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The Constitutionality of the Black Lung Interim Presumption

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Introduction

The Federal Black Lung Program[1] was established "to provide benefits . . . to coal mine employees who are *totally disabled* due to pneumoconiosis."[2] Under this program, the Black Lung Interim Presumption provides that a presumption of *total disability* be granted to coal miners who can demonstrate that they have certain minimum years of coal mine employment and pneumoconiosis or, as it is commmonly referred to, black lung.[3] This presumption has helped thousands of victims of pneumoconiosis receive black lung benefits. However, it has allowed many persons *not* medically *totally disabled* from pneumoconiosis to receive benefits.[4]

To date, over 500,000 miners and their dependents have received black lung benefits.[5] This has resulted in an increasingly larger deficit in the Black Lung Disability Trust Fund, which Congress established for the payment of Black Lung benefits. The Black Lung Disability Trust Fund presently owes the General Fund of the United States Treasury "Repayable Advances"

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[1] 30 U.S.C. §§ 901-945 (1982).

[2] *Id.* § 901(a) (emphasis added).

"[P]neumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrasilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. § 718.201 (1985).

[3] 20 C.F.R. § 410.490(b) (1984); 20 C.F.R. § 727.203(a) (1985).

[4] Jones v. The New River Co., 3 BLACK LUNG REP. (MB) 1-199, 1-208 (1981) (Smith, J., dissenting).

[5] Stephens & Hollon, *Closing the Evidentiary Gap: A Review of Circuit Court Opinions Analyzing Federal Black Lung Presumptions of Entitlement*, 83 W. VA. L. REV. 793, 794 (1981).

in excess of 2.5 *billion* dollars.[6] This is the most expensive and determined effort that Congress has ever made toward compensating victims of an occupational disease.[7]

The Black Lung Interim Presumption benefits coal miners regardless of their ability to continue working. A number of facts lead to this inference. First, Congress ratified the Social Security Administration's interim presumption (SSA presumption) even though competent medical experts had testified that it was invalid.[8] Second, Congress permitted the Department of Labor (DOL), which is responsible for processing black lung claims filed after January 1, 1973, to write its own more liberal eligibility standards despite such criticisms.[9] Third, the Federal Government, which was responsible for payment of black lung claims prior to December 31, 1972, routinely refused to appeal black lung claim approvals.[10] Finally, despite legislative and medical evidence establishing the invalidity of the SSA presumption, in *Alabama By-Products v. Killingsworth*, the Eleventh Circuit Court of Appeals upheld the constitutionality of the DOL Interim Presumption[11]

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[6] Ky. Coal J., Apr. 1985, at 25 states:

> Federal Black Lung benefit payments were $48.4 million in January, 1985. Operating expenses were another $2 million-plus, bringing expenses to $50.5 million for the month. Collections . . . were $18.7 million short of what was needed so that some was borrowed as is the monthly custom, from the U. S. General Fund. The "Repayable Advances" owed to the General Fund are now $2,540,546,347.64.

See also Administration to seek rise in black-lung taxes on coal [sic], Lexington Herald-Leader, June 28, 1985, at B14 ("Susan Meisinger, deputy undersecretary in the Labor Department, told the House Ways and Means Committee . . . that the federal black lung trust was $2.5 billion in debt.").

[7] Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. VA. L. REV. 677, 679 (1983).

[8] *See Jones*, 3 BLACK LUNG REP. at 1-219 (Smith, J., dissenting); *see also* Solomons, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869, 889 (1981).

[9] Alabama By-Products v. Killingsworth, 733 F.2d 1511, 1512 n.1 (11th Cir. 1984). *See generally* Solomons, *supra* note 8.

[10] Lopatto, *supra* note 7, at 687.

[11] *Alabama By-Products*, 733 F.2d at 1518; *see also* Peabody Coal Co. v. Director, Office of Workers' Compensation Programs, 54 U.S.L.W. 2321 (7th Cir. 1985) (20 C.F.R. § 727.203(a) is a valid exercise of statutory authority and does not violate due process). The presumption declared constitutional is promulgated in 20 C.F.R. § 727.203(a) (1985) and reads:

> (a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least ten years will be presumed to be totally disabled due to pneumoconiosis . . . if one of the following medical requirements is met:

(DOL presumption), which is an expanded version of the SSA presumption.[12]

This comment discusses the first three of these factors in Section I. Then, it analyzes the *Alabama By-Products* decision in Section II. Finally, it concludes that the Eleventh Circuit erred in its *Alabama By-Products* holding, since the DOL presumption violates the due process clause of the United States Constitution.

