claimants seeking counsel.

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## Most Claims Are Initially Denied, Most Often because Claimants Cannot Meet All Evidentiary Requirements

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### DOL Denies a Majority of Initial Claims and about Half of All Subsequent Appeals

Since 2001, most claims have been initially denied; and for 2008, we calculated that about half of all appeals resulted in the denial of claimant benefits. The OWCP overall denial rate for black lung claims has remained constant at around 85 percent or higher in the 8 years since the fiscal year 2001 changes to the Black Lung Benefits Program regulations. At the initial claims level, OWCP denied 87 percent of the 4,416 claims decided in fiscal year 2008 (see table 2). There was virtually no difference between the denial rates for claims filed against the DOL-managed Black Lung Disability Trust Fund (84 percent) and claims filed against mine companies (88 percent). At the first level of appeals, OALJ issued decisions that resulted in the denial of claimant benefits in more than half, or 53 percent, of the 1,367 decisions issued in fiscal year 2008.<sup>43</sup> At the

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<sup>42</sup>OALJ also said that continuances are also commonly granted to develop additional medical evidence.

<sup>43</sup>OALJ awarded claimant benefits in 23 percent of its decisions in fiscal year 2008 and remanded 13 percent. The remaining 11 percent of OALJ decisions were either withdrawn by parties, dismissed, or involved decisions that were not related to the awarding of claimant benefits.

second level of appeals, BRB decisions resulted in the denial of claimant benefits in about half, or 47 percent, of the 737 appeals issued in fiscal year 2008.<sup>44</sup> Because neither OALJ nor BRB systematically track whether their decisions result in the award or denial of claimant benefits, we were only able to determine their denial rates for 1 year and were not able to determine how they have changed over time.

**Table 2: The Number of Black Lung Claims and Appeals Decisions Issued and the Percent That Resulted in Denial of Claimant Benefits in Fiscal Year 2008**

<b>DOL agency</b>	<b>Number of black lung claims and appeals decisions issued</b>	<b>Percent of black lung decisions that resulted in the denial of claimant benefits</b>
OWCP	4,416	87
OALJ	1,367	53
BRB	737	47

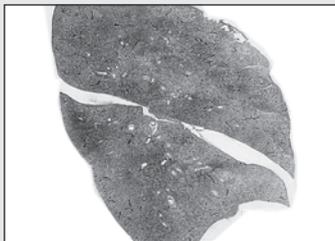
Source: GAO analysis of Department of Labor data.

<sup>44</sup>The BRB does not deny or award claims but affirms, reverses, modifies, or vacates the OALJ decision to grant or deny benefits to claimants.

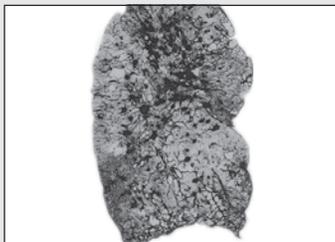
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## Few Claimants Are Able to Prove They Meet All of the Program's Evidentiary Requirements

### Lung Diseases Associated with Long-Term Coal Mine Dust Exposure



Healthy Lungs  
Source: NIOSH, 2009.



Simple Coal Workers' Pneumoconiosis  
Source: NIOSH, 2009.

Coal mine dust can cause a range of lung diseases depending on the level of exposure. These images, taken from autopsies of deceased miners show the impact that coal dust can have on the lungs. The second image depicts lungs that have been damaged as a result of Simple Coal Workers' Pneumoconiosis (CWP). In contrast to the healthy lungs on top, the CWP lungs show mild to moderate lung scarring that may result in impaired lung function. While lung scarring is apparent in the autopsy image, the ability to detect Simple CWP in X-rays may vary by physician.

Few claimants are able to meet all of the program's evidentiary requirements, which are set by law. In order to be eligible for black lung benefits, claimants generally must prove they have pneumoconiosis—coal-induced lung disease—that they are totally disabled as a result of it, and that the disease is caused by their mine employment. Based on DOL data, we calculated that over 60 percent of the claims adjudicated and denied by OWCP in fiscal year 2008 and estimated that over half of the claims adjudicated and denied by OALJ and BRB were denied because claimants could not prove that they had pneumoconiosis or, if they could, that pneumoconiosis had caused disability or death.<sup>45</sup> Some claimants have difficulty proving that their lung disease is pneumoconiosis.<sup>46</sup> Although a lung X-ray can detect scarring, agency officials report that claimant doctors and company physicians may each read the X-ray differently. In addition, according to NIOSH scientists, some miners develop a form of lung disease associated with long-term exposure to coal mine dust that impairs lung function but frequently cannot be detected by X-ray. Agency officials and claimant doctors we interviewed said a significant portion of black lung claimants who have this form of pneumoconiosis also have a history of smoking, which presents another evidentiary problem: while the Black Lung Benefits Program regulations require that miners prove coal dust is a significant contributing cause of their disability,<sup>47</sup> NIOSH officials reported that there is no scientific way to assign the proportion of cause to either inhalation of coal dust or tobacco smoke. Depending on the intensity and duration of exposures to coal dust and tobacco smoke, both can play a role in the impairment and disability of a miner. In such cases, judges told us that they rely heavily on nonclinical evidence to determine whether claimants are eligible for benefits. According to some administrative law judges, mining company doctors are usually better credentialed and produce lengthier, more sophisticated, and comprehensive medical reports and evaluations than claimants' doctors. For example, some claimants' doctors may only produce DOL's 4-page medical evaluation, while RO doctors will provide medical reports in excess of 20 pages supported by various citations from medical journals.

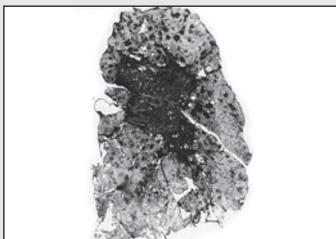
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<sup>45</sup>We estimated that other claims were denied because claimants were not able to prove total disability, were not able to prove coal mine employment, or did not follow procedures for preparing claims or submitting evidence.

<sup>46</sup>By statute, there is an irrebuttable presumption of total disability due to pneumoconiosis if X-rays of a miner's lungs show a spot or lesion that is greater than 1 centimeter in diameter. 30 U.S.C. § 921.

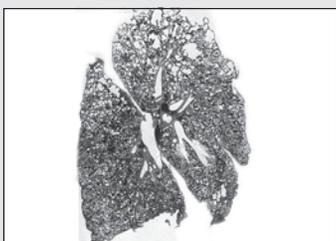
<sup>47</sup>See 20 C.F.R. §§ 718.204(c) and 718.201 (2009).

**Lung Diseases Associated with Long-Term Coal Mine Dust Exposure**



Advanced Coal Workers' Pneumoconiosis

Source: NIOSH, 2009.



Coal Mine-Induced Emphysema

Source: NIOSH, 2009.

In contrast to Simple Coal Workers' Pneumoconiosis (CWP), Advanced CWP, as seen in the first image, is generally characterized by massive lung scarring and lesions, resulting in severely impaired lung function. The second image depicts Coal Mine-Induced Emphysema, which is characterized by destruction of respiratory tissues, resulting in impaired airflow through the lungs and into the bloodstream. Emphysema is one type of Chronic Obstructive Pulmonary Disease (COPD) associated with long-term coal mine dust exposure, which includes Chronic Bronchitis, among others.

Claimants who can prove they have pneumoconiosis may nevertheless be unable to establish that it is a significantly contributing cause for the condition of their lungs, if other medical conditions are present that may contribute as well. Agency officials, claimants' attorneys, and physicians with whom we spoke said claimants may also suffer from ailments such as heart disease, tuberculosis, or sarcoidosis—impairments which, like pneumoconiosis, can diminish a claimant's lung function. In cases where it is difficult to determine the cause of a claimant's disability, administrative law judges must decide whether the claimant's doctor or the mine operator's doctor has offered the most well-reasoned medical opinion. As in the case of smokers with pneumoconiosis, judges told us they rely heavily on nonclinical evidence, namely physician credentials and the length and comprehensiveness of the evidence presented by the parties.

