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I. Introduction

Pneumoconiosis, commonly known as "black lung disease," claims the lives of almost 1,500 American coal workers every year.[1] Coal workers develop black lung disease simply by breathing the air of their workplace.[2] Black lung disease begins deep within the lungs and evolves into a chronic and progressive respiratory disease that may lay dormant for years before totally disabling and killing coal miners.[3] For many years, miners suffering from black lung disease battled against a medical community that continually denied the deadly effects of the disease, against coal mine operators willing to sacrifice safety for profits, and against state workers' compensation programs that obstinately turned a blind eye to most mine-related injuries and illnesses.[4] By 1969, turmoil over the lack of benefits for those suffering from black lung disease boiled over into "wildcat strikes" that threatened to paralyze the profitable coal industry.[5] Faced with a growing public outcry for mine

1. Gardiner Harris & Ralph Dunlop, *Dust, Deception, and Death: Why Black Lung Hasn't Been Wiped Out*, COURIER-J. (Louisville, Ky.), Apr. 19, 1998 (examining the number of death certificates listing pneumoconiosis as the cause of death), *available at* http://www.courier-journal.com/dust/. Harris and Dunlop report: "It's as if the Titanic sank every year, and no ships came to the rescue. While that long-ago disaster continues to fascinate the nation, the miners slip into cold, early graves almost unnoticed." *Id.*

2. *See* ANDREW CHURG & FRANCIS H. Y. GREEN, PATHOLOGY OF OCCUPATIONAL LUNG DISEASE 134–35 (2d ed. 1998) (discussing in detail the medical aspects of black lung disease resulting from the inhalation of coal dust).

3. *See id.* at 139–41 (describing the clinical and pathological features of black lung disease and noting that "[t]he disease progresses even in the absence of further dust exposure").

4. *See infra* Part II.B (describing the tumultuous social underpinnings of the Federal Black Lung Benefits Program).

5. *See* BARBARA ELLEN SMITH, DIGGING OUR OWN GRAVES: COAL MINERS AND THE

health and safety reforms,[6] Congress established the Federal Black Lung Benefits Program.[7]

The Federal Black Lung Benefits Program, like the disease itself, often proceeds at a tortuously slow pace because of protracted litigation.[8] The major factors contributing to the marathon-like benefits process include the imbalance in legal resources between coal miners and coal operators and the mountains of medical evidence presented by each party, such as X-rays, pulmonary function tests, and arterial blood gas tests.[9] Claims are bogged down further by a procedural obsession with accuracy that allows miners and operators to relitigate many issues.[10] This Note argues against a recent Seventh Circuit decision that discards finality in an overzealous pursuit of accuracy.[11]

This Note suggests that the United States Courts of Appeals should reject the recent Seventh Circuit decision and continue to value finality in

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STRUGGLE OVER BLACK LUNG DISEASE 98–99 (1987) (noting that high prosperity in the coal industry during the late 1960s established a feeling of job security among miners that led to "wildcat strikes," work stoppages not sponsored by the United Mine Workers of America that called for dust controls and black lung disability benefits).

6. *See* Ben A. Franklin, *The Scandal of Death and Injury in the Mines*, N.Y. TIMES, Mar. 30, 1969, *reprinted in* APPALACHIA IN THE SIXTIES: DECADE OF REAWAKENING 93 (David S. Walls & John B. Stephenson eds.) (1972) (recounting the national attention directed toward mine health and safety that followed the disastrous 1968 explosion that killed seventy-eight coal miners in Consolidation Coal Company's No. 9 mine in Farmington, West Virginia).

7. *See* Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. §§ 901–945 (2000)) (representing the first of many laws passed by Congress in developing the Federal Black Lung Benefits Program).

8. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 535 (7th Cir. 2002) (stating that the black lung case before the Seventh Circuit, "like so many other black lung cases, has a long and tortuous history"); Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 ADMIN. L. REV. 1025, 1028–1032 (2002) (describing a black lung benefits claim that remained undecided after twelve years and noting that this length of adjudication is not uncommon).

9. *See* Murchison, *supra* note 8, at 1032 (noting the protracted nature of black lung claims). Professor Murchison posits that the delay in processing results from:

> multiple claims; adversarial proceedings between a corporation with experienced legal counsel and a coal miner who may or may not be represented; uncertain legal application of finality doctrines, resulting in re-litigation of virtually every issue; dominance by the coal operator in producing medical evidence; . . . and the stop-and-start mode of compensating miners at various times in the life of a claim.

Id.

10. *See Old Ben*, 292 F.3d at 541 (finding a preference for accuracy over finality in determining black lung benefits awards).

11. *See id.* (determining that accuracy should always trump finality concerns in modification adjudications).

the modification process.[12] One must note that traditional notions of finality do not apply in the workers' compensation setting because of the dynamic nature of injury and illness.[13] Any workers' compensation system must allow for adjustment of awards in accordance with changes in a worker's condition.[14] However, this flexibility should not become counterproductive by forcing claimants and operators to continuously litigate the accuracy of benefits awards or denials. Miners, coal mine operators, the courts, and society will benefit from a black lung benefits program that achieves an accurate, yet final resolution in disability claims.

Part II of this Note discusses the long and intertwined histories of coal mining and the Federal Black Lung Benefits Program. Part III describes the modification procedure that claimants and coal operators may pursue during and after the benefits determination process. Although Congress intended the modification procedure to allow for the adjustment of benefits awards in order to account for changes in a miner's condition or to correct a mistake in a determination of fact, modification often serves as a sword and a shield for parties hoping to stall and harass their adversaries.[15] Courts find themselves in the position of balancing two compelling, but competing equitable values: accuracy and finality. Courts must remember the United States Supreme Court's admonition that petitions for modification should be granted only when doing so will "render justice under the act."[16] In other words, administrative law

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12. *See id.* at 550 (Wood, J., dissenting) (stating that while traditional notions of res judicata do not apply in the modification process, an ALJ should still consider finality when deciding whether to reopen a black lung benefits award for modification).

13. *See* Jessee v. Dir., Office of Workers' Comp. Programs, 5 F.3d 723, 725 (4th Cir. 1993) ("[T]he 'principle' of finality just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits").

14. *See* 7 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 127.07[7] (2000) (noting the flexibility inherent in workers' compensation). Larson states:

> It is almost too obvious for comment that *res judicata* does not apply if the issue is the claimant's physical condition or degree of disability at two entirely different times, particularly in the case of occupational diseases. A moment's reflection would reveal that otherwise there would be no such thing as reopening for a change in condition.

Id.

15. *See* Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *9 (4th Cir. Dec. 8, 2000) (concerning a claim for Longshore benefits and noting the danger of allowing modification proceedings merely to allow one party "to get a second chance at presenting evidence available in the first hearing" because it creates a back-door route for parties to retry their cases).

16. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam)

judges (ALJs) must weigh the interest in accurate benefits determinations against the interests of judicial efficiency and finality.[17] Part IV of this Note criticizes the Seventh Circuit's decision to discard finality in *Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs*.[18] Part V analyzes the decisions of the United States Courts of Appeals that value finality in the reopening inquiry. Part VI suggests that ALJs

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(stating that administrative law judges possess broad discretion to reopen benefits awards in order to "render justice under the act").

17. *See* Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *11–12 (4th Cir. Feb. 16, 2001) (weighing the finality and accuracy interests and stating that "the paramount interest is in ensuring that eligible claimants receive benefits and that ineligible claimants do not, and when that interest clashes with an interest in finality, the latter must yield").

18. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 547 (7th Cir. 2002) (stating that accuracy should be the paramount interest considered in ALJ decisions to reopen benefits awards for modification). In *Old Ben*, the Seventh Circuit considered whether an ALJ applied the correct legal standard when she declined to reopen a black lung benefits award because doing so would violate principles of finality. *Id.* at 538. The claimant, James Hilliard, filed for black lung benefits in 1990. *Id.* at 535. A claims examiner initially denied the claim. *Id.* The Department of Labor (DOL) received additional information and reversed the decision, granting Mr. Hilliard benefits. *Id.* at 535–36. The claim proceeded to the Office of Administrative Law Judges (OALJ), and the presiding ALJ granted benefits. *Id.* at 536. The coal operator, Old Ben Coal Company, appealed and then requested dismissal of the appeal to pursue modification. *Id.* The district director denied modification, and the operator requested a hearing. *Id.* A new ALJ issued an order to show cause why the case should not be decided on the record. *Id.* The operator did not file a response and almost a year passed until April 1995, when the operator informed the ALJ of Mr. Hilliard's death and requested a remand in anticipation of a survivor's claim. *Id.* The ALJ granted the request. *Id.* Mrs. Hilliard did not file a survivor's claim and the case returned to the OALJ for a hearing. *Id.* Mr. Hilliard's estate moved to have the operator's modification petition decided on the record, and after receiving no objection from the operator, ALJ Thomas Burke denied its request for modification. *Id.* After ALJ Burke denied the modification request, the operator discovered that its lawyer had abandoned its case. *Id.* After obtaining new counsel, the operators appealed the decision denying modification. *Id.* The Benefits Review Board (BRB) remanded the claim to the district director who subsequently returned it to the OALJ for a hearing by ALJ Linda Chapman. *Id.* at 537. Nine years after Mr. Hilliard's initial claim, ALJ Chapman declined to reopen the award for modification because "[t]o do so would make mincemeat of any principle of finality." *Id.* at 538. The BRB upheld the decision and the operator appealed to the Seventh Circuit. *Id.* The Seventh Circuit found that ALJ Chapman applied the wrong legal standard when she based her decision not to reopen Mr. Hilliard's benefits award for modification in the interest of finality. *Id.* at 548. The Seventh Circuit noted the language of the statute setting forth the circumstances under which an ALJ may modify an award: a change in circumstances or mistake in fact. *Id.* at 539. The Seventh Circuit determined that the Supreme Court interpreted these terms broadly and that principles of finality do not apply to black lung claims. *Id.* at 539–41. It also afforded deference to the DOL's interpretation that accuracy is preferred over finality in benefits awards. *Id.* at 541. The Seventh Circuit remanded the case because it found that ALJ Chapman applied the wrong legal standard by not giving credence to the statute's preference for accuracy over finality. *Id.* at 546.

examine both accuracy and finality when determining whether reopening for modification promotes justice.

II. The Federal Black Lung Benefits Program

A. Background of Coal Mining and Black Lung Disease

Coal, the world's most abundant fossil fuel, permeates the layers of rock beneath the earth's surface.[19] Coal reserves in the United States can be mined profitably for many centuries to come.[20] Increased mechanization in the past forty years improved production output while also reducing the need for coal miners.[21] However, over 100,000 miners still work in underground and surface mines in the United States.[22]

The process of coal formation takes many centuries, as shifting layers of rock put pressure on seams of peat beneath the earth's surface.[23] Peat mixes with many elements in the earth's crust during its transformation into coal.[24] Some of these elements can cause cancer or have toxic effects on the human body's cells.[25] The process of ripping coal from its subterranean home leaves millions of tiny coal bits drifting through the confined mine atmosphere where they mix with other particles, such as ash and silica, to form coal dust.[26] Harm

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19. *See* CHURG & GREEN, *supra* note 2, at 131 (noting that coal reserves can be found on almost every continent and that the largest reserves exist in the former Soviet Union and the United States); LARRY THOMAS, HANDBOOK OF PRACTICAL COAL GEOLOGY 139 (1992) (stating that the United States, Australia, and South Africa export the top amounts of coal).

20. *See* CHURG & GREEN, *supra* note 2, at 131 (reporting that reserves in the United States contain 396 billion metric tons of coal).

21. *See id.* at 133 (stating that while productivity increased fivefold since 1950, the number of coal miners steadily declined from a high of 441,000 in 1949 to 118,733 in 1992).

22. *See* DUANE LOCKARD, COAL: A MEMOIR AND CRITIQUE 19–35 (1998) (noting that in the coal fields of Kentucky, Illinois, and West Virginia, coal mining remains the population's primary occupation).

23. *See* D. W. VAN KREVELEN, COAL 42 (1961) (describing the process of coal formation beginning with the accumulation of wood, bark, roots, and leaves in swampy areas).

24. *See* CHURG & GREEN, *supra* note 2, at 131 (identifying the most common inorganic elements in coal as silicon, aluminum, iron, calcium, sulfur, magnesium, titanium, sodium, and potassium).

25. *See id.* (noting that trace elements in coal that may be cytotoxic or carcinogenic in low amounts include boron, mercury, lead, molybdenum, arsenic, cadmium, antimony, and selenium).

26. *See id.* at 134 ("The underground mining environment contains a complex mixture of suspended particles of various shapes and sizes derived from the coal seam, adjacent rock strata, and rock dust used to dampen explosions.").

to the human body occurs when miners inhale suspended, microscopic particles that can penetrate deep into the alveolar region of the lung.[27]

Over 170 years ago, physicians began to suspect a link between coal dust and lung disease.[28] The earliest medical description of the disease dates back to 1831, when a Scottish doctor, James Gregory, performed an autopsy on a patient who worked in a coal mine for over ten years.[29] The patient quit mining due to shortness of breath and chest pain.[30] Before the patient died, he developed a severe cough that yielded dark expectorate.[31] Dr. Gregory noted that the patient's lungs were black in color and contained several large, fluid-filled cavities.[32]

Although some physicians suspected a link between coal dust and respiratory disease,[33] most physicians and health officials pointed to silica dust as the sole cause of respiratory ailments in coal miners.[34] Adding to this major health misconception, company doctors, with more allegiance to their employers than to their patients, comprised the main source of healthcare for most coal miners in the United States.[35] Company doctors worked for, and reported to, the coal operators who frequently owned everything in coal mining towns from the miners' homes to the general store.[36] Company doctors

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27. *See id.* at 135 (stating that coal dust can be classified by particle size into three categories; particles in the smallest two categories can penetrate deep into the lungs and impinge on airways and nasal passages).

