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Limiting Attorney's Fees in Black Lung Benefits Cases: A Violation of Procedural Due Process?

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Limiting Attorney's Fees in Black Lung Benefits Cases: A Violation of Procedural Due Process?

INTRODUCTION

On June 28, 1985, the United States Supreme Court, in *Walters v. National Association of Radiation Survivors*,[1] upheld the constitutionality of a statute limiting to ten dollars the total fee that may be paid to an attorney or agent representing a veteran seeking benefits from the Veteran's Administration (VA) for service-connected death or disability.[2] This statute was challenged by veterans who felt that the fee limitation effectively precluded them from obtaining legal representation in violation of their procedural due process rights as guaranteed by the Fifth Amendment.[3] The veterans claimed that the low level of the fee which could be paid to an attorney had the result of eliminating any hope of securing legal counsel in a veteran's benefit case on a regular basis.[4]

In another area of benefit proceedings a trend is developing that could give rise to an argument that is very similar to the one voiced by the veterans in *Walters*. In black lung proceedings attorneys' fee requests are facing drastic reductions and the practical effect is that fewer attorneys are taking such cases and the availability of representation for black lung claimants is being threatened.[5]

This comment will explore the reasoning behind *Walters* and look at the possible repercussions it may have on government

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[1] Walters v. National Ass'n of Radiation Survivors, 105 S.Ct. 3180 (1985), *rev'g*, 589 F. Supp. 1302 (N.D. Cal. 1984) [hereinafter *Walters*].

[2] *Id.*

[3] *Id.* (The plaintiffs also raised a First Amendment claim, but the focus of this comment is on the Fifth Amendment claim.).

[4] *Id.*

[5] *See infra* notes 56-58 and accompanying text.

control of attorneys' fees in black lung benefit cases. The focus will be on the arguments put forth by the veterans and the possible application of the majority's reasoning to a claim by black lung claimants that they are effectively being precluded from adequate counsel in violation of their rights.

I. THE VETERANS CASE

A. Background

On July 14, 1862, Congress prescribed the fees that could be charged by agents or attorneys for filing and establishing claims for pensions, bounties or other allowances on behalf of veterans.[6] Congress also provided that any agent or attorney in such a case who demanded or received any greater compensation than the act allowed would be deemed guilty of a high misdemeanor.[7] Two years later, Congress passed a supplemental act allowing agents or attorneys the fixed sum of ten dollars, regardless of the amount of time expended on the representation.[8] In passing this law, Congress was influenced by the paternalistic motive of keeping the money in the hands of the beneficiaries[9] and out of the pockets of "unscrupulous" attorneys.[10] Attorneys were accused of taking advantage of veterans by retaining an unwarranted portion of the award in compensation for very limited legal assistance.[11]

The present day version of the fee limitation law has changed very little. Attorneys or agents may be employed to bring a claim

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[6] United States v. Hall, 98 U.S. 343, 353 (1878) (*Hall*, in part, involved the question of the validity and constitutionality of the ten dollar fee limitation and this Court found such to be a valid exercise under the Constitution.).

[7] *Id.*

[8] *Id. See generally Walters*, 105 S.Ct. at 3210 (Stevens, J. dissenting) (the ten dollar fee then is roughly the equivalent of a $580 fee today).

[9] *Hall*, 98 U.S. at 354-56.

[10] S. Rep. No. 499, 97th Cong., 2nd Sess. 1, at 50 (1982) (This report was filed in response to a committee bill which proposed opening up the decisions of the Board of Veteran's Appeals (BVA) to judicial review, a practice which had previously been precluded by statute, but the bill died in the House Committee and thus was never enacted.).

[11] *Id.*

on behalf of a veteran,[12] but the fee for such efforts is still limited to ten dollars for any one claim.[13] In addition, anyone violating this provision will be fined not more than five hundred dollars and/or imprisoned at hard labor for not more than two years.[14]

These provisions, with their qualifications and guidelines, were at the heart of the issue in *Walters*.[15] This case was an appeal from a district court decision granting a preliminary injunction against the enforcement of the fee limitation law.[16] The plaintiffs contended that the fee limitation denied veterans any realistic opportunity to obtain legal representation in presenting their claim to the VA, thereby depriving them of their right to procedural due process under the Fifth Amendment.[17]

B. The Mathews Test

In weighing the veterans' interests, the *Walters* Court used the standard by which violations of procedural due process are measured as developed in *Mathews v. Eldridge*.[18] *Mathews* involved a person whose social security disability benefits had been terminated.[19] The claimant brought an action "challenging the

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[12] 38 U.S.C. § 3404(a) (1982) (before being recognized, attorneys or agents may be called upon to "show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants").