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## Some Parties Suggest That the Black Lung Program Should Provide a Settlement Option

Although it can be difficult for some claimants to meet all of the Black Lung Benefit Program's evidentiary standards, there is no settlement option, such as an agreement for payment of partial benefits for partial disability. Though settlement is prohibited under the current statute,<sup>48</sup> some stakeholders told us that a settlement option would increase the number of miners who would receive awards and reduce the amount of time it takes to resolve black lung claims. Still, others have said that such settlements would be incongruent with the fact that the disease is progressive. Some DOL officials told us that settlement would cause miners to settle for award amounts that would be less than what they would be eligible for once the disease progressed. Others noted that if the program permitted claimants to be paid through a lump sum settlement, instead of the current practice of receiving monthly benefit payments, miners might spend their award before they would most need it.

Other state and federal workers' compensation programs, including the Longshore and Harbor Workers' Compensation Act, do allow claimants to settle their claims or to be compensated for partial disability.<sup>49</sup> The West Virginia state workers' compensation program, among others, also provides the option for claimants to settle their black lung claim for partial disability. One claimant with whom we spoke who has been unable to resolve his federal black lung claim for 8 years was able to receive compensation for partial disability under the West Virginia workers' compensation program while still employed as a coal miner. Although this settlement option has been used in other workers' compensation programs, DOL officials—citing the prohibition in the statute—said to date, there has been no research done to evaluate the costs and benefits of offering settlement for partial disability to black lung claimants.

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<sup>48</sup>30 U.S.C. § 932 (a).

<sup>49</sup>33 U.S.C. § 933 (g) (1).

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## Coal Miners Face a Number of Challenges in Pursuing Federal Black Lung Benefits, Including Finding Legal Representation and Developing Sound Medical Evidence

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Although the Program and DOL Recognize the Importance of Legal Representation for Miners, DOL Does Not Track, Evaluate, and Report on Claimants' Access to Legal Representation

The importance of legal representation for black lung claimants is well established. The Black Lung Benefits Act recognizes the importance of claimant representation by providing reasonable fees for claimant attorneys in the successful prosecution of a claim under the statute.<sup>50</sup> DOL has recognized that the early involvement of legal representatives in claimants' cases improves the quality of evidence submitted and the decision making in all claims for benefits.<sup>51</sup> Therefore, DOL issued regulations in 2001 that provide for compensation of claimant attorneys for all reasonable time, from the outset of a case, if it ends in an award.<sup>52</sup> In a variety of ways, DOL has also encouraged black lung claimants to seek representation for the claims they initially file, as well as the claims they appeal.<sup>53</sup> For example, DOL's Web site includes a claimant resource page that provides representation guidelines for administrative appeals and identifies a number of lawyer referral services, including services with the

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<sup>50</sup>A reasonable attorney fee, subject to department approval, may be collected from the RO that is ultimately found liable for the payment of benefits or, in a case in which there is no RO who is liable for the payment of benefits, from the Black Lung Disability Trust Fund. See 30 U.S.C. § 932(a). (This section of the Black Lung Benefits Act incorporates 33 U.S.C. § 928(a), the attorney fee provision of the Longshore and Harbor Workers' Compensation Act.)

<sup>51</sup>DOL regulations state that a representative can be an attorney or a nonattorney. 20 C.F.R. § 725.363 (2009).

<sup>52</sup>The regulation states that the fees payable include reasonable fees for necessary services performed prior to the creation of the adversarial relationship. 20 C.F.R. § 725.367 (2009).

<sup>53</sup>DOL regulations state that OALJ does not have authority to appoint counsel or refer claimants to attorneys. 29 C.F.R. § 18.35 (2009).

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American Bar Association and legal aid clinics associated with law schools and other nonprofit organizations. On this Web page, OALJ advises claimants that DOL adjudications “vary widely in complexity and in many instances it may be wise to obtain legal counsel.” Administrative law judges also use various means to encourage claimants to seek representation. For example, some judges provide information about the advantages of representation in the Notice of Hearing, talk directly to unrepresented claimants about such advantages at the hearing, or issue a special letter to unrepresented claimants indicating that black lung cases often involve complicated legal issues and encouraging them to find representation. Finally, judges are permitted to grant claimants additional time in order for them to secure representation before a hearing.<sup>54</sup>

While DOL collects some information about claimant representation, it does not track, evaluate, or report on claimants’ access to legal representation throughout the claims and appeals process. At our request, OWCP, OALJ, and BRB provided us with the number of claimants with legal representation at each stage of the process based on data captured by their systems. However, due to limitations in data collection, these numbers were not sufficiently reliable for use in our report. For example, at the OWCP level, officials told us that some claimant representation information is captured by an automated correspondence system, separate from the main data management system, but that the correspondence system was not designed to track claimant representation and cannot identify types of representatives and at what point in the claims process a claimant acquired representation. The data management systems used by OALJ and BRB capture claimant representation data, but these data are limited by similar factors. For example, OALJ’s system cannot identify whether a representative is an attorney or lay representative and at what point in the appeals process a claimant acquired representation. In addition, BRB officials told us that their data do not include the number of all appeals filed without counsel because they do not track legal representation for appeals filed by nonprofit agencies on the behalf of black lung claimants. Further, OWCP, OALJ, and BRB officials told us that they do not report any of the representation information they collect or use it to measure performance. However, a number of DOL officials told

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<sup>54</sup>According to BRB, when an appeal is filed by a claimant without an attorney to BRB (a pro se appeal), the Board provides a complete substantial evidence review on all issues of fact and law pertinent to the administrative law judge’s decision. In many cases, this results in an administrative law judge’s denial of benefits being remanded for reconsideration of whether the claimant is entitled to benefits.

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us that finding representation is a significant challenge for many claimants. For example, program officials cited claimants' lack of representation, particularly in the early stages of a claim, as a significant barrier to successful claims. OALJ officials told us that few attorneys will represent black lung claimants and that lack of legal representation limits OALJ's ability to process cases quickly.

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### Disincentives for Lawyers to Take Claimants' Cases and Scarce Nonprofit Resources Impede Claimants' Ability to Secure Legal Representation

There are few financial incentives for lawyers to take black lung claimants' cases, and claimants generally do not have the financial resources to cover the costs associated with developing the evidence needed to support and defend their claims. According to DOL officials, attorneys are not inclined to take claimants' cases due to a low probability of success. As noted previously, only 13 percent of all claims were initially approved by OWCP in fiscal year 2008. Moreover, while DOL has no official data on the final approval rate after all appeals are exhausted, black lung experts suggested that the final award rate is about half of the initial award rate. Other disincentives DOL officials and claimant attorneys cited are that the process can be lengthy and costly. For example, one attorney told us that it has taken as long as 15 years from the start of a black lung case to receive compensation for working on it.<sup>55</sup> Among the significant legal costs that claimant attorneys said they incur with black lung cases is the time spent preparing legal briefs and expenses associated with evidence development, such as preparing medical experts' reports. Because claimants lack financial resources for evidence development and DOL's payment of claimant attorneys' fees is contingent on the success of cases, claimant attorneys bear much of the legal costs during the litigation of claimants' cases.<sup>56</sup> In Black Lung Benefits Act cases, a claimant may not be charged a fee by an attorney unless black lung benefits are awarded.<sup>57</sup> While no precise estimates of legal costs for claimant cases were available, based on GAO's analysis of one law firm's estimated total legal costs for black lung cases, cases that took roughly between 2 to 4 years to resolve averaged about \$18,000 in total legal costs. This firm also indicated that it has five unresolved black lung cases that have been active 7 years or more,

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<sup>55</sup>DOL regulations permit interest to be assessed for attorney's fees, computed from the date on which the attorney fee was awarded through the date the RO paid the attorney's fee. 20 C.F.R. § 725.608(c) (2009).

