REPORT OF THE COMPTROLLER GENERAL OF THE UNITED STATES

Examination Of Allegations Concerning Administration Of The Black Lung Benefits Program

Social Security Administration

Department of Health, Education, and Welfare

According to these allegations, the Social Security Administration has not adequately determined the eligibility of claimants awarded black lung benefits.

Although most of the allegations could not be substantiated, Social Security has adopted disability criteria for determining eligibility which appear to be more liberal than intended by black lung legislation.

MWD-76-72

JAN. 14, 1976

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-164031(4)

The Honorable L. H. Fountain, Chairman
Subcommittee on Intergovernmental Relations
and Human Resources
Committee on Government Operations
House of Representatives

Dear Mr. Chairman:

Pursuant to an October 23, 1974, request from your office, we examined the Social Security Administration's response to certain allegations made by an employee regarding the administration of the black lung benefits program. These allegations dealt with

--failing to properly verify coal mine employment as required by law,

--defining coal miner to include claimants who have never worked underground in the mines,

--adopting interim criteria for determining disability that are too lenient,

--improperly paying benefits to certain widows and orphans,

--paying benefits on claims based upon fraudulent medical evidence, and

--"windfalls" accruing to various Kentucky lawyers representing black lung claimants.

We reviewed the laws and regulations relating to the black lung benefits program and discussed the allegations and program administration with Social Security officials. We also examined 145 black lung cases to determine the type of evidence used to verify coal mine employment.

Since Social Security's position on each of the allegations was presented in its response, we did not submit this report to the Department of Health, Education, and Welfare (HEW) or Social Security for advance review and comment. Social Security's views were obtained, however, concerning matters on which we disagreed with its position, and these views are reflected in this report.

BACKGROUND

The Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 801), enacted on December 30, 1969, was amended by the Black Lung Benefits Act of 1972 (30 U.S.C. 901), approved on May 19, 1972. The amended act provides for monthly cash payments from general tax funds to

--coal miners who are totally disabled due to pneumoconiosis (black lung) resulting from employment in coal mines 1/ and

--survivors of deceased coal miners who were entitled to such benefits, who died from black lung, or were totally disabled from the disease at the time of death.

HEW, which delegated administrative responsibility to Social Security, and the Department of Labor administer the black lung benefits program. Social Security is responsible for processing and paying miners' claims filed through June 30, 1973, and survivors' claims filed through December 31, 1973. The Department of Labor is responsible for claims filed after these dates. However, Social Security is responsible for all cases in which a miner receiving Social Security black lung benefits dies and his widow files a claim within 6 months.

FAILING TO PROPERLY VERIFY COAL MINE EMPLOYMENT AS REQUIRED BY LAW

This allegation indicated that although a minimum of 10 years of coal mine employment was required for program eligibility, in many cases this was not adequately verified. Also, claims examiners were allegedly precluded from using social security earnings records to verify the length of coal mine employment.

1/Although the 1969 act applied only to miners, and certain dependents and survivors of miners who worked in underground coal mines, the 1972 act broadened program coverage, in most instances, to include miners (and their dependents and survivors) who worked in coal mines other than underground mines. For certain cases the amended act includes a provision requiring underground coal mine employment for program eligibility. Under this provision, however, surface miners may also qualify if conditions of their employment are substantially similar to conditions in an underground mine.

To be eligible for benefits, the law provides that the miner's pneumoconiosis must have arisen out of coal mine employment. The law does not require a specific tenure of coal mine employment for program eligibility. If a miner worked for 10 or more years in a mine and has or had pneumoconiosis, it is presumed that it arose out of coal mine employment. 1/ If a miner has less than 10 years of employment, he must prove that his pneumoconiosis arose out of coal mine employment. Social Security instructions provide that the miner can prove this if there is no evidence of pneumoconiosis before his coal mine employment and either

--he was employed for 5 to 9 years in a coal mine and did not later work for 10 or more years in another job 2/ where he was exposed to a dust hazard which could have caused his pneumoconiosis, or

--he was so employed for less than 5 years and medical evidence proves he had pneumoconiosis during a period within 5 years of his last coal mine employment.