28. *See* SMITH, *supra* note 5, at 4 (stating that the 1831 report by Dr. Gregory, *Case of Peculiar Black Infiltration of the Whole Lungs, Resembling Melanosis*, was the first of several British reports that linked lung disease in coal miners to inhalation of coal dust).

29. *See id.* at 3 (describing Dr. Gregory's findings of severe lung damage including dark color, wide-spread disorganization, and large, fluid-filled cavities).

30. *See id.* (detailing John Hogg's symptoms).

31. *See id.* (noting Hogg's condition prior to death, including the brackish sputum he coughed up).

32. *See id.* at 3–4 (recounting the autopsy findings and that Dr. Gregory and John Hogg attributed Hogg's lung disease to working in the mines).

33. *See id.* at 4 (stating that twenty-eight years after Dr. Gregory's report, a Pennsylvania doctor named John T. Carpenter reported to local health authorities his belief in the link between inhalation of coal dust and development of respiratory disease).

34. *See* CHURG & GREEN, *supra* note 2, at 129 (stating that the emphasis on silica as the sole cause of pneumoconiosis resulted from "reports from the anthracite coal fields in eastern Pennsylvania, where both the prevalence of pneumoconiosis and the silica exposures were high and . . . because CWP [coal workers' pneumoconiosis] and silica were indistinguishable on the chest radiograph").

35. *See* SMITH, *supra* note 5, at 14–15 (stating that coal operators "sought to control the definition and treatment of medical problems" through a system where "miners were required as a condition of employment" to pay for the services of physicians who reported directly to the coal operators).

36. *See id.* at 15 ("Some companies even turned a small profit from [the company

frequently ignored, redefined, or concealed the occupational injuries common among miners in order to satisfy their employers. The operators demanded that doctors attribute mining injuries and illnesses to the weakness or clumsiness of individual miners, and not to a lack of mine health and safety measures.[37] The company doctors often told coal miners that breathing coal dust did not hurt them because the body could naturally expectorate carbon and that breathing coal dust actually helped prevent tuberculosis.[38] The negligence of company doctors, combined with the operators' preoccupation with production and profits rather than safety, fostered a long period of silence about the harmful effects of inhaling coal dust and added to the mischaracterization of the fatal lung disease as "miners' asthma."[39]

Recognition of the miners' plight began to emerge in the early 1940s when British physicians classified pneumoconiosis as a disease separate and distinct from silicosis.[40] In the 1960s, American physicians finally began to acknowledge that inhaling coal dust without silica could lead to a serious lung disease, rather than miners' asthma.[41] Confusion concerning the clinical definition of the disease, coupled with the persistent denial by some authorities that occupational lung disease among miners actually existed, led to the medical profession's tardy recognition of black lung disease.[42] Finally, in

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physician] arrangement by pocketing five to ten percent of the medical checkoff from miners' pay.").

37. *See id.* at 15–16 (drawing a connection between the financial entanglement of company doctors and coal operators and the tendency of company doctors to downplay the health problems of coal miners).

38. *See* ALAN DERICKSON, BLACK LUNG: ANATOMY OF A PUBLIC HEALTH DISASTER 44–47 (1998) (detailing the mischaracterization of the effects of inhaling coal dust, ranging from producing only minor ailments and conditions easily defeated by the body's natural defenses, to the view of the coal mine as an "underground sanitarium").

39. *See* SMITH, *supra* note 5, at 16–17 (outlining "a conspiracy of silence between company physicians and their corporate employers" that led to a belief among company doctors and coal miners that those who became disabled from benign miners' asthma either faked illness or feared the mines). In effect, "the suffering and disability that attended black lung, thus, became medically stigmatized signs of psychological duplicity or instability." *Id.* at 17.

40. *See* DERICKSON, *supra* note 38, at 121 (discussing Great Britain's classification of pneumoconiosis as a disease with symptoms and radiographic distinctions separate from silicosis).

41. *See* SMITH, *supra* note 5, at 25–28 (describing the surge of research, articles, and seminars examining coal mine-related breathing disorders that culminated in 1967 with an analysis of data from a large United States Public Health Service study that found 125,000 current and former miners had pneumoconiosis).

42. *See id.* at 27–30 (discussing the medical community's divergent views on the origin of black lung disease). Smith discusses two conflicting definitions of the disease. *Id.* at 27. The first definition viewed coal dust as the sole agent of the disease "which acted over time in an essentially mechanical and cumulative fashion to impair lung function." *Id.* The second

1968, black lung disease and many other mine health and safety issues suddenly exploded onto the national agenda due to a single mining accident in Farmington, West Virginia, that killed seventy-eight mine workers.[43]

B. The Birth of Black Lung Benefits

Even before the tragic disaster in Farmington, West Virginia, coal mining began to attract attention on a national scale. The soft coal industry grew profitably in the mid-1960s due to the Vietnam War, the growing demand for energy, and relatively good relations between the coal operators and the United Mine Workers of America (UMWA).[44] Miners enjoyed a high level of job security because of the shortage of skilled labor in the Appalachian coal fields.[45] Coal miners realized that strikes posed a powerful threat in a tight labor market and subsequently became more vocal about mining issues ranging from health and safety to collective bargaining.[46] During this time, groups of doctors with no ties to mine operators began a campaign to "spread the word that the inhalation of coal dust causes black lung, a crippling, potentially fatal occupational disease."[47] In January of 1969, West Virginia coal miners who distrusted the medical establishment, the state legislature, and their own union, formed the West Virginia Black Lung Association to advocate for dust controls

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definition of black lung disease focused on the condition of the miners. *Id.* at 27–28. This definition began with the finding that some miners who exhibited breathlessness and impaired lung functioning would exhibit no signs of disease on chest X-rays. *Id.* at 28. Physicians following this definition found a direct correlation between the number of years spent in the mines and the impairment of lung function. *Id.* These physicians believed that agents such as the cytotoxins and carcinogens in the air and dust that miners breathe have harmful effects on the lungs that do not appear on X-rays. *Id.* To this day, no medical consensus on black lung exists and it is possible that "black lung is, in fact, several diseases, some or all of which may be associated with or aggravated by occupational exposure to dust (and perhaps other substances)." *Id.* at 29.

43. *See id.* at 99 (stating that the explosion in Consolidated Coal Company's No. 9 Mine on November 20, 1968 launched the black lung movement into the national consciousness and led Congress to pass the Federal Coal Mine Health and Safety Act of 1969—the first of many federal laws creating the Federal Black Lung Benefits Program).

44. *See id.* at 98 (noting the profitability of the mining industry following a major strike and subsequent contract compromise in 1966).

45. *See id.* (describing the void left in the skilled labor pool following the retirement of a large number of World War II-era coal miners).

46. *See id.* (examining the volatile undercurrent resulting from the dissatisfaction among strong minority groups within the UMWA over the 1966 contract compromises).

47. *See id.* at 98–99 (detailing the grass-roots movement for reform in Appalachian coal country).

and to secure compensation for the disabled.[48] The Federal Black Lung Benefits Program owes its creation to the grass-roots efforts of physicians and miners, states' concerns that black lung claimants would raid their workers' compensation programs, and feelings of regret within the federal government for ignoring the plight of coal miners for decades.[49]

The true catalyst for reform, however, came on November 20, 1968, when seventy-eight coal miners perished in explosions and fires in Consolidation Coal Company's No. 9 Mine near Farmington, West Virginia. In the aftermath of the tragedy at Mine No. 9, a nation horrified by the hopelessness of rescue efforts and the mournful vigils of distraught widows shifted its attention to mine health and safety.[50] In response, Congress began debating the need for mine safety standards, including dust controls, and a federal compensation program for sufferers of black lung disease.[51] In 1969, Congress passed the Federal Coal Mine Health and Safety Act (the 1969 Act).[52] Title IV of the 1969 Act established the Federal Black Lung Benefits Program for coal miners who suffered from total disability resulting from black lung disease and for the dependents of miners who died from black lung disease.[53]

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48. *See* Murchison, *supra* note 8, at 1044 (describing the Black Lung Association's protests at West Virginia's state capital and a wildcat strike involving more than 40,000 miners).

49. *See id.* at 1045 (setting forth the factors that resulted in a federal disability program for sufferers of black lung disease).

50. *See* SMITH, *supra* note 5, at 102 (discussing the media frenzy that descended on Farmington, West Virginia and the interest of a "nation of people celebrating Thanksgiving with family and friends," riveted to "hopeless" and tragic reports from Mine No. 9).

51. *See* Murchison, *supra* note 8, at 1045 (noting the congressional response to mine health and safety issues).

52. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. §§ 901–945 (2000)).

53. *Id.*; *see* 20 C.F.R. § 718.204(b) (2002) (defining "totally disabled"). Section 718.204(b)(1) provides the definition of total disability for purposes of Part C claims filed with the DOL:

> A miner shall be considered totally disabled if the irrebuttable presumption described in § 718.304 applies. If that presumption does not apply, a miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:
>
> (i) From performing his or her usual coal mine work; and
>
> (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

Id. § 718.204(b)(1).

C. Statutory Framework of the Black Lung Benefits Act

The responsibility for ensuring workplace safety and compensation for occupational disease traditionally falls to the states, rather than to the federal government.[54] How and why did the federal government become involved in creating programs and laws regarding issues traditionally reserved for state governments? The primary answer lies in the inherent dangers of coal mining.[55] A series of disasters in the early 1900s led to the creation of the Bureau of Mines within the Department of the Interior.[56] The Bureau of Mines investigated mining methods and miner safety.[57] A notable disaster in 1951, which killed 119 miners in West Frankfort, Illinois, led to the passage of a mandatory Mine Safety Code.[58] Under the Mine Safety Code, Congress, for the first time, gave federal inspectors the authority to shut down dangerous mines.[59] Because of overlapping authority with state inspectors, federal inspectors divided responsibility for mine safety with their state counterparts.[60] Federal inspectors focused on avoiding large-scale disasters while state inspectors managed the day-to-day dangers of coal mining.[61]

State workers' compensation programs provided benefits for coal miners who died or suffered an injury in the treacherous confines of the mines.[62] However, most states, with the exception of Pennsylvania and Alabama, did not

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54. *See* PETER S. BARTH, THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE 2 (1987) (noting that in 1911, Wisconsin and New York became the first states to enact workers' compensation laws).

55. *See id.* at 3–4 (discussing the physical risk of harm from both large-scale disasters and individual incidents).

56. *See id.* at 6–8 (describing the creation of the Bureau of Mines and its evolution into a body with standard-setting and inspection authority).

57. *See id.* at 7 (outlining the responsibilities of the Bureau of Mines).

58. *See id.* (detailing the cooperation between the notorious UMWA president, John L. Lewis, and the United States Secretary of the Interior leading to an optional Mine Safety Code in 1947 that did not become mandatory until 1952).

59. *See id.* at 7–8 (describing the inspection duties of the Bureau of Mines).

60. *See id.* at 8 (stating that the "shared responsibility of federal and state inspectors created obvious administrative problems").

61. *See id.* (noting the informal division of inspection responsibility between state and federal inspectors).

62. *See id.* (discussing the importance of workers' compensation benefits to workers in dangerous occupations). Professor Barth reports statistics compiled by the federal government that show that during 1969, the year that tensions over black lung benefits in West Virginia were at their highest, one miner died for every 600 miners employed full time. *Id.* at 3–4; *see also* SMITH, *supra* note 5, at 137 (noting that the main goal behind the development of workers' compensation laws was to provide quick, equitable relief to workers, while also limiting tort liability for employers).

provide benefits to those disabled by black lung disease.[63] Denial of black lung disease's deadly and disabling effects, exemplified by its characterization as miners' asthma, permeated most state workers' compensation programs.[64] Congress responded to the unavailability of benefits for miners suffering from black lung disease by passing Title IV of the Federal Coal Mine Health and Safety Act of 1969 which established the Federal Black Lung Benefits Program.[65]

The federal government continues to tweak the program by passing amendments to the original statute and by promulgating new regulations.[66] Following its passage in 1969, Congress amended the statute three times to adjust the eligibility criteria for black lung benefits.[67] In 2000, the Department of Labor (DOL) amended its regulations governing the majority of issues surrounding the benefits program.[68] This evolution created a hopelessly complex system for adjudicating benefits claims with different rules governing claims filed during different periods of time.[69] Allen R. Prunty and Mark E. Solomons argue that "[b]ecause the federal black lung program discriminates among claimants so significantly, depending solely on the date on which the claim was filed, the disparate treatment of otherwise similarly situated claimants must seem inexplicable to those who can not obtain an award."[70]

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63. *See* BARTH, *supra* note 54, at 8–9 (noting that Alabama served a relatively small number of miners and that Pennsylvania provided black lung benefits under a separate program with lower benefits than its workers' compensation program).

64. *See id.* at 8 ("[T]he widely shared perception was that workers who were disabled or the survivors of those killed by dust diseases had little or no access to workers' compensation benefits.").

65. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969) (codified as amended at 30 U.S.C. §§ 901–945 (2000)).

66. *See* BARTH, *supra* note 54, at 33–50 (setting out the legislative framework of the Federal Black Lung Benefits Program through 1981); *id.* at 255–62 (providing an early analysis of the 1981 Amendments); *see also* Rita A. Massie, Student Work, *Modification of Benefits for Claimants Under the Federal Black Lung Benefits Program*, 97 W. VA. L. REV. 1023, 1025–30 (1995) (summarizing the major amendments to the Federal Black Lung Benefits Program).

67. *See* Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified as amended in scattered sections of 30 U.S.C.) (making it easier for miners to present a successful black lung benefits claim). *But see* Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, Title II, § 202(a), 95 Stat. 1643, 1643 (1981) (codified as amended at 30 U.S.C. § 923(b) (2000)) (increasing the difficulty of establishing eligibility for black lung benefits).

68. *See generally* Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 65 Fed. Reg. 79,920 (Dec. 20, 2000) (codified at 20 C.F.R. pts. 718, 722, 725, 726, 727) (setting forth the criteria for receiving black lung benefits).