<sup>56</sup>If benefits are awarded, attorney's fees are paid by the mine company or the Black Lung Disability Trust Fund. 20 C.F.R. §725.366 (2009).

<sup>57</sup>20 C.F.R. §725.365 (2009).

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with an average cost of at least \$70,000 in total accrued legal costs.<sup>58</sup> In contrast to reports of limited representation available to claimants, DOL officials and representatives from claimant groups and mine companies said that mine operators tend to have greater resources to develop black lung evidence.

Various nonprofit organizations offer assistance to claimants, but their capacity to meet the legal needs of black lung claimants is limited. A prominent nonprofit legal resource for claimants is a black lung legal clinic operated by the law school at Washington and Lee University in Virginia. Currently, the clinic has 42 active black lung cases, and its operation relies largely on the voluntary efforts of law professors and their students. Officials told us that the clinic does not have the resources to provide legal assistance to a larger number of black lung claimants. Another source of nonprofit legal assistance for claimants is the federally supported Black Lung Clinics program, which primarily provides medical services. Serving 14 states, these clinics are supported by HRSA grants; they provide miners with a number of services related to the diagnosis and treatment of black lung disease. Some clinics are authorized by DOL to conduct diagnostic testing for the Black Lung Benefits Program, and clinics are encouraged by the Black Lung Clinics program to assist miners with their claims through benefit counseling and legal referral. According to program officials, four clinics receiving HRSA grants also provide claimants with free lay representation.<sup>59</sup> DOL administrative law judges told us that some lay representatives have provided miners with effective support and guidance by helping them understand the claims process and properly complete the required documentation on time. However, they noted that lay representatives are better suited to helping claimants with initial claims than with appeals, which they said generally requires formal legal training. At one time, the UMWA offered legal representation for black lung claimants, but UMWA representatives said currently that they can only refer claimants to outside legal representatives.

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<sup>58</sup>We did not independently assess the reliability of these cost estimates.

<sup>59</sup>HRSA officials could not provide us with information about grantee expenditures on lay representation because the program does not collect this information.

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## Evidentiary Documents Submitted by DOL-Approved Doctors Do Not Always Provide Sound or Thorough Support for Miner Claims

DOL administrative law judges and claimant advocates reported that doctors who have been approved by DOL to conduct diagnostic tests and provide pulmonary evaluations do not always submit complete medical documentation.<sup>60</sup> DOL judges told us that doctors' medical opinions are a key element of evidence in claims adjudication and indicated that most of the opinions submitted by DOL's approved doctors did not provide claimants with sound evidentiary support for their cases. In particular, DOL judges told us that doctors' written opinions frequently lack clarity and specificity on the causal factors of disease and do not adequately explain their reasons for their conclusions, if at all.

While DOL has made efforts through its national and district offices to educate its approved diagnostic providers about documenting medical evidence for black lung claimants, some claimant doctors and representatives told us that the program does not consistently provide doctors with clear guidance for effectively and completely documenting their medical opinions, particularly with respect to describing the causes of disease and explaining the basis of their medical conclusions. In particular, one doctor with experience as a DOL-approved provider told us that doctors new to DOL's approved list are often unclear about how to properly document their medical opinions on DOL's medical evaluation form.<sup>61</sup>

While DOL provides supplemental guidelines for doing this, he suggested that many DOL-approved physicians are not accustomed to the comprehensive, narrative format required by DOL.<sup>62</sup> Program officials told us that the comprehensive narrative format is necessary and preferable over forms that solicit discrete responses because of the complexity of black lung disease and the importance of good reasoning in developing sound medical evidence. However, according to one doctor, the narrative portion of the pulmonary evaluation form is often left incomplete or poorly developed because of its open-ended structure. In an attempt to

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<sup>60</sup>To ensure that claimants have access to physicians who are well qualified to conduct black lung diagnostic testing and complete pulmonary evaluations, DOL issued regulations in 2001 requiring OWCP to create and maintain an official, publicly available list of department-approved medical providers. See 20 C.F.R. § 725.406 (2009).

<sup>61</sup>For DOL's medical evaluation form, see CM-988: Medical History and Examination for Coal Mine Workers' Pneumoconiosis (OMB No.: 1215-0090).

<sup>62</sup>For DOL's supplemental guidelines, see CM-988A: *Instructions for Black Lung Physical Examination*.

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### Diagnostic Testing for Black Lung Disease and Associated Disability



Source: Cook County Health and Hospitals System.

In order to determine the presence or absence of black lung disease and the degree of associated disability, miner-claimants for federal black lung benefits are required to undergo a series of diagnostic tests, including a chest X-ray, pulmonary function study (breathing tests), arterial blood gas study, and a physical examination. Diagnostic tests are conducted on miners by DOL-approved physicians, and if contested, by physicians contracted by mine companies or their insurers. The clinical information reported from diagnostic testing generally constitutes a significant part of the parties' medical evidence in black lung cases.



Source: Cook County Health and Hospitals System.

improve the clarity and completeness of medical evaluations, as well as reduce the need for doctor follow-up, one DOL district office developed a supplemental questionnaire for soliciting explicit information from doctors and attached it to DOL's official medical form. According to officials at this district office, the supplemental form effectively supported their efforts in improving the quality of medical evidence documented by approved doctors. However, DOL's national office required the district office to discontinue using this supplement as a routine form because it had not been authorized through the Office of Management and Budget.

The extent to which DOL's district offices hold approved doctors accountable for the quality of submitted medical evidence is unclear because DOL does not track whether and how often district offices need to follow-up with doctors or withhold payment for inadequate medical documentation. DOL can also remove a doctor from the approved list for poor performance, including poor quality of documentation and delays in submitting reports. Since the creation of DOL's approved provider list in 2001, OWCP has removed four doctors and reinstated one. However, DOL officials told us they are reluctant to remove doctors because of challenges in maintaining an adequate number who are qualified to conduct diagnostic testing for the program. For example, in identifying recruiting challenges, DOL officials said that some doctors do not want to expose themselves to cross-examination by attorneys for the mine employers or their insurers. They also noted that certain geographic areas present difficulties for finding enough qualified doctors suitable for the approved list. Consequently, OWCP may use more liberal standards for evaluating the qualifications of doctors in these areas to ensure that claimants have access to and, where possible, a choice between approved doctors. Because of recruiting challenges, DOL officials said that they prefer to work with approved doctors to improve the quality of their documentation, rather than remove them from the approved list.

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## Blood Gas Testing Practices May Contribute to Inaccurate Disability Readings for Claimants

Medical experts with whom we spoke told us that some practices of conducting blood gas tests, which provide evidence for claimant and RO parties, may contribute to inaccurate disability readings for claimants.<sup>63</sup> Blood gas tests are required by regulation and conducted with the miner at rest and, if medically indicated, during exercise.<sup>64</sup> According to one medical expert, inaccurate readings can result from insufficient intensity or duration of exercise, poorly executed manual blood draw, prolonged delay between blood draw and sample analysis, and improperly calibrated diagnostic equipment, among others things. DOL officials acknowledged that differences in how doctors conduct blood gas tests may influence test results. In particular, they stated that using a catheter is more reliable and, therefore, preferable to a single stick or to manually drawing blood with a syringe. However, they explained that diagnostic testing facilities in some areas may not have the capacity to carry out blood draws using indwelling catheters. They also said that, generally, they are not able to monitor or control how doctors conduct blood gas tests. DOL validates the results of all blood gas tests conducted by its approved doctors. In contrast, officials said they do not have the authority to validate or require validation of results of tests conducted by mine operator doctors.