I. STATUTORY FRAMEWORK

The Federal Black Lung Program originated with Title IV of the Federal Coal Mine Health and Safety Act of 1969 (Title IV).[13] Title IV provides lifetime black lung benefits for claimants suffering total disability caused by pneumoconiosis, if the claimant filed for benefits before December 31, 1972.[14] These claims were processed by the SSA and paid by the Federal Government.[15] Since January 1, 1973, claims have been filed under the respective states' workers' compensation law, or if no approved state law exists, then the claim is processed by the DOL and paid by the claimant's coal mine employer.[16] If the claimant's coal mine employer refuses to pay or is insolvent, then the DOL is authorized to pay approved claims from federal funds subject

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(1) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis;
(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease;
(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveloi to the blood;
(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;
(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

[12] 20 C.F.R. § 410.490(b) (1984); *see infra* note 22; *see supra* note 11; *cf.* 20 C.F.R. § 727.203(a) (1985).

[13] 30 U.S.C. §§ 901-936 (1982). *See generally* Solomons, *supra* note 8 (for a detailed discussion of the legislative history of the interim presumption).

[14] 30 U.S.C. § 924 (1982).

[15] *Id.* §§ 921-924.

[16] *Id.* §§ 931-936.

to a lien on the operator's property in favor of the United States for the amount of the liability.[17]

A. Ratification of the SSA Presumption

Title IV was extensively amended by the Black Lung Benefits Act of 1972.[18] These amendments gave the SSA the exclusive authority to promulgate criteria for determining the existence of totally disabling pneumoconiosis.[19] Congress felt that these amendments were necessary due to the SSA's low black lung claim approval rate.[20]

Acting under this congressional mandate, the SSA devised the interim presumption to liberalize and simplify the standards for establishing pneumoconiosis.[21] This was accomplished by granting a rebuttable presumption of *total disability* to any claimant who could prove either: (1) ten years of coal mine employment and an x-ray, biopsy, or autopsy establishing the existence of pneumoconiosis; or (2) fifteen years of underground coal mine employment and a ventilatory study establishing the existence of a chronic respiratory or pulmonary disease.[22] This

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[17] *Id.* § 934.

[18] Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified at 30 U.S.C. §§ 901-936 (1982)).

[19] *Id.* § 921(b); *see also* Solomons, *supra* note 8, at 871.

[20] Solomons, *supra* note 8, at 870-71.

[21] Stephens & Hollon, *supra* note 5, at 794.

[22] 20 C.F.R. § 410.490(b) (1984). The text of the SSA interim presumption is as follows:

> (b) Interim Presumption. With respect to a miner who files a claim for benefits . . . and with respect to a survivor of a miner who . . . timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
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> (1) One of the following medical requirements is met:
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> (i) A chest roentgenogram (x-ray), biopsy, or autopsy establishes the existence of pneumoconiosis; or
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> (ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease.
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416, 410.456) [which states that if a miner was employed for ten years or

presumption increased the SSA's claim approval rate and made the review of claims quick and uncomplicated.[23]

B. Expansion of the SSA presumption

Initially, Congress prohibited the DOL from using the SSA presumption.[24] Instead, the more stringent statutory presumptions enacted in Title IV[25] applied to the DOL claims. Under

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more in the Nation's coal mines, and suffered from pneumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment].

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

[23] 20 C.F.R. § 410.490(a) (1984).

[24] Solomons, *supra* note 8, at 873-74.

[25] 30 U.S.C. § 921(c) (1982). The text of the statutory presumptions is as follows:

(c) Presumptions.

(1) If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment.

(2) If a deceased miner was employed for ten years or more in one or more coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis. . . .

(3) If a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C . . ., (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), if diagnosis had been made in the manner prescribed in clause (A) or (B), then there should be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis, as the case may be.