Social Security instructions further provide for verifying coal mine employment by referring to social security earnings records when satisfactory evidence is not otherwise readily available. Responding to the allegation that claims examiners were precluded from obtaining earnings records for this purpose, Social Security officials said that the district offices have used this verification method more than was intended by sometimes referring to these records when adequate evidence was available from other sources. Social Security added that referring to social security earnings records is costly and time consuming.

1/HEW regulations provide that this presumption may be rebutted if there is persuasive evidence that the pneumoconiosis arose out of any cause other than coal mine employment.

2/Such jobs are commonly found in establishments engaged in the mining and quarrying of rocks and minerals and establishments which convert those rocks and minerals into basic products; e.g., primary metal industries and manufacturers of cement, structural clay products, pottery, concrete, brick, gypsum products, cut stone, and abrasive and asbestos products.

Evidence used to verify coal mine employment

Social Security instructions divide evidence of coal mine employment into two types--primary evidence and secondary evidence.

Primary evidence consists of records of an employer, union, or governmental agency, or certification by Social Security district office representatives of relevant portions thereof, as well as documents issued by employers, unions, or governmental agencies at the time the individual was working in a coal mine. Types of primary evidence include:

--Individual income tax returns.

--W-2 forms.

--Pay stubs.

--Union pension cards.

--Statements signed by employers.

--Social security earnings records, which Social Security has maintained since 1937.

Secondary evidence consists of the written statements of the miner or of others with respect to the miner's coal mine employment. Types of secondary evidence include:

--Recorded prior allegations of coal mine employment, such as information relating to an individual's work history found among hospital and physician treatment records and in records of welfare agencies or later employers.

--Records and public documents with current or usual occupation entered.

--Personal testimony by a miner, his widow, and by other persons with knowledge of his work history.

We reviewed 98 randomly selected black lung cases to determine the extent to which primary evidence was used to verify coal mine employment. In 70 cases there was sufficient primary evidence to document 10 years of coal mine employment. For

24 1/ of the remaining cases, we obtained the miners' social security earnings records. These records documented 10 years of employment in 14 of the 24 cases. The remaining 10 had primary evidence of between 5 and 10 years of employment.

The average age of the miners in the sample was 68, and much of their coal mine employment was accumulated before Social Security maintained earnings records. Therefore, secondary evidence was used to document coal mine employment in many cases. We believed it necessary to determine the extent to which primary evidence showed at least 10 years of employment in cases where the claimant's coal mine employment occurred after social security earnings records were introduced. We thus reviewed 47 additional cases where the miners were born after December 31, 1924. 2/ (A miner would have had to have gone to work before age 12 for his earnings not to have been reflected on his earnings records.)

We found 30 files had sufficient primary evidence to document 10 years of employment. For the other 17 cases, we obtained the miners' social security earnings records and were able to document 10 years of employment in 8 cases. Eight of the remaining 9 cases had between 5 and 10 years documented and 1 had less than 5 years.

In most of the reviewed cases, primary evidence adequately documented employment of 10 years or more, thus establishing a rebuttable presumption of program eligibility. (See p. 3.) Contrary to the allegation, many case files contained social security earnings records.

DEFINING COAL MINER TO INCLUDE CLAIMANTS WHO HAVE NEVER WORKED UNDERGROUND IN THE MINES

Social Security's response to this allegation was that under HEW regulations, an individual need not have worked underground to be considered a miner. However, as far as Social Security could determine, no oral instructions were ever given to classify accountants and executives as underground coal miners, as alleged.

1/Another four cases had no primary evidence, although coal mine employment was claimed prior to 1937 before Social Security maintained earnings records.

2/Social Security advised us that less than 5 percent of the miners awarded benefits, as of March 1975, were born after December 31, 1924.

HEW regulations define a coal miner as an individual who is working or has worked as an employee in a coal mine, performing functions in extracting or processing the coal. Under this definition, accountants, bookkeepers, and other office workers would not be eligible for black lung benefits despite having worked for a coal mine employer.

We questioned Social Security disability claims examiners to determine if oral or written instructions for adjudicating black lung claims were issued to classify accountants and executives as underground coal miners. They indicated no knowledge of any such instructions being issued.

ADOPTING INTERIM CRITERIA FOR DETERMINING DISABILITY THAT ARE TOO LENIENT

As a result of the Black Lung Benefits Act of 1972, Social Security adopted interim adjudicatory rules (temporary criteria) for determining entitlement to black lung benefits.

The criteria provide for a more liberal basis of entitlement than the "permanent criteria" in the following ways:

--Provide a rebuttable presumption for all miners, regardless of age, that simple pneumoconiosis identified by X-ray, biopsy, or autopsy is totally disabling, whereas under the permanent criteria, only complicated pneumoconiosis is presumed to be total disabling.

--Apply liberalized values of the ventilatory function test to all miners regardless of age.

This allegation suggests that claimants who were not medically or physically disabled due to black lung have been found eligible and awarded benefits under the interim criteria. Responding to this, Social Security asserted that the interim criteria are more liberal than the permanent criteria. Although recognizing that allowing black lung claims under the presumption of total disability due to simple pneumoconiosis (as set forth by the interim criteria) would result in awarding benefits to some who are not medically disabled, Social Security stated that the interim criteria were needed to carry out the specific directive of the Congress as stated in the following excerpt from Senate Report No. 92-743.

"Accordingly, the Committee expects the Secretary to adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of

> claims consistent with the language and intent of these amendments. Such interim rules and criteria shall give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than breathing tests when it is not feasible or practicable to provide physical performance tests of the type described in the above cited section from the Secretary's annual report. For example, an older miner who has developed pneumoconiosis or another respiratory or pulmonary disease which is presumed to be pneumoconiosis, and who is no longer working as a miner, would be prevented from returning to or continuing in his usual work as a miner due to the combined employment handicaps of advancing age and respiratory or pulmonary disease even though the disease may have produced relatively little functional loss."

In citing various methods and practices through which black lung benefits have been improperly awarded, the allegation infers that Social Security awards such benefits without regard to age. Social Security records showed that of the miners awarded benefits between January 1970 and March 1975, over 12,000, or about 5 percent, were under age 55. We believe that such awards represent a significant portion of total benefits ultimately paid because younger miners will probably remain on the program rolls longer than older miners and are more likely to have dependent children, thereby qualifying for larger black lung payments.

While indicating that the interim criteria were expected to contain liberalized provisions for adjudicating claims of older miners suffering from black lung, regardless of the degree of functional impairment, the Senate report refers to certain distinctions in the case of a younger miner. It states that:

> "On the other hand, a younger [1/] miner might not be so severely handicapped unless the disease had produced sufficient functional limitation that he is unable to meet the work demands of coal mine employment as determined by medical evaluation."

Age is obviously a more serious impairment to the employability of an older miner than it is to a younger miner. The "combined employment handicaps of advancing age and respiratory or pulmonary disease" facing the older miner, as described in the Senate report, thus appear much less applicable to the younger miner. By presuming total disability due to simple pneumoconiosis, regardless of age, the interim criteria ignore the distinctions between older and younger miners.

The interim criteria provide that the presumption of total disability due to simple pneumoconiosis may be rebutted if

> "other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work."

According to black lung program officials, however, Social Security has not routinely sought additional medical or other evidence to confirm disability. These officials explained that with an older miner, such confirming tests have normally been contraindicated by the claimant's physician, while with a younger miner, facilities for administering such tests have not usually been available, resulting in the backlogging of claims which the Black Lung Amendments of 1972 were intended to eliminate.

[1/In discussing the claimants' ages, the Senate report does not mention specific age ranges quantifying the terms "older" and "younger." According to Social Security officials, they also have not defined these terms. Under the interim criteria, however, Social Security has developed separate ventilatory function test values for miners age 65 and over, while maintaining the permanent criteria values for those under age 65. In its response to the allegation, Social Security refers to the group age 65 and over as "older miners."]

The officials added that additional medical evidence has usually been sought only when claimants were initially unable to qualify for black lung benefits under either the interim or permanent criteria. However, the claimants themselves must obtain such evidence.

Social Security officials have applied the presumption of total disability due to simple pneumoconiosis to all miners based on the assumption that a miner of any age with any degree of pneumoconiosis would find it impossible to secure coal mine or comparable employment due to the potential liability of the employer and the general unavailability of comparable work in areas where most applicants reside. We believe this does not recognize the need, as indicated in the Senate report, to substantiate by medical evaluation a functional disability inhibiting a younger miner. Thus, presuming that simple pneumoconiosis is totally disabling without considering the miner's age appears to be inconsistent with congressional intent.

Under the permanent criteria, ventilatory function test values are prescribed for determining the breathing capacity of black lung claimants. These values parallel those applied in the regular Social Security disability insurance benefits program, which were developed to evaluate ventilatory function in individuals below age 65. Social Security therefore determined that from a medical standpoint, these values were inapplicable for evaluating claimants age 65 and over, noting that the values would overestimate the ability of such older claimants to perform work. Accordingly, the ventilatory criteria were modified (liberalized) under the interim criteria to consider claimants age 65 and older. These liberalized values, however, have been applied to all miners, regardless of age.

In commenting on Social Security's rationale for applying the interim ventilatory values to all miners, Social Security officials said that these criteria are more restrictive for younger claimants and more liberal for older claimants. Nevertheless, we question the logic of applying a standard developed for individuals age 65 and older to claimants of any age.

Social Security found it inappropriate to apply ventilatory criteria developed for claimants under age 65 to those age 65 and older. Conversely, we believe it is equally inappropriate to apply criteria developed for older individuals to younger claimants. If, as Social Security noted, the ventilatory values under the permanent criteria would

overestimate the ability of claimants age 65 and older to work, it seems that the interim criteria values would underestimate the ability of claimants under age 65 to work.

Ventilatory test results in man vary according to age and height. By specifying values dependent upon the height of the examinee, the interim ventilatory criteria recognize the varying effect of height differences. We believe, however, that Social Security has ignored the varying effect of age differences in applying interim ventilatory values to all miners.

In summary, it does not appear that the Congress intended the interim criteria to be so liberal that eligibility based upon presumed disability is allowed to a younger claimant without further evidence that "* * * the disease had produced sufficient functional limitation that he is unable to meet the work demands of coal mine employment as determined by medical evaluation."

IMPROPERLY PAYING BENEFITS TO CERTAIN WIDOWS AND ORPHANS

This allegation appears to address the fact that under the 1972 Black Lung Benefits Act, a widow of two or more miners could establish entitlement to multiple benefits based on the coal mine employment of each. Social Security recognized that while such multiple benefits could be paid it was not in the best interests of the program to do so. HEW issued a regulation providing that benefits payable to such individuals shall be at a rate equal to the highest rate of benefits under any one claim for which entitlement is established. This regulation precludes widows (and other claimants) from being paid based on the coal mine employment of more than one miner. The regulation, which took effect on April 3, 1974, governs any multiple claims, past or present.

This allegation also implies that orphans not related to the miner have received benefits. Responding to this, Social Security pointed out that section 412 of the act provides for the payment of benefits "* * * in the case of the child or children of a widow who is receiving benefits * * *." As long as a child qualifies as a child of a qualified widow, the fact that he or she is not a child of the miner does not preclude entitlement. One of our reports, MWD-75-44, December 31, 1974, to the Chairman, Special Studies Subcommittee, House Government Operations Committee, showed that the median age for widows whose

claims were reviewed was 68 years, which would seem to greatly restrict the number of cases where a widow would have additional children after the miner's death.

PAYING BENEFITS ON CLAIMS BASED UPON FRAUDULENT MEDICAL EVIDENCE

According to this allegation, certain physicians have intentionally submitted fraudulent medical evidence in support of black lung claims. This allegation also implies that Social Security was improperly reimbursing claimants for securing medical evidence.

Responding to this, Social Security said that although evidence certain physicians had submitted was deemed inadequate, incomplete, or inconclusive, the accusation of intentional wrongdoing could not be substantiated. According to Social Security, additional medical evidence was obtained before these claims were finally evaluated. Social Security has found that most fraud complaints have proven to be unwarranted, although some recommendations for prosecution have been made.

Social Security officials said that Social Security has no system for detecting medical fraud. Fraud investigations are undertaken only when specific allegations are made. For example, Social Security officials were about to undertake an investigation of a certain doctor who allegedly maintained a collection of positive black lung X-rays fitting various physical dimensions and who allegedly submitted individual X-rays from this collection, for fees ranging from $400 to $500, to support black lung claims. Social Security officials added, however, that few instances of fraud have been documented.