69. *See* Massie, *supra* note 66, at 1025 (outlining the benefits process); *see also* SMITH, *supra* note 5, at 179 ("By 1974, mastering the intricate rules governing federal black lung compensation was an exacting task even for experienced lay advocates.").

70. *See* Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its*

Prunty and Solomons further argue that this "unfair treatment" creates much of the contentious, repetitious, and seemingly endless litigation commonly found in so many black lung benefits claims.[71] In order to understand why the Federal Black Lung Benefits Program operates under multiple sets of statutes and regulations, one must examine its legislative history.

1. Title IV of the Federal Coal Mine Health and Safety Act

Congress passed the 1969 Act to:

> provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.[72]

Congress hoped the program would ease the burden on coal miners, who did not generally qualify for benefits for black lung disease under state workers' compensation programs, by providing temporary assistance to miners suffering from black lung disease.[73] Title IV divided responsibility for processing black lung benefits claims between the Social Security Administration (SSA) and the DOL depending on when the claimant filed for benefits.[74] This fissure in the Federal Black Lung Benefits Program resulted from a funding compromise. Initially, the federal government assumed responsibility for most "old claims" (Part B).[75] Then, coal operators assumed liability for a temporary four-year window (Part C).[76] Finally, the states took over permanent responsibility by applying to be federally certified workers' compensation programs.[77] At the

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Evolution and Current Issues, 91 W. VA. L. REV. 665, 723–24 (1989) (discussing the problems associated with modification and subsequent claims).

71. *See id.* at 724 (proposing that a feeling of unfair treatment among unsuccessful claimants encourages them to file multiple claims).

72. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 792, 792 (codified as amended at 30 U.S.C. § 901 (2000)).

73. *See* H.R. CONF. REP. NO. 91-761, at 88–91 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2578, 2603 (1969) (providing background on the purposes and policies behind the Federal Coal Mine Health and Safety Act of 1969).

74. Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 401, 83 Stat. 792, 792 (codified as amended at 30 U.S.C. § 901 (2000)).

75. *Id.* §§ 411–14.

76. *Id.* §§ 421–26.

77. *See* BARTH, *supra* note 54, at 36–37 (discussing the division of responsibility for the payment of claims).

time, most lawmakers believed that the federal government would handle a majority of the claims for black lung benefits in the first two years. Thereafter, only a small number of benefits claims would remain because of new dust suppression measures in the 1969 Act.[78]

Part B, "Claims for Benefits Filed on or Before December 31, 1972," provided cash benefits to miners totally disabled as a result of pneumoconiosis and to the surviving dependants of miners who died from the disease.[79] The SSA administered Part B with funding from general revenues.[80] Part B covered miners' claims filed on or before December 31, 1972, as well as widows' claims filed by that date, or six months after the death of the miner if he died on or before January 1, 1973.[81] Congress assisted claimants by providing an irrebuttable presumption of entitlement if the miner had complicated pneumoconiosis and by providing two rebuttable presumptions for miners who had at least ten years of mining work history and either had pneumoconiosis or died from a respiratory disease.[82] Eligible claimants received benefits for life and the payments did not vary according to age, earnings, or extent of impairment.[83]

Part C, "Claims for Benefits After December 31, 1972," covered claims filed on or after January 1, 1973.[84] The DOL oversaw the administration of these claims.[85] Part C shifted liability for benefits payments to individual coal mine operators.[86] Eventually, state workers' compensation programs approved

78. *See id.* at 34–36 (stating that Congress provided for mandatory mine air-quality sampling and increased availability of respiratory equipment).

79. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 411–14, 83 Stat. 792, 793–95 (codified as amended at 30 U.S.C. §§ 921–25 (2000)).

80. *Id.* § 411(a).

81. *Id.* §§ 411–14.

82. *Id.* § 411(c)(1)–(3).

83. *See* BARTH, *supra* note 54, at 35 (noting that the Part B benefits administered by the SSA differed from both traditional models of assistance programs: workers' compensation and social security). The federal government willingly created liberal Part B benefits for miners because it anticipated that its liability would be temporary. *Id.* Under the original legislation, Part B benefits ended after only two years while under Part C, the states took over from the DOL after seven years, leaving the federal government merely to certify state compliance with federal standards. *Id.* at 34.

84. Federal Coal Mine Health and Safety Act of 1969, §§ 421–26.

85. *Id.* Theoretically, the DOL would maintain a list of certified state workers' compensation programs. *Id.* § 421. However, only a small number of states applied to be certified and no state ever received certification. BARTH, *supra* note 54, at 43.

86. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, §§ 422–23, 83 Stat. 792, 796–97 (codified as amended at 30 U.S.C. § 932(b) (2000)).

by the Secretary of Labor would assume responsibility for Part C claims.[87] Only those miners not covered by an approved state program could file a Part C claim with the DOL.[88] In processing those claims for black lung benefits not covered by state workers' compensation, Congress provided that the DOL must follow the procedural provisions of the Longshore and Harbor Workers' Compensation Act (Longshore Act).[89]

2. The Black Lung Benefits Act of 1972

Part B claims immediately swamped Social Security offices.[90] The SSA received 350,000 claims in the first two years.[91] Congress and the coal operators realized that a huge liability awaited coal operators if the rate of new claims maintained the same pace after Part C went into effect.[92] The federal government also realized that it could not process the bulk of claims in the first two years of the program because it previously underestimated the number of claims involving death and disability in years prior to 1969.[93] While the SSA managed to make determinations in ninety-three percent of the claims filed, it only awarded benefits to about half of those claimants.[94] The large volume of claims and high rate of denial led to the first set of amendments to Title IV, The Black Lung Benefits Act of 1972 (1972 Amendments).[95]

The 1972 Amendments extended the dates for filing benefits claims and broadened the coverage of the Federal Black Lung Benefits Program.[96]

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87. *Id.* § 421.

88. *Id.* § 422.

89. *Id.*; *see also infra* notes 167–71 and accompanying text (discussing the Longshore Act).

90. *See* BARTH, *supra* note 54, at 37–38 (describing the flood of claims resulting because many groups, including miner advocates, politicians, and the UMWA, encouraged potential beneficiaries to file claims).

91. *See id.* at 38 (stating that "new claims were being filed at the rate of 1,800 a week" in 1971).

92. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 422(b), 83 Stat. 792, 796 (codified as amended at 30 U.S.C. § 932(b) (2000)) (providing that "each such operator shall be liable for and shall secure the payment of benefits").

93. *See* BARTH, *supra* note 54, at 38 (noting that Part B would not be able to deal with all "old cases" of pneumoconiosis in just two years).

94. *See id.* at 39 ("Anger and resentment toward the agency by the coal mining community and their elected representatives over the rate of denials was substantial.").

95. Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (codified as amended in scattered sections of 30 U.S.C.).

96. *See* Massie, *supra* note 66, at 1027–28 (outlining the provisions of the 1972 Amendments).

Congress expanded the definition of total disability,[97] included coverage for surface miners,[98] and provided for the payment of benefits to survivors of miners who suffered from total disability due to black lung, regardless of their cause of death.[99] The federal legislators also included a rebuttable presumption of entitlement for miners with fifteen years of underground mining experience and total disability due to respiratory impairment.[100] To further increase the rate of successful claims, the SSA agreed to promulgate new regulations revising the medical criteria it used to determine whether a claimant qualified for benefits.[101] However, the DOL continued to be bound by the more stringent procedures of the Longshore Act.[102]

3. *The Black Lung Benefits Reform Act of 1977 and the Black Lung Benefits Revenue Act of 1977*

While the SSA made strides under the revised laws and regulations (by the late 1970s, Part B approval was as high as seventy percent),[103] the DOL struggled in its new role as main administrator of the Federal Black Lung Benefits Program.[104] Indeed, Professor Peter S. Barth calls the DOL assumption of administrative responsibility for the benefits program "a disaster for the agency and the law's supporters."[105] Professor Barth notes six major problems that emerged in the DOL's first four years of administration.[106] First, a large volume of claims from "old cases," as opposed to recently budding cases of black lung disease, continued to accumulate.[107] Second, the states did not

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97. Black Lung Benefits Act of 1972 § 4.

98. *Id.* § 3(a).

99. *Id.* § 4(b).

100. *Id.* § 4(c).

101. *See* 20 C.F.R. § 410.490 (2003) (setting forth interim rules); *see also* BARTH, *supra* note 54, at 42 (noting the promulgation of a new interim presumption proved significant in raising the rate of successful claims).

102. *See* Massie, *supra* note 66, at 1028 (stating that the regulations followed by the DOL in administering Part C claims contained "more restrictive medical eligibility regulations").

103. *See* BARTH, *supra* note 54, at 44 (noting SSA's success under the interim presumption).

104. *See* Prunty & Solomons, *supra* note 70, at 680 (describing Congress's disapproval of the DOL's low approval rate and painfully slow claims process).

105. BARTH, *supra* note 54, at 42.

106. *See id.* at 42–44 (pointing out the main flaws in the Federal Black Lung Benefits Program).

107. *See id.* at 42 (noting that a high volume of cases equaled high costs for the program).

include black lung disease in their workers' compensation programs.[108] The failure of states to shoulder their portion of the administration and compensation burden signaled to Congress that the federal government must maintain a permanent role in managing the black lung benefits program.[109] Third, the parties in the Part C phase exhibited a surprising willingness to fiercely litigate any and all claims.[110] Unlike Part B, Part C incorporated an adversarial process.[111] Coal operators, who now faced financial liability for benefits, aggressively defended claims and frequently appealed determinations of responsibility.[112] Fourth, the DOL paid for benefits more frequently than the operators.[113] In many successful claims, the DOL could not name a responsible operator, and when it could name a responsible operator, the program required the DOL to pay (with some hope of recovery) the miner's benefits while the operator exhausted its appeals.[114] Fifth, a massive backlog resulted from the inexperience of DOL personnel, the high volume of claims, and the adversarial nature of the parties.[115] Finally, the DOL repeated one of the primary sins that led to the 1972 Amendments: It boasted an extremely low approval rate of less than ten percent.[116]

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108. *See id.* at 43 (recounting that few states applied for, and none received, certification).

109. *See id.* (describing the inevitability of permanent federal participation in the black lung benefits process).

110. *See id.* (noting the willingness of operators to appeal benefits awards); *see also* Jessica L. Toler, Note, *Dead Canaries: The Struggle of Appalachian Miners to Get Black Lung Benefits*, 6 J. GENDER RACE & JUST. 163, 179 (2002) (reporting that claimants "are out-manned, out-gunned, and out-spent" by coal operators during the benefits process).

111. *See* BARTH, *supra* note 54, at 43 (noting that claimants, operators, and even the DOL face-off against each other at every stage of the Part C process).

112. *See id.* ("In virtually every instance where a determination was made that an employer (or the insurer) should pay compensation, the matter was appealed.").

113. *See id.* (stating that over two-thirds of benefit awards did not name a responsible operator).

114. *See id.* (reporting that the DOL (or the Trust Fund today) pays a successful claimant's benefits while the operator appeals the award). The DOL may recover payments from the operator once appeals are exhausted and the award is final. However, the new modification standard imposed on ALJs by the Seventh Circuit may prevent benefits awards from ever becoming final because modification is perpetually available, thereby preventing the Trust Fund from recouping payment from operators. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 541 (7th Cir. 2002) (stating a preference for accuracy over finality in determining black lung benefits awards).

115. *See* BARTH, *supra* note 54, at 43 ("From July 1, 1973 to December 31, 1977, no determination had been made in about 50,000 of the 123,000 cases filed.").

116. *See id.* at 44 (noting that while the DOL approval rate settled at only 8%, the SSA approval rate for Part B claims rose to 70%).

These breakdowns in the benefits program led to a second set of Title IV amendments. Congress moved to patch the faults in the program by passing two concurrent pieces of legislation, the Black Lung Benefits Reform Act of 1977 (Reform Act of 1977)[117] and the Black Lung Benefits Revenue Act of 1977 (Revenue Act of 1977).[118] Congress, in the Reform Act of 1977, attempted to increase the number of successful claimants for Part C.[119] Through the Revenue Act of 1977, Congress hoped to secure funds for the mounting expenses of the Federal Black Lung Benefits Program by creating an excise tax on operators for every ton of coal they produced.[120]

The Reform Act of 1977 enabled the DOL to set its own medical standards.[121] While promulgating these new standards, the DOL could not evaluate claims by standards more restrictive than the SSA's standards under the 1972 Amendments.[122] Congress expanded the pool of eligible claimants by redefining "miner" to include those who worked in and around coal mines or coal preparation facilities.[123] In addition, the Reform Act of 1977 created a new presumption of entitlement for the survivors of miners who suffered at least partial disability from pneumoconiosis, worked for at least twenty-five years in the mines prior to June 30, 1971, and died prior to March 1, 1978.[124] Finally, Congress deleted the provision that eliminated Part C after 1981, thereby solidifying the DOL's permanent role in managing the Federal Black Lung Benefits Program and erasing any thoughts that the states might one day assume sole responsibility for black lung benefits.[125]

Congress also addressed mounting funding concerns.[126] Once the federal government realized its continuing responsibility for Part C claims, it turned its

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117. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C. and 30 U.S.C.).

118. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978) (codified as amended in scattered sections of 26 U.S.C. and 30 U.S.C.).

119. *See* BARTH, *supra* note 54, at 45–50 (noting that the Reform Act of 1977 tried to ease the burden on miners).

120. *See id.* at 48–49 (describing the Revenue Act of 1977 which assessed an excise tax on coal tonnage).

121. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified as amended in scattered sections of 26 U.S.C., 29 U.S.C. and 30 U.S.C.).

122. *Id.* § 2(c).

123. *Id.* § 2.

124. *Id.* § 3(a).

125. *Id.* § 7.