(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner, . . . and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption

Title IV, if a claimant could establish ten years of coal mine employment and the existence of pneumoconiosis, then the pneumoconiosis was presumed to have been *caused* by the coal mine employment.[26] Under Title IV, however, the claimant was *not* presumed to be *totally disabled*.[27]

During congressional hearings, it became apparent that the DOL's low claim approval rate was substantially related to its inability to utilize the liberal SSA presumption to adjudicate its black lung claims.[28] The SSA claim approval rate had increased significantly with its use of the SSA presumption.[29] Thus, claimants urged the DOL to adopt the SSA presumption.[30]

Originally, the DOL supported application of the SSA presumption to its claims, because the DOL thought that all claimants should be treated equally.[31] However, this position changed after the SSA admitted in congressional hearings that the SSA presumption was invalid and that it was used by them primarily to expedite the processing of a large number of backlogged claims with a minimum expenditure of effort.[32] Thereafter, the DOL Assistant Secretary testified that the SSA presumption's "eligibility criteria might not be medically supportable as standards for total disability,"[33] and suggested that the DOL should

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that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.

(5) In the case of a miner who dies on or before March 1, 1978, who was employed for 25 years or more in one or more coal mines before June 30, 1971, the eligible survivors of such miner shall be entitled to the payment of benefits . . . unless it is established that at the time of his death such miner was not partially or totally disabled due to pneumoconiosis. . . .

[26] 30 U.S.C. § 921(c)(1) (1982).

[27] *Id.*

[28] Solomons, *supra* note 8, at 887.

[29] *Id.* at 884.

[30] *Id.*

[31] *Id.* at 885-86.

[32] *Id.* at 890 ("Dr. Blumenfeld, who was working at the SSA, "testified" that the only 'practicable way' the SSA could respond to the . . . 'interim evidentiary rules' was to establish criteria which permitted an award if some level of disease was detected, whether or not any impairment was present."); *see also* Jones v. The New River Co., 3 BLACK LUNG REP. (MB) 1-199, 1-219 (1981) (Smith, J., dissenting).

[33] Solomons, *supra* note 8, at 890.

write its own eligibility standards after consultation with medical experts.[34]

Nevertheless, the Black Lung Benefits Reform Act of 1977[35] authorized the DOL to devise new eligibility criteria that were no "more restrictive than" the SSA presumption.[36] Thus, by congressional mandate, the DOL presumption[37] is very similar to the SSA presumption.[38] Under both presumptions,[39] a claimant is *presumed totally disabled* from pneumoconiosis if he can establish that he has worked in one or more coal mines for at least ten years and that an x-ray, biopsy, autopsy[40] or ventilatory studies[41] shows the existence of some degree of pneumoconiosis. The DOL version further expands the scope of qualifying medical evidence to include blood gas tests,[42] other medical evidence,[43] and, if the claimant is deceased, an affidavit from a survivor stating that the decedent had pneumoconiosis.[44]

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[34] *Id.*

[35] 30 U.S.C. §§ 901-945 (1982).

[36] Alabama By-Products v. Killingsworth, 733 F.2d 1511, 1511-12 n.1 (11th Cir. 1984). 30 U.S.C. § 902(f)(2) (1982) states that:

> [The] [c]riteria applied by the Secretary of Labor in the case of -
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> . . .
>
> (C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor *shall not be more restrictive than* the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor (emphasis added).

See also 20 C.F.R. § 727.200 (1985) which further explains:

> [I]n enacting the Black Lung Benefits Reform Act of 1977, Congress provided that the criteria for determining whether a miner is or was totally disabled or died due to pneumoconiosis *shall be no more restrictive than* the criteria applicable to a claim filed with the Social Security Administration on or before June 30, 1973, under Part B of Title IV of the Act (the interim adjudicatory rules) (emphasis added).

[37] 20 C.F.R. § 727.203(a) (1985).

[38] *Id.*; *cf.* 20 C.F.R. §410.490(b) (1984).

[39] 20 C.F.R. §§ 727.203(a) & 410.490(b) (1985); *see supra* notes 11 and 22 (for text of statutes).

[40] 20 C.F.R. §§ 727.203(a)(1), 410.490(b)(1)(ii) (1985); *see supra* notes 11 & 22 (for text of statutes).