Through its experience of handling black lung cases, Social Security was able to identify doctors and clinics providing highly reliable ventilatory function test studies. Because of this, claims examiners were informed, through a listing of such doctors and clinics, that the evidence submitted by those on the list was considered review exempt. Evidence submitted by those not on the list was not considered review exempt, and claims examiners were instructed to conduct a 100-percent review of the evidence submitted, obtaining additional evidence when needed. Also, a rereading of all X-rays submitted, regardless of their source, was required to help insure program integrity.

Social Security responded to the allegation of fraudulent reimbursement of the costs of obtaining medical evidence by saying that the black lung legislation provides that claimants are to be reimbursed for reasonable medical expenses they incur in establishing their claims unless the evidence is wholly duplicative or extraneous to the medical issue of the claimant's disability or death due to black lung.

WINDFALLS ACCRUING TO VARIOUS KENTUCKY LAWYERS REPRESENTING BLACK LUNG CLAIMANTS

Social Security's response to this allegation pointed out that the Federal Government is not involved in setting attorney fees in State workmen's compensation black lung claims nor does it have any authority to do so. With regard to Federal black lung claims for which Social Security is authorized to set attorney fees, Social Security also stated that all criticism concerning these fees has come from lawyers who questioned Social Security's authority to retroactively regulate such fees or expressed dissatisfaction with the fee level set for them.

One of our reports, B-164031(4), January 8, 1974, to Congressman John N. Erlenborn, commented on the reasonableness of attorney fees for black lung workmen's compensation claims in Kentucky as well as the amounts and legislative bases for similar fees in Pennsylvania, Virginia, and West Virginia. The report showed that 4 Kentucky attorneys received $5,088,090 for 1,225 cases in fiscal years 1971-73. This amounted to about $215 per hour for the lawyers. The average attorney fee in Kentucky for fiscal year 1973 was $4,277 for each award pursuant to State law, compared to the average fee of $419 that Social Security had authorized for Federal black lung benefits.

The Governor of Kentucky formed the Kentucky Black Lung Task Force to analyze various topics, including the attorney fee situation, and to recommend improvements. On July 5, 1973, the task force issued a report recommending that Kentucky

--revise its legislation to provide a maximum attorney fee of $750 in a noncontested claim;

--establish a maximum fee of $4,212, unless the attorney can justify a higher fee; and

--require any attorney representing a claimant for black lung benefits to support a claim for a fee by a detailed affidavit, including a statement of the number of hours he spent working on the claim.

As a result of the Task Force report, the Workmen's Compensation Board, which approved all attorney fees paid under the workmen's compensation laws, revised its regulations, effective July 14, 1973, to require a detailed affidavit of the amount of work done, time spent, complexity of issues involved, and any related materials the attorney used in making a fee claim.

During our review in 1973, the maximum allowable attorney fee in Kentucky black lung cases was 20 percent of the award value under the State Workmen's Compensation Act. During 1974, the State legislature amended the act's provisions regulating such attorney fees, establishing a maximum fee of $750 for a noncontested claim, as recommended by the Task Force. For other claims in which the fee is specified in a contract between the attorney and his client, the maximum fee was maintained at 20 percent of the award value, but was not to exceed (1) $5,000 if the claim goes no further than the Kentucky Workmen's Compensation Board or (2) $6,000 if the claim reaches the courts. For cases in which the fee is not specified by contract, a $6,500 maximum was established.

Kentucky Department of Labor officials said in September 1975 that these changes have not appreciably decreased the size of fees paid to attorneys in State black lung workmen's compensation cases. They added, however, that during the past 7 to 8 months, an average of only 40 to 45 claims per month had been filed, compared to about 200 per month in 1973.

Regarding attorney fees in State black lung workmen's compensation claims in Pennsylvania, Virginia, and West Virginia, our report (see p. 12) showed that such fees were insignificant compared to those paid in Kentucky because (1) United Mine Workers' attorneys represented many claimants in these States but less than 1 percent of the claimants in Kentucky and (2) claimants in these States--unlike those in Kentucky--do not always have to retain attorneys to obtain benefits.

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This concludes our work on your request.

Sincerely yours,

Comptroller General
of the United States