126. *See* BARTH, *supra* note 54, at 47–48 (noting that although operators and states were eventually scheduled to accept liability for black lung benefits, the federal government had in reality paid most benefits awards because of the inability to name responsible operators).

attention to its increasing liability to beneficiaries.[127] The Revenue Act of 1977 created the Black Lung Disability Trust Fund (Trust Fund).[128] Financing for the Trust Fund came from a tax paid by coal operators on each ton of coal produced.[129] The Trust Fund accepted liability for any Part C claim when the miner's last employment in the mines occurred prior to 1970, thereby making operators indirectly responsible for the oldest cases.[130] The Trust Fund also assumed liability when the DOL could not name a responsible operator or when the DOL could name a responsible operator, but the operator pursued an appeal (in the last scenario, the Trust Fund can seek repayment when the award becomes final or the operator concedes).[131]

4. The Black Lung Benefits Amendments of 1981 and the Black Lung Benefits Revenue Act of 1981

Congress, guided by a conservative administration bent on deregulation of many government programs, moved to delete many of the claimant-friendly provisions of the first two Title IV amendments.[132] The Black Lung Benefits Amendments of 1981 (1981 Amendments) eliminated the following three presumptions which many claimants relied upon to establish eligibility: (1) the presumption of entitlement for claimants who worked at least ten years in the mines and died from a respiratory disease;[133] (2) the presumption of entitlement for claimants with fifteen years of underground mining experience and total disability due to respiratory impairment;[134] and (3) the presumption of

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127. *See id.* at 47 ("[A]lmost all payments under the Department of Labor program came from the U.S. Treasury.").

128. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3, 92 Stat. 11, 12–15 (1978) (codified as amended at 30 U.S.C. § 934 (2000) and adding 26 U.S.C. § 4121 (2000)).

129. *See id.* § 2 (providing for a tax of $1.10 on each ton of coal sold from underground mines and a tax of $0.55 on each ton of coal sold from surface mines, so long as the tax does not exceed 4.4% of the selling price).

130. *Id.* § 3.

131. *Id.*

132. *See* BARTH, *supra* note 54, at 255–56 (recounting that congressional supporters of the Federal Black Lung Benefits Program feared that the Reagan administration and a Republican-controlled Senate would shut down the entire program); *see also* Massie, *supra* note 66, at 1029–30 ("The 1981 Amendments make it significantly more difficult to establish eligibility for Black Lung Benefits in claims filed on or after January 1, 1982.").

133. Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, § 202(b)(1), 95 Stat. 1643, 1643 (codified as amended at 30 U.S.C. § 921(c) (2000)).

134. *Id.*

entitlement for the survivors of miners who were at least partially disabled from pneumoconiosis, worked for at least twenty-five years in the mines prior to June 30, 1971, and died prior to March 1, 1978.[135] The 1981 Amendments also provided for offsetting black lung benefits by the amount of any earnings received by the miner.[136] The current Federal Black Lung Benefits Program, which operates under the 1981 Amendments, grants very few black lung benefits awards.[137]

D. Navigating the Maze: The Black Lung Benefits Process Today

Applying for federal black lung benefits involves navigating various statutory frameworks and dense regulations. This labyrinth-like task can challenge even an experienced practitioner,[138] not to mention the many coal miners who try to navigate the system without representation.[139] Claims for benefits can bounce back and forth between multiple levels of adjudication. Miners and operators frequently find themselves in disputes that take years, and even decades, to resolve.[140]

To further complicate matters, the statutory framework provides that the procedural provisions of the Longshore Act govern the processing of black lung benefits claims.[141] Although the Longshore Act sets forth general guidelines, regulations promulgated by the DOL govern the specifics of the claims

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135. *Id.*

136. *See id.* § 203(b) (providing that the SSA may deduct amounts from a miner's benefits for wages or self-employment income).

137. *See* Toler, *supra* note 110, at 177–78 (noting that only 4% of miners received benefits awards on the basis of their initial application during the 1990s).

138. *See* Prunty & Solomons, *supra* note 70, at 672 (describing the "Byzantine maze of statutory provisions").

139. *See* Toler, *supra* note 110, at 178 (stating that many claimants cannot find representation because few practitioners are willing to work on claims that may last more than a decade and have a low chance of succeeding); Ron Nixon, *Lawyers Are Few and Far Between for Black Lung Plaintiffs*, ROANOKE TIMES & WORLD NEWS, Nov. 25, 2000, at A9 (attributing attorneys' unwillingness to work on black lung benefits claims to the obstacles surrounding payment, which include provisions in the DOL regulations requiring attorneys to receive payment only from successful awards and the ability of coal operators to contest fee awards).

140. *See* Toler, *supra* note 110, at 178 (noting that black lung benefits claims frequently last as long as twenty years and that many miners die before their claims are finally heard and decided). For a detailed description of the rigors of pursuing a federal black lung benefits claim, see Murchison, *supra* note 8, at 1028–32 (describing the ongoing twelve year battle for coal miner Harold Terry's benefits).

141. *See* 30 U.S.C. § 932(a) (2000) (providing for the application of the Longshore Act provisions in federal black lung benefits claims).

process.[142] The DOL issued its latest revision to the black lung regulations on December 20, 2000.[143] These regulations apply to all claims filed after January 19, 2001.[144]

A coal miner applying for black lung benefits must file a claim with a DOL district director office.[145] The district director develops evidence, processes the claim, and provides a proposed decision and order.[146] The district director first gathers the claimant's work history and relevant medical evidence.[147] Based on the employment information provided by the claimant, the district director notifies operators facing potential liability.[148] The district director then produces a schedule for the submission of evidence, a summary of findings from the DOL's pulmonary examination of the claimant, and the district director's preliminary analysis of the evidence.[149] The district director may then ask for additional evidence, issue a proposed decision and order, schedule an informal conference, or issue a benefits award to an eligible claimant if the DOL cannot name a responsible operator.[150] Once the district director issues a proposed decision and order, the claimant and the responsible operator have thirty days to request a hearing before the Office of Administrative Law Judges (OALJ).[151]

If the claimant or the operator files a timely request for hearing, an ALJ schedules a hearing and conducts a de novo review of the record.[152] The ALJ then issues a decision and order containing findings of fact and conclusions of law based on the evidence presented.[153] Either party may request a reconsideration of the decision.[154] After an ALJ issues a denial of a request for reconsideration, or a revised decision and order, either party may then appeal the decision to the Benefits Review Board (BRB).[155]

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142. 20 C.F.R. §§ 718, 725 (2003).

143. *Id.*

144. *Id.* § 725.2(c).

145. *Id.* § 725.303.

146. *See id.* §§ 725.401–725.420 (outlining the procedures for adjudication of claims before the district director).

147. *Id.* §§ 725.404, 725.405.

148. *Id.* § 725.407.

149. *Id.* § 725.410.

150. *Id.* § 725.415.

151. *Id.* § 725.419.

152. *Id.* §§ 725.451, 725.454.

153. *Id.* §§ 725.476, 725.477.

154. *Id.* § 725.480.

155. *Id.* § 725.481.

Parties must make specific claims of legal or factual error in the ALJ's decision to properly invoke review by the BRB because the BRB may not engage in de novo review.[156] The BRB must determine whether substantial evidence in the record, considered as a whole, supports the ALJ's findings of fact and conclusions of law.[157] If the ALJ's decision is rational, supported by substantial evidence, and in accordance with law, the BRB will affirm.[158] The claimant, the operator, or the Director of the Office of Workers' Compensation Programs (as designee for the Secretary of Labor) may seek review of a BRB decision in the United States Court of Appeals for the circuit where the injury occurred.[159] The last avenue for appeal lies in the United States Supreme Court, which either party may petition for a writ of certiorari.

III. Modification

In addition to the multiple opportunities for reconsideration and appeal within the claims process, the claimant and the operator may request modification of an award or denial of benefits.[160] The ALJ, "in order to render justice under the act,"[161] may reopen a benefits award for modification to account for a change in the claimant's condition or to correct a mistake in a determination of fact.[162] The petition for modification remains part of the original benefits claim and is not considered a new claim.[163] Miners may petition for modification at any time within one year of the denial of their claim.[164] Coal operators may petition for modification within one year of the date of their last payment of benefits.[165] After the ALJ issues a modification

156. *Id.* § 802.301.

157. *Id.*

158. *Id.*

159. *Id.* § 802.410.

160. *Id.* § 725.310. For a detailed description of how modification works in the federal black lung benefits system, see Massie, *supra* note 66, at 1037–43 (outlining the modification procedures and introducing various issues involving modification).

161. *See* Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 464 (1968) (quoting the legislative history that explains the rationale behind the 1934 amendment to section 22 of the Longshore Act that broadened the grounds on which a deputy commissioner (ALJ today) may modify a benefits award); *see also* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam) (allowing modification based on re-evaluation of the cumulative evidence and refusing to restrict modification to cases presenting new evidence).

162. *See* 33 U.S.C. § 922 (2000) (setting forth the requirements for modification).

163. 20 C.F.R. § 725.310(a) (2003).

164. *Id.*

165. *Id.*

decision, either party may take advantage of the full reconsideration and appeals process.[166]

Congress wove modification into the Federal Black Lung Benefits Program when it incorporated the Longshore Act provisions into the 1969 Act.[167] The Longshore Act required inclusion of the modification process because longshoremen and harbor workers frequently sustain injuries that either worsen or heal over time.[168] The modification process allows for the adjustment of benefits awards with respect to a claimant's changing condition.[169] One longshoreman may recover from injuries or adapt so that he no longer suffers from a disability. On the other hand, another longshoreman may initially compensate for an injury well enough to continue employment, only to experience a worsening of his condition to the point of total disability.[170] Modification creates flexibility to make appropriate benefits determinations by accounting for a claimant's changing condition.[171] However, this flexibility does not always make procedural sense for successful black lung claimants. Sufferers of black lung disease who qualify for federal benefits have no hope of recovering lung function.[172] Therefore, with regard to a successful black lung claimant, the provision of a modification petition based on a change of condition does not take into account the incurable nature of black lung disease. Modification does, however, play an important role for unsuccessful claimants.

Within one year of the denial of his claim, a claimant may petition the ALJ for modification by demonstrating a change in condition sufficient to establish

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166. *See* Massie, *supra* note 66, at 1040 (describing the levels of review available for decisions on petitions for modification).

167. *See* 30 U.S.C. § 932(a) (2000) (stating that the provisions of the Longshore Act govern the processing of federal black lung benefits claims).

168. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 255–56 (1971) (per curiam) (noting that ALJs possess broad authority to modify benefits awards).

169. *See* 33 U.S.C. § 922 (2000) (providing for modification based on a change in condition).

170. *See* Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 293–94 (1995) (analyzing a case where a longshoreman learned to operate a crane after injuring his back and leg), *vacated by* Dir., Office of Workers' Comp. Programs v. Rambo, 515 U.S. 1139 (1995), *vacated by* Metro. Stevedore Co. v. Rambo, 521 U.S. 121 (1997).

171. *See* 33 U.S.C. § 922 (2000) (allowing ALJs to open modification on their own initiative or at the request of any party).

172. *See* Labelle Processing Co. v. Swarrow, 72 F.3d 308, 314 (3d Cir. 1995) (stating that "pneumoconiosis is a *latent* dust disease" with a "perniciously progressive nature"); Orange v. Island Creek Coal Co., 786 F.2d 724, 727 (6th Cir. 1986) (noting the progressive nature of black lung disease).

eligibility for black lung benefits.[173] In order to warrant a hearing on modification, the claimant need only submit enough evidence to show a possibility of error in the initial benefits award.[174] The change need not be great, it only must be perceivable.[175] Once the process moves to a hearing, the claimant must establish that the perceivable change in condition results in the claimant's total disability due to black lung disease, thereby entitling him to benefits.[176] A claimant demonstrating eligibility based on a change in condition will receive benefits that reach back to the date of the change.[177]

Claimants and operators also may petition for modification to correct a mistake in a determination of fact.[178] The Supreme Court gives ALJs broad

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173. 20 C.F.R. § 725.310(a) (2003). While operators technically may also allege a change (an improvement) in the miner's condition, in reality this option should not be available for operators. Congress intended modification to provide flexibility in the Longshore Act setting because the injuries and earning potential of harbor workers can be dynamic. *See supra* notes 167–71 and accompanying text (describing modification in the Longshore Act). This is not the case for a successful black lung claimant. Black lung disease is a progressive breathing disorder that leads to heart failure, pneumonia, respiratory failure, and other complications. *See* BARTH, *supra* note 54, at 57–61 (describing the effects of black lung disease). To qualify for black lung benefits, the claimant must show that he suffers from pneumoconiosis, that the disease results from working in a coal mine, that the claimant is totally disabled, and that the disability directly results from pneumoconiosis. 20 C.F.R. §§ 718.201–718.204 (2003). If a miner can meet these four criteria and receive benefits, he likely suffers from an incurable form of pneumoconiosis. *See* BARTH, *supra* note 54, at 60 (noting that black lung disease which is severe enough to establish eligibility for federal benefits usually remains incurable). The operator cannot realistically argue for modification on the basis of a change in condition. The operator must allege a mistake of fact to successfully petition for modification. *See* 33 U.S.C. § 922 (2000) (limiting the grounds for modification to mistake of fact or change in conditions). An operator's petition for modification of a successful benefit award based solely on a change in the miner's condition would amount to little more than an additional and unnecessary opportunity for the operator to contest its liability for benefits. *But see* Prunty & Solomons, *supra* note 70, at 721–22 (arguing that a miner's petition for modification based on a change in conditions should be barred unless the miner inhaled additional dust because he continued or returned to coal mining).

174. *See* 20 C.F.R. § 725.310(a) (2003) (stating that the district director may reconsider an award or denial of benefits at the request of either party or upon his or her initiative).

175. *See* Amax Coal Co. v. Franklin, 957 F.2d 355, 356 (7th Cir. 1992) (stating that in the modification process, the required change in condition need only be perceptible, and not material).