[13] *Id.* at § 3404(c)(2).

[14] 38 U.S.C. § 3405 (1982) (this can be done by soliciting, contracting for, charging, or receiving in excess of the ten dollar limit, or attempting to do such).

[15] 105 S.Ct. 3180. For a description of the procedure which veterans must follow see *id.* at 3183-84.

[16] *See* National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, (N.D. Cal. 1984), *rev'd*, 105 S. Ct. 3180 (1985) (The District Court recognized that two previous decisions, Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal. 1975), *aff'd per curiam sub nom*, Gendron v. Levi, 423 U.S. 802 (1975), and Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), upheld the limitation to be constitutional. The District Court noted that *Gendron* rested upon one of two grounds on which the Supreme Court granted summary affirmance, and *Demarest* based its decision on the ruling in *Gendron*; thus there was no res judicata effect since it was not clear upon which conclusion *Gendron* based its decision.).

[17] *National Ass'n*, 589 F. Supp. at 1306 (the plaintiffs were two veterans organizations, three individual veterans, and a veteran's widow).

[18] 424 U.S. 319 (1976).

[19] *Id.*

constitutional validity of the administrative procedures established by the Secretary of HEW for assessing whether there exists a continuing disability."[20] A Federal District Court determined that the administrative procedures in question were unconstitutional.[21] On certiorari, however, the Supreme Court held that an evidentiary hearing is not required prior to termination of disability benefits and that the existing administrative procedures for such termination fully comports with due process.[22]

In arriving at this conclusion the Supreme Court noted that, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances;"[23] rather it "calls for such procedural protections as the particular situation demands."[24] The Court felt that resolution of the issue required analysis of the governmental and private interests that are affected.[25] In considering these interests, the Court applied a test which requires consideration of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[26]

C. *The Walters Court's Decision*

The *Walters* Court, like previous courts,[27] applied the *Mathews* test to determine if the fee limitation was a violation of

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[20] *Id.* at 324-25 (plaintiff sought an immediate reinstatement of benefits pending a hearing on the issue of his disability).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 334 (quoting Cafeteria Worker v. McElroy, 367 U.S. 886, 895 [1961]).

[24] *Mathews*, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[25] *Id.*

[26] *Id.* at 335.

[27] *See* Hewitt v. Helms, 459 U.S. 460, 473 (1983) (inmate claimed that prison officials' actions in confining him to administrative segregation violated his rights under

procedural due process.[28] However, the Court also considered the additional element of deference owed to Congress in light of the longevity of the limitation[29] and the previous action Congress had taken on the subject.[30]

Initially, the Court turned its attention to the government interest involved. First, the Court reiterated the paternalistic motive of protecting the veterans' benefits.[31] Then, the Court endorsed the desirability of an informal and nonadversarial system for handling VA claims.[32] According to the Court, the introduction of attorneys into the proceedings would be unlikely to further this goal.[33] In fact, the Court stated that if compen-

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Due Process Clause of the 14th Amendment); Santosky v. Kramer, 455 U.S. 745, 754 (1982) (parents challenging New York Family Court action ruling for permanent termination of their right); Little v. Streater, 452 U.S. 1, 6 (1981) (indigent suing to have state pay for his blood test in a paternity suit); Mackey v. Montrym, 443 U.S. 1, 10 (1979) (driver lost his license for failure to submit to a breath-analysis test); Parham v. J.R., 442 U.S. 584, 600 (1979) (claim that Georgia's procedures for voluntary commitment of children under the age of 18 to state mental hospitals violated due process); Dixon v. Love, 431 U.S. 105, 112 (1977) (truck driver challenged constitutionality of an Illinois statute which authorized the revocation of a license upon showing that driver's conduct falls into any of the 18 enumerated categories). Each case employed the *Mathews* test.

[28] *Walters*, 105 S. Ct. at 3189.

[29] *Id.* at 3190 (the Court made special note of the fact that the provision was 123 years old). *But see id.* at 3214 (Stevens, J., dissenting). ("The age of the statute cuts against, not in favor of, its validity." The passage of time "[h]as effectively eroded the one legitimate justification that formerly made the legislation rational"—unscrupulous attorneys.).