Claimant advocates and representatives from black lung clinics we interviewed alleged that some doctors working for mine companies or their insurers conduct blood gas tests in ways that boost claimants' blood oxygen levels, thereby lowering their disability readings. Examples they provided include failing to record the pulse rate during the blood draw, not icing blood samples, shaking blood samples to aerate them prior to analysis, and allowing significant delays between drawing and analyzing blood. Program officials acknowledged that they are aware of such allegations but said they have no way to test the veracity of these claims or determine the incidence of such practices. Currently, DOL has no system for logging and tracking complaints it receives from parties to black lung cases concerning testing practices of either DOL-approved or RO-hired doctors. Mine industry representatives with whom we spoke said they are not aware of complaints or any cases of manipulation.

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<sup>63</sup>Blood gas tests measure the ability of the lungs to oxygenate blood and are an indication of the level of a claimant's impairment.

<sup>64</sup>20 C.F.R. § 718.105 (2009).

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## Conclusions

The Black Lung Benefits Program remains a significant source of black lung compensation for the nation's coal miners, but there are a number of administrative and structural problems that could impede the ability of eligible miners to pursue claims. First, the high rate of appeals by both claimants and mine operators and the high number of remands by OALJ and BRB all prolong the resolution of claims. Although the cause for these rates is not entirely clear, it is evident that the program's structure can create financial incentives for both miners and mine operators to continue to file or extend appeals. Without ways to streamline or speed the appeals process, expedite hearings for remote areas, and avoid remands, many claims will likely continue to go unresolved for years. Yet, because DOL does not track all claims from initial application through appeals, the agency cannot begin to accurately assess the scope of this problem or develop strategies to improve it.

In recent years, few claimants have been able to meet all of the program's evidentiary requirements, and the current state of black lung science makes it difficult for claimants to meet certain requirements. Without a thorough examination of the ability of claimants to meet evidentiary standards or exploring alternatives to resolving claims, such as settlement, claimants with meritorious claims may not receive benefits.

Moreover, many claimants are not equipped with the medical and legal resources they need to develop evidence that will meet the program's requirements. While miners must be able to develop sound evidentiary support for their black lung cases, the medical evidence prepared by DOL-approved doctors does not consistently provide this support, and blood gas testing practices may contribute to inaccurate disability test readings. In the absence of complete and reliable medical evidence for miners, there is a greater chance that the judges who review the cases will be presented with medical evidence that is insufficient. Similarly, without better options for legal representation, significant numbers of claimants proceed with their claims through a complex and potentially long administrative process without the resources DOL officials and black lung experts note are important to developing evidence and supporting their claims. Yet, DOL does not collect data that would offer a complete assessment of the scope of this problem. Absent efforts to re-examine these structural issues and remedy administrative problems, claimants with meritorious claims will go without benefits, and delays in the resolution of claims will continue.

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## Recommendations for Executive Action

To improve the effectiveness of the Black Lung Benefits Program, we recommend that the Secretary of Labor undertake the following seven actions:

1. Take steps to reduce the number of black lung cases remanded from BRB to OALJ by convening a group to determine the causes of these remands and develop solutions for reducing their incidence.
2. Obtain summary information on how long it takes to resolve claims using its current automated system to routinely track cases through the entire adjudication process and develop associated performance measures.
3. Consider shortening the time required to schedule hearings for black lung cases by examining the feasibility of using video teleconferencing technology to streamline the scheduling of hearings in remote areas.
4. Based on feedback from relevant black lung medical stakeholders, including approved diagnostic providers and Black Lung Clinics, develop options for improving how doctors' opinions are documented on DOL's medical evaluation form.
5. Evaluate and report on claimant access to legal and lay representation by implementing changes to the data management systems of OWCP, OALJ, and BRB that will permit accurate data about claimant representation throughout the claims and appeals process.
6. Evaluate and address blood gas testing practices that may contribute to inaccurate disability test readings by implementing a feedback mechanism to record and track complaints from federal black lung claims stakeholders about testing practices.
7. Examine the following issues and evaluate the potential for proposing structural changes to the program to Congress:
  - options for enhancing incentives for attorneys and lay representatives to take claimants' cases; areas that could be explored include alternate pay structures for attorneys and an examination of federal support for lay representation;
  - the costs and benefits of allowing compensation for partial disability and settlement of claims;

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- the clinical limitations in documenting evidence to prove pneumoconiosis and total disability; and
  - new and previous proposals to reduce the amount of time it takes to resolve claims and appeals, including requiring complete evidentiary development at the primary claims processing phase and limiting the need for appeals.

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOL for review and comment. The department provided written comments with OWCP, OALJ, and BRB responding to our report in three separate letters. These letters are reproduced in appendix II. In its comments, DOL generally agreed with six of our recommendations, and disagreed with one recommendation. DOL agreed to take steps to reduce the number of black lung cases remanded from BRB to OALJ by convening a group to determine the causes of these remands and develop solutions for reducing their incidence, though BRB expressed concern that the creation of an “independent panel” would be inappropriate. In order to respond to BRB’s concern, we modified the language from “independent panel” to “group.” We recognize BRB’s judicial independence and authority and the need for the department to determine the reasons for remands in order to develop solutions to reduce them. The intent of our recommendation was not to assess or evaluate BRB’s performance.

The department generally disagreed with our recommendation to obtain information on how long it takes to resolve claims by developing a mechanism to track cases through the entire adjudication process and develop associated performance measures. OALJ and OWCP indicated in their individual responses that the current system does track the status of each claim and that the system is currently capable of tracking black lung claims throughout the appeals process. However, DOL does not currently track how long a claim remains in the adjudications process as one indicator of performance. We believe that DOL should leverage the capability of its current automated systems for routinely tracking such information and develop associated performance measures. Accordingly, we modified the wording of our recommendation to clarify this point.

In its response, OWCP provided its own analysis of the time it takes to resolve black lung claims. However, we were unable to verify the accuracy of OWCP’s analysis because DOL did not provide us with the data or the calculations used to derive this figure. Moreover, when we carried out our analysis of time to resolve claims, OWCP stressed the difficulty of conducting such an analysis and provided us with data, some of which we found unreliable. It was because of this difficulty and the lack of reliable

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data that we focused our analysis on the only subset of data for which we could reliably determine claim resolution times—those cases that were ultimately awarded benefits. It also made sense to examine these cases because: (1) they were the most likely to be litigated, (2) were, in our opinion, the best available proxy for how long a litigated claim could remain in the system and (3) because other types of claims, such as Trust Fund claims, are unlikely to be appealed. OWCP said it provided its analysis because ours used data that represented approximately 2 percent of black lung claims that were filed between 2001 and 2008, according to its data. OWCP did not provide us with information about how it derived the 2 percent figure, so we could not verify its accuracy. However, given that few miners who bring a claim prevail, and we examined those where a miner was awarded benefits, we recognize that the cases we examined represent a small part of all claims. In the report, we made clear that these cases were only a small subset of all cases and that processing times for these cases could not be generalized. Moreover, even though the claims we examined represent a minority of claims filed, they are part of the constituency that the Act sought to ensure would have recourse through the system. OWCP officials told us that they did not believe that a global measure of timeliness would improve its ability to measure performance or provide any other benefit. We disagree and believe that such a measure would add transparency that might ultimately improve DOL's processes.

The department concurred with our recommendation to consider shortening the time required to schedule OALJ hearings. The OALJ supported the idea that video teleconferencing hearing technology could assist in expediting hearings in remote locations and used their comments to begin considering issues related to acquiring such technology.

DOL also agreed with our recommendation to develop options for improving how doctors' opinions are documented. Though OWCP agreed with our recommendation, in their comments agency officials emphasized that any revisions to the form should include a "well-reasoned narrative" and allow less room for legal challenge from parties, not more. However, we believe that it is essential for DOL to collect and consider feedback from stakeholders in their revisions to the form.

In response to our recommendation to collect more specific data for evaluating claimant access to legal and lay representation, DOL agreed to enhance their existing systems to begin to track when in the process a claimant is represented and whether the claimant is represented by an attorney or lay representative. OALJ, in its individual comments, disagreed with us on the extent to which claimant representation data is currently being captured by OALJ. However, we still maintain that the data provided

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by OALJ was not sufficiently reliable and that system enhancements—including the type of representation a claimant secured and at what point a claimant received that representation (e.g., 1 month, 4 months, or 1 year after an appeal)—are required for DOL to develop a more accurate assessment of the level of claimant access to representation.