176. *See id.* (noting that although the regulations only require a perceptible change in condition to warrant reopening, the claimant must still make a showing of entitlement upon reopening); *see also* 20 C.F.R. §§ 725.201–725.205 (2003) (outlining the requirements claimants must meet to receive federal black lung benefits).

177. *See* Jarka Corp. v. Hughes, 299 F.2d 534, 536–37 (2d Cir. 1962) (discussing the retroactive nature of benefits awards granted in a modification procedure).

178. *See* 33 U.S.C. § 922 (2000) (setting forth the requirements for modification).

discretion to correct a "mistake in a determination of fact."[179] In *O'Keeffe v. Aerojet-General Shipyards, Inc.*,[180] the Court found that ALJs possess broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."[181] Therefore, a claimant or operator may petition for modification by simply asserting that the ALJ decided the ultimate question of fact incorrectly—whether the claimant is disabled due to pneumoconiosis attributable to his working in the mines.[182] Either party may simply ask the ALJ to reflect further on the initial evidence and find in the moving party's favor.[183] An ALJ will evaluate any new evidence presented, along with the evidence presented in the original claim, to determine whether a mistake of fact exists and, if so, whether it necessitates modification of the benefits award.[184] A successful petition entitles the miner to retroactive benefits beginning with the date when he originally began suffering from total disability.[185]

If the Supreme Court provides ALJs with broad discretion to reopen claims for modification, under what circumstances may ALJs deny petitions for modification? While the Court's case law does not address this question

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179. *See* Betty B Coal Co. v. Dir., Office of Workers' Comp. Programs, 194 F.3d 491, 497 (4th Cir. 1999) ("This modification procedure is extraordinarily broad, especially insofar as it permits the correction of mistaken factual findings.").

180. O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254 (1971) (per curiam). In *O'Keeffe*, the Supreme Court considered whether modifications based on a mistake of fact must rely on new evidence. *Id.* at 255. The DOL denied a claimant benefits because the claimant failed to prove that disability resulted from his employment. *Id.* at 254. The claimant moved to reopen and presented testimony from his personal physician. *Id.* The DOL reversed the prior decision and awarded benefits. *Id.* The Fifth Circuit reversed because "in the absence of changed conditions or new evidence clearly demonstrating mistake in the initial determination, the 'statute simply does not confer authority upon the Deputy Commissioner to receive additional but cumulative evidence and change his mind.'" *Id. at* 254–55. The Supreme Court reversed. *Id.* at 256. The Court analyzed the legislative history of the Act and found that Congress vested deputy commissioners (ALJs) with broad discretion to correct mistakes of fact. *Id.* Modification does not require new evidence and deputy commissioners may justify reopening by merely reflecting on the evidence previously submitted. *Id.*

181. *Id.* at 256.

182. *See* Jessee v. Dir., Office of Workers' Comp. Programs, 5 F.3d 723, 726 (4th Cir. 1993) ("If a claimant avers generally that the ALJ improperly found the ultimate fact and thus erroneously denied the claim, the [ALJ] has the authority, without more, to modify the denial of benefits.").

183. *See O'Keeffe*, 404 U.S. at 256 (stating that an ALJ's discretion allows her to reopen and modify cases merely upon rethinking the previously submitted evidence).

184. 20 C.F.R. § 725.310(a) (2003).

185. *See* Jarka Corp. v. Hughes, 299 F.2d 534, 536–37 (2d Cir. 1962) (noting that benefits awarded upon a mistake of fact may reach farther back than benefits awarded upon a change of conditions).

directly, the federal circuits rely heavily on the Court's directive that ALJs "render justice under the act."[186] Most federal circuits find that this generous grant of discretion gives ALJs freedom to consider two main factors: accuracy and finality.[187] However, some circuits interpret the Court's support of broad, substantive criteria for modification as a preference for accuracy over finality in benefits awards.[188] These circuits mandate that an ALJ may not deny a petition for modification solely in the interest of finality.[189] The Seventh Circuit recently addressed the value of finality in petitions for modification and found that "finality simply is not a paramount concern of the Act."[190]

IV. The Seventh Circuit Discards Finality in Old Ben Coal Co. v. Director, Office of Workers' Compensation Programs

True to the pedigree of most black lung claims, a long and complex procedural history accompanied the operator's petition to the Seventh Circuit in *Old Ben*.[191] The case arrived before the Seventh Circuit after the operator appealed the ALJ's denial of its petition for modification.[192] The operator claimed that the ALJ did not apply the correct legal standard when she found that reopening James Hilliard's benefits award would not "render justice under the act."[193]

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186. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (giving ALJs broad discretion to correct factual errors).

187. *See infra* notes 286–90 and accompanying text (noting the various circuits that value accuracy and finality in the reopening inquiry).

188. *See* Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *10–12 (4th Cir. Feb. 16, 2001) (finding that ALJs should ground their analysis in promoting accuracy, not finality or res judicata, when evaluating modification petitions); Consolidation Coal Co. v. Worrell, 27 F.3d 227, 230 (6th Cir. 1994) ("Once a request for modification is filed, no matter the grounds stated, if any, the deputy commissioner has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions."); Jessee v. Dir., Office of Workers' Comp. Programs, 5 F.3d 723, 725 (4th Cir. 1993) (stating that traditional notions of finality do not apply in Longshore and black lung benefits claims).

189. *See Bethenergy Mines*, 2001 U.S. App. LEXIS 2390, at *11–12 ("In modification cases, the paramount interest is in ensuring that eligible claimants receive benefits and that ineligible claimants do not, and when that interest clashes with an interest in finality, the latter must yield.").

190. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 546 (7th Cir. 2002) (analyzing the proper legal standard that ALJs should apply when evaluating petitions for modification).

191. *See supra* note 18 (detailing the procedural history of *Old Ben*).

192. *See Old Ben*, 292 F.3d at 538 (noting that the ALJ declined to reopen because "[t]o do so would make mincemeat of any principles of finality").

193. *See id.* at 538–40 (discussing the operator and the DOL's arguments).

The operator petitioned for modification after it discovered that its attorney abandoned his law practice and did not provide for the operator's physicians to evaluate Mr. Hilliard's autopsy report.[194] Prior to the hearing on modification, Mrs. Hilliard refused to comply with the operator's request to allow its physician to view her husband's autopsy material.[195] The ALJ denied the operator's request for an order directing Mrs. Hilliard to authorize evaluation of the autopsy material because she determined that Mrs. Hilliard had no duty to cooperate with the operator in its attempt to reverse the benefits award.[196] The ALJ found that the operator's counsel knew of Mr. Hilliard's death three years ago and the availability of the autopsy report at that time.[197] After a hearing, the ALJ denied the operator's petition for modification because to grant it would not render justice under the Act, noting that "[m]odification is discretionary, not automatic."[198] Allowing modification by the operator in this claim would allow it to retry its case on the basis of evidence it should have presented at prior hearings.[199] The ALJ stated that to permit modification in this context would "make mincemeat of any principles of finality" by encouraging operators to contest awards year after year simply on the basis of re-evaluations of previously submitted medical evidence.[200]

The operator argued that the ALJ applied an erroneous standard when evaluating its petition for modification.[201] Specifically, the operator claimed that the ALJ imposed an impermissible threshold requirement when she stated that she would reopen the award for modification only if doing do would render justice under the Act.[202] The operator asserted that the statute and regulations

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194. *See* Petitioner's Brief and Short Appendix at 14, Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002) (No. 00-3222) (arguing that the disappearance of one's counsel presents reasonable and proper grounds for modification) (on file with the Washington and Lee Law Review).

195. *See id.* at 7 (noting Mrs. Hilliard's refusal to authorize the operator's review of her husband's autopsy slides).

196. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 537 (7th Cir. 2002) (discussing the ALJ's order to deny the operator's request to order Mrs. Hilliard to authorize examination of her husband's autopsy slides).

197. *See id.* (noting the autopsy slides' availability at the time of Mr. Hilliard's death).

198. *Id.*

199. *See id.* (observing that the ALJ refused to allow the operator "to retry its case simply because it feels that it can make a better showing the next time around").

200. *See id.* at 538 (analyzing the inequity in forcing successful claimants to repeatedly defend their awards against operators with greater resources).

201. *See id.* at 539 (advocating a broader view of reopening for modification).

202. *See* Petitioner's Brief and Short Appendix at 16, Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002) (No. 00-3222) (arguing against the ALJ's application of a "render justice under the act" threshold requirement in modification

did not require this and that they in fact provided broad grounds for either party to seek modification.[203] The operator also argued that although Congress gave ALJs broad discretion to account for changes in condition and to correct mistakes of fact, Congress did not intend for ALJs to have standardless discretion to deny modification.[204] Congress intended ALJs to deny reopening only when the party seeking modification could not point to any relevant mistakes or changed conditions.[205] Finally, the operator alleged that even if the threshold inquiry proved appropriate, the ALJ erroneously found that an employer's modification request would never render justice under the Act.[206] The operator pointed out that any party may seek modification and that the "Act does not and cannot treat the parties differently based on their identity."[207]

The DOL also filed a brief as a party in interest. The DOL noted the permissive nature of modification and argued that petitions for modification should not be denied solely because the party seeking modification could have presented its supporting evidence at an earlier hearing.[208] The DOL asserted that ALJs should deny timely petitions for modification only if the party seeking modification previously engaged in reprehensible conduct.[209] The DOL claimed that the Federal Black Lung Benefits Program prefers accuracy over finality and does not allow erroneous benefits awards to continue simply to further finality.[210]

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petitions) (on file with the Washington and Lee Law Review).

203. *See id.* at 16–19 (claiming that nothing in the statues, regulations, or case law concerning modification requires a "rendering justice" threshold inquiry).

204. *See id.* at 18–19 (arguing that the use of the word "may" in 33 U.S.C. § 922 (2000) does not give open-ended authority to ALJs to decide modification petitions according to personal beliefs and preferences).

205. *See id.* ("A more logical and reasonable reading of the word 'may' suggests that the adjudicator has the discretion to respond only to material and relevant mistakes or changed conditions and ignore irrelevant or immaterial mistakes or changes.").

206. *See id.* at 19–20 (claiming that the ALJ's finding that employer modifications will never render justice under the act was "arbitrary and an abuse of discretion").

207. *Id.* at 20.

208. *See* Brief of the Federal Respondent at 8, Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002) (No. 00-3222) (noting that the flexible nature of modification precludes ALJs from denying petitions for modification solely because the moving party did not present its evidence earlier) (on file with the Washington and Lee Law Review).

209. *See id.* at 19 (arguing that employers not engaged in contemptible conduct can take full advantage of the modification statute's generous provisions).

210. *See id.* at 15 (noting that modification encourages correction, and not perpetuation, of mistakes).

Mrs. Hilliard argued that the ALJ's threshold inquiry represented an appropriate exercise of ALJ discretion.[211] She noted that appellate courts afford great discretion to a trial judge's evaluations of the "interest of justice" criterion in a variety of settings including criminal law and bankruptcy.[212] According to her arguments, the operator and DOL misplace their concern for arbitrary decision-making because "where a render justice finding is questionable, the losing party's recourse is the appellate process, not a restriction on discretion."[213]

Mrs. Hilliard argued that the ALJ properly denied the operator's petition because the operator ignored the opportunity to develop and present evidence at a prior hearing.[214] Mrs. Hilliard asserted that modification should not be used to correct prior mistakes in litigation.[215] Allowing modification to save a litigant from his counsel's mistakes does not serve the interests of justice.[216] Congress intended modification to allow for the correction of mistakes in determinations of fact, not to correct mistakes by a party's counsel.[217] The claimant argued that "[a]pproval of such tactics would only add to the already prolonged litigation which is the unfortunate trademark of federal black lung claims."[218]

Mrs. Hilliard also noted that the operator misread the ALJ's decision when it claimed the ALJ determined that employer modifications can never render justice under the Act.[219] The ALJ reviewed and analyzed the history of the

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211. *See* Brief for Claimant-Respondent at 16–19, Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002) (No. 00-3222) (presenting compelling authority for the ALJ's threshold inquiry) (on file with the Washington and Lee Law Review).

212. *See id.* at 19–20 (discussing the generous deference afforded to hearing officers in many settings incorporating the "interest of justice" criterion, such as criminal law, bankruptcy, and procedural issues including grants of new trial, severance, and transfer of venue in the federal courts).

213. *See id.* at 20–21 (noting that Congress granted ALJs great deference because of their expertise in trial issues and their ability to spend more time with a case than trial judges).

214. *See id.* at 21 ("Section 22 does not permit modification of an award to save litigants from their counsel's mistakes but instead is limited to actual mistakes of fact.").

215. *See id.* (arguing that modification should not be used to correct an attorney's error regarding the presentation of evidence).

216. *See id.* (stating that a party may not use modification to simply retry its case).

217. *See id.* at 22 (pointing to the language of 33 U.S.C. § 922 (2000), which provides for modification based on a mistake in a determination of fact).

218. *Id.* at 21–22.

219. *See id.* at 25 (arguing that the ALJ gave adequate consideration to the operator's motion and based her determination on the facts before her, not upon an opinion of the inequity of employer modifications).

claim, the grounds for the award, and the operator's argument.[220] Mrs. Hilliard asserted that the ALJ held that reopening would not render justice under the Act in *this* claim, and *not* the broader proposition that operator modifications can never render justice.[221] The ALJ did not make any overarching determinations regarding operators in general.[222] Mrs. Hilliard argued that the Seventh Circuit should uphold the ALJ's determination because the ALJ gave due consideration to all the evidence and facts presented at the hearing and in the prior record.[223]

A panel of the Seventh Circuit examined the Supreme Court's broad interpretation of "change in condition" and "mistake of fact."[224] The court of appeals also noted the generous time line for requesting modification and the lack of a specific limit on the number of modification petitions a party may file.[225] In light of Supreme Court case law granting ALJs wide discretion to reopen benefits awards and the generous time limit provisions of the modification statute, the Seventh Circuit agreed with the DOL that ALJ evaluations of modification petitions should focus on accuracy, and not on finality.[226] Therefore, the Seventh Circuit determined that the ALJ had applied the wrong legal standard when she denied the operator's petition for modification on the basis of finality concerns.[227] The Seventh Circuit voted

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220. *See id.* at 24 (pointing to the ALJ decisions on discovery requests and the provision of a hearing on modification).