[30] *See supra* note 10 (Congress had the issue before them in 1982 and let it die in a House Committee.).

[31] *Walters*, 105 S. Ct. at 3190 (This goes back to the idea of the unscrupulous attorney that was put forth in *Hall*, *see supra* text accompanying notes 9 and 10, and the 1982 Senate Report.). *But see* S. Rep. No. 499, 97th Cong., 1st Sess. 1, 50 (1982) (recognizing that in light of the widespread network of local bar associations that now generally police attorney behavior, this position is no longer tenable).

[32] *Id.* at 3191.

[33] *Id. See generally* Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (noting that the use of counsel in prison disciplinary proceedings would "inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals"); Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973) (Dealing with attorneys in probation revocation proceedings, the Court stated that "the decision-making process will be prolonged, and the financial cost to the State for appointed counsel, . . . a longer record, and the possibility of judicial review will not be insubstantial."); Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1288 (1975) ("The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.").

sated attorneys were allowed into the process, "the day might come when it could be said that an attorney might indeed be necessary to present a claim properly in a system rendered more adversary and more complex by the very presence of lawyer representation."[34] The Court concluded that "great weight" must be accorded the government interest at stake.[35]

Next, the Court analyzed the risk of erroneous deprivation of the private interest and the potential of reducing any such error through the proposed introduction of attorneys into the process.[36] In concluding that attorneys would add no procedural safeguard, the Court relied on statistics showing that those veterans represented by counsel have only a slightly higher success rate than veterans represented by non-attorneys or veterans who represented themselves.[37] In addition, the Court said that the availability of attorneys in the ordinary case had not been shown to lead to a likelihood of reduction in errors.[38] According to the Court, "[n]either the difference in the success rate nor the existence of complexity in some cases is sufficient to warrant a conclusion that the right to retain and compensate an attorney in VA cases is a necessary element of procedural fairness under the Fifth Amendment."[39]

Finally, the Court weighed the importance of the private interests affected by the official action.[40] The Court recognized previous cases in which it had held that the liberty interest

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[34] *Walters*, 105 S. Ct. at 3192.

[35] *Id.*

[36] *Id.* at 3192-93.

[37] *Id.* at 3192-95 (The statistics cited show that veterans represented by attorneys or agents have a 18.3% success rate before the BVA, while those represented by non-attorneys have a 15.8% success rate, and those who have no representation a 15.2% success rate.).

[38] *See id.* at 3194-95. *But cf.* National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. at 1310 (The District Court was impressed by the complexity of cases involving Agent Orange, exposure to radiation, and post-traumatic stress syndrome.).

[39] *Walters*, 105 S. Ct. at 3195 (The Court seems to feel that the rare, exceptional cases don't warrant the safeguards because the process works in the generality of cases.). *Cf.* Parham v. J.R., 442 U.S. 584, 608 n. 16 (1979) ("As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on the courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems.").

[40] *Walters*, 105 S. Ct. at 3195.

involved was sufficient to justify the right to counsel,[41] but the Court distinguished the present factual situation. First, the Court reasoned that the only present interest protected by the Due Process Clause was a property interest,[42] which in this case was not of sufficient importance to warrant a right to counsel.[43] Second, the Court reasoned that the claimant does not depend on the payments for their daily subsistence, since the benefits at stake in VA proceedings are not granted on the basis of need, but on the basis of eligibility.[44] Third, the Court further distinguished the case on the ground that VA proceedings are non-adversarial in nature and that counsel has not been guaranteed in various other proceedings that do not approximate trials.[45]

II. THE DANGEROUS PRECEDENT OF *Walters*

A. Expansion into Black Lung Benefits

At the heart of the *Walters* decision is a paternalistic motive[46] and the desire to keep the procedure as informal and non-adversarial as possible.[47] The danger behind this rationale is that it could be used to support the reduction or even elimination of attorneys' fees in other administrative proceedings involving government benefits. In fact, the *Walters* Court quoted with approval a legal commentator, who questioned, "[w]hether we would not do better to abandon the adversary system in certain

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[41] *See Gagnon*, 411 U.S. 778 (The Court held one charged with probation violation may be entitled to counsel because of the liberty interest involved.); Goldberg v. Kelly, 397 U.S. 254 (1970) (which was relied upon by the appellees since it held that a welfare recipient subject to possible termination of benefits had a right to be represented by counsel).

