

# U.S. Department of Labor

Office of Inspector General—Office of Audit

## REPORT TO THE OFFICE OF WORKERS' COMPENSATION PROGRAMS, OFFICE OF ADMINISTRATIVE LAW JUDGES, AND BENEFITS REVIEW BOARD



### PROCEDURAL CHANGES COULD REDUCE THE TIME REQUIRED TO ADJUDICATE FEDERAL BLACK LUNG BENEFIT CLAIMS

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## BRIEFLY...

Highlights of Report No. 05-15-001-50-598, issued to the Office of Workers' Compensation Programs (OWCP), Office of Administrative Law Judges (OALJ), and the Benefits Review Board (BRB).

### WHY READ THE REPORT

Coal Worker's Pneumoconiosis, or black lung disease, is a condition suffered by coal miners that often leads to lung impairment, disability, and premature death. Between 1970 and May 2013, black lung disease killed more than 70,000 coal miners. Under the Black Lung Benefits Act (BLBA), the Department of Labor (DOL) provides compensation to coal miners who are determined to be totally disabled by pneumoconiosis arising out of coal mine employment and to their eligible survivors. This report discusses actions that DOL agencies involved in the claims process (OWCP, OALJ, and BRB) could take to improve the quality and timeliness of its black lung disease claims decisions.

### WHY OIG CONDUCTED THE REVIEW

We conducted this review in response to a request by the United States House of Representatives' Committee on Education and the Workforce (Committee). The Committee's request was prompted by a report issued in October 2013 by the Center for Public Integrity that examined alleged misconduct by doctors and lawyers working for the coal industry.

### READ THE FULL REPORT

To view the report, including the scope, methodology, and full agency responses, go to:

<http://www.oig.dol.gov/public/reports/oa/2015/05-15-001-50-598.pdf>.

**April 2015**

### PROCEDURAL CHANGES COULD REDUCE THE TIME REQUIRED TO ADJUDICATE FEDERAL BLACK LUNG BENEFIT CLAIMS

#### WHAT OIG FOUND

We found many opportunities to improve the black lung disease claims process. OWCP could work with its approved medical providers to improve the quality of medical reports and to reduce the time it takes providers to submit those reports. OWCP could also work with the Social Security Administration to expedite access to claimants' earnings records. OALJ could improve its workload management by establishing performance goals for the disposition of cases for the office as a whole and for its district offices individually. OALJ also needs to address a shortage of staff resources, improve communications between its headquarters and district offices, and upgrade the training provided to judges and law clerks. BRB should consider whether the temporary reassignment of BRB staff to assist OALJ in reducing its case backlog would be a more effective use of resources. DOL should consider streamlining the claims process with an automated system that allows OWCP, OALJ, and BRB to exchange case files. Finally, DOL could take additional actions in response to the recommendations made by the Government Accountability Office in its October 2009 report on the black lung benefits program.

#### WHAT OIG RECOMMENDED

We made 23 recommendations addressing the issues identified above. In response to our report, the agencies indicated that they already have or are in the process of taking action on most of our recommendations. OWCP noted that it would like to further evaluate the long-term impacts of the 2010 amendments to the BLBA before pursuing additional amendments. Also, OALJ stated that it did not believe implementing a time tracking system for judges and law clerks would be an effective mechanism to improve productivity.

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**U.S. Department of Labor**

Office of Inspector General  
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April 9, 2015

**Inspector General's Report**

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The Office of Inspector General (OIG) conducted a review of the U.S. Department of Labor's (DOL) black lung disease claims process in response to a request from the United States House of Representatives' Committee on Education and the Workforce (Committee). The Committee was concerned with reports of alleged misconduct by doctors and lawyers working for the coal industry, and whether this misconduct might have led to improper denial of claims. The request followed an October 29, 2013, report by the Center for Public Integrity (CPI), which conducted a year-long investigation examining the role of doctors and lawyers working on behalf of the coal industry and their impact on miners' ability to qualify for black lung benefits claims.

The OIG met with staff from the Committee and agreed to review the black lung disease claims process to identify factors that might improve claims adjudication. As part of this review, the OIG also followed up on actions DOL had taken in response to recommendations the Government Accountability Office (GAO) made in its October 2009 report on the Federal Black Lung Benefits Program.

Black lung can cripple and kill. The disease often leads to lung impairment, disability, and premature death. According to the National Institute for Occupational Safety and

Health (NIOSH), about 2,000 miners die from black lung every year. As of May 2013, Black lung had killed more than 70,000 coal miners since 1970.

As a result of the Committee's request, we conducted a review of the federal black lung disease claims process to answer the following questions:

1. Did DOL have controls and processes in place to effectively and efficiently adjudicate black lung claims?
2. Has DOL implemented the recommendations from GAO's October 2009 report, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims?*

To answer these questions, we reviewed policies and procedures, performed walkthroughs of the claims and adjudication processes, conducted extensive interviews with program management and staff and external stakeholders, and tested a sample of claims closed at Office of Workers' Compensation Programs (OWCP), Office of Administrative Law Judges (OALJ), and Benefits Review Board (BRB) during Fiscal Years (FY) 2011-2013. We analyzed reported data for black lung claims closed during FYs 2008-2014 to identify timelines and potential bottlenecks associated with the process. We also analyzed other federal and state benefit programs to identify common practices (see Exhibit 1). Finally, we followed up with officials from OWCP, OALJ, and BRB regarding actions those agencies had taken in response to the recommendations GAO made in its October 2009 report.

We found many opportunities to improve the black lung claims process. OWCP could work with its approved medical providers to improve the quality of medical reports and to reduce the time it takes providers to submit those reports. OWCP could also work with the Social Security Administration (SSA) to expedite access to claimants' earnings records, including electronic transmission of information between agencies and exploring the possibility of seeking legislation to authorize OWCP to have online access to SSA's earnings database. To reduce the backlog of cases pending before it, OALJ needs to establish timelines and performance goals for the disposition of cases for OALJ as a whole and for the district offices individually. OALJ could improve its workload management by hiring more law clerks and staff attorneys to work with judges, by reinstituting its contract writer program, by using video teleconferencing (VTC) to conduct hearings, and by working with the BRB regarding temporary reassignments of staff. OALJ should also improve policy guidance and communications between headquarters and district offices, and improve the training provided to judges and law clerks. Finally, OWCP, OALJ, and BRB need to work together to develop an automated case management system that would allow the electronic exchange of case files among the three agencies.

We also found DOL could take additional actions in response to the seven recommendations GAO made in its October 2009 report. These recommendations

related to reducing the number of cases remanded from BRB to OALJ, developing performance measures for the timeliness of claims processing, using VTC to conduct hearings, improving how doctors' opinions are documented, obtaining accurate data about claimant representation, evaluating physicians' blood gas testing practices, and evaluating the potential for proposing changes to the Black Lung Benefits Act (BLBA), such as providing compensation for partial disability and allowing settlement of claims.

## **Background**

As defined in 20 CFR §718.201, black lung disease, or pneumoconiosis, means a chronic dust disease of the lung, including respiratory and pulmonary impairments arising out of coal mine employment (CME).<sup>1</sup> From the 1970s through the 1990s, the percentage of miners with radiographic signs of black lung dropped from 6.5 to 2.1 percent. During the most recent decade, however, the rate began to increase, reaching 3.2 percent of coal miners tested in 2012.

BLBA, as amended, authorizes monthly payments to, and medical treatment for, coal miners totally disabled from pneumoconiosis arising from employment in or around coal mines. BLBA also authorizes monthly benefits to certain eligible miners' dependent survivors. In 2014, BLBA provided monthly benefit payments to beneficiaries ranging from \$631.80 to \$1,263.60.

Three DOL agencies share responsibility for processing and adjudicating black lung claims: OWCP, OALJ, and BRB. Claims are initially filed with OWCP, which makes a determination to approve or deny benefits. Parties dissatisfied with OWCP's determination may request a hearing before OALJ. In most cases, OALJ holds an oral hearing, receives testimony and other evidence, and renders a written decision on the claim. OALJ's decision can be appealed to BRB, and further appeals may be brought to the U.S. Circuit Courts of Appeals and the U.S. Supreme Court. Table A shows black lung claims activity for FY 2014 as reported by each of the three agencies.

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<sup>1</sup> Refer to Appendix A for definitions of and distinctions between legal and clinical pneumoconiosis.

| <b>Table A: FY 2014 Black Lung Claims Activity</b> |                                |                              |                    |                                |
|----------------------------------------------------|--------------------------------|------------------------------|--------------------|--------------------------------|
| Agency                                             | Claims Pending as of 10/1/2013 | Claims Received <sup>2</sup> | Decisions Issued   | Claims Pending as of 9/30/2014 |
| OWCP                                               | 2,710                          | 7,394 <sup>3</sup>           | 5,217 <sup>4</sup> | 4,887                          |
| OALJ                                               | 2,851                          | 1,104                        | 813                | 3,142 <sup>5</sup>             |
| BRB                                                | 313                            | 312                          | 426                | 199                            |

**Source:** Claims activity reported by OWCP, OALJ, and BRB.

According to its website, OWCP's mission is to:

Protect the interests of workers who are injured or become ill on the job, their families and their employers by making timely, appropriate, and accurate decisions on claims, providing prompt payment of benefits and helping injured workers return to gainful work as early as is feasible.

Claims filed under the BLBA are administered by OWCP's Division of Coal Mine Workers' Compensation (DCMWC).

Administrative law judges (ALJs) from OALJ preside over formal hearings concerning many labor-related matters. Hearings concerning black lung benefits and Longshore and Harbor Workers' Compensation Act (Longshore Act) constitute the largest part of the office's work. OALJ also hears and decides cases arising from more than 60 other labor-related statutes and regulations. According to its website, the OALJ's mission is "to render fair and equitable decisions under the governing law and facts of each case."

BRB was created by Congress in 1972 to review appeals of OALJ decisions arising under BLBA and the Longshore Act and its extensions. BRB has authority to resolve appeals filed by any party-in-interest raising a "substantial question of law or fact." BRB reviews appealed decisions of ALJs to determine if the findings were supported by substantial evidence and decided in accordance with the law.

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<sup>2</sup> The terms "claim" and "case" may be used interchangeably in this report. At the OWCP stage, miners and survivors file black lung claims. If a party dissatisfied with OWCP's determination on the claim requests an OALJ hearing (or subsequently appeals to the BRB), a claim becomes a "case."

<sup>3</sup> This includes new, refiled (claimant has filed at least once before), successor (subsequent claim filed on a miner's record by another person), and conversion claims (some dependent survivors are automatically entitled to benefits).

<sup>4</sup> This includes adjudications of new, refiled, successor, and conversion claims.

<sup>5</sup> Pending claims include unassigned claims (waiting to be assigned to an ALJ) as well as those claims assigned to an ALJ that are either waiting to be scheduled for hearing or a decision to be written and issued. OALJ considers its backlog to include all pending claims.

## Results

### **Objective 1 — Did DOL Have Controls and Processes in Place to Adjudicate Black Lung Claims Efficiently and Effectively?**

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Although DOL had many effective processes and controls in place to adjudicate black lung claims, we also found many opportunities for improvement. Overall, we identified a host of factors at OWCP, OALJ, and BRB acting together that added additional time to the adjudication of black lung claims and could impact the quality of claims decisions. OWCP has taken actions that have sped up the issuance of initial claims determinations, but it could take additional steps to improve the quality and timeliness of medical evidence obtained from doctors and to improve the timeliness of earnings records obtained from Social Security.

We identified opportunities to improve the management of OALJ resources, which could improve the timeliness of its decisions. This is important because either the claimant or the mine operator requested an OALJ hearing in about 20 percent of the decisions issued by OWCP. Moreover, about 38 percent of OALJ decisions were appealed to BRB in FY 2014. On average, in FY 2014, OWCP reported it took 235 days to issue a decision on a black lung claim. For claims that involved a hearing at OALJ, OALJ reported it took an average of 693 additional days to conduct the hearing and issue a decision. For claims appealed to the BRB in FY 2014, BRB reported it took an average of 328 days to issue its decision. The statistics showing the number of days claims spend at each agency were provided to us by the agencies themselves. We did not verify this data as part of this review, but we will conduct a separate review of the reliability of this data and report our results in a subsequent report.

OALJ lacked adequate performance measures or goals, and has not made use of the performance management tools it does have. OALJ stated the reason it does not have performance goals for its ALJs is that Office of Personnel Management (OPM) regulations prohibit ALJs from receiving performance ratings. However, this does not preclude OALJ from establishing performance measures for its district offices.

As OALJ has struggled to manage its case load in the face of decreasing staff, BRB has detailed some staff to outside agencies and has used some staff to update research tools. Until November 2014, these two agencies had not collaborated or reached an agreement to share resources to achieve the common goal of expediting the disposition of black lung cases. During our fieldwork, however, the agencies announced they had held a meeting to discuss possibilities for sharing resources and improving the black lung claims process. In addition, BRB stated it detailed one of its black lung attorneys to OALJ for a six-month period. The two agencies also drafted a memorandum of understanding (MOU) to address the sharing of resources.

***Quality and timeliness of reports from approved medical providers could be improved***

**Improving the Quality of Medical Reports**

OWCP maintains a list of approved physicians who have agreed to provide the initial medical examination of black lung claimants and report the results to OWCP. OWCP pays for this examination and report, which provide the basis for OWCP's initial decision on the claim.

During our review of case files, we noted significant differences in the level of detail and comprehensiveness of documentation among medical reports. OWCP field office personnel told OIG that OWCP's medical providers' reports were generally less detailed than the medical reports presented by mine operator-paid physicians at all levels of the claims review and adjudication process. At times, OWCP claims examiners had to follow up with physicians to obtain more information and additional clarity, which contributed to overall delays in the claims process. Claims examiners and ALJs are required to base their decisions on well-reasoned medical reports. Differences in the level of detail in OWCP's, claimants', and mine operators' medical reports could impact claim outcomes.