221. *See id.* (stating that the ALJ based her decision "on the facts of the case, established legal principles and rational decision-making").

222. *See id.* (providing that the ALJ did not "summarily dismiss" the operator's claim).

223. *See id.* at 26 (noting an ALJ's discretionary power to reject late evidence).

224. *See* 33 U.S.C. § 922 (2000) (providing that an ALJ may grant modification "on the ground of a change in conditions or because of a mistake in a determination of fact"); Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 539 (7th Cir. 2002) (interpreting the circumstances under which an ALJ may modify an award); O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam) (stating that ALJs possess great discretion to reopen benefits awards in order to "render justice under the act").

225. *Old Ben*, 292 F.3d at 540; *see also* 33 U.S.C. § 922 (2000) (setting the time limit for modification at one year after the denial of an award or one year after the last payment of benefits).

226. *See Old Ben*, 292 F.3d at 542 n.8 (analyzing the proper amount of deference to give the DOL's interpretation of ALJ discretion to deny petitions for modification). As the Seventh Circuit stated, "[W]e need not decide precisely the level of deference that should attach to the DOL's interpretation of the statute and implementing regulations; its position, we believe, is both reasonable and persuasive. Regardless of the precise standard of deference applied, therefore, we would uphold the DOL's interpretation." *Id.*

227. *See id.* at 548 (finding that accuracy should be the paramount concern in modification).

two-to-one to remand the claim for further consideration under a standard holding accuracy, and not finality, paramount.[228]

V. The Federal Circuits Value Finality in the Reopening Inquiry

The *Old Ben* holding errs by worshiping at the alter of accuracy and removing finality from the "render justice under the act" inquiry.[229] The Seventh Circuit instructs ALJs that unless they can point to some abusive conduct by the party seeking modification, the ALJ cannot deny the petition for modification. The Seventh Circuit effectively narrows Congress's broad grant of discretion to ALJs to evaluate whether reopening a benefits award for modification will render justice under the Act.[230]

A. The Sixth Circuit

In its analyses, the Seventh Circuit pointed to the Sixth Circuit's practice of discarding finality in the reopening inquiry. The court repeatedly quoted *Consolidation Coal Company v. Worrell*[231] for the proposition that ALJs may only deny modification in limited circumstances.[232] The *Consolidation Coal* court stated that "[o]nce a request for modification is filed, no matter the grounds stated, if any, the

228. *See id.* (remanding the claim for further consideration under the accuracy standard).

229. *See id.* at 547 (discussing when an ALJ may properly deny a modification petition).

230. *See id.* at 550–51 (Wood, J., dissenting) (arguing that Congress gave ALJs broad discretion).

231. Consolidation Coal Co. v. Worrell, 27 F.3d 227, 230 (6th Cir. 1994) (finding that ALJs possess broad discretion to reopen benefits awards, even when the petition does not formally aver a change in condition or mistake in fact). In *Consolidation Coal*, the Sixth Circuit considered whether the DOL properly treated a miner's second claim for benefits under the modification provisions. *Id.* at 228. The miner filed the second claim within one year of his initial denial. *Id.* However, he did not specifically aver that the ALJ made a mistake in a determination of fact or that a change occurred in his condition. *Id.* at 230. The employer argued that in order to invoke modification, the party seeking modification must make a specific claim of mistake in fact or change in conditions. *Id.* The court noted that ALJs possess broad discretion to reopen benefits awards, including the discretion to simply rethink the ultimate determination on eligibility. *Id.* Therefore, the court found that the miner did not have to make a specific claim of mistake of fact or change in conditions and the DOL properly treated the second claim under the modification provisions. *Id.*

232. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 541 (7th Cir. 2002) (quoting *Consolidation Coal* to demonstrate a preference for accuracy over finality in modification).

deputy commissioner has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions."[233] However, the Seventh Circuit picked this language out of *Consolidation Coal* without examining the context of the case. *Consolidation Coal* involved a miner's claim filed less than one year after his initial denial.[234] The miner did not specifically assert a change in condition or a mistake of fact.[235] The Sixth Circuit held that the ALJ properly treated the claim as a petition for modification and refused to adopt the operator's position that a petition for modification must specifically state its basis in a change of condition or mistake of fact.[236]

Consolidation Coal stands for the proposition that the DOL does not require a party seeking modification to specifically plead a mistake of fact or change in condition.[237] This holding is consistent with *O'Keeffe*, which allows ALJs to simply rethink benefits awards.[238] However, *Consolidation Coal* did not suggest that reopening must be automatic. Indeed, the Sixth Circuit noted in *Consolidation Coal* that ALJs retain the power to determine when reopening would render justice under the Act.[239] The court stated that the ALJ "may, *if he chooses*, accept this contention [that the benefits award contains error] and modify the final order accordingly."[240] Additionally, two years after *Consolidation Coal*, the Sixth Circuit stated that "[m]odification is not automatic, but discretionary" and that ALJs "must balance the need to render justice against the need for finality in decision-making."[241] Therefore, the *Old Ben* decision mistakenly relied on *Consolidation Coal* because the Sixth Circuit expressly recognizes an ALJ's discretion to grant or deny modification requests based on interests of finality.

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233. *Consolidation Coal*, 27 F.3d at 230.

234. *See id.* at 228 (outlining the background of the claim).

235. *See id.* at 228–29 (noting that the BRB considered the claim a petition for modification and not a subsequent claim).

236. *See id.* at 230 (declining to require claimants to specifically assert a change of condition or mistake).

237. *See id.* (stating that a party need only allege error in the ultimate finding to request modification).

238. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam) (finding that modification can challenge the ultimate finding of liability).

239. *See* Consolidation Coal Co. v. Worrell, 27 F.3d 227, 230 (6th Cir. 1994) (recognizing that ALJs possess great discretion in granting or denying modification petitions).

240. *Id.* at 230 (emphasis added).

241. York v. Dir., Office of Workers' Comp. Programs, No. 95-3555, 1996 U.S. App. LEXIS 24016, at *10 (6th Cir. 1996).

B. The Fourth Circuit

In a series of decisions dating back to 1993, the Fourth Circuit addressed when an ALJ may properly deny a petition for modification.[242] However, the circuit's answer remains unclear. The court considered the denial of a coal miner's request for modification in *Jessee v. Director, Office of Workers' Compensation Programs*.[243] The ALJ denied the miner's request because he found that one ALJ may not correct a mistake made by another ALJ.[244] The Fourth Circuit ruled that the ALJ interpreted his authority too narrowly.[245] In support, the court noted that *O'Keeffe* granted ALJs almost "limitless" authority to reopen benefits awards.[246] During the appeal, the employer argued that the ALJ's denial should stand because to permit modification would "abrogate the principle of finality of judicial determinations."[247] The Fourth Circuit responded to this argument by stating that "the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits."[248] The majority in *Old Ben* quotes this language to support its

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242. *See* Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *11 (4th Cir. Feb. 16, 2001) (establishing that accuracy should trump finality in modification determinations); Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *9 (4th Cir. Dec. 8, 2000) (finding that finality remains a valuable factor in preventing parties from abusing the modification procedure); Jessee v. Dir., Office of Workers' Comp. Programs, 5 F.3d 723, 725 (4th Cir. 1993) (stating that finality does not apply to modification like it does in other settings).

243. *See Jessee*, 5 F.3d at 725 (finding that finality does not restrict ALJs from granting timely petitions for modification). In *Jessee*, the Fourth Circuit considered whether ALJs have the authority to correct mistakes of fact made by another ALJ. *Id.* at 724. The miner petitioned for benefits and presented an X-ray demonstrating qualifying values for black lung disease. *Id.* The first ALJ denied the miner's petition citing the absence of any pulmonary evidence demonstrating black lung. *Id.* The miner filed a petition for modification based on the ALJ's mistaken determination regarding the lack of pulmonary evidence. *Id.* A second ALJ denied the petition, citing a lack of authority to correct a mistake made by another ALJ. *Id.* The miner appealed, arguing that ALJs possess broad authority to reopen benefits awards to correct errors. *Id.* at 725. The employer argued that principles of finality should prevent the ALJ from reviewing the prior denial. *Id.* The Fourth Circuit disagreed, finding that finality does not apply to black lung claims the same way it does in other disputes. *Id.* The court noted that Congress allowed ALJs to reopen benefits awards to correct errors based on little or no evidence. *Id.* Therefore, finality does not prevent an ALJ from correcting a mistake of fact whether made by herself or another ALJ. *Id.* at 726.

244. *See id.* at 724 (citing the ALJ's reluctance to review another ALJ's decision).

245. *See id.* at 725 (noting that the broad grant of discretion to ALJs necessitates a broad reading of their authority to reopen benefits awards).

246. *See id.* at 724 (quoting the Supreme Court's language in *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam)).

247. *Id.* at 725.

248. *Id.*

conclusion that an ALJ may not deny a petition for modification in the interest of finality.[249] Clearly, however, the Fourth Circuit found that finality does not restrict ALJs from granting timely petitions for modification.[250] The court *does not* state that ALJs never can consider finality when exercising their discretion to deny a modification request.

Three years later, the Fourth Circuit reaffirmed the notion of ALJ discretion in *Stevens Shipping Company v. Kinlaw*.[251] This case involved an employer's petition for modification of a successful Longshore claim.[252] The ALJ declined to reopen the claim because the evidence presented by the employer did not suggest the need for modification and because a new hearing would not promote justice.[253] The Fourth Circuit noted the language in *Jessee* stating that finality "does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits."[254] The court also noted that the employer cited no authority requiring an ALJ to exercise her discretion to reopen.[255] The court went on to explain:

> *Banks* and *O'Keeffe* may support the argument that in this case the ALJ could have reconsidered her initial decision and ordered an evidentiary hearing. They do not, however, support the claim that she must do so . . . .

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249. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 541 (7th Cir. 2002) (quoting *Jessee* to demonstrate the preference of accuracy over finality in modification proceedings).

250. *See* Jessee v.Dir., Office of Workers' Comp. Programs, 5 F.3d 723, 726 (4th Cir. 1993) (remanding the claim to the ALJ for determination of the modification request).

251. *See* Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *9 (4th Cir. Dec. 8, 2000) (finding that ALJs should only grant modification if doing so would promote justice). In *Stevens Shipping*, the Court considered whether an ALJ abused her discretion when she denied an employer's request for modification because she found another evidentiary hearing would not promote justice. *Id.* at *4–5. The employer filed for modification of a successful benefits award based on the doctor's evaluation of the stresses of the particular job in question. *Id.* at *4. The ALJ denied the petition because she found that the employer could have presented the evidence it relied on for modification at the initial hearing. *Id.* at *4–5. The ALJ determined that allowing modification to give the employer a second chance to present evidence would not promote justice. *Id.* The employer appealed, arguing that ALJs have the authority to simply rethink the question of entitlement even in the absence of new evidence. *Id.* at *6–7. The court noted that while ALJs do possess broad discretion to reopen benefits awards, nothing requires them to do so. *Id.* at *7. Therefore, the ALJ did not abuse her discretion and the denial of reopening remained appropriate. *Id.* at *9–10.

252. *See id.* at *2 (outlining the procedural history of the case).

253. *See id.* at *4–5 (reiterating the ALJ finding that after-the-fact observations by the employer's physician do not present a compelling need for modification).

254. *Id.* at *7.

255. *See id.* ("Petitioner does not cite a single authority in which the ALJ was required to exercise that discretion [to reopen].").

> Similarly, in *Jessee*, we simply ruled that the ALJ had the authority to consider a modification request, not that he was required to do so.[256]

The Fourth Circuit instructed ALJs to reopen only when doing so would "promote justice" and determined that ALJs should not reopen to allow a party a second chance to present evidence available at the initial hearing.[257] The Fourth Circuit clarified that *Jessee* instructs ALJs to consider a variety of factors, including finality, when exercising their discretion to grant or deny a petition for modification.[258]

Only two months after this opinion, the Fourth Circuit announced its decision in *Bethenergy Mines, Inc. v. Henderson*.[259] In this case, the ALJ declined to correct a mistake of fact because reopening would not render justice under the Act.[260] The ALJ stated that the operator previously conceded the existence of pneumoconiosis and that an appeal constituted a more proper challenge than a petition for modification.[261] The ALJ determined that granting modification would permit the operator to relitigate its claim and to correct the mistakes of its counsel.[262] However, the Fourth Circuit found that the ALJ committed an abuse of discretion by denying the operator's petition for

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256. *Id.* at *7–8.

257. *See id.* at *9 (reinforcing the need for finality in modification determinations).

258. *See id.* at *7–9 (supporting an ALJ's discretion to evaluate a variety of factors when considering modification).

259. *See* Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *10–12 (4th Cir. Feb. 16, 2001) (holding that an ALJ abuses her discretion if she denies reopening solely in the interest of finality). In *Bethenergy*, the Fourth Circuit addressed whether an ALJ abused her discretion when she denied a coal operator's petition for modification in the interests of finality. *Id.* at *8–9. The operator petitioned for modification of a successful benefits award based on a physician's recantation of a positive X-ray reading and a subsequent Supreme Court ruling on the level of proof required to invoke an eligibility presumption. *Id.* at *6. The ALJ noted the presence of a mistake in the determination of eligibility, but denied reopening based on the operator's failure to develop the proper evidence at the first hearing. *Id.* at *4. The ALJ found it would not render justice to allow the operator another chance to litigate its claim when it failed to properly do so during the initial proceeding. *Id.* at *7–8. The Fourth Circuit disagreed and found that the ALJ committed an abuse of discretion by denying modification primarily in the interest of finality. *Id.* at *8–9. The court determined that when a party makes a timely petition for modification, the ALJ may only deny the petition if the requesting party engaged in misconduct. *Id.* at *9. The court reasoned that when accuracy and finality stand at odds, accuracy should trump finality. *Id.*

260. *See id.* at *7 (denying the operator's petition for modification although "the preponderance of the evidence does not establish the existence of pneumoconiosis").