[41] 20 C.F.R. §§ 727.203(a)(2), 410.490(b)(1)(ii) (1985); *see supra* notes 11 & 22 (for text of statutes).

[42] 20 C.F.R. § 727.203(a)(3) (1985); *see supra* note 11 (for text of statute).

[43] 20 C.F.R. § 727.203(a)(4) (1985); *see supra* note 11 (for text of statute).

[44] 20 C.F.R. § 727.203(a)(5) (1985); *see supra* note 11 (for text of statute).

C. *Refusal to Appeal Claim Approvals*

Despite intensive judicial review of the black lung statute,[45] none of its presumptions were challenged as being unconstitutional until 1976.[46] This was due primarily to Federal Government (as opposed to state or responsible operator) liability for all claims filed prior to December 31, 1973.[47] Generally, the Federal Government was not represented by counsel at black lung hearings and would not appeal the approval of a black lung claim.[48] On the other hand, black lung claimants were almost always represented by counsel at black lung hearings and generally appealed the rejection of their black lung claims.[49] During this period, due to the application of the liberal SSA presumption and the failure to properly utilize the adversary system, a disproportionate number of black lung claims were approved.

However, since January 1, 1973, claims have been filed with and adjudicated by the DOL.[50] These claims are paid by the claimant's coal mine employer.[51] Once coal mine operators became liable to their previous employees for black lung benefits, their attempt to avoid liability by attacking the constitutionality of the presumption was inevitable.

II. THE CONSTITUTIONALITY OF THE INTERIM PRESUMPTION AS DETERMINED BY *Alabama By-Products*

A. *The Standard of Review*

One of the first cases involving a constitutional challenge to a black lung presumption was *Usery v. Turner Elkhorn Mining Co.*[52] In that case, twenty-two operators challenged the consti-

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[45] *See, e.g.*, Sullivan v. Califano, 617 F.2d 1215 (6th Cir. 1980); Dickson v. Califano, 590 F.2d 616 (6th Cir. 1979); Begley v. Matthews, 544 F.2d 1345 (6th Cir. 1976), *cert. denied*, 430 U.S. 985 (1977).

[46] *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

[47] 30 U.S.C. § 921(a) (1982).

[48] Lopatto, *supra* note 7, at 687.

[49] *Id.*

[50] 30 U.S.C. §§ 931-936 (1982).

[51] *See supra* notes 13-17 and accompanying text.

[52] Turner Elkhorn Mining Co. v. Brennan, 385 F. Supp. 424 (E.D. Ky. 1974), *rev'd sub nom.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). In *Turner Elkhorn*, twenty-two operators filed suit challenging the constitutionality of four of the statutory presumptions at 30 U.S.C. § 921 (1982). The operators were partially successful at the district court level. However, the Supreme Court upheld all four of the challenged statutory presumptions as constitutional.

tutionality of four statutory presumptions in Title IV.[53] The United States Supreme Court again utilized three principles consistently used to test the constitutionality of presumptions arising in civil statutes and involving economic legislation.[54] First, legislative acts adjusting the burdens and benefits of economic life are presumed to be constitutional, and the complaining party has the burden of establishing that the legislature violated due process by acting arbitrarily and irrationally.[55] Second, deference is accorded to Congress in matters not particularly within judicial competence or common knowledge.[56] Third and most importantly, due process requires legislative presumptions arising in civil statutes and involving economic regulation to exhibit a rational relationship between the fact(s) proved and the fact presumed.[57]

After reviewing the evidence, the Court upheld all four of the challenged statutory presumptions.[58] The Court stated that a rational relationship existed because an inference that pneumoconiosis was caused by coal mine employment from proof of ten years of coal mine employment and the actual existence of pneumoconiosis was not so unreasonable as to be purely arbitrary.[59] The Court added: "[i]t is worth repeating that [under these statutory presumptions] mine employment . . . simply serves along with proof of pneumoconiosis . . . to presumptively establish the cause of pneumoconiosis. . . ."[60]

B. A Constitutional Challenge to the DOL Presumption

In *Alabama By-Products Corp. v. Killingsworth*,[61] the Eleventh Circuit Court of Appeals utilized the principles enunciated in *Turner Elkhorn* to determine the constitutionality of the DOL presumption invoked when a claimant proves ten years of coal

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[53] *Turner Elkhorn*, 428 U.S. at 5.

[54] *Id.* at 15, 28.

[55] *Id.* at 15; *see, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[56] *Turner Elkhorn*, 428 U.S. at 28 (quoting United States v. Gainey, 380 U.S. 63, 67 (1965)).

[57] *Id.* (quoting Mobile, J. & K.C.R.R. v. Turnipseed, 219 U.S. 35, 43 (1910)).

[58] *Id.* at 6.

[59] *Id.* at 29-30.

[60] *Id.*

[61] 733 F.2d 1511 (11th Cir. 1984).

mine employment and the existence of pneumoconiosis by x-ray, autopsy, or biopsy.[62] Since a regulatory presumption is adjudicated by the same standards applicable to statutory presumptions, this was the proper standard of review, even though the DOL presumption did not arise in a civil statute.[63]

However, the *Alabama By-Products* court faced a substantially different issue than the one presented in *Turner Elkhorn*. The question in *Alabama By-Products* was whether a rational relationship existed between ten years of coal mine employment combined with a chest x-ray establishing the existence of pneumoconiosis (the facts proved) and total disability (the fact presumed).[64] The DOL presumption scrutinized in *Alabama By-Products* presumes *total disability* from proof of ten years of coal mine employment combined with the existence of pneumoconiosis.[65] This shifts the burden of *persuasion* to the operator on the issue of *total disability*.[66] The statutory presumptions examined in *Turner Elkhorn*,[67] however, merely presumed that based on proof of the same two criteria the pneumoconiosis was *caused* by coal mine employment.[68] This merely shifts the burden of *production*[69] to the operator on the issue of *causation*.[70] Despite these significant differences and without more than a cursory examination of the legislative history, the Eleventh Circuit upheld the DOL presumption as constitutional.[71]

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[62] *Id.* at 1513.

[63] Atwood's Transp. Lines, Inc. v. United States, 211 F. Supp. 168 (D.D.C. 1962), *aff'd*, 373 U.S. 377 (1963).

[64] *Alabama By-Products*, 733 F.2d at 1517.

[65] 20 C.F.R. § 727.203(a) (1984).

[66] *Alabama By-Products*, 733 F.2d at 1514; BLACK'S LAW DICTIONARY 178 (5th ed. 1979) states: "Burden of Persuasion. The onus on the party with the burden of proof to convince the trier of fact of all elements of his case."

[67] 30 U.S.C. § 921(c)(1) (Supp. IV 1970).

[68] *Turner Elkhorn*, 428 U.S. at 27.

[69] FED. R. EVID. 301 states:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[70] *Turner Elkhorn*, 428 U.S. at 29.

[71] *Alabama By-Products*, 733 F.2d at 1518. *But see* Peabody Coal Co. v. Director, Office of Workers' Compensation Programs, 54 U.S.L.W. 2321 (7th Cir. 1985) (The fact that 20 C.F.R. § 727.203(a)(2), unlike the statutory presumption at issue in *Turner Elkhorn*, determines the ultimate issue of disability is inconsequential); Kaiser Steel Corp. v. Director, 757 F.2d 1078 (10th Cir. 1985) (same conclusion as *Peabody Coal Co.*).

C. *A Critical Analysis of Alabama By-Products*

In *Alabama By-Products*, the operator asserted three major arguments: (1) there is no link between the number of years of coal mine employment and total disability; (2) the connection between x-ray evidence of simple pneumoconiosis and the presumption of total disability is insufficient because x-rays do not measure the presence or extent of pulmonary impairment; and (3) the evidence in the legislative record suggests only that simple pneumoconiosis can cause some functional impairment, particularly in its later stages, but not that simple pneumoconiosis *per se* is totally disabling.[72]

However, the court concluded that a rational relationship exists between ten years of coal mine employment with the existence of pneumoconiosis and total disability.[73] The court based its decision on three premises: (1) the incidence of pneumoconiosis increases with the duration of mine employment; (2) a positive x-ray finding indicates pneumoconiosis; and (3) a positive x-ray combined with so many years of coal mine employment may indicate simple pneumoconiosis.[74] A thorough examination of these three principles will show that the Eleventh Circuit erred in holding the DOL presumption constitutional.