DOL also stated that it would expand its existing medical provider database to include records of complaints in response to our recommendation to implement a feedback mechanism to record and track complaints from black lung program stakeholders about testing practices. Though they generally agreed with our recommendation, OWCP expressed concern that an increase in complaints could discourage even good doctors from remaining on DOL's list of approved medical providers. However, the purpose of our recommendation is not to penalize good doctors, but for DOL to begin to track complaints so that the agency can begin to understand the extent to which disability testing errors occur with DOL-approved doctors as well as mine company-hired doctors.

DOL also agreed with our recommendation to evaluate the potential for proposing structural changes to the program to Congress. In response to our recommendation, both OWCP and OALJ used their comments to begin an examination of potential options for consideration for legislative changes. DOL also submitted technical changes to a draft of the report, which we incorporated into the report as appropriate.

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We are sending copies of this report to the Secretary of Labor, relevant congressional committees, and other interested parties. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

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If you or your staff have any questions about this report, please contact me at (202) 512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on last page of this report. GAO staff who made key contributions to this report are listed in appendix III.

Sincerely yours,

A handwritten signature in black ink that reads "Andrew Sherrill". The signature is written in a cursive style with a large initial 'A' and a long, sweeping underline.

Andrew Sherrill  
Director, Education, Workforce,  
and Income Security Issues

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# Appendix I: Objectives, Scope, and Methodology

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To gain insight in to the administration of the Black Lung Benefits Program, we examined (1) how long it takes to process and resolve black lung benefits claims; (2) at what rate and for what reasons black lung claims and appeals are denied by the Department of Labor (DOL); and (3) what barriers, if any, confront miners or their survivors in pursuing their claims.

To determine how long it takes to process black lung benefits claims, we collected data from the Office of Workers' Compensation Programs (OWCP) Automated Support Package claims tracking system, Office of Administrative Law Judges (OALJ) Case Tracking System, and the Benefits Review Board (BRB) Prime Appeals Tracking System. We assessed the reliability of OWCP, OALJ, and BRB data by (1) performing electronic testing of required data elements, (2) reviewing existing information about the data and the system that produced them, and (3) interviewing agency officials knowledgeable about the data. We also obtained processing data from performance reports from each of the three agencies. We determined that the data were sufficiently reliable for the purposes of this report. To establish criteria, the team compared current black lung claims and appeals processing times to the program's past performance and to agency and Office of Management and Budget performance goals. In addition to conducting data analysis, the team conducted interviews with officials from OWCP, OALJ, and BRB.

To determine how long claims remain in the claims and appeals process, we collected data from the OWCP Automated Support Package claims tracking system. However, DOL does not track how long all claims remain in the claims and appeals process. DOL officials cited three primary reasons for not doing so: each body of the program maintains independence and does not share similar administrative processes or computer systems; OWCP's claimant tracking system was designed, in part, to ensure that claimants are paid, not to determine how long claims remain in the process; and determining how long claims remain in the claims and appeals process can be challenging because it is difficult to determine what constitutes a claims resolution. For these reasons, we were only able to determine how long claims persisted in the claims and appeals process for one subset of claimants: miners for whom a

responsible mine operator (RO) ultimately paid benefits.<sup>1</sup> Although DOL provided data on other claimants, such as miners' widows who were awarded benefits, the data were not sufficiently reliable to determine the time to resolve these claims. We attempted to determine if newer claims were resolved at different rates than older claims and how two major regulatory changes to the program instituted in 1981 and 2001 affected claim resolution times.<sup>2</sup> However, our report focused on claims filed between January 19, 2001, and December 31, 2008, because DOL officials said that these claims more accurately reflected how long claims persist in the current claims and appeals process. We determined the time that claims persisted in the process by measuring the date of the initial claim application to the date when a RO agreed to pay benefits.<sup>3</sup> Our examination assessed two cohorts: 3,073 claims filed between January 2, 1982, and January 19, 2001, and 763 claims filed between January 20, 2001, and December 31, 2008. However, many claims filed between 2001 and 2008 are still in the claims and appeals process and hence could not be measured. Therefore, the time calculated to resolve these newer claims may not be fully representative of the time necessary to resolve the claims and appeals process.

To determine the rates at which black lung claims and appeals are denied by DOL, we collected case tracking data from OWCP, OALJ, and BRB. OWCP was able to provide us with data tracking the number of denials, and we used these data to determine the OWCP denial rate. OALJ and BRB do not keep such data. To determine the OALJ and BRB denial rates, we reviewed all fiscal year 2008 OALJ and BRB case documents from a list generated from the agencies' respective case tracking systems. We calculated the number of denials and the total number of cases and then

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<sup>1</sup>Given the challenges noted above, we did not attempt to determine how long claims that were denied remained in the process, even though they may represent a significant proportion of claims. We also did not focus on claims where a miner was awarded benefits from the Black Lung Disability Trust Fund because, according to officials, many of these claims are awarded at OWCP, and it is unlikely that these awards would be appealed.

<sup>2</sup>45 *Fed. Reg.* 13678 (Feb. 29, 1980) and 65 *Fed. Reg.* 79920 (Dec. 20, 2000), respectively.

<sup>3</sup>Claims resolved in 1 year or less included 138 claims that recorded "zero" as the number of days in which a RO agreed to pay benefits. DOL officials said that this is an artifact of their claims process. Specifically, in some cases, a mine company agrees to pay shortly before or after OWCP's initial decision, and for administrative reasons, a zero is recorded. However, for 24 of these claims, the number of days in which a RO agreed to pay benefits appeared unreliable (e.g., when an agreement to pay was dated several years prior to the claim application date). These claims were not omitted from our analysis.

computed a denial rate. To determine the reasons that black lung claims were denied, we collected data from OWCP's case tracking system that captures the reasons for denials. Neither OALJ nor BRB track the reasons why appeals are denied; therefore, to establish the reasons why black lung appeals were denied, we selected random probability samples of all black lung OALJ and BRB appeals cases decided and denied in fiscal year 2008, recorded the results of this analysis into a data collection instrument, and projected the results onto the population. We sampled 85 cases for OALJ and 76 cases for BRB. All percentage estimates in this report from these samples have a margin of error of plus or minus 10 percentage points or less at the 95 percent confidence level, unless otherwise noted. In addition to our data analysis, the team also conducted interviews with officials from OWCP, OALJ, BRB, and the National Institute for Occupational Safety and Health (NIOSH).

To understand the barriers that claimants face in pursuing federal black lung benefits, we conducted interviews with key officials and experts at DOL and other relevant federal agencies, representatives with national, regional, and local organizations that focus on issues or provide support services related to black lung disease and associated disability, as well as local stakeholders who are involved in federal black lung claims on behalf of miner-claimants. At DOL, we interviewed officials with OWCP, OALJ, and BRB and officials and experts with NIOSH, the Centers for Disease Control and Prevention, and the Health Resources and Services Administration. We interviewed representatives from national organizations, including the National Mining Association, the United Mine Workers of America, and the National Coalition of Black Lung and Respiratory Disease Clinics. At the regional and local levels, we interviewed representatives of federal grant-supported Black Lung Clinics, Washington and Lee University's black lung legal clinic, as well as miner-claimants and a range of local black lung stakeholders, including doctors, outreach workers, lawyers, and lay representatives.