261. *See id.*; *see also* Stokes v. George Hyman Constr. Co., 19 Ben. Rev. Bd. Serv. (MB) 110, 113 (Oct. 16, 1986) (finding that legal errors are not grounds for modification).

262. *See Bethenergy Mines*, 2001 U.S. App. LEXIS 2390, at *8 (noting the ALJ's reluctance to "allow Bethenergy either to re-litigate its claim through the back door 'after it failed on a previous theory' or to correct counsel's misjudgments belatedly").

modification solely in the interest of finality.[263] The court implied that where a requesting party produces evidence of a mistake in a determination of fact, the ALJ may not deny a petition for modification except on the basis of misconduct by the requesting party.[264] The court went on to expressly disavow the importance of finality by stating that "[i]n modification cases, the paramount interest is in ensuring that eligible claimants receive benefits and that ineligible claimants do not, and when that interest clashes with an interest in finality, the latter must yield."[265]

The court supported this statement by citing the *Jessee* language that finality "does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits."[266] However, the court did not mention *Stevens Shipping* or its interpretation that *Jessee* "simply ruled that the ALJ had the authority to consider a modification request, not that he was required to do so."[267] *Bethenergy Mines* leaves the Fourth Circuit with an internal fissure regarding the proper treatment of finality in modification determinations. *Stevens Shipping* instructs ALJs that they may consider a variety of factors, including finality, when evaluating modification requests,[268] while *Bethenergy Mines* tells ALJs that "[f]inality and *res judicata* are not appropriate factors in adjudicating modification requests."[269] It remains unclear which rule currently represents the law in the Fourth Circuit. The cases only differ in that *Stevens Shipping* concerned a claim for Longshore benefits while *Bethenergy Mines* dealt with a claim for black lung benefits. It seems inequitable for the Fourth Circuit to value finality in Longshore claims, while discarding it in black lung claims, because Title IV of the 1969 Act incorporated the modification provisions from the Longshore Act into the Federal Black Lung Benefits Program.[270] Therefore, if a court had to choose a rule regarding finality, it should choose the *Stevens Shipping* rule, and not the *Bethenergy Mines* rule, because black lung borrows from Longshore, and not *vice versa*.

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263. *See id.* (disavowing the importance of finality in modification requests).

264. *See id.* (noting that the ALJ did not find that the operator had engaged in misconduct).

265. *Id.* at *12.

266. *See id.* at *11 (stating that finality does not apply to properly filed modification requests).

267. Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *8 (4th Cir. Dec. 8, 2000).

268. *See id.* at *9 (reinforcing the need for finality in modification determinations).

269. Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *11 (4th Cir. Feb. 16, 2001).

270. *See* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 422, 83 Stat. 792, 796 (codified as amended at 30 U.S.C. § 932(a) (2000)) (providing that the DOL processes black lung claims under the procedural provisions of the Longshore Act).

C. The Other Circuits

Most federal circuits give ALJs broad discretion to consider a variety of factors, including finality, when granting or denying modification requests. The United States Court of Appeals for the District of Columbia specifically notes that "even though there was power to reopen, there is no reason to think that there should be an automatic reopening simply because the Deputy Commissioner or the Administrative Law Judge found a mistake in a determination of fact."[271] The court went on to instruct ALJs that their decisions whether or not to reopen should be guided by asking whether reopening for modification would render justice under the Act.[272] ALJs should not grant modification requests to parties looking for a back-door route to relitigate their case.[273] The court emphasized that finality should factor into the reopening decision by stating that:

> The congressional purpose in passing the law regarding [modification] would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation.[274]

The United States Court of Appeals for the First Circuit also imparts broad discretion to ALJs weighing modification requests.[275] The First Circuit held that even when it may be in the interests of justice to reopen a claim for modification, ALJs possess the discretion to deny reopening in the interests of finality.[276] The court explained that, although an ALJ *could* reopen to correct mistakes in some cases, the statute *does not require* her to grant reopening.[277] A request for modification remains a plea to the ALJ's discretion.[278] The philosophy behind giving great weight to finality stems from the notion that the

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271. McCord v. Cephas, 532 F.2d 1377, 1380 (D.C. Cir. 1976).

272. *See id.* at 1380–81 (discussing the appropriate standard for reopening).

273. *See id.* at 1381 (noting that parties must put their best arguments forward at the initial hearing).

274. *Id.*

275. *See* Gen. Dynamics Corp. v. Dir., Office of Workers' Comp. Programs, 673 F.2d 23, 25–26 (1st Cir. 1982) (finding that ALJs should balance accuracy and finality in modification determinations).

276. *See id.* at 25 ("[A] court must balance the need to render justice against the need for finality in decision-making.").

277. *See id.* (providing that finality should remain an important factor when evaluating modification requests).

278. *See id.* at 26 (noting that the employer did not present a convincing argument for reopening the case).

"orderly administration of justice . . . depends in no small part upon finality of judicial determinations."[279]

The United States Court of Appeals for the Eleventh Circuit also values finality in modification determinations.[280] While ALJs may grant modification based on a simple review of the evidence, they should not grant modification to give a party another chance to present its case.[281] The actions of the attorney, although they may result in the possibility of an erroneous benefits award, are binding on the party.[282] The Eleventh Circuit's stance directly conflicts with the Seventh Circuit's holding in *Old Ben*.[283] In *Old Ben*, the Seventh Circuit criticized the Eleventh Circuit's rule preventing parties from using modification to correct mistakes of counsel because it relies heavily on finality.[284] The Supreme Court instructed ALJs to consider accuracy *and* finality when considering whether reopening will render justice under the Act.[285] Indeed, the United States Courts of Appeals for the First Circuit,[286] the Fourth Circuit,[287] the Sixth Circuit,[288] the Ninth Circuit,[289] and the District of Columbia[290] join

279. *Id.*

280. *See* Verdane v. Jacksonville Shipyards, Inc., 772 F.2d 775, 780 (11th Cir. 1985) (stating that Congress did not intend modification to save a party from the consequences of his own counsel's errors).

281. *See id.* at 780 (setting forth the appropriate inquiry for modification requests).

282. *See* Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 92–93 (1990) (stating that under our system of representative litigation, each party must be bound to its counsel's mistakes and that a party's only recourse comes from an action against its counsel for malpractice).

283. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 545–46 (7th Cir. 2002) (finding that the lack of new evidence required for reopening implies that even challenges of attorney error may be grounds for reopening).

284. *See id.* at 544–45 ("[L]anguage in these cases that emphasizes finality interests cannot easily be squared with the language of the statute, the holdings of the Supreme Court, or the holdings of other circuits . . . .").

285. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 255 (1971) (per curiam) (instructing ALJs to reopen only when doing so will promote justice).

286. *See* Gen. Dynamics Corp. v. Dir., Office of Workers' Comp. Programs, 673 F.2d 23, 25–26 (1st Cir. 1982) (finding that ALJs should balance accuracy and finality in modification determinations).

287. *See* Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *9–10 (4th Cir. Dec. 8, 2000) (finding that finality remains a valuable factor in preventing parties from abusing the modification procedure).

288. *See* York v. Dir., Office of Workers' Comp. Programs, No. 95-3555, 1996 U.S. App. LEXIS 24016, at *10 (6th Cir. 1996) ("An allegation of mistake should not be allowed to become a back door route to retrying a case because one party thinks he can make a better showing on the second attempt.").

289. *See* McDonald v. Dir., Office of Workers' Comp. Programs, 897 F.2d 1510, 1513 (9th Cir. 1990) (acknowledging that ALJs should examine finality concerns when determining whether reopening will render justice under the Act).

the Eleventh Circuit in interpreting Congress's language to support a reopening inquiry guided by both accuracy and finality.

VI. Striking the Balance: Rendering Justice Requires Examining Both Accuracy and Finality

An ALJ should consider both accuracy and finality when deciding whether to reopen a claim for modification. The DOL should rethink the position it took in *Old Ben* and engage in a thoughtful rulemaking proceeding aimed at specifying the importance of both accuracy and finality in the reopening inquiry.[291] However, until the DOL recognizes the benefits of such a rulemaking process, federal courts of appeals should find that a proper exercise of ALJ discretion in modification petitions includes evaluating both accuracy and finality.[292] ALJs must have the discretion to base determinations on finality, as well as accuracy, because providing for final resolutions in benefits determinations reduces the ability of parties with substantial resources to purchase victory through repeated opportunities for litigation.[293]

A. Accuracy

When evaluating a petition for modification, an ALJ should determine whether reopening will promote justice by correcting a mistake in a determination of fact or by accounting for a change in conditions.[294] ALJs must perform the role assigned to them by Congress—to deciding claims based on an adjudicatory record.[295] Repeated litigation over individual benefits awards

290. *See* McCord v. Cephas, 532 F.2d 1377, 1380–81 (D.C. Cir. 1976) (rejecting the notion that ALJs should grant modification automatically).

291. *See* Metro. Stevedore Co. v. Rambo, 515 U.S. 291, 300 (1995) (determining that changes in the modification process are "better directed at Congress or the Director in her rulemaking capacity"), *vacated by* Dir., Office of Workers' Comp. Programs v. Rambo, 515 U.S. 1139 (1995), *vacated by* Metro. Stevedore Co. v. Rambo, 521 U.S. 121 (1997).

292. *See supra* notes 286–90 and accompanying text (noting that many circuits already follow a standard that allows for the evaluation of accuracy and finality).

293. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 554–55 (7th Cir. 2002) (Wood, J., dissenting) (warning that repetitive modifications can actually distort accuracy).

294. *See* 33 U.S.C. § 922 (2000) (providing the appropriate grounds for modification).

295. *See id.* § 919 (outlining ALJ duties).

erodes the accuracy of the record in specific claims and the overall precision of the benefits process.[296]

By providing for endless modification opportunities, the Seventh Circuit loses its way in its quest for accuracy. The Seventh Circuit proclaims that accuracy should be the primary concern of the modification inquiry.[297] However, the court undermines its own search for accuracy because its decision in *Old Ben* threatens to reduce the precision of benefits determinations by multiplying the chances for parties to distort the record of a claim.[298] Coal operators stand to benefit the most from multiple opportunities to litigate because their financial resources far surpass those of most miners.[299] The DOL recognized this imbalance in resources between miners and operators and attempted to level the playing field with new rules limiting the submission of medical evidence.[300]

Wide financial disparity provided coal operators with an opportunity to overwhelm claimants with vast amounts of costly medical evidence.[301] Miners could not compete with the superior economic resources of operators when developing their own medical evidence.[302] This imbalance of resources between the parties threatened the pursuit of accuracy.[303] Inequality in the amount of evidence distorted the medical record in the operators' favor because miners must establish eligibility by a preponderance of the evidence.[304] Many claimants found it impossible to meet the preponderance standard in light of the

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296. *See* Gen. Dynamics Corp. v. Dir., Office of Workers' Comp. Programs, 673 F.2d 23, 25–26 (1st Cir. 1982) (finding that repeated litigation hinders the "orderly administration of justice").

297. *See Old Ben*, 292 F.3d at 541–42 (finding that accuracy trumps finality in modification inquiries).

298. *See id.* at 538 (noting the ALJ's conclusion that repeated proceedings skew the evidentiary record).

299. *See* Toler, *supra* note 110, at 179 (describing the effects of the gap in financial resources between coal operators and miners).

300. *See* Notice of Proposed Rulemaking, Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3338 (proposed Jan. 22, 1997) (determining that disparity in financial resources between miners and operators necessitates rules for limiting their impact on determinations).

301. *See id.* (observing that operators "generate medical evidence in such volume that it overwhelms the evidence supporting entitlement that claimants can procure").

302. *See, e.g.*, Bethenergy Mines, Inc. v. Henderson, No. 99-2495, 2001 U.S. App. LEXIS 2390, at *6–7 (4th Cir. Feb. 16, 2001) (recounting that the miner presented two positive X-rays and the operator submitted forty-one negative X-rays).

303. *See* Murchison, *supra* note 8, at 1058 (discussing due process concerns created by the imbalance of resources).

304. *See Bethenergy Mines*, 2001 U.S. App. LEXIS 2390, at *6–7 (discussing the effect of cumulative evidence on a presumption).

twenty, thirty, or even forty medical opinions solicited by operators.[305] To cure the imbalance in resources and preserve accurate determinations, the DOL issued strict rules on the amount of evidence each party may submit in their affirmative cases and rebuttals.[306]

Unfortunately, the DOL did not issue rules addressing the effects of financial disparity in the modification context. The federal circuits, other than the Seventh Circuit, allow ALJs to consider finality in order to prevent the distortion that could result from endless litigating opportunities.[307] However, under the *Old Ben* standard, the same imbalance in resources that distorted the accuracy of medical evidence threatens to decrease the accuracy of benefits determinations. A former black lung ALJ predicted that focusing solely on accuracy "would encourage a practice whereby parties would delay developing evidence until they had 'tested the waters' at the first trial by giving parties a second opportunity to litigate the same issues via a petition for modification."[308] Judge Wood made a similar argument in her dissent in *Old Ben*.[309] Judge Wood feared that the majority's holding would "encourage employers to come back once a year to try to deprive employees of their awards."[310] This fear demands that ALJs exercise their discretion by considering whether a concern for accuracy militates against a finding that modification will render justice under the Act.

The ALJ in *Old Ben* echoed Judge Wood's concern when she noted that finality actually protects accuracy in a system with such financial disparity between the parties.[311] The ALJ noted that allowing perpetual modification actually impairs accuracy because:

> [It forces] a Claimant who has received a favorable decision to defend against the superior resources of an Employer who could conceivably come

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305. *See* Murchison, *supra* note 8, at 1058–59 (reporting examples of large disparities in the amount of medical evidence submitted by miners and operators).