[42] *Walters*, 105 U.S. at 3195.

[43] *Id.* (The Court felt that the welfare benefits in *Goldberg* were distinguishable from the Veterans' benefits since "the recipients in *Goldberg* depended [upon payment] for their daily subsistence.").

[44] *Id.* at 3195-96 (The Court was following a distinction made in *Mathews*, that eligibility for disability benefits, unlike welfare benefits, is not based on financial need and, since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence, the requirements of procedural due process are not the same.).

[45] *Id.* at 3196.

[46] *See supra* note 31.

[47] *See supra* note 32 and accompanying text.

areas of mass justice."[48] Support of such a principle endangers the public's right to representation by an attorney in other benefit proceedings where attorneys' fee limitations are enacted.[49] An attempt may be made to use the reasoning from *Walters* to defeat a due process challenge based upon the practical effect of eliminating counsel when in fact the case does not stand for such a general principle. The facts of *Walters* and the ensuing legal discussion make it clear that its situation was but a narrow factual occurrence that should not have application in all areas of benefit proceedings.

One area where the rationale of *Walters* has no justifiable application and should not preclude a due process challenge is in black lung benefit proceedings. In this area a federal statute grants the government the authority to allow representative counsel a "reasonable fee,"[50] while accompanying regulations provide that "[n]o fee charged for representation . . . shall be valid unless approved under this subpart. No contract or prior agreement for a fee shall be valid . . . ."[51] These regulations further prescribe the application process that attorneys must follow in applying for their fees and the factors the federal authority considers when setting a reasonable rate.[52] On their face these provisions present no problem with obtaining reasonable attorneys' fees, but in practice this is not always the result.[53]

When an attorney in a black lung case submits a fee application, it is reviewed under a "necessary" standard: work is

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[48] Friendly, *supra* note 33, at 1289.

[49] While there are many areas where the government regulates and limits attorneys' fees, for purposes of this Comment the focus will be on black lung benefits cases because of the severe cuts that have occurred in attorneys' fees and the importance of this area to Kentucky practitioners.

[50] 30 U.S.C. § 932(a) (1982).

[51] 20 C.F.R. § 725.365 (1986).

[52] 20 C.F.R. § 725.366 (1986). *See generally* Coleman v. Director, 5 B.L.R. 1-35 (1982); Sagle v. Director, 3 B.L.R. 1-750 (1981) (both cases demonstrate this procedure).

[53] There have been constant attacks on these provisions due to the reductions in fees that take place routinely. *See* McKee v. Director, 6 B.L.R. 1-233 (1983) (court rejected claim that reduction in requested hours constituted an unlawful interference with the practice of law); Potter v. Director, 4 B.L.R. 1-197 (1981) (board rejected contention that a showing of fraud constituted the sole valid basis for reducing the requested number of compensable hours in the fee award); Cocke v. Director, 3 B.L.R. 1-799 (1981) (board rejected unlawful interference claim, fraud claim, and a claim that the flat-rate fee award policy is unreasonable).

considered necessary if at the time it was performed the attorney reasonably considered the work necessary to establish entitlement.[54] The awarding of fees is discretionary and will not be set aside upon appeal unless shown to be arbitrary, capricious, an abuse of discretion, or not in accordance with the law.[55]

Under this process, attorneys routinely face rejection of their fee request or severe reductions in either the hourly rate granted or in the number of compensable hours allowed.[56] Even when a court grants attorneys their requested fees, it is often after a lengthy process requiring a submission of a fee request, an appeal of the initial decision, and then a return to the first forum on remand.[57] Consequently, many attorneys are reluctant to accept a black lung case, and others will not take them at all.[58] If this practice continues, adequate representation will not be available for black lung claimants due to governmental action, giving rise to a potential violation of due process.[59]

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[54] Marcum v. Director, 2 B.L.R. 1-894, 1-901 (1980).

[55] *Id.* at 1-896.

[56] *See generally* Esselstein v. Director, 676 F.2d 228, 229 (6th Cir. 1982) (court reduced requested rate from $100 to $65 per hour, saying co-counsel work was routine); Elkins v. Secretary of Health & Human Services, 658 F.2d 437, 440 (6th Cir. 1981) (court denied attorney's fee in part because attorney had not complied with established procedures for an award); Maloney v. Director, 4 B.L.R. 1-711 (1982) (court reduced hourly rate from $100 to $65 per hour); Calhoun v. Director, 3 B.L.R. 1-812 (1981) (court was hearing an appeal from a decision reducing an attorney's requested fee of $3737 to an award of $50); Courier-Journal, July 13, 1980, at A1, col. 4 (quoting attorneys who have had claims reduced: requested $1530.60, award $0.00; requested 35 1/2 hours, award $0.00; requested $2225, award $0.00; requested $4000, award $170; requested 40 hours, award $432.60).

[57] *See* Hrutkay v. Bethlehem Mines Corp., 5 B.L.R. 3-4 (1982); *Potter*, 4 B.L.R. 1-197; *Calhoun*, 3 B.L.R. 1-812; *Cocke*, 3 B.L.R. 1-799; *Sagle*, 3 B.L.R. 1-750.

[58] *See generally* Courier-Journal, July 13, 1980 at B4, col. 2 (The paper notes that attorneys are no longer handling the claims or, at least, they are screening the ones they handle very carefully.); Courier-Journal (Indiana Edition), June 25, 1985, at B3, col. 2 (Quoting a coal miner whose claim took five years to work through the system: "you can't get an attorney because it takes so long for him to get his pay." The miner made the statement as he testified before a congressional subcommittee.).

[59] *Cf.* Linnell, Choate & Weber v. Heyde, 330 F. Supp. 170 (D. Maine 1971) (This case involved a petition for review of an award of attorneys' fees made by respondent in a compensation order awarding benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 901. Petitioners were awarded fees of $950, later increased to $1450 for 48 hours work. The court found this award "wholly inadequate" and raised it to $2500, plus expenses of $675.93 saying "that claimants will be unable to obtain the services of competent counsel unless the attorney's fees to be paid are reasonably compensatory of the services rendered.").

B. Black Lung Representation and The Mathews Test

Determining if a black lung claimant's interest is of such importance that it should be allowed due process protection involves a two-step analysis.[60] First, the court must decide if there is a property interest sufficient to require due process protection.[61] Secondly, employing the *Mathews* test, the court must determine what process is due prior to the denial of benefits.[62]

In *Board of Regents v. Roth*,[63] the Supreme Court announced what is required for a person to have a property interest in a benefit:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.[64]

"The touchstone of due process is protection of the individual against arbitrary action of the government."[65] Whether any procedural protections are required depends not on whether governmental benefits are characterized as a "right" or as a "privilege," but whether individuals will be condemned to suffer grievous loss.[66]

Under these standards, black lung claimants clearly possess a property interest of sufficient magnitude to invoke due process

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[60] Devine v. Cleland, 616 F.2d 1080, 1085 (9th Cir. 1980) (case involving veterans' educational assistance).

[61] *Id.* at 1086. The emphasis is on the applicants' rights to due process, not the attorneys'. The courts have held that the rejection of the fees agreed upon between themselves and their clients by the Social Security Administration does not constitute a denial of due process from the attorney's point-of-view. *E.g.*, Thomason v. Schweiker, 692 F.2d 333 (4th Cir. 1982); Copaken v. Secretary of HEW, 590 F.2d 729 (8th Cir. 1979); Pepe v. Schweiker, 565 F. Supp. 97 (E.D. Pa. 1983); Byrd v. Harris, 509 F. Supp. 1222 (E.D. Tenn. 1981), *aff'd*, 701 F.2d 174 (6th Cir. 1982).

[62] *Devine*, 616 F.2d at 1086; *see also* Goldberg v. Kelly, 397 U.S. 254 (1970).

[63] 408 U.S. 564 (1972).

[64] *Id.* at 577.

[65] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[66] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

protection.[67] The legitimacy of an alleged interest does not depend upon whether the person has previously been receiving the desired benefit,[68] but upon a comparison of the nature of an individual's interest in the benefit and consequences of its denial with public considerations for withholding that right.[69] In the case of black lung claimants, arbitrary denial of their benefits could leave them with an "uncompensated disability of lifelong duration."[70]

The next step is to employ the *Mathews* test to determine the extent of protection due a class prior to a denial of benefits,[71] with the first factor being the private interest that will be affected by the official action.[72] In *Walters*, the Court made the distinction between benefits which are granted on the basis of need[73] and benefits which are granted because an applicant meets the eligibility requirements.[74] The Court felt that the former are more deserving of due process protection than the latter,[75] and thus held that the victims were not entitled to employ counsel since their benefits were likened to the social security benefits in *Mathews* (eligibility) and not the welfare benefits in *Goldberg*