First, *Alabama By-Products* correctly stated that Congress received evidence that the incidence of pneumoconiosis increases with the duration of mine employment.[75] However, the evidence in the legislative history does not establish a conclusive relationship between duration of employment and extent of disability.[76] The evidence presented to Congress indicated that it takes at least ten to fifteen years of coal mine employment before pneumoconiosis even begins to develop.[77]

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[72] *Alabama By-Products*, 733 F.2d at 1517.

[73] *Id.* at 1518.

[74] *Id.*

[75] *Id.*

[76] *See* S. REP. No. 209, 95th Cong., 1st Sess. 17 (1977); *see also* Jones v. The New River Co., 3 BLACK LUNG REP. (MB) 1-199, 1-217 (1981) (Smith, J., dissenting).

[77] *Black Lung Benefits Reform Act, 1976: Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 94th Cong., 2d Sess. 1,681 (1976) (report prepared by the National Academy of Sciences) [hereinafter cited as *1976 Hearings*], as *cited in Jones*, 3 BLACK LUNG REP. at 1-216.

In fact, a report submitted to Congress by the National Academy of Sciences stated that pneumoconiosis is *not* likely to occur after only eight to ten years of coal mine employment.[78] Fifteen years of coal mine employment was the lowest duration advocated as an objective standard for determining eligibility for black lung benefits.[79] The other durations suggested ranged from twenty-five to fifty years.[80] Thus, it is evident that ten years of coal mine employment alone should not be sufficient evidence to invoke a presumption of total disability.

Second, *Alabama By-Products* relied on the fact that Congress heard some evidence that a positive x-ray finding indicates pneumoconiosis.[81] However, such reliance is misplaced. Although a positive chest x-ray may indicate the *presence* of pneumoconiosis, chest x-rays do not measure the *extent* of disability.[82] The legislative history substantiates the fact that chest x-rays are merely used to establish the presence of pneumoconiosis.[83] The mere presence of pneumoconiosis does not establish total disability. The medical director of the Department of Occupational Health made this clear when he stated in congressional hearings that an x-ray should not be used to determine the presence or severity of respiratory disability.[84]

Further, Dr. Donald Rasmussen, an expert in pulmonary testing who had conducted a study on the value of an x-ray in determining the extent of disability, testified that functional impairment was not related to x-ray findings.[85] A report submitted by the National Academy of Sciences reached a similar

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[78] *Id.*

[79] *Id.*

[80] H.R. REP. No. 770, 94th Cong., 1st Sess. 73 (1975).

[81] *Alabama By-Products*, 733 F.2d at 1518.

[82] *Black Lung Legislation, 1971-72: Hearings before the Subcommittee on Labor of the Senate Commitee on Labor and Public Welfare*, 92d Cong., 1st and 2d Sess. 1, 115-37, 119 (1972) (testimony of Dr. Rasmussen, Appalachian Regional Hospital, Beckley, W.Va.) [hereinafter cited as *1971 Hearings*], *cited in Jones*, 3 BLACK LUNG REP. at 1-217.

[83] *1976 Hearings*, *supra* note 77, at 680-81, *cited in Jones*, 3 BLACK LUNG REP. at 1-217.

[84] *1971 Hearings*, *supra* note 82, at 42 (testimony of Dr. Kerr, Director, Department of Occupational Health, United Mine Workers of America).

[85] *Id.* at 119.

conclusion.[86] It stated that "the chest x-ray is not a useful means of assessing the functional status of the lung nor of determining disability."[87] Thus, a rational connection betweeen an x-ray showing simple pneumoconiosis and a presumption of total disability does not exist.[88]

Finally, *Alabama By-Products* pointed out that the DOL presumption clearly states that evidence of pneumoconiosis and ten years of coal mine employment are conjunctive requirements.[89] However, even as conjunctive requirements, evidence of pneumoconiosis and ten years of coal mine employment should not be sufficient evidence to invoke a presumption of total disability. An introduction to some basic medical concepts is necessary to clarify this statement.