306. *See* 20 C.F.R. § 725.414(a) (2003) (limiting miners and operators to two X-ray submissions each).

307. *See supra* notes 286–90 and accompanying text (noting the federal circuits that value accuracy and finality).

308. *See* Gerald Mavin Bober & Judith K. Gunderson, *A Judge's Perspective on the Presentation of Evidence at a Black Lung Hearing*, 50 TENN. L. REV. 491, 511–12 (1983) (providing valuable insight from an ALJ into the various issues surrounding modification).

309. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 549–55 (7th Cir. 2002) (Wood, J., dissenting) (disagreeing with the majority conclusion that accuracy should always trump finality in modification).

310. *Id.* at 554 (Wood, J., dissenting).

311. *See id.* at 555 (Wood, J., dissenting) ("[I]t is the employer who is likely to have sufficient resources for this kind of endless proceeding.").

> back year after year with "new" medical opinions, until the sheer weight of those opinions, all of which could have been presented during earlier proceedings, forced a decision in the Employer's favor.[312]

This argument demonstrates the critical need for the consideration of finality in black lung benefits claims.

The *Old Ben* decision also threatens accuracy because it increases the lack of legal representation for coal miners. To establish eligibility for benefits, miners must face off in adversarial proceedings against their former employers.[313] Miners frequently apply for benefits without representation because they cannot afford it, cannot find it, or do not realize they need it.[314] If they can afford it, miners seeking counsel frequently cannot find it because attorneys shy away from representing black lung claimants due to the extreme length of black lung claims, the extremely low success rate for miners, and federal rules preventing attorneys from collecting fees until after a miner receives a final benefits award.[315] The *Old Ben* decision threatens to exacerbate this lack of representation, and thereby hinder the pursuit of accuracy, by encouraging "employers to come back once a year to try to deprive employees of their awards."[316] Opening up successful claims to repeated modification requests results in a wider disparity in legal resources between miners and operators because fewer and fewer attorneys will fight decade-long battles over perpetually challengeable awards. ALJs must possess the authority to say "enough is enough" and deny a petition for modification because the interests of accuracy demand a final resolution.[317]

A concern with accuracy prompted Congress to allow ALJs to modify benefits awards to correct mistakes of facts and to account for changes in condition.[318] However, like an artist who in the pursuit of perfection never

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312. *Id.* at 538.

313. *See* Toler, *supra* note 110, at 179 ("[M]ost miners are out-manned, out-gunned, and out-spent from the very second they enter a courtroom, by the same companies that have poisoned them.").

314. *See* Nixon, *supra* note 139 (noting that few Virginia attorneys take black lung cases because the cases can last for several years and attorneys must follow strict regulations on collection of fees).

315. *See* Toler, *supra* note 110, at 178 (arguing that a low success rate and a delayed fee scheme discourage many attorneys from taking black lung claims).

316. Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 554 (7th Cir. 2002) (Wood, J., dissenting).

317. *See* Stevens Shipping Co. v. Kinlaw, No. 99-1954, 2000 U.S. App. LEXIS 31354, at *9 (4th Cir. Dec. 8, 2000) (noting that reopening to allow a party a second chance to prevent evidence available at the first hearing does not promote justice under the Act).

318. *See* 33 U.S.C. § 922 (2000) (providing the appropriate grounds for modification).

finishes a painting, the Seventh Circuit creates an unrealistic standard. Accuracy is a legitimate goal, but open-ended and repetitious modification proceedings do not advance precision. ALJs must have the authority to deny modification if repeated proceedings will distort, rather than enhance, the accuracy of the record in an individual claim.

B. Finality

Traditional notions of finality do not apply in black lung benefits claims.[319] However, the Seventh Circuit goes too far by entirely eliminating finality from the black lung landscape. The Seventh Circuit ignores the broad discretion afforded to ALJs by *O'Keeffe* and prevents ALJs from following Congress's instruction to reopen benefits awards for modification only when doing so would "render justice under the act."[320] Until the DOL heeds the intent of Congress and solidifies finality's importance in black lung claims, the federal courts of appeals should take the affirmative step to craft a carefully tailored concept of finality that will guide ALJ discretion. This carefully tailored concept provides ALJs with three conditions of finality to consider during the reopening inquiry: (1) diligence; (2) futility; and (3) motive.

An ALJ should deny a petition for modification if a lack of diligence by the requesting party prevented it from presenting the evidence it now relies on for modification.[321] By examining the requesting party's overall diligence, the ALJ can take into account mitigating circumstances like self-representation or the opposing party's failure to cooperate in discovery.[322] A diligence requirement prevents a party from exploiting modification to re-litigate its claim. Parties may not request modification as a back-door attempt to present evidence and arguments that the party could have presented at the original hearing.[323]

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319. *See* 7 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 127.07[7] (2000) (observing that workers' compensation systems must possess the flexibility necessary to account for changes in the condition of workers).

320. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 255–56 (1971) (per curiam) (stating that ALJs possess broad discretion to reopen benefits awards).

321. *See Old Ben*, 292 F.3d at 554 (Wood, J., dissenting) (proposing that diligence should be part of an ALJ inquiry into the appropriateness of modification). *But see id.* at 547 (arguing that diligence remains a factor under the majority's standard, but that it "cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act").

322. *See Stevens Shipping Co.*, 2000 U.S. App. LEXIS 31354, at *6–8 (noting that ALJs may consider a wide variety of factors when exercising their discretion to reopen).

323. *See* York v. Dir., Office of Workers' Comp. Programs, No. 95-3555, 1996 U.S. App.

The ALJ also should determine whether futility precludes reopening because, for example, state law forecloses recovery of moneys paid to a deceased miner.[324] *Old Ben* represents a perfect example of a futile modification because Illinois law prevented recovery from the miner's estate for any overpayments by the DOL. A futile modification may also occur if a miner produced enough evidence to meet a statutory presumption of entitlement. Once the miner meets the presumption, no number of negative X-rays should overturn the finding of eligibility.[325]

Finally, ALJs should determine whether modification represents an appropriate use of judicial resources. Diligence and futility overlap with this determination, but the ALJ also should look deeper into the requesting party's motive.[326] An ALJ should not grant a modification petition if the requesting party merely hopes to stall payment of benefits or to harass the other party.[327] Even the accuracy-centered *Old Ben* standard provides for denial of a modification petition if the requesting party engaged in reprehensible behavior.[328]

Courts value finality because the public desires bringing litigation to a close.[329] Bringing disputes to a final resolution relieves miners and coal operators of the burdens of repeatedly presenting arguments and developing

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LEXIS 24016, at *10 (6th Cir. Apr. 17, 1996) (determining that claimants must make their best arguments at the initial stages of a claim).

324. *See* Claimant-Respondent's Supplemental Memorandum at 4, Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533 (7th Cir. 2002) (No. 00-3222) (arguing that Illinois law barred the DOL from presenting a claim against Mr. Hilliard's estate for any alleged overpayment) (on file with the Washington and Lee Law Review). *Old Ben* represents a futile reopening because Illinois law barred the DOL from recovering from Mr. Hilliard's estate because the DOL did not bring a claim against Mr. Hilliard's estate within the proscribed two-year window. *See* 755 ILL. COMP. STAT. 5/18-12(b) (2000) (stating that "all claims which could have been barred under this section are, in any event, barred 2 years after decedent's death").

325. *See* 30 U.S.C. § 921(c)(3) (2000) (providing an irrebuttable presumption of total disability based on medical evidence of lung abnormalities).

326. *See* McCord v. Cephas, 532 F.2d 1377, 1381 (D.C. Cir. 1976) (analyzing the employer's motive and concluding that "[i]t would be difficult to describe a history of greater recalcitrance, of greater callousness towards the processes of justice, and of greater self-serving ignorance").

327. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 552 (7th Cir. 2002) (Wood, J., dissenting) (observing that ALJs should deny reopening upon any evidence of intentional misuse of the modification process).

328. *See id.* at 545 (providing that a party engaging in misconduct should not enjoy the benefits of modification).

329. *See* H. L. A. HART, THE CONCEPT OF LAW 143 (1981) (discussing the advantages and disadvantages of finality and concluding that finality helps predict the present state of the law).

costly medical evidence.[330] This becomes especially important for the many disabled miners and their families who typically depend on a fixed income made up in part by federal black lung benefits.[331] It also eases the legal expenses for coal operators who may face hundreds of claims from individual miners. If each claim proceeds through modification multiple times, the number of potential hearings and evidentiary submissions quickly becomes daunting.

Finality also avoids unnecessary judicial waste by forcing parties to present their best arguments and evidence at initial proceedings.[332] The Federal Black Lung Benefits Program cannot afford superfluous adjudications. The benefits program bears a well-deserved reputation for taking years, and even decades, to adjudicate benefits claims.[333] The *Old Ben* decision, which requires ALJs to follow a nearly automatic modification standard, will only serve to further bog down this marathon-like benefits process.[334] In order to maintain any sense of judicial efficiency, ALJs should exercise their broad discretion to reopen benefits awards only when doing so will render justice under the Act, and not merely because one party believes it can present a better case the second time around.

Judge Wood argued that if Congress truly wanted finality to play no part in ALJ decisions, the modification statute would instruct ALJs that they "must" reopen, rather than "may" reopen.[335] Congress granted ALJs broad discretion because their intimate knowledge of the facts and circumstances surrounding individual claims allows them to effectively promote justice by balancing the pursuit of accuracy with the need for final resolutions.[336] The federal courts of

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330. *See* Arizona v. California, 530 U.S. 392, 412–13 (2000) (noting that courts may dismiss duplicative arguments *sua sponte*).

331. *See* Toler, *supra* note 110, at 178–79 (describing the dire economic circumstances common among miners).

332. *See* McCord v. Cephas, 532 F.2d 1377, 1381 (D.C. Cir. 1976) (urging parties to put their best arguments forward during the original claim proceeding because they may not do so in later stages if they simply chose not to present their arguments during the original hearing).

333. *See* Murchison, *supra* note 8, at 1027 (relaying that many miners "wholeheartedly despise" the Black Lung Benefits Program because of its adversarial nature and extremely slow benefits determinations).

334. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 555 (7th Cir. 2002) (Wood, J., dissenting) (predicting that the decision in *Old Ben* will result in an "endless proceeding").

335. *See id.* at 550 (Wood, J., dissenting) (noting that Congress uses the language of discretion to describe ALJ authority to grant or deny modification requests).

336. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam) (stating that Congress intended ALJs to "review factual errors in an effort 'to render justice under the act'").

appeals should not adopt the Seventh Circuit's approach because it unduly restricts ALJ discretion by holding that ALJs should not deny modification in the interest of finality.[337] The federal courts of appeals should adopt the standard proposed in this Note that roots ALJ discretion in a carefully tailored concept of finality. By examining diligence, futility, and motive, ALJs can confidently determine whether reopening a black lung benefits claim will truly render justice under the Act.

VII. Conclusion

History shows that coal miners must struggle for any benefit that eases the burdens of their deadly occupation. Coal miners waged hard-fought battles against mine operators, their own union, and even the federal government to earn the most modest of reforms.[338] Therefore, it seems perversely natural that the Federal Black Lung Benefits Program pits miners against their former employers in adversarial proceedings.[339] However, while most agree that every battle must have an end, the Seventh Circuit's decision in *Old Ben* threatens to create perpetual litigation between miners and operators over the validity of benefits awards.[340] In order to avoid the destruction that accompanies everlasting conflicts, ALJs must possess broad discretion to value both accuracy and finality when evaluating petitions for modification.

The Supreme Court's broad grant of discretion to ALJs to render justice under the Act should not be restricted by an overbearing preoccupation with accuracy. ALJs should evaluate whether reopening promotes justice before requiring parties to argue the merits of a prior benefits decision.[341] To

337. *See Old Ben*, 292 F.3d at 550–51 (Wood, J., dissenting) (arguing that the majority overly cabins ALJ discretion).

338. *See* RICHARD D. LUNT, LAW AND ORDER VS. THE MINERS 11–17 (1979) (describing brutal conflicts ranging from the bloody West Virginia mine wars of the 1920s to internal struggles within the UMWA).

339. *See* Prunty & Solomons, *supra* note 70, at 670–71 (arguing that many conflicts pertaining to black lung benefits arise from the differing viewpoints of coal miners, who see the program as a type of pension, and mine operators, who believe they are footing the bill for economic relief in the depressed coal fields).

340. *See* Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs, 292 F.3d 533, 555 (7th Cir. 2002) (Wood, J., dissenting) (fearing that *Old Ben* will lead to repetitive and unnecessary modification requests).

341. E-mail from Sandra M. Fogel, attorney for Mrs. Hilliard in *Old Ben*, to Brian Hager (Feb. 6, 2003, 10:38:00 EST) (proposing a two-part modification process whereby an ALJ would first determine whether modification will render justice under the Act and then, if the ALJ grants modification, the ALJ would hold a hearing on the merits) (on file with the Washington and Lee Law Review).

determine whether modification will "render justice under the act," ALJs must examine both accuracy and finality. Congress accounted for this delicate balancing of interests by providing ALJs, those with the greatest knowledge of the facts and circumstances surrounding an individual claim, with broad discretion to grant or deny modification to render justice under the Act.[342] The DOL and the federal courts of appeals should reject the Seventh Circuit's overzealous concern with accuracy and adopt the approach proposed in this Note. This approach allows ALJs to exercise their full discretion to consider the precision of benefits awards and the conditions of finality. By doing so, ALJs meet the expectations of Congress by providing for accurate benefits awards while also accounting for society's interest in the finality of judicial determinations.

342. *See* O'Keeffe v. Aerojet-Gen. Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam) (finding that Congress intended the modification procedure to provide ALJs "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted").