Statement of John Cline, Attorney for Federal Black Lung Claimants
Submitted to the
Committee on Health, Education, Labor and Pensions, of the U.S. Senate Subcommittee on Employment and Workplace Safety
Hearing on July 22, 2014

Chairman Casey, Ranking Member Isakson, and Senators:

My name is John Cline, and I have represented miners and widows with federal black lung claims as a lay representative from 1993 to 2005 and as a lawyer from 2005 to the present.

The Black Lung Benefits Program

When President Nixon submitted the Coal Mine Health & Safety Act to Congress in 1969, he recognized that "[d]eath in the mines can be as sudden as an explosion or a collapse of a roof and ribs, or it comes insidiously from pneumoconiosis or black lung disease."[1] The purpose of the Act was to protect miners on the job and also to provide modest benefits to coal miners and their dependents in the event of a miner's death or total disability from black lung.

Like other workers' compensation programs, the Act is remedial and intended to provide benefits at the time of need. In order to qualify for the benefits, however, a disabled miner or widow must engage in fairly complex, adversarial litigation and must prevail against large coal companies or insurance companies with experienced lawyers and significantly more financial resources.[2] As revealed in the Pulitzer Prize winning articles by Chris Hamby and the Center for Public Integrity, this adversarial process is not only complex but has been significantly abused by some coal companies and their attorneys.

[1] *See* http:/www/msha.gov/SOLICITOR/CoalAct/69hous.htm at 3-4.

[2] As stated by a long term defense attorney in an article published in the West Virginia Law Review in 2003, "Currently…[federal black lung] claimants must confront the vastly superior economic resources of their adversaries: coal mine operators and their insurance carriers. Often, these parties generate medical evidence in such volume that it overwhelms the evidence supporting entitlement that claimants can procure." William S. Mattingly, *Id Due Process is a Big Tent, Why Do Some Feel Excluded from the Big Top?* 15 W. Va. L. Rev. 791, 792 (2003).

See also Brian C. Murchison, *Due Process, Black Lung, and Shaping of Administrative Justice*, 54 Admin. L. Rev. 1025, 1030 (2002).

The Black Lung Case of Gary Fox

In particular, the black lung case of Gary Fox that is featured in the first article by Chris Hamby is a tragic example of how the purpose of the Act was subverted by unscrupulous legal tactics. In short,

- Mr. Fox was born in 1950.
- After high school, he went into the Army and served in Vietnam.
- He worked as a coal miner for 32 years from 1974 to 2006, and
- Three years later, he died of complicated black lung at the age of 58.
- He was married and had a daughter, but didn't live long enough to see either one of his two grandchildren.

But, if we take a closer look, there is an underlying story about how Mr. Fox tried to get out of the dust seven years earlier by filing a claim for federal black lung benefits and how his employer, Elk Run Coal Company (which is a division of A T Massey) defeated his claim by misleading its own experts and the Court:

- In 1997, Mr. Fox filed a claim for state black lung benefits, and the West Virginia Occupational Pneumoconiosis Board issued a report to both Mr. Fox and to Elk Run that said he had x-ray findings "consistent with progressive massive fibrosis," which is another term for complicated pneumoconiosis or complicated black lung.

- Mr. Fox continued to work because he needed to support his family, but in 1998, his physician became concerned about the possibility of lung cancer. A lobectomy was performed to remove a 5 cm mass from his right upper lung. The local pathologist who examined the tissue samples said it was not cancer and described the mass as a pseudotumor with "numerous anthracotic deposits."

- After recovering from the lung surgery, Mr. Fox went back to work in the mines but realized that he needed to get out of the dust before his breathing got worse. This time he filed a federal black lung claim because the federal program has an irrebuttable presumption of total disability when the miner has progressive massive fibrosis or complicated black lung. If the West Virginia Occupational Pneumoconiosis Board correctly found that he had "progressive massive fibrosis," the federal program would provide a modest monthly income to help support his family and also provide medical benefits for his declining pulmonary condition. His claim was initially approved by the DOL District Director, but Elk Run appealed to an administrative law judge.

- Mr. Fox tried unsuccessfully to find a lawyer, so he appeared without representation. Elk Run, however, was represented by experienced attorneys from the law firm of Jackson Kelly who hired two expert pathologists to review the pathology slides from Mr. Fox's lobectomy along with his work record, and additional radiographic readings. Both experts found that the pathology was consistent with complicated pneumoconiosis and not a pseudotumor. Moreover, one of the pathologists reviewed an x-ray taken after the lobectomy and noted that Mr. Fox had radiographic evidence of even more large opacities that were consistent with complicated pneumoconiosis.