Pneumoconiosis is a disease wherein lung tissue envelops foreign dust particles.[90] The disease is classified into two categories: simple and complicated.[91] Complicated pneumoconiosis is an advanced stage which produces pulmonary impairment and severe disability.[92] Simple pneumoconiosis is a less advanced stage which is not considered disabling,[93] and seldom produces significant respiratory impairment.[94] Both simple and complicated pneumoconiosis are irreversible.[95] Complicated Pneumoconiosis is also progressive, and symptoms may not develop until some years later.[96] While "[t]here is some medical debate on whether simple pneumoconiosis is progressive . . . most scientists believe continued dust exposure is a necessary catalyst for any progression of simple [pneumoconiosis]."[97] Thus, it is unlikely that a retired coal miner with simple pneumoconiosis will advance to the complicated stage.[98]

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[86] *1976 Hearings, supra* note 77, at 681, *cited in Jones*, 3 BLACK LUNG REP. at 1-217.

[87] *Id.*

[88] *Jones*, 3 BLACK LUNG REP. at 1-217.

[89] *Alabama By-Products*, 733 F.2d at 1517.

[90] Lopatto, *supra* note 7, at 679.

[91] *See Turner Elkhorn*, 428 U.S. at 7; Lopatto, *supra* note 7, at 679.

[92] *See Turner Elkhorn*, 428 U.S. at 7; Lopatto, *supra* note 7, at 679.

[93] *See Turner Elkhorn*, 428 U.S. at 7; Lopatto, *supra* note 7, at 679.

[94] *See Turner Elkhorn*, 428 U.S. at 7; Lopatto, *supra* note 7, at 679.

[95] *See Turner Elkhorn*, 428 U.S. at 7; Lopatto, *supra* note 7, at 680.

[96] *See Turner Elkhorn*, 428 U.S. at 8; Lopatto, *supra* note 7, at 680.

[97] Lopatto, *supra* note 7, at 680.

[98] This is assuming no further dust exposure.

The testimony[99] relied upon by the *Alabama By-Products'* court merely suggests that simple pneumoconiosis *may* cause total disability,[100]—not that it does. The Supreme Court's conclusion in *Turner Elkhorn* lends credence to the proposition that simple pneumoconiosis is not totally disabling. It stated that "simple pneumoconiosis . . . is generally regarded by physicians as seldom productive of significant respiratory impairment."[101] The Surgeon General's testimony, included in the Senate Report on the Black Lung Benefits Reform Act of 1976, stating that "simple pneumoconiosis seldom produces significant ventilation impairment" further supports this proposition.[102]

Thus, complicated pneumoconiosis is not likely to develop after only ten years of coal mine employment,[103] and although simple pneumoconiosis may result, it is not likely to produce total disability.[104] Therefore, the evidence necessary to invoke the presumption shows at most partial disability, yet the DOL presumption presumes total disability. Since the stated purpose of Title IV is "to provide benefits . . . to coal mine employees who are *totally disabled* due to pneumoconiosis"[105] a partially disabled claimant should not receive benefits for total disability.

Conclusion

There is abundant support, including medical evidence and legislative history, to sustain the three major arguments raised by the operator in *Alabama By-Products.* First, there is no correlation between ten years of coal mine employment and the total disability of a miner.[106] Second, the presumption of total disability cannot be based on x-ray evidence of pneumoconiosis.[107] Third, even as conjunctive requirements, these factors

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[99] H.R. REP. No. 151, 95th Cong., lst Sess. 3 (1977).
[100] *Alabama By-Products*, 733 F.2d at 1518.
[101] *Turner Elkhorn*, 428 U.S. at 7.
[102] S. REP. No. 1254, 94th Cong., 2d Sess. 5 (1976).
[103] *See supra* notes 76-78 and accompanying text.
[104] *See supra* notes 97-99 and accompanying text.
[105] 30 U.S.C. § 901 (1982) (emphasis added).
[106] *See supra* text accompanying notes 76-80.
[107] *See supra* text accompanying notes 82-88.

are insufficient to support a presumption of total disability.[108] Thus, the DOL presumption does not meet the Constitution's due process clause requirement that a rational relationship exist between the fact(s) proved and the fact presumed. Therefore, the Eleventh Circuit should have held the DOL presumption unconstitutional as violative of the due process clause. Such a decision would have forced the DOL to return to its use of the more stringent statutory presumptions of Title IV immediately, thereby saving millions of tax dollars expended on unwarranted black lung benefits.

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[108] *See supra* text accompanying notes 90-102.