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[67] *Cf.* Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir. 1982) (holding that a housing applicant had a constitutionally protected property interest in benefits by virtue of her membership in a class of individuals whom the housing provisions were intended to serve); *Devine*, 616 F.2d at 1086 (court found that veterans applying for educational assistance have a property interest that deserves due process protection); Davis v. United States, 415 F. Supp. 1086, 1091 (D. Kan. 1976) (holding that a former federal prison inmate possessed property interest of sufficient magnitude to invoke protection of the due process clause of the Fifth Amendment, even though he had not yet been adjudged entitled to receive benefits under the regulatory scheme, for injuries allegedly suffered as consequence of his employment within federal prison hospital).

[68] *Davis*, 415 F. Supp. at 1095.

[69] *Id.* at 1096-97.

[70] *Cf. id.* at 1091.

[71] *See supra* text accompanying note 62.

[72] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[73] Walters v. National Ass'n of Radiation Survivors, 105 S.Ct. 3180, 3195-96 (1985) (The Court was referring to their decision in *Goldberg* where they held that a welfare recipient subject to possible termination of benefits was entitled to be represented by an attorney.).

[74] *Id.* (The court was referring to their decision in *Mathews* which held that a claimant is not entitled to an evidentiary hearing prior to the termination of disability benefits. However, in this case the present system did allow for a hearing prior to such a denial becoming final, just not at the beginning of the process.).

[75] *Id.*

(need).[76] However, in light of the seriousness of the affliction under which black lung claimants suffer,[77] it is clear that their situation is more closely analogous to *Goldberg* than to *Mathews* or *Walters*. The *Goldberg* court stated that "the crucial factor . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. . . ."[78] In the black lung situation, Congress has found that a significant number of coal miners are not only partially disabled, but are totally or fatally disabled from black lung due to employment in underground coal mines.[79] Thus, in many cases, the black lung claimants', like the welfare recipients', ability to seek redress is adversely affected because of their need to concentrate upon finding a means of daily subsistence[80] and proper medical care. The black lung claimant has a sufficient private interest to warrant a right to be represented by an attorney and such a right should not be lightly dismissed.[81]

The second factor is the "risk of erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[82] In the case of black lung applicants we are not looking at an additional procedural safeguard, rather we are faced with the elimination of one already in place -- representative counsel.[83] It is counsel who develops the record so as to entitle a claimant to benefits, and without this representation the risk of erroneous deprivation would be high.[84]

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[76] *Id.*

[77] *See generally* Courier-Journal (Indiana Edition), June 25, 1985, at B3, col. 2 (Senate Minority Leader Robert C. Byrd, D-W. Va. speaking on the ravages of black lung disease, "I've seen them as they sat up at night in a rocking chair—that's how they had to sleep. They couldn't lie down."); Courier-Journal, July 13, 1980, at B4, col. 2 (Black Lung is a permanent respiratory problem caused by prolonged breathing of coal dust.).

[78] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[79] Meiser, *The Black Lung Benefits Act*, 17 Forum 813 (1982).

[80] *See generally Goldberg*, 397 U.S. at 264.

[81] *See Walters*, 105 S. Ct. at 3216 (Stevens, J., dissenting) ("[T]he citizen's right to consult an independent lawyer and to retain that lawyer to speak on his or her behalf is an aspect of liberty that is priceless.").

[82] *Mathews*, 424 U.S. at 335.

[83] *See supra* notes 56-58.

[84] *See infra* notes 85-87 and accompanying text.

The last factor is the "[g]overnment's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[85] Administrative efficiency cannot justify a rule that indirectly prohibits counsel by discouraging their participation.[86] In many cases, the right to be heard is meaningless if it does not include the right to be heard with the assistance of legal counsel.[87] Counsel can "help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examinations, and generally safeguard the interest of the recipient."[88] This is especially true in black lung proceedings when one considers the nature and complexity of the issues to be presented.[89] Furthermore, the presence of counsel does not constitute an additional or substitute procedural requirement, but is merely a continuation of past practice.[90]

In the *Walters* case the government interest was comprised of a paternalistic motive[91] coupled with the desire to maintain a procedure that was both informal and non-adversarial.[92] In the case of black lung benefits, the government's interest is to see that claimants receive the benefits to which they are entitled.[93] The presence of attorneys in no way interferes with this purpose. Counsel serves the much needed function of aiding the claimant by developing the record to the degree necessary to qualify the claimant for the benefits that are due him.[94] In addition, for the

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[85] *Mathews*, 424 U.S. at 335.