- Training

As discussed on pages 9 and 10 of this report, OWCP monitored the quality of physicians' reports and provided informal training where quality was lacking. OWCP also conducted training on accuracy of reporting at workshops sponsored by the National Coalition of Black Lung and Respiratory Disease Clinics. However, OWCP's guidance has been largely informal and reactive, responding to specific issues identified with certain providers, instead of formal and proactive for all providers. Medical providers continued to submit incomplete medical reports. When physicians did not provide all of the medical evidence required to prove or disprove totally disabling pneumoconiosis, OWCP had to contact the physicians and request additional information, delaying the claims process. OWCP stated its upcoming online physician training will contain a module on the proper completion of required medical reporting forms.

- Second Medical Opinions

A second medical opinion, or at a minimum, a second reading of x-rays, could bolster the accuracy of claims determinations and possibly reduce the number of requests for OALJ hearings. A second opinion could also provide additional relevant medical evidence to be considered if OALJ hearings are held. Second-opinion physicians would typically provide a narrative report describing the findings from physical examinations of patients and from review of diagnostic testing or other medical records.

After reviewing a miner's claim and all of the employment and medical evidence, the district director issued a "Schedule for the Submission of Additional Evidence (SSAE)." All parties were provided with all evidence submitted at the time the SSAE was issued. In addition, the SSAE included: 1) a summary of the results of the initial complete pulmonary evaluation or, for survivors' claims, a summary of the medical evidence developed; 2) the district director's preliminary analysis of the medical evidence; 3) the district director's designation of the "responsible operator" (RO) liable for the payment of benefits; and 4) a notice to the claimant and the RO that they have a right to submit evidence on the claimant's entitlement to benefits and the operator's liability for them. The SSAE gave the claimant and the operator no less than 60 days to submit additional evidence and allowed an additional 30 days to respond to evidence the other party submitted in response to the SSAE. After this evidence had been submitted by both parties, the district director issued a Proposed Decision and Order (PDO). Both parties received all evidence considered by the district director and had a further opportunity to file for a hearing with the OALJ.

OWCP generally provided only one medical opinion to miners – the complete pulmonary evaluation the statute guarantees to each miner who applies for benefits. OWCP is currently operating a pilot program designed to strengthen this evaluation. The pilot program involves only those claims in which the miner had 15 or more years of CME and the OWCP-approved physician's opinion supported an award of benefits at the SSAE level. If the mine operator submitted medical evidence contrary to OWCP's provider's opinion, OWCP's examining physician was given an opportunity to review it, along with any evidence offered by the claimant, and reconsider his or her findings. The OWCP physician then issued a supplemental opinion that was considered when the claim was adjudicated.

OWCP obtained a second medical opinion only in cases where the Black Lung Trust Fund (Trust Fund)<sup>6</sup> was liable for any benefits owed. In such cases, OWCP had the right to submit additional medical evidence above and beyond the requirements of the initial complete pulmonary evaluation.<sup>7</sup> In some cases, the second opinion was not needed because OWCP and the miner accepted the original physician's findings, but in other cases, the miner submitted evidence that undermined the original exam and OWCP required additional evidence. The second opinion, in those cases, could take the form of an additional examination, or a second physician's review and opinion of evidence already in the file.

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<sup>6</sup> The Trust Fund pays benefits when: (a) the miner's last CME was before January 1, 1970; (b) no liable coal mine operator can be identified; or (c) the miner's most recent employment of at least one year ended while the operator was authorized to self-insure, and such operator is no longer financially capable of securing benefit payments. For more information, see Appendix A.

<sup>7</sup> 20 CFR 725.414(a)(3)(iii)

OWCP has always had x-rays re-read for quality assurance purposes, and stated it was working with NIOSH to develop a quality assurance program that would monitor readings of chest x-rays by radiologists qualified as B-readers. B-readers are physicians certified by NIOSH as demonstrating proficiency in the classification of chest radiographs for opacities consistent with pneumoconiosis using the International Labour Office Classification System. This quality assurance program would include radiologists who are retained by OWCP, claimants, and coal mine operators. OWCP's after-the-fact evaluation for the pilot program will be focused primarily on determining the qualitative improvement of the decisions rendered at the district office level, not on determining whether claim processing times can be improved.

Other workers' compensation programs, three of which are administered by DOL, used second medical opinions and/or referee (third opinion, see referee medical opinions below) medical exams as additional evidence or as tie breakers in cases where medical providers have reached different conclusions (see Exhibit 1). Although this may extend OWCP's processing time for claims, a second or referee opinion might provide added value by increasing accuracy and contributing to the finality of a determination.

- Referee Medical Opinions

Unlike second medical opinions, referee medical opinions could be rendered by physicians of an appropriate specialty who examine the medical evidence and furnish a rationalized medical opinion. Such referee opinions could be used to resolve a conflict of medical opinion between OWCP's physician and the operator's/claimant's physician and/or the second opinion physician. A referee, or tie-breaker medical examination, would review OWCP's, claimants', and mine operators' medical evidence and provide a definitive ruling on which side would prevail, while also potentially reducing the time it takes to adjudicate a case. The use of referee medical examinations would require a legislative change, as the BLBA does not provide for a binding tie-breaker examination. The referee or tie-breaker medical examination would only reduce adjudication time if the statute made it binding on the parties.

- Vetting of Medical Providers

It is important that OWCP's approved medical providers be properly vetted to safeguard the integrity and image of the program. We researched the credentials of all 108 physicians on the provider list. We found one physician had been reprimanded by a state board of medicine for "improperly prescribing controlled substances," and one had been reprimanded for self-prescribing medication. OWCP was not aware of either of these reprimands and, therefore, could not take such information into consideration, as it had no program in place to

periodically review the certifications and continued fitness of physicians to practice on its behalf.

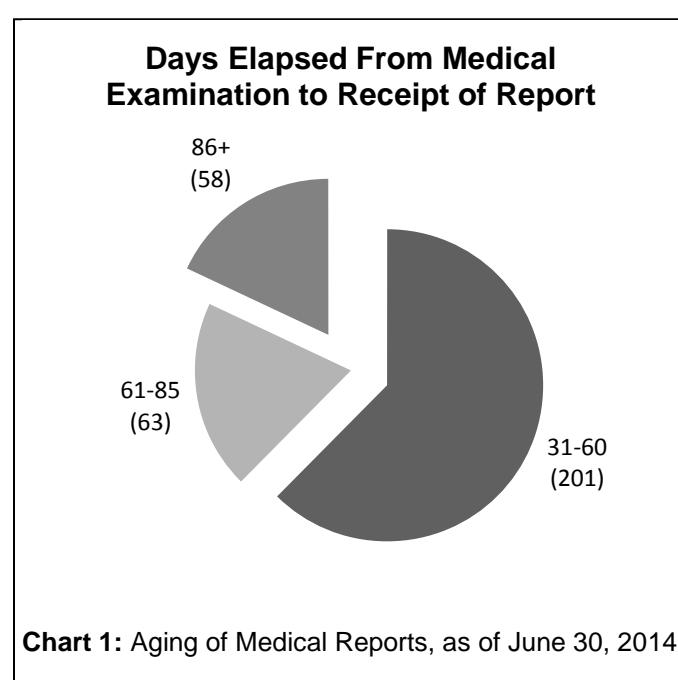
According to its response to our draft report, OWCP stated it had fully implemented a system to screen and remove medical providers on the provider list when circumstances warrant.

### Improving the Timeliness of Medical Reports

The elapsed time between the medical examination of a claimant and the submission of the medical provider's report was the single most significant factor contributing to the processing time of black lung claims at the OWCP level. BLBA states each miner will receive a complete pulmonary evaluation by an approved medical provider. This evaluation forms the medical basis for OWCP's initial adjudication of each miner's entitlement to benefits.

OWCP could make additional improvements by having medical providers submit their reports more quickly after an exam has taken place. According to OWCP's FY 2014 operational plan, medical evidence should be submitted within 85 days of the date of the medical examination. This 85 days includes the time it should take for miners to undergo required examinations and testing and for physicians to submit their reports. OWCP reported it reduced the average time to receive complete pulmonary evaluation reports from 123 days in FY 2012 to 83 days in FY 2013, and 88 days in FY 2014.

Although OWCP has reported it made progress towards reducing the average actual time to receive complete medical reports, we found there were a number of medical reports received after the 85 days had passed. At the time of our review in June 2014, we found 322 medical reports were pending for more than 30 days after the date of the medical exam. Of those, 58 had been pending for more than 85 days, with the longest case pending for 448 days. Chart 1 illustrates this aging of medical reports as of June 30, 2014. Moreover, as previously noted, medical reports varied in quality. In some cases, OWCP had to contact medical providers for clarification when the reports they submitted were vague, unclear, or inconclusive.



Medical reports are a critical part of the evidence considered by OWCP when making a determination on a claim. Untimely submission of these reports delays benefit determinations. Compounding this effect are further delays created when OWCP personnel are required to follow up with physicians to clarify the narratives they provided.

While OWCP did not believe there was a significant timeliness issue with respect to the receipt of medical evidence since it had attained the average goal set forth in its operating plan, the agency has sought to further improve the timeliness of this evidence while not negatively affecting its quality. To minimize medical appointment scheduling delays, OWCP initiated the electronic transmittal of authorization letters to eligible providers. The agency also recruited additional doctors to conduct examinations in the medically underserved areas where many miners reside. According to OWCP, scheduling medical examinations with qualified physicians in remote mining communities and mandating those physicians write quality reports requires those doctors to have sufficient time to prepare thorough and careful reports.

OWCP has also worked to mitigate the effect of the delays in obtaining medical evidence by pursuing other aspects of the claims process while also pursuing the medical evidence. For example, OWCP sent Notices of Claims (NOC) to mine operators to obtain earnings records and continued to process claims to the extent it could even as it waited for medical reports to be submitted.

OWCP monitored both the quality and timeliness of physicians' reports. According to OWCP, where quality or timeliness was lacking, physicians were contacted and personally trained by district directors and national staff on an informal basis. Physicians whose performance does not improve can be removed from OWCP's diagnostic provider list. OWCP stated it preferred to work with a physician first to correct any deficiencies before removing them from the approved provider list. OWCP stated it removed six physicians for cause between FYs 2011 and 2014.

OWCP also conducted training on timeliness and accuracy of reporting at workshops sponsored by the National Coalition of Black Lung and Respiratory Disease Clinics. Many of the physicians who conduct pulmonary evaluations served at member clinics.

These actions notwithstanding, OIG believes there are additional steps OWCP can take to try to effectively influence providers to submit medical reports of sufficient quality more expeditiously, such as ensuring physicians are better trained in OWCP requirements and implementing a system of incentives for physicians who turn in reports on a timely basis. In this regard, in conjunction with the University Of Illinois-Chicago School Of Public Health, OWCP indicated it plans to launch online training modules for medical providers in 2015. Physicians will receive continuing medical education credit for completing these modules. OWCP indicated it is considering making it a prerequisite for participation in the black lung program. OWCP believes it also encourages reporting timeliness by promptly paying physicians for their

pulmonary evaluations when reports are complete. While this may be the case, we believe a prompt payment alone is not a strong enough incentive for timely report submission, as evidenced by the 58 medical reports pending more than 85 days after the examination date.

***OWCP should work with SSA to obtain more timely access to claimants' earnings records***

According to OWCP, in FY 2014 it took an average of 58 days to obtain miners' earnings records from SSA. OWCP relied on two sources to identify operators who would eventually be responsible for miners' black lung benefits: 1) miners, who named the last operator who employed them for at least a year, and 2) SSA, which provided OWCP with miners' earnings records.

The accuracy of each miner's employment history is of utmost importance in making accurate liability and entitlement findings. OWCP must identify a miner's most recent year of CME and ensure their employer is financially capable of assuming liability for the claim. In addition, the earnings record is necessary to determine the length of a miner's CME and therefore, whether he or she may take advantage of certain rebuttable presumptions that assist in establishing entitlement to benefits.<sup>8</sup>

OWCP first sends a NOC to the operator named by a miner in their application for benefits. The NOC informs the operator that a claim has been made and requires it to respond within 30 days either agreeing or disagreeing that it had employed the miner for at least a year. During that 30-day period, OWCP requests earnings records from SSA to validate the employment history provided by the miner. If the earnings records do not validate the miner's employment history, OWCP then sends another NOC to a different operator, again requiring a response within 30 days.

OWCP used a manual, paper-based system to request the records from SSA because it did not have the statutory authority to directly access SSA's database. Because paper forms had to be mailed back and forth between OWCP and SSA, each iteration of this process introduced additional delays. According to OWCP, additional time was required when SSA rejected and returned forms for minor clerical errors.

Online access to SSA earnings records would simplify and speed up the process of verifying claimants' employment histories. OWCP should determine whether the legislative changes needed to authorize such access are feasible. Absent any statutory changes, OWCP could improve the process for obtaining earnings records by collaborating with SSA to implement an electronic exchange of employment data. For example, OWCP could obtain SSA earnings records via encrypted email. This would be more efficient than printing out the information and mailing it to OWCP. OWCP would

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<sup>8</sup> 20 C.F.R. § 718.302

not be accessing SSA's information system; therefore, no new statutory authority would be needed.

OWCP and SSA are piloting the electronic submission of earnings records requests under the Energy Employees Occupational Illness Compensation Program (Energy program). OWCP told OIG it hopes to expand this submission system to both the black lung and Federal Employees' Compensation Act (FECA) programs. We support this initiative.

### ***Workload management of ALJs could be improved***

Hearings concerning black lung and Longshore Act benefits constitute the largest parts of OALJ's workload. OALJ, however, also hears and decides cases arising from over 60 labor-related statutes and regulations, including, for example, such diverse subjects as alien labor certifications and attestations, OSHA formal rulemaking proceedings, and standards of conduct in union elections.

Hearings are requested in about 20 percent of the black lung claims decisions issued by OWCP. On average in FY 2014, OALJ reported it took 693 days, or almost 2 years, to issue a decision and order on a black lung case from the time a case was received. We identified a number of areas DOL should consider addressing to improve its workload management.

OALJ reports reflect it experienced a 68 percent increase in workload between FY 2009 and FY 2013, with new cases increasing from 5,028 in FY 2009 to 8,446 cases in FY 2013. From 2005 to 2014, OALJ's total full-time employees (FTE) dropped from 170 to 130, a decrease of 24 percent.

- Number of Staff Attorneys and Law Clerks

The primary individuals handling the adjudication of black lung claims were the ALJs themselves and their law clerks. Law clerks performed many tasks that could greatly increase an ALJ's productivity, including researching cases and drafting decisions. Staff attorneys and legal assistants also played important roles, such as researching cases, drafting decisions, and scheduling hearings.

In 1996, a total of 65 judges worked for OALJ. By 2013, there were 40 judges and 31 law clerks. By 2014, the number of judges and law clerks had further decreased, to 38 and 27, respectively. Also, from 2005 to 2013, OALJ's incoming case load increased from 5,220 to 8,446 new cases per year. OALJ still managed to dispose of 4,599 cases in FY 2013, an increase of 70 cases from FY 2009, even with fewer ALJs. Nonetheless, the increase in new cases (primarily immigration and whistleblower), combined with the reduction in FTEs, resulted in an increase in the overall OALJ case backlog of 134 percent – from 4,846 in FY 2009 to 11,325 in FY 2013.

According to the judges we interviewed, the more law clerks assigned to a judge, the greater the judge's productivity. Past practice at OALJ was to assign one law clerk to each judge. The ratio dropped to 0.71 clerks per judge in FY 2014. In addition, law clerks arrive at OALJ with little or no exposure to black lung law, necessitating a five to six month on-the-job training period. Most law clerks secure other employment before the end of their tenure and may leave OALJ before their two-year term finishes. As a result, law clerks may only be productive for 18 months or less.



**Image 1:** Unassigned case files in the Cincinnati OALJ office

Another agency, the Federal Mine Safety and Health Review Commission, made use of extended three-year terms for law clerks. OALJ could modify its law clerk program by either offering a three or four-year term, or a two-year term with the possibility of a one or two-year extension. This could greatly extend the potential productive period of law clerks. We surveyed all ALJs and law clerks on this issue, and found 66 percent of judges and 100 percent of law clerks who responded favored extending clerkships.<sup>9</sup>

In addition to increasing law clerk terms, judges we spoke with expressed a strong desire to add a staff attorney position in each of the district offices. While law clerks leave OALJ after a fixed term, staff attorneys would be permanent and help maintain the institutional memory that is required for organizations to function in times of rapidly changing workforces.

- Temporary reassignments of BRB staff to assist OALJ

While OALJ's resources have been shrinking, BRB has maintained a stable resource allocation that has now resulted in excess staff resources. Even though total BRB staffing has been stable at 42 FTEs (of which 27 are devoted to black lung), the number of new appeals it has received has declined over the last five years, from 520 new appeals in FY 2012 to 312 in FY 2014. The backlog of cases at OALJ has contributed to the decline in workload at BRB, and enabled BRB to reassign staff as follows:

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<sup>9</sup> We designed and administered survey questionnaires to all OALJ judges and law clerks. The survey response rate was 72.5 percent for judges and 71.4 percent for law clerks.

- BRB had detailed three attorneys outside of the agency since September 2013, and increased the details to a total of five attorneys in October 2014. Details last 120 days or more.
- BRB had assigned four attorneys to work intermittently on updating research tools.

BRB officials explained details provide staff with exposure to other areas, enhance professional development, and provide career growth opportunities. BRB officials were aware of the backlog at OALJ, but expected it to cause an increase in BRB's case load at some point in the future.

BRB should consider whether the temporary reassignment of BRB staff to assist OALJ in reducing its case backlog would be a more effective use of resources. Until November 2014, BRB had not held any discussions with OALJ to attempt coordination of resources. Subsequent to the agencies' discussions in November 2014, BRB detailed one of its black lung attorneys to OALJ for a six-month period. The two agencies have also now drafted an MOU in relation to the sharing of resources.

- Use of Contract Writers

Past practice at OALJ also included the use of contract writers. Contract writers performed functions similar to law clerks, but on a contract basis. The contract writer program, although widely praised by OALJ staff, was terminated by the (now retired) OALJ chief judge in 2008. At the time, OALJ reported writers were paid \$300 to \$400 per case, far less than the cost of a law clerk devoting the equivalent number of hours to the task. According to OALJ, the program was terminated due to concerns related to cost, quality of some of the writers' drafts, and the security of personally identifiable information. Our survey of judges found 62 percent of those who responded favored reinstating the program. On the other hand, some judges we interviewed expressed concerns about the quality of work produced by past contract writers. OALJ should consider reinstating the contract writer program, while at the same time instituting appropriate quality control checks and controls over personally identifiable information. At the time we were preparing our report, OALJ was beginning the process of soliciting bids from potential contract writers.

- Use of Legal Assistants

Legal assistants, who typically perform clerical duties, such as mail handling and filing, were underutilized. In our fieldwork and survey of legal assistants, we found they sometimes had little work to do. Most legal assistants we spoke with expressed the desire to do more work. OALJ could either increase the job responsibilities of legal assistants or reassess how many legal assistants it needs

and whether funds currently used to fund legal assistant positions could be better used to hire more judges or law clerks.

- Performance Measures and Goals

OALJ lacked adequate performance measures or goals. OPM regulations expressly prohibit ALJs from receiving performance ratings.<sup>10</sup> Judges can only be removed for “good cause” after a formal hearing before the U.S. Merit Systems Protection Board.<sup>11</sup> OALJ has never dismissed an ALJ for poor work performance.

While OALJ cannot establish performance ratings for its judges, it does have the ability to establish performance measures or goals for itself. However, OALJ has not done so. Since 2012, OALJ has provided quarterly reports to the Deputy Secretary on OALJ’s progress towards meeting its annual performance targets. However, this has not been used as a performance measuring tool that assigns accountability to the agency for meeting its performance targets. Furthermore, OALJ has not established separate performance goals for its district offices.

While OALJ management told us they communicate these national targets to the districts, judges in the districts were largely unaware of them. In addition, although OALJ management reviewed reports detailing case age and dispositions by office, these reports were not used to any significant extent to manage the OALJ workload or judges.

During our review, we found examples of performance management that OALJ should consider. The West Virginia black lung program has used detailed performance standards for timeliness, including a maximum 15-month pendency period for cases. Further, the West Virginia program has an advisory council that continually reports and tracks timelines for judges. The Federal Reserve Board has promulgated regulations that have required its ALJs to file certain documents within defined time periods. Finally, while judges are not subject to performance ratings, they can be removed for cause. For example, SSA has established it may record case disposition statistics and use them against ALJs in disciplinary, removal, or other actions.

In 1996, Congress established a 12-month time limit for BRB to dispose of Longshore Act cases. Any cases not disposed by BRB within 12 months were to be administratively affirmed. This effectively nullified BRB’s authority if it did not act expeditiously. BRB established a 12-month standard for Longshore Act cases as required by Congress, and also voluntarily applied the 12-month standard to black lung cases. We noted that in FY 2014, BRB reported its average case disposition time for all cases was 10.7 months. Although the 12-month time limit

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<sup>10</sup> 5 CFR 930.206(a)

<sup>11</sup> 5 CFR 930.211

imposed by Congress is no longer in effect for Longshore Act cases, BRB continues to comply with it for both programs

We concluded from these examples that OALJ could consider a variety of steps to set performance goals and measure its performance.

- Assignment of Cases

The methodology used by OALJ to assign cases may not encourage the greatest productivity. For example, in the Cincinnati office, new cases had been assigned to judges only when judges sufficiently cleared their dockets. Each judge was initially assigned 60 black lung cases to hear for the year. If any cases were continued at the request of the parties, then the office backfilled or assigned replacement cases for that judge so the judge would be assigned a minimum of 60 cases for the year. As judge cleared their docket, additional cases were assigned. As a result, judges who cleared the greatest number of cases had been consistently assigned the largest number of cases, and the judges clearing the least number of cases had been assigned the least number of cases.

By contrast, in the Pittsburgh OALJ office, judges were assigned 25-case dockets every three months – or four docket assignments per year for a total of 100 black lung cases per judge. According to the (then) Acting Chief Judge, the types of cases adjudicated in the Pittsburgh and Cincinnati district offices were comparable, as those offices adjudicated mostly black lung claims. In FY 2014, 82.7 and 74.4 percent, respectively, of Pittsburgh's and Cincinnati work was black lung cases. OALJ officials told us black lung cases in both offices in general were of the same nature and complexity. Despite the fact that both offices had a similar case load and similar mix of cases, the Pittsburgh OALJ office reported it adjudicated 43 black lung cases per FTE, whereas the Cincinnati, OH, office adjudicated only 26 black lung cases per FTE.<sup>12</sup>

OALJ lacked a system to track the amount of time judges and law clerks spent on the cases assigned to them. In order to assess productivity levels, OALJ would need this type of information together with information on the types and complexity of cases. OALJ should implement a tracking system to record the amount of time judges and law clerks spend on each case and reconsider its methodology for assigning cases in the Cincinnati district office.

- Utilization of Video Teleconferencing

OALJ has lacked the ability to conduct hearings by VTC. Judges have needed to travel to remote hearing locations, frequently losing two days in travel time, which

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<sup>12</sup> The Pittsburgh, PA, OALJ office adjudicated 272 black lung cases, utilizing 6.3 FTEs (judges and law clerks) and the Cincinnati, OH OALJ office adjudicated 214 black lung cases, utilizing 8.4 FTEs.

could have been spent hearing cases or writing decisions. ALJs traveled to 79 cities to hear cases in FY 2013. OALJ leadership indicated its ALJs typically hear 7-8 cases per day during the three days they are away at a hearing location. In order to hear cases for three days, however, judges must frequently spend two days traveling.

Black lung regulations require hearings to be held within 75 miles of the claimant's residence where possible. OALJ preferred its judges travel to a hearing location instead of a claimant travel to a VTC site given that it may be logistically or financially burdensome for a claimant to travel to a distant VTC site. In addition, some judges believed they were better positioned to evaluate the credibility of witnesses in a live setting. However, other judges we interviewed indicated most black lung cases are decided primarily on the record. According to these judges, although the testimony of witnesses is important, the medical and employment evidence was the primary source informing judges' decisions.

SSA adopted a universal teleconference system for its ALJs, which reduced the need for its ALJs to travel to remote locations for hearings. Most other programs we reviewed, including the Energy and FECA programs administered by DOL, conduct many of their hearings by teleconference in order to similarly reduce travel (see Exhibit 1). Moreover, the regulations require only that hearings be held within 75 miles of claimants "where possible."<sup>13</sup> Given that other agencies are able to properly evaluate the credibility of witnesses using VTC or telephone hearings, we believe OALJ should re-consider utilizing this technology in order to help clear its backlog.

Many VTC facilities are available for the OALJ to use on an occasional basis, and telephones are universally available. OALJ officials informed us they are currently working with DOL's Office of the Solicitor on a test project to determine the viability of regularly holding VTC hearings.

GAO recommended, and we agree, that the OALJ could significantly expedite its hearing schedule by implementing some form of distance hearing process, such as VTC or telephonic hearings.

### ***OALJ needs to improve its communications and policy guidance***

We found a lack of communication and interactions between OALJ headquarters management and its district offices, as well as among the district offices. Chief among feedback we received from judges and law clerks was the insufficiency of information, such as updates to decision templates or brief banks of common procedural orders (for example, evidentiary orders admitting or excluding evidence) shared between

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<sup>13</sup> 20 CFR 725.454

headquarters and the field. OALJ did not hold regular meetings to maintain a flow of information among its judges, law clerks, and other staff.

Each OALJ district office had seen itself as a self-contained entity responsible for developing its own processes and procedural guidance, and practices among offices have varied widely. Judges in each office had independently developed decision templates and practice aids, such as handbooks containing legal guidance and case law, for their own use, rarely sharing those with other offices.

OALJ had an almost complete lack of centralized policies and procedures. Limited policy or procedure manuals and other resource guidance had been available to help guide the organization's activities. Where guidance existed, it had been infrequently updated. Almost all policy and procedural guidance had been generated independently by each district office. One source of black lung legal guidance (the 'Bench Book', an in-house manual on black lung law) was formerly maintained by a staff attorney at OALJ headquarters; however, this attorney recently resigned and the guidance is at risk of falling out of date. More than half the judges who responded to our survey rated the quality and sufficiency of OALJ policies and procedures as "poor" or "fair." All of the other programs we reviewed had policies and procedures in place to guide their operations (see Exhibit 1).

GAO also recommended OALJ and BRB leadership develop a system of regular communication to better coordinate activities where both have a common interest. Such communication would facilitate a coordinated approach to managing caseloads.

#### ***More formal training should be provided to ALJs and law clerks***

We found OALJ provided little formalized training for any of its positions, even though untrained law clerks cycled through OALJ every two years. According to OALJ, when funds were available, new law clerks traveled to OALJ headquarters for training with the black lung program attorney. As funding was reduced, program experts (experienced judges and staff attorneys) traveled to the district offices to train new law clerks. Aside from a week of introductory training provided online and via telephone to incoming law clerks and judges, training was mostly ad-hoc, performed at the local level, and dependent on departing law clerks to impart their knowledge and experience to incoming clerks.

New ALJs were provided only a week of introductory training in black lung law and were subsequently required to train themselves on an ad-hoc basis. While OALJ maintained the "Bench Book", it possessed limited training manuals or other materials, and had no centralized repository of policies and procedures, as previously discussed. Because of budget constraints, OALJ had not paid travel or registration expenses for ALJs to attend professional conferences, such as the Federal Administrative Law Judges Conference. During the period of our review, OALJ did not hold an office-wide conference to facilitate the exchange of knowledge and ideas among ALJs and law clerks. As a result, the

knowledge base of law clerks and judges was mostly ad-hoc, derived from on-the-job training, and not periodically refreshed. In our review of other programs, we found several, including others administered by DOL, offered formalized training programs for their staff (see Exhibit 1). Our survey of ALJs found only 17 percent of those who responded rated their initial training and continuing education as “good” or “excellent.”

OALJ could benefit from implementing a formal training program for incoming ALJs, and more importantly, incoming law clerks. ALJs typically remain with OALJ for many years and are able to accumulate a working knowledge of black lung law over time. Their productive period can be years, or even decades. Law clerks cycle through the OALJ every two years or less. As a result, training new law clerks may be a more immediate concern.

***DOL should consider streamlining the claims process with an automated system that allows the exchange of case files***

OWCP’s claims process was primarily manual and paper-based. Claimants submitted applications on paper forms, which were input into OWCP’s tracking system. Most subsequent documentation was received in paper form, including medical evidence (except for digital x-rays), mine operator responses, and SSA earnings records. As part of this process, OWCP had to mail all hard-copy documentation to its stakeholders, including claimants, mine operators, and attorneys. Case files could include hundreds of pages of evidence. We measured a random sample of case files at OWCP offices and found stacked case files measuring more than two feet high and including approximately 7,000 pages. When an OALJ hearing is requested, OWCP has had to photocopy entire case files and mail them to OALJ, thus incurring significant time and resources to photocopy hundreds of pages, collate them, and pack and ship them to their destination. In our interviews with OWCP staff, we were told the copying, collating, and packing process could take as much as an entire day for a single case file. OWCP forwarded about 1,300 cases to OALJ in FY 2013.<sup>14</sup>



Image 2: Example of a case file

<sup>14</sup> Based on cases docketed by OALJ in FY 2014, assuming about a one-year lag between receipt and assignment of the case.

OWCP's electronic system was limited to tracking claims, not storing and sharing case files. In addition, OWCP had no system in place to allow medical providers to submit medical evidence electronically. As a result, OWCP's claims process remained primarily paper-based. The paper-intensive system added significant logistical delays to the process.

As of the end of FY 2014, OWCP had implemented an electronic case file storage system in all offices. All new documents filed with OWCP were stored electronically. Although this is a significant improvement over the previous system, it lacked certain critical features, in particular, the ability to export case files to OALJ. In addition, the system should enable the transmission of electronic medical records directly to OWCP from physicians' electronic health record (EHR) systems, an ability that is becoming increasingly common. An EHR is a digital version of a patient's paper medical chart. EHRs are built to share information with other health care providers and organizations. The system is on real-time; therefore information is available instantly and securely to authorized users. From 2011 to 2014, the Affordable Care Act (ACA) provided incentives to Medicare providers who made "meaningful use" of EHRs. Beginning in 2015, ACA will penalize providers who do not. As a result, it is expected most healthcare providers will adopt EHRs, thus making it even more important for OWCP's system to accept electronically transferred medical records.

OWCP believes the information technology (IT) systems used in the black lung claims process are robust and continue to become more efficient. OWCP officials also contend that although OWCP, OALJ, and BRB do not share a computer system, OWCP's new electronic case files can easily be transferred on DVD or via another manner of electronic submission. While this would be an improvement from photocopying and mailing paper records, the transfer of black lung claim information would be more efficient and the black lung claim process less protracted if the three agencies shared a computer system, or at a minimum, the ability to seamlessly transfer information among their systems.

In its 2009 audit, GAO recommended OWCP and OALJ coordinate in developing a system that routinely tracks the resolution of cases throughout their lifecycle. We believe the process would also significantly benefit from a case management system that would permit the electronic exchange of case files among OWCP, OALJ, and BRB. Such a system would increase accuracy by eliminating the need to input case file information at each level, and mitigate the risk of loss by fire or flood of paper case files. On January 29, 2014, OALJ's Cincinnati office in fact experienced a flood that threatened to compromise the integrity of case files.

OALJ's IT systems were, at best, outdated. As a result, OALJ has lacked a comprehensive case management system, relying instead on paper for its operations. Furthermore, OALJ has been unable to receive and exchange files electronically with OWCP and BRB. OALJ's outdated IT systems also limited its ability to allow widespread telework.

An automated system that would allow an exchange of case files between OWCP, OALJ, and BRB would streamline the claims process and reduce costs. A system could be designed to preserve the independence of the three agencies, but still allow the regular transmission of case file information. According to OALJ, it will begin replacing its legacy case management system starting in FY 2016 with a commercial-off-the-shelf (COTS) system, which will have the capability to create interfaces with the OWCP and BRB systems.

**Objective 2 — Has DOL implemented the recommendations made by GAO in its October 2009 report?**

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In a 2009 report titled, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims* (GAO-10-7, October 2009), GAO made seven recommendations to improve the effectiveness of the black lung benefits program. We identified additional actions DOL could take in response to all of the recommendations.

***DOL could take more action on GAO's recommendations***

The GAO Report discussed the length of time claims remained in the claims and appeals processes during the period 2001 through 2008, as well as factors that influenced the claims timeline. These factors included incentives for both miners and mining companies to keep claims in the appeals process, and DOL's practices of allowing time for claimants to find legal representation and waiting until there are a sufficient number of cases in rural areas before sending a judge to hold hearings.

GAO also identified a number of challenges that coal miners faced when pursuing federal black lung claims, including finding legal representation and developing sound medical evidence to support their claims. According to GAO, DOL ALJs said medical evidence prepared by DOL-approved doctors for claimants did not always provide sound or thorough evidentiary support for their claims. GAO also found various practices of medical testing may have contributed to inaccurate disability test readings.

To determine if OWCP, OALJ, and BRB implemented corrective actions to address GAO's recommendations, we interviewed members of the GAO team that conducted the 2009 review and coordinated with the three DOL agencies to obtain additional information and documentation. The following summarizes the actions the three agencies have taken in response to each of GAO's recommendations and additional actions we identified that could be taken.

### **Reduce Remands from BRB to OALJ**

**GAO Recommendation 1:** Take steps to reduce the number of black lung cases remanded from BRB to OALJ by convening a group to determine the causes of these remands and develop solutions for reducing their incidence.

OALJ and BRB held a meeting to discuss causes of remands and solutions for reducing their incidence, but no actions have been taken.

As an independent adjudicatory body, it would be inappropriate for the BRB to discuss the possible disposition of appeals before it with representatives of the agency where the cases on appeal originated. The rationale for the BRB's disposition of its appeals is set forth in the decisions issued by the BRB.

No group was formed to substantively address and determine the causes of remands and develop solutions for reducing their incidence. In the one meeting held by the parties, suggestions were offered that included BRB: making improvements to the DOL-sponsored examination form; publishing a greater number of decisions; and considering affirming or reversing OALJ decisions, rather than remanding them. However, no specific solutions were decided upon.

As a result, we concluded OALJ and BRB have not implemented this recommendation. The group should reconvene and determine which of those actions would be of most benefit to the process and implement those actions.

### **Track Cases through the Entire Adjudication Process**

**Recommendation 2:** Obtain summary information on how long it takes to resolve claims using its current automated system to routinely track cases through the entire adjudication process and develop associated performance measures.

OWCP stated its “Automated Support Package” produces ad hoc reports that track claims through the entire adjudication process. According to OWCP, these reports enable it to track the time that elapses at each stage of the process and the amount of time it takes claims to proceed through the entire adjudication process. OWCP and OALJ have developed some performance measures by establishing goals for the timeliness of their dispositions. BRB has also established a goal for its appeal dispositions.

Although each agency has implemented and enhanced its own tracking system, none communicate with one another and there is no system that can routinely track cases through the entire adjudication process.

BRB reported to OIG that its new case management and tracking system, “DOL Appeals,” was brought online in September 2011. The system has enabled BRB to track all of its appeals through the adjudication process. DOL Appeals has also allowed BRB to provide electronic filing and electronic service options to its customers, significantly enhancing the efficiency of the appeals process before the Board. DOL Appeals tracks the disposition of appeals before BRB, as well as the disposition of cases appealed from BRB to the Courts of Appeals. This data is then included in quarterly reports to the Deputy Secretary of Labor.

OWCP reported to the OIG that integration of the OWCP, OALJ and BRB systems would take years and many millions of dollars to produce an outcome that was already achievable using ad hoc reports. The status of an individual claim can currently be obtained through queries of the OWCP system, and more detailed but not necessarily more useful information for tracking purposes may be obtained by querying the OALJ and BRB case systems. OWCP updates its system immediately upon receipt of ALJ and BRB decisions but does not plan to integrate systems with either agency. OWCP added its associated performance standards and results are published on their web site.

OALJ reported to OIG that its “Case Tracking System” (CTS) was utilized as a management tool in monitoring case progress. CTS did not communicate with OWCP or BRB systems. However, OALJ told OIG that its new COTS system, scheduled for implementation in FY 2016, includes the capability to develop interfaces with OWCP and BRB systems.

As a result, we concluded OWCP, OALJ, and BRB have not implemented this recommendation. Although each agency has implemented and enhanced its own tracking system, none communicate with one another and there is no system that can routinely track cases through the entire adjudication process. The three agencies should communicate and coordinate to more seamlessly track cases through the entire process. Moreover, although OWCP has clear performance measures and goals, neither OALJ nor BRB has established sufficient performance measures. OALJ and BRB have established broad goals for the time it takes both agencies to dispose of cases, but these do not flow to those handling the actual cases.

### **Use VTC for Hearings**

**Recommendation 3:** **Consider shortening the time required to schedule hearings for black lung cases by examining the feasibility of using VTC technology to streamline the scheduling of hearings in remote areas.**

OALJ is continuing to investigate options for conducting hearings by VTC, but does not routinely use this technology.

OALJ told OIG it experimented with holding video hearings in 2011 using a federal district court in Washington, DC, and the equipment worked well. OALJ did not further

pursue this option due to the necessity of using court personnel, and the courts were not interested in sharing their facilities. OALJ purchased and tested a WebEx camera in 2013. The test demonstrated that, for technical reasons, WebEx was not a viable option for a hearing. OALJ issued a white paper in May 2014 implementing videoconferencing, but DOL has not yet conducted a cost benefit analysis. OALJ officials informed us they are currently working with DOL's Office of the Solicitor on a test project to determine the viability of regularly holding VTC hearings using existing DOL equipment and facilities.

As a result, we concluded OALJ has not implemented this recommendation. OALJ should proactively pursue and leverage VTC technology to streamline the scheduling of hearings in remote areas. Use of VTC is also discussed on pages 16-17 of this report.

### **Improve How Doctors' Opinions Are Documented**

**Recommendation 4:** **Based on feedback from relevant black lung medical stakeholders, including approved diagnostic providers and black lung clinics, develop options for improving how doctors' opinions are documented on DOL's medical evaluation form.**

DOL redesigned the medical evaluation form, but OWCP personnel continue to report problems with the comprehensiveness and clarity of medical providers' reports.

In addition to redesigning the medical evaluation form, OWCP continued to give presentations and work with clinics and individual physicians at various conferences each year. At each of these conferences, its district directors had been able to meet with diagnostic providers and clinics in their jurisdiction to discuss and resolve issues of concern. OWCP had not received any feedback indicating physicians did not understand how to complete the medical evaluation form. Nevertheless, OWCP was working with a physician to develop training modules for physicians who perform DOL examinations in an effort to enhance providers' compliance with the regulations and to ensure uniformity in weighing evidence and preparing comprehensive narratives in physician reports.

Notwithstanding OWCP's position on this, during our fieldwork, we received consistent feedback from OWCP field personnel regarding the lack of comprehensiveness and clarity of the medical reports. As a result, OWCP personnel had to follow up regularly with physicians to clarify the information on the form, thus extending processing times for claims. We do not believe the current format of the medical report is sufficient to solicit all necessary information from the provider because it does not provide enough guidance. This guidance could take the form of multiple-choice checkboxes or decision trees to help providers reach well-reasoned and timely medical opinions. An electronic fill-in form could provide a logic-based series of questions that could help ensure a thorough and consistent approach to medical examinations. OIG concluded that although OWCP made some improvements to its form, the agency should revisit the

possibility of changing the format to elicit a more comprehensive and clear explanation of the providers' diagnoses.

As a result, we concluded OWCP has not implemented this recommendation. Although OWCP implemented some corrective actions to its medical form relevant to recommendation 4, we believe the agency should revisit the possibility of changing the current format to better solicit a more comprehensive and clear view of the providers' diagnoses.

### **Develop Accurate Data about Claimant Representation**

**Recommendation 5:** **Evaluate and report on claimant access to legal and lay representation by implementing changes to the data management systems of OWCP, OALJ, and BRB that will permit accurate data about claimant representation throughout the claims and appeals process.**

OWCP and BRB made changes to their systems to record claimant representation data, but OALJ had not. OWCP added "Diary Action Codes" to its data system that allowed it to determine if a claimant had either attorney or lay representation, and the dates that representation started and ended. OWCP reported annually on representation statistics.

OALJ told OIG it records information related to a claimant having representation, but the system does not differentiate between attorneys and lay representatives.

BRB informed OIG that its case management system is able to identify which appellants appearing before BRB were represented by counsel and which were not.

As a result, we concluded OWCP and BRB implemented this recommendation, but OALJ did not. OALJ should update its system to differentiate between attorneys and lay representatives to be able to report accurate data about claimant representation.

### **Record and Track Complaints about Medical Testing Practices**

**Recommendation 6:** **Evaluate and address blood gas testing practices that may contribute to inaccurate disability test readings by implementing a feedback mechanism to record and track complaints from federal