In our interviews, we collected information about factors that facilitate and hinder miners' pursuit of federal black lung benefits, including the availability and adequacy of relevant medical and legal services to miners. Our interviews with DOL officials specifically focused on the department's policies, procedures, and guidance for providing or assisting claimants with identifying such services, as well as their views on the effectiveness of such services in assisting claimants to develop sound evidence for their cases. Our interviews with miner-claimants and local black lung stakeholders, including Black Lung Clinic personnel, were organized as site visits to southern West Virginia and eastern Kentucky. These states

and regions were selected because they have (1) high levels of miner death related to black lung disease,<sup>4</sup> (2) a large volume of federal black lung claims,<sup>5</sup> and (3) estimates of black lung-related resources and services.<sup>6</sup> The site visits provided valuable information about the challenges miners face in pursuing federal black lung benefits from the perspective of claimants, as well as local black lung stakeholders who have worked closely with claimants. In addition, we reviewed relevant federal statutes, regulations, administrative cases, and court cases.

We conducted this performance audit from October 2008 to October 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient and appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>4</sup>Based on 2009 data derived from NIOSH's National Occupational Respiratory Mortality System.

<sup>5</sup>Based on 2009 data derived from OWCP.

<sup>6</sup>Based on the opinions of national experts and federal agency officials.

# Appendix II: Comments from the Department of Labor

**U.S. Department of Labor**

Assistant Secretary for  
Employment Standards  
Washington, D.C. 20210



SEP 30 2009

Andrew Sherrill  
Director  
Education, Workforce, and Income Security Issues  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

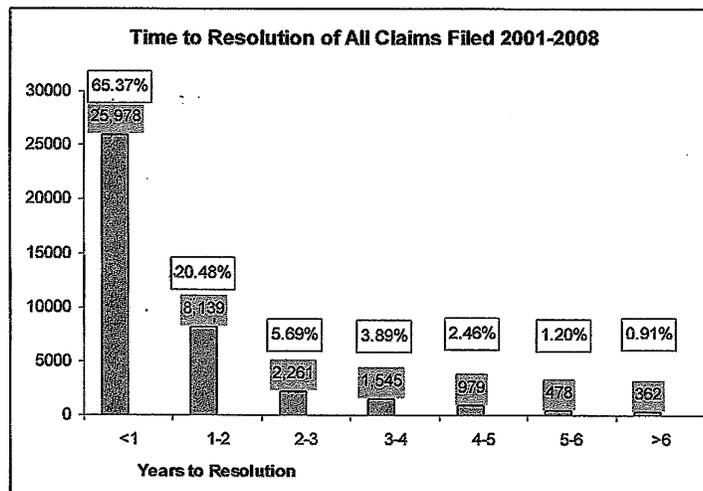
Dear Director Sherrill:

Thank you for the opportunity to comment on your [Draft Report No. GAO-10-7, Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims](#). Although OWCP agrees with several of its recommendations, we have two major concerns. First, we believe that GAO's statements in the narrative underestimate the scope of the Automated Support Package (ASP) which is used by the Office of Workers' Compensation Programs' (OWCP) to record data about claims for black lung benefits. Claims are tracked throughout the claims process -- including initial processing in OWCP, referrals to and from the Office of Administrative Law Judges (OALJ), the Benefits Review Board (BRB), the US Circuit Courts of Appeals, and the US Supreme Court -- and ASP tracks the outcomes of the decisions rendered by those bodies. OWCP is the official repository of every claim filed under Part C of the Act, and as such it must maintain claims information to ensure that decisions on claims in all stages of the process are recorded and implemented.

As illustrated by the chart below, OWCP can calculate the time interval between claims receipt and disposition. The same analytical ability can be applied to calculate time intervals between all stages in the claims resolution process, and is used extensively by OWCP to monitor its development and adjudication processes. GAO faults the OWCP system for the absence of detailed records of the representation of claimants by attorneys and lay representatives or a log of complaints about diagnostic physicians. OWCP acknowledges that its system does not now have the capability to perform these functions, but they can be added relatively easily to OWCP's records management system. But the OWCP data system does capture and track the status of each claim.

Second, we are concerned that GAO has selected for its study a small subset of claimants that is unrepresentative of the overall population the Department actually serves. GAO has selected miners' claims filed between 2001 - 2008 for which a private party was potentially liable that have been ultimately awarded, a grouping which represents approximately 2% of the total claims

filed during that period. The report states that this cohort of claims was selected because it represents the cases most likely to be litigated; because of that tendency, a significant portion of these claims took several years to reach an award. However, an analysis of all claims decided during that period shows that only 0.91% took over 6 years to be resolved. GAO's sample consisted of 763 claims out of 32,626 (not including the automatic continuation of benefits to dependent survivors of miners whose awarded claims were filed before January 1, 1982). A more representative graph, showing all claims filed in that period, is attached below:



Further, certain clarifications are in order. On the first page, GAO states that the Black Lung Program provides \$250 million in benefits to 40,000 beneficiaries. In fact, OWCP also administers Part B of the program, which distributed an additional \$262 million in black lung benefits to over 33,000 disabled miners and their survivors in FY 2008. Those benefits are funded from the general revenues rather than the Trust Fund. On page 10, the phrase "claims can be appealed and modified up to a year after a decision" should read "modification may be requested up to one year after a decision denying benefits and may also be requested by any party up until one year after the last payment of benefits." The statement in the notes to Figure 2 that modification can be requested "[f]or up to a year after initial payment" is also inaccurate and should be replaced. Footnote 2 fails to mention that Federal black lung benefits are only offset by state workers compensation or other disability benefits which are awarded for the same disease. Footnote 46 on page 19 reads "By regulation, there is an irrebuttable presumption of pneumoconiosis...." This should read "By statute, there is an irrebuttable presumption of total disability due to pneumoconiosis if X-rays of the miner's lungs show a spot or lesion that is greater than 1 centimeter in diameter. 30 U.S.C. §921 [Sec. 411(c)(3)]." The regulation cited by GAO merely parallels the statutory language. Similarly, in footnote 11, which addresses the irrebuttable presumption, the phrase "present with" should be replaced with "have x-ray

evidence of.” On the opening “Highlights” page, GAO states that the “regulations require that claimants prove that their condition is primarily caused by coal dust.” In truth, a claimant need only establish that his lung disease is “significantly related to or substantially aggravated by” coal dust, a less stringent standard (20 CFR § 718.201(b)). Footnote 3 appears to limit black lung to only two diseases, clinical pneumoconiosis and chronic obstructive pulmonary disease. The Act and regulations expansively define coal workers’ pneumoconiosis as any chronic lung disease arising out of coal mine employment and its sequelae (30 U.S.C. § 902(b); 20 C.F.R. § 718.201(a)). Finally, footnote 10 incorrectly implies that if a miner has 10 years of coal mine employment any lung disease he has will be presumed to be due to that employment. This presumption applies only to miners suffering from clinical pneumoconiosis.

Finally, we would like to address the Recommendations for Executive Action that specifically concern OWCP.

Regarding recommendation 2), OWCP already tracks the times required to perform each of the stages of its claims development and adjudication processes, has established timeliness goals for them and continues to make significant progress in reducing the times required for their completion. The OALJ and BRB also have established goals for the performance of their roles in the hearings and appeals process. While we are able to track all portions, we do not believe that development of an overall global measure from receipt of claim to disposition would contribute more to the goal of timely disposition of claims than is currently being achieved through the efforts to complete each stage in the adjudication process in a more timely manner.

Regarding 4), GAO believes that OWCP should “develop options for improving how doctor’s opinions are documented...” OWCP agrees, and believes that GAO’s recommendation for obtaining feedback from stakeholders has great merit. OWCP shares GAO’s concern about how its diagnostic physicians document their diagnoses and opinions, and has made a strenuous effort to educate doctors on the need to ensure that their findings are supported by test results. OWCP district office and national office staff have worked closely with physicians when questions have been raised about the adequacy of their reports. The difficult question of how much explanation the physician should supply has been addressed in the recent Court of Appeals decision in Greene v. King James Coal Mining Inc., 575 F.3d 628 (6<sup>th</sup> Cir. July 30, 2009), which found that a doctor’s opinion that addresses all the elements necessary for entitlement is sufficient even if it is not persuasive. Because the regulations provide that totally disabling “legal pneumoconiosis” is compensable just as is “clinical pneumoconiosis,” OWCP is apprehensive about not requiring the physician to write a well-reasoned narrative that includes a determination of the miner’s disability due to a chronic dust disease of the lungs that may not evince the classic radiological findings of pulmonary fibrosis. OWCP wants to ensure that any reporting form that evolves from such feedback allows less room for challenge, not more.

Regarding recommendation 5), OWCP recognizes the need for more specific data concerning representation of claimants and is initiating enhancements to its case management system to capture additional information about representation, including a delineation of lay or attorney and beginning and ending dates of representation.

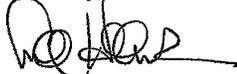
Regarding recommendation 6), analysis of an ABG test requires sophisticated technical knowledge and equipment, and it is not reasonable to expect a claimant (or any patient) to be able to determine if the test was administered in compliance with the regulations (20 C.F.R. § 718.105.) OWCP is concerned that allegations against and investigations of DOL-authorized

physicians, even if unfounded, may drive good doctors out of the program. Nevertheless, the National Office of OWCP/DCMWC does have a database of medical providers and will expand it to include a record of complaints from claimants and other parties reported to District Offices and the actions taken to resolve them.

In recommendation 7), GAO suggests the consideration of several changes to the Act, and OWCP will review all the GAO recommendations for potential legislative reform. OWCP notes that several of these recommendations, including alternate pay structures for attorneys and requiring complete evidentiary development at the initial phase of claims processing, were proposed in earlier black lung rulemakings. The Department carefully explained its ultimate conclusions in the preamble to the Final Rule that became effective on January 20, 2001. Also, Congress considered settlements and compensation for partial disability at the time of the original legislation and rejected it because it recognized the unequal bargaining power of ill, elderly miners when confronted with the resources of major mining and insurance companies. The purpose of the Act is to provide a lifetime of income maintenance to disabled miners and their dependent survivors, and one of its unique features is the provision of interim benefits to eligible claimants during the pendency of prolonged challenges to their entitlement. Under state workers' compensation systems, lump-sum settlements and partial benefits are frequently exhausted within a short period (a typical example of a state award is compensation for 104 weeks), and may run out long before the miner's pneumoconiosis progresses to the point of total disability which would permit the lifetime award mandated by the Act. At the end of FY 2008 less than 9% of awarded miners had any offsetting state workers' compensation award for the same disease. Although state workers' compensation benefits for total disability due to black lung disease are more generous than the Federal benefits, the laws of the all of the major coal producing states impose more stringent criteria for their receipt than does the Federal program.

Thank you again for the opportunity to respond to this report.

Sincerely,



SHELBY HALLMARK  
Acting Assistant Secretary

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September 30, 2009

Andrew Sherrill  
Director  
Education, Workforce, and Income Security Issues  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Director Sherrill:

Thank you for the opportunity to comment on the Draft Report No. GAO-10-7, Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims. The efforts of you and your staff in preparing this important report are appreciated, and the Office of Administrative Law Judges (OALJ) welcomes an examination of the claims process under the Black Lung Benefits Act. OALJ is in general agreement with the report's conclusions and recommendations, and offers only a few clarifications and comments.

**Comments on Recommendations for Executive Action**

*1. Development of mechanism for tracking claims throughout the adjudication*

OALJ concurs with the Office of Workers' Compensation Programs (OWCP) comments on this recommendation. The existing computerized case tracking systems for OALJ, OWCP and the Benefits Review Board (BRB) are designed to meet unique needs of each of those agencies. OALJ recommends that any initiative for developing a method to track claims throughout each stage of the adjudication should focus on leveraging information from the existing systems, rather than creating a new system or consolidating the existing systems.

*2. Examination of feasibility of using video teleconferencing technology*

OALJ concurs that video-hearing technology could assist in expediting the scheduling of hearings on those occasions when the hearing location cannot be easily combined with other cases on an Administrative Law Judge's docket.

The Social Security Administration (SSA) has used video-hearing technology successfully in adjudications, and is presently expanding its use of that technology. OALJ has followed SSA's video-hearing program and those of other agencies and courts, examined video hearing technology at the College of William and Mary School of Law's Center for Legal and Court Technology, and conducted a few video hearings. Consequently, we recognize that video technology has the capacity under the proper circumstances for facilitating a timely and fair

hearing, and would welcome the opportunity to do a more formal examination of whether video-hearings would assist the hearing process at the Department of Labor.

OALJ's experience with black lung adjudications, however, suggests that video technology may be of limited value in the Black Lung Benefits Program. Notably, a vast majority of black lung hearings are conducted in the coal mining regions of the United States and claims in these areas are scheduled regularly throughout the fiscal year. On the other hand, the number of cases delayed because the hearing location is remote is relatively low.

For hearings conducted in remote locations, OALJ is uncertain whether video conferencing technology will be available or easily accessible. Presently, less expensive alternatives have been employed by OALJ to adjudicate these claims. For example, Administrative Law Judges have conducted telephonic hearings on request of the parties. The transcripts from these hearings become part of the formal record. Also, on agreement of the parties, Administrative Law Judges have issued decisions "on the record." In such cases, the parties submit their medical evidence, affidavits, and arguments to the Administrative Law Judge who, in turn, issues a decision based on the documentation.

3. *Development of mechanism for evaluating claimants' access to legal and lay representation*

The report concludes that some adjudicatory delays related to claimants' difficulty in finding legal representation could be better evaluated by implementing changes to the data management systems of OWCP, OALJ and the BRB. The reason for this recommendation appears to be GAO's finding that the Department's systems could not produce data in the format GAO needed for its report. For example, OALJ's existing system could not identify when in the process a representative was obtained by the claimant, or whether the representative was an attorney or a lay representative.

Enhancements could be made to OALJ's case tracking system to record such information. We are not certain, however, how recording and reporting this information in a database would assist in remedying the problem of lack of representation.<sup>1</sup> Rather, we suggest that this is already a well understood problem, and that the focus should be examining whether incentives for attracting more attorneys and lay representatives to represent claimants is warranted.

4. *Requiring complete evidentiary development at the primary processing phase*

The report recommends evaluation of "[n]ew and previous proposals . . . requiring complete evidentiary development at the primary claims processing phase and limiting the need

<sup>1</sup> According to OALJ's Case Tracking System, approximately 80 percent of claimants are represented at the OALJ level. As noted in the report, Administrative Law Judges actively encourage claimants to obtain representation. Although Administrative Law Judges are prohibited by regulation from appointing counsel or referring a claimant to an attorney, OALJ's public website contains a list of black lung clinics, OWCP offices, and a law school clinical program that claimants may contact for assistance.

for appeals.” By law, black lung hearings must be conducted in accordance with the Administrative Procedure Act, which ensures full and fair adjudications of claims.

Black lung hearings are adversarial. Employers and carriers, with rare exception, are represented by counsel and have resources to develop evidence. Consequently, closing the record at the OWCP level may have the unintended effect of lowering a claimant’s opportunity to successfully prosecute his or her claim. Allowing evidentiary development by the parties at the OALJ level, and continuing to allow access to a formal hearing before an Administrative Law Judge, is essential to a fair hearing process.

Further, as the system is presently constituted, it is unnecessary for employers or carriers to expend resources at the OWCP level if the Department-sponsored examination under 20 C.F.R. § 725.406 is unfavorable to the miner. Indeed, as noted in the report, “about 80 percent of all claims decided by OWCP annually have no requests for further action.”<sup>2</sup> This high rate of resolutions at the informal OWCP level militates against the necessity of forcing parties to develop all medical evidence at that level.

#### General Comments

##### *1. Weighing the medical opinions in a claim*

The draft report states that Administrative Law Judges rely on “non-clinical” evidence such as physician credentials, length of depositions or reports, and level of sophistication of the medical reports in determining entitlement.

To be clear, the “clinical” evidence in a claim, which includes chest x-rays, autopsies or biopsies, CT-scans, and expert medical opinions based on a records review or examination of the miner dictate the outcome of a claim. In each and every decision issued by an Administrative Law Judge on the merits of a claim (as opposed to withdrawals, dismissals, or the like), the Administrative Law Judge specifically addresses each piece of “clinical” evidence submitted by all parties in compliance with the evidentiary limitations at 20 C.F.R. § 725.414.

As in other workers’ compensation programs, claims arising in this program often involve a “battle of the experts.” Therefore, Administrative Law Judges are required by law to consider a physician’s credentials as well as how well-reasoned and well-documented a physician’s opinion is compared to the credentials and opinions of other experts in the claim. This has nothing to do with the length of a report or deposition; rather, it has to do with whether the physician’s rationale and conclusions are supported by testing, symptoms, work and smoking histories, and examination results. Opinions that are better supported and better reasoned by credentialed physicians will be accorded greater weight by the Administrative Law Judge.

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<sup>2</sup> See Draft Report at p. 12.

2. *Delay tactics*

The report states that some claimants and employers may have incentives to prolong the claims adjudication process. Parties should well note, however, that Administrative Law Judges have little tolerance for delay tactics that may be utilized by either party and they will deny requests for continuances that do not have a reasonable basis, or that have become excessive in number.

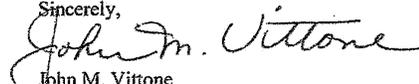
Claimants who fail to cooperate during discovery in violation of an Administrative law judge's order, or who fail to attend their scheduled hearing, risk having their claims dismissed. Similarly, employers or carriers who violate an Administrative Law Judge's discovery orders, or fail to attend a scheduled hearing, risk having their evidence excluded and the claim decided on the basis of the Department-sponsored examination and evidence presented by the claimant.

The draft report states that some mine operators deliberately wait to submit their medical evidence until after the miner has submitted evidence and, often, such evidence is submitted just prior to the hearing. Certain safeguards are built into the regulations to protect claimants from consequences of this conduct. First, in every claim set for hearing, the Administrative Law Judge issues a "Notice of Hearing" that sets forth specific deadlines for submitting evidence. If any party fails to comply with these deadlines, then the Administrative Law Judge may exclude the late evidence. Moreover, pursuant to 20 C.F.R. § 725.456(b)(3), the parties are required to exchange medical evidence at least 20 days prior to the date of the hearing. Failure to comply with this requirement may lead the Administrative Law Judge to exclude the proffered evidence.

There are times, however, when scheduling a physical examination, or taking a physician's deposition is difficult due to time constraints on the parties and experts. By regulation, any party may depose its medical expert prior to the hearing, or have the expert testify at the hearing. At certain hearing locations, it is common for claimants to have physicians testify at the hearing in support of entitlement to benefits. In cases where evidence is submitted on the eve of the hearing or at the hearing, Administrative Law Judges may allow development of post-hearing evidence so that no party is disadvantaged, provided the Administrative Law Judge does not find improper motive in submission of the evidence.

Again, thank you for the opportunity to comment on the draft report. If you require any further information, please contact us at anytime.

Sincerely,

  
John M. Vittone  
Chief Administrative Law Judge

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



September 21, 2009

Andrew Sherrill  
Director  
Education, Workforce, and Income Issues  
United States Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Director Sherrill:

Thank you for the opportunity to comment on the Draft Report No. GAO-10-7, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners Ability to Pursue Claims*. The effort of your staff, in addressing this important issue as well as the professional manner in which the information was acquired to review the complex statutory and regulatory claims process is appreciated. The Benefits Review Board (BRB) is in general agreement with the report's conclusion and recommendations and offers only a few comments for clarification purposes.

**Comments on BRB's Role in Adjudication of Miner's Claims:**

The report provides analysis that is incomplete with respect to the BRB's statutorily-created standard of review for final decisions on appeal from the Office of the Administrative Law Judges under the Longshore Act and the Black Lung Act.

Pursuant to Section 21(b)(3), 33 U.S.C. §921(b)(3) of the Longshore and Harbor Workers' Compensation Act, as incorporated into the Black Lung Act by Section 422, 30 U.S.C. §932, the BRB is charged with reviewing the findings of fact and conclusions of law of administrative law judges (ALJs) in cases on appeal before it. If substantial evidence supports the findings of fact, and those findings of fact are consistent with the applicable law, the ALJ's decision is affirmed; if not, the case is remanded to the ALJ to correct the errors.

The GAO report finds that approximately one-third (33%) of the BRB's decisions are remands and that the Board affirms denials in 46% of the cases it considers. It follows that in approximately 20% of cases, the BRB affirms the ALJ's award of benefits. In addition, the Board reverses the ALJ's Decision and Order as a matter of law in approximately 1% of the cases it considers. In cases of affirmance, the BRB is affirming the findings of the ALJ, whether an award or denial. To suggest that

the Board remands cases for procedural matters is simply not true. Historic consistent appeal rates from the BRB to the U.S. Court of Appeals (10%) and affirmance of BRB decisions by the U.S. Court of Appeals (85-90%) confirm this. The BRB reviews ALJs' findings of fact for substantial evidence, and affirms them if they are rational and consistent with applicable law, in accordance with the Administrative Procedure Act. The BRB is a creature of statute with limited authority, as set forth above.

**Comments on Recommendation for Executive Action:**

Recommendation 1: BRB believes "creation of an independent panel" is inappropriate. The BRB is a statutorily created independent quasi-judicial body with responsibility to review the cases appealed to it, pursuant to a statutorily created standard of review.

However, if the purpose of the recommendation is to analyze the reasons for the remand of cases, GAO is advised that the Board maintains a complete library of its issued decisions, both on the web and in hard copy. A study of the reasons for remand is possible by reviewing those decisions and cataloguing the rationale provided in each case in support of remand.

**GENERAL COMMENTS:**

*Page 7 - Figure 2.*

the second block down, under "BRB Benefits Review Board in Figure 2," "In the Overview of the Black Lung Claims Adjudication Process," The Board's actions also include "Remanding."

*Page 10 - Issue of Appeal / Modification.*

The report suggests that the time for filing both an appeal and a request for modification is one year. The time for filing an appeal and time for filing a request for modification are 30 or 60 days, and one year, respectively. An appeal and a modification request are two separate legal actions with respect to a case. The statutory authority to seek modification within one year of any action on a claim extends the timeline for resolution of a claim.

*Page 14 - Remand*

For the record, the Board notes its disagreement with comments attributable to "some ALJ's" regarding the purpose of BRB remands.

*Page 21 – Legal Representation*

The report correctly expresses concern over the lack of legal representation for claimants pursuing claims. However, the report does not reflect any of the discussions held with the audit team regarding BRB’s standard of review in an appeal where a claimant does not have an attorney. When an appeal is filed by a claimant without an attorney (a *pro se* appeal) the Board provides a complete substantial evidence review on all issues of fact and law pertinent to the ALJ’s decision. In many cases this results in an ALJ denial of benefits being remanded for reconsideration of whether claimant is entitled benefits.

Sincerely,

NANCY S. DOLDER



Chairman of the Board  
and Chief Administrative Appeals Judge

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# Appendix III: GAO Contact and Staff Acknowledgments

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## GAO Contact

Andrew Sherrill, (202) 512-7215 or [sherrilla@gao.gov](mailto:sherrilla@gao.gov)

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## Acknowledgments

Patrick Dibattista (Assistant Director) and Michelle Bracy (analyst-in-charge) managed all aspects of the assignment. Edward Bodine, Christopher Lyons, and Brenda Muñoz made significant contributions to this report, in all aspects of the work. In addition, James Ashley, Cynthia Grant, and Jean McSween provided technical support in design and methodology and statistical analysis; Doreen Feldman and Roger Thomas provided legal support; James Bennett and Susan Bernstein assisted in the message and report development; and Jeff Miller assisted with quality assurance.

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