[86] *Walters*, 105 S. Ct. at 3212 (Stevens, J., dissenting) (speaking here on the practical effect of the VA's ten dollar fee limitation).

[87] *Goldberg*, 397 U.S. at 270-71 (recognizing the importance of an attorney to a welfare recipient's case).

[88] *Id.* at 271; *see also* National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1323 (N.D. Cal. 1984) (attorneys could gather evidence, find witnesses, obtain expert testimony and reports, and present all in the needed fashion).

[89] *Cf. National Ass'n*, 589 F. Supp. at 1315-16 (The relationship between the importance of an attorney and the risk of erroneous deprivation generally rests on the importance of the interest at stake, the nature and complexity of the issues to be presented, and the likely ability of the person involved to be able to present such issues.).

[90] *See supra* text accompanying note 83.

[91] *See supra* note 31 (again, the Senate notes that this motive is no longer tenable).

[92] *See supra* text accompanying note 31 (This motive has no application here in light of the presence of, and need for, attorneys already in the process.).

[93] *See* Director v. Black Diamond Coal Mining Co., 598 F.2d 945 (5th Cir. 1979); Hopkins v. Gardner, 374 F.2d. 726, 728-29 (7th Cir. 1967), *rev'd on other ground sub nom*, Hopkins v. Cohen, 390 U.S. 530 (1968).

[94] *See supra* note 87 and accompanying text.

most part, the attorney's fee is not taken out of the claimant's benefits,[95] but is paid either by the employer[96] or by the black lung trust fund.[97] It is obvious that the government's interest in black lung cases is not put in jeopardy by the presence of legal advocates.

When considering the black lung claimant's right to counsel under the *Mathews* test, it is clear that such a right is mandated by due process. The claimant has an important private interest that is adversely affected by the government's action in limiting attorneys' fees.[98] Obviously, the risk of erroneous deprivation to the claimant's rights if counsel is removed from the process is great,[99] and the presence of attorneys in no way interferes with the avowed government interest of expediting the flow of benefits to the miners.[100]

CONCLUSION

The government has an obvious interest in regulating the fees awarded to attorneys in black lung cases, but the present application of the discretionary standards in setting such awards is proving to be a dangerous path to travel. The officials responsible for setting the level of awards are interpreting a "reasonable fee" in a wholly unreasonable manner.[101] If the government has chosen this route to protect claimants from their own folly of paying attorneys too much, then they have overstepped their role. "It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error."[102] Li-

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[95] The claimant pays only those fees incurred prior to giving notice to the employer or the director to the Black Lung Disability Trust Fund of his condition and need for benefits. *See generally* O'Quinn v. The Pittston Co., 4 B.L.R. 1-25 (1981); Yokley v. Director, 3 B.L.R. 1-230 (1981).

[96] *See* 30 U.S.C. § 932(a) (1982).

[97] *See* Republic Steel Corp. v. Director, 590 F.2d 77 (3rd Cir. 1978); *Yokley*, 3 B.L.R. 1-230.

[98] *See supra* text accompanying notes 72-81.

[99] *See supra* text accompanying notes 82-90.

[100] *See supra* text accompanying notes 91-97.

[101] *See supra* note 56.

[102] American Communications Ass'n v. Douds, 339 U.S. 382, 442-43 (1950).

kewise, if the aim is to simplify the process,[103] then a grave injustice is being exercised against the miners by denying their right to counsel as mandated by *Mathews*,[104] and the benefits which flow from such representation.[105] No matter the intentions, be they good or bad, of the government in their application of the present standards,[106] the practical result of this course of action will be the eventual elimination of attorneys from black lung benefit cases at the expense of claimants' procedural due process rights.

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[103] Even if there was a semblance of support for this position, administrative fairness usually does entail "some additional administrative burdens and expense." *See* Richardson v. Wright, 405 U.S. 205, 227 (1972) (Brennan, J., dissenting).

[104] *See supra* text accompanying notes 97-99.

[105] *See supra* note 86 and accompanying text.

[106] "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).