- Any lawyer familiar with federal black lung claims would know that pathology is the "gold standard" for determining the presence of complicated pneumoconiosis and also would recognize that these two expert pathology reports supported Mr. Fox's entitlement to benefits. However, despite being advised by its own expert pathologists that Mr. Fox had complicated coal workers' pneumoconiosis and not a pseudotumor as the local pathologist had opined, Elk Run's lawyers presented the local pathologist's discredited report to its four reviewing pulmonologists and to the Administrative Law Judge as though it was "all" of the pathology evidence.

- Based on the skewed opinions of those four pulmonologists that Mr. Fox did not have pneumoconiosis plus a number of negative x-ray readings by Dr. Wheeler at Johns Hopkins, the judge had no basis for awarding benefits and denied Mr. Fox's claim.

- Without the black lung benefits, Mr. Fox continued working in order to support his family until 2006 when he was too short of breath to continue. He filed again for federal black lung benefits and eventually prevailed.

- During the course of Mr. Fox's second claim, I was his lawyer, and Elk Run went to extraordinary lengths to hide its deception in the prior claim, but eventually, after exhausting all of its options, Elk Run finally had to disclose those two expert pathology reports that would have entitled Mr. Fox to benefits in his previous claim.

- After Elk Run's tactics were exposed, the judge who was misled in the prior claim aptly said, "That's really misleading the Court. It's misleading the witnesses. It's tainting the witness testimony." [3]

- If Mr. Fox had been able to get out of the dust back in 1999, as the Act intended, he might have lived long enough to see his two grandchildren.

[3] *See http://www.publicintegrity.org/2013/10/29/13585/coal-industrys-go-law-firm-withheld-evidence-black-lung-expense-sick-miners.*

Other Examples of Employer Misconduct

Unfortunately, Mr. Fox's case is not an isolated example of deception by employers in federal black lung claims. As Chris Hamby and the Center for Public Integrity disclosed, there have been numerous other examples:

1. In the case of Elmer Daugherty (a miner for 42 years), the Jackson Kelly attorney representing his employer, Westmoreland Coal Company, submitted the "exam report of Dr. George Zaldivar" as if it were the entire report but had removed Dr. Zaldivar's narrative finding of complicated pneumoconiosis. The West Virginia Supreme Court eventually determined that the lawyer's conduct involved "dishonesty, fraud, deceit, or misrepresentation." [4]

2. The same tactic was used in the case of Charles Caldwell and presumably was used against other unsuspecting miners because Jackson Kelly argued vigorously that the practice was permissible.

3. In the case of Clarence Carroll (a miner for 45 years), the Jackson Kelly attorney for Westmoreland Coal Company submitted the "report of Dr. Harold B. Spitz containing his interpretation of [a single] x-ray film" as if it were Dr. Spitz's entire reading of that x-ray but did not disclose the fact that Dr. Spitz had read the same x-ray two and a half years earlier as part of a serial reading of five x-rays taken over several years. Dr. Spitz's single reading said the x-ray was consistent with a high profusion of simple pneumoconiosis and the coalescence of smaller opacities whereas his more probative serial reading was consistent with complicated pneumoconiosis. As in the Daugherty and Caldwell cases, Jackson Kelly presented a misleading portion of a physician's opinion as though it was his entire opinion.

4. In the case of Norman Eller (a miner for 39 years), Jackson Kelly was told by a leading expert that a set of chest CT images was incomplete and insufficient to exclude coal workers' pneumoconiosis. Nevertheless, Jackson Kelly obtained and submitted two interpretations of the same incomplete CT images that were negative for coal workers' pneumoconiosis. Like the Fox case, this intentional submission of unreliable evidence is misleading to the court.

5. And, more recently, we have learned about an x-ray service that will obtain radiographic readings for employers and retain the ones that would favor the claimant.

Thus, there is ample evidence that the intentional skewing of so-called "medical" opinions by employers is fairly common and rarely discovered because the practice goes undetected whenever:

1. The claimant is *pro se* and does not know how to pursue discovery,

[4] *See Lawyer Disciplinary Bd. v. Smoot*, 716 S.E.2d 491, 506 (W. Va. 2010).

2. The claimant is represented by an attorney who does not pursue discovery,

3. The claimant has an attorney who pursues discovery, but the claimant's motion to compel discovery is denied by an ALJ,[5] or

4. The claimant has an attorney who pursues discovery; the ALJ grants a motion to compel discovery; but then, the employer withdraws its challenge to the claim and accepts liability in order to avoid discovery.

Moreover, there is no practical remedy, particularly when an employer can avoid disclosure by simply agreeing to withdraw its challenge to entitlement and accept liability for a claim that the employer probably had no legitimate basis for contesting in the first place.

DOL's Response

To its credit, the Department of Labor has taken some positive steps in response to these deceitful tactics that have been undermining the purpose of the Act. One very important step is the recent announcement that the DOL *will consider* a new regulation requiring the disclosure of medical evidence "to ensure that miners have full access to information about their health and that accurate benefit determinations are made." Requiring the disclosure of all interpretations of radiographs and pathology slides is critically important because:

(1) It would provide a significant deterrent to fraud and deception, and

(2) It would be consistent with Section 923 of the Act, which requires adjudicators to consider "all relevant evidence" in determining the validity of claims.[6]

In a program that is intended to protect miners, it makes no sense to withhold medical evidence that could have an adverse effect on their health, and I urge the committee to ensure that the Department implements this regulatory change as rapidly as possible.[7]

[5] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-233, 1-243 (Jan. 26, 2007).

[6] 30 U.S.C. 923(b).

[7] Although the regulations set evidentiary limits to preclude unnecessarily repetitious evidence, an adjudicator can find "good cause" to exceed those limits in order to prevent the kind of deception described in the examples above. *See* 20 C.F.R. § 725.456(b)(1).

In the meantime, however, as explained in a letter to the Secretary of Labor from Chairman Casey and other members of Congress back in February, it would be a real setback if the Department of Labor implements a more restrictive discovery rule that would require a showing "exceptional circumstances" and the inability to obtain similar evidence without implementing the rule requiring disclosure of medical evidence in federal black lung claims first. Otherwise, the "exceptional circumstances" rule would apply to black lung cases, and coal companies or their attorneys could employ deceptive tactics to defeat the meritorious claims of miners like Mr. Fox with virtually no fear of detection.

Dr. Wheeler and the Black Lung Unit at Johns Hopkins

Another significant problem documented by Chris Hamby, the Center for Public Integrity, and ABC News was the availability negative radiographic readings from the Black Lung Unit at Johns Hopkins and from Dr. Paul Wheeler in particular. Based on statistical evidence and Dr. Wheeler's own statements, he was not properly following the official criteria for classifying radiographs. In more than 100 cases decided since 2000, Dr. Wheeler's negative readings were contradicted by undisputed biopsy or autopsy evidence of black lung. And one of those miners is Mr. Bailey who is testifying here today.

To its credit, DOL has taken corrective measures to also this address problem. It has notified the District Directors that Dr. Wheeler's radiographic readings are not entitled to probative weight unless the employer can provide additional evidence that would rehabilitate his interpretations. The Department also is notifying claimants whose claims contain negative radiographic readings by Dr. Wheeler that they may have a basis for refiling or requesting modification of a prior denial. I commend the Department for these actions.

Administrative delays

Finally, I would like emphasize that massive delays in the processing of claims, particularly at the ALJ level, are creating huge problems for claimants. We have been advised that the caseload at the ALJ level has nearly doubled since 2004 and the number of ALJs for both Longshore and Black Lung cases has dropped from 45 to 36. As a result, the number of days it takes for an appealed case to be assigned to a judge has increased from 160 to 429. Put differently, the delay has gone from a little over three months to more than fourteen months. And then, it still takes a

number of months for a hearing date to be set and usually a year or more for the judge to issue a decision.[8] In other words, there is a virtual log jam at the ALJ level, and because of the long delay, it is not unusual for a claim to outlive the miner or widow.

I cannot emphasize enough that these long delays are causing huge problems for claimants. If a miner or widow is denied benefits at the District Director level but has a valid claim, it will take years for the miner or widow to prevail with no benefits during the interim. Or, if a claimant is awarded benefits by the District Director, the miner or widow has to live with the uncertainty that those benefits could be overturned on appeal, which means that the miner or widow may have to repay all the benefits he or she received while the award was tied up in litigation.

These long delays also make it much more difficult for claimants to obtain representation. It is completely unrealistic to expect that lawyers who only get paid if the claimant prevails will want to represent miners or widows if they also have to wait years to be paid an hourly rate for their time and will not be paid at all if the claimant does not prevail.

Thank you for considering my remarks.

Respectfully submitted by,

John Cline

[8] It is my understanding that the lack of modern technology and a significant shortage of clerks as well as judges are contributing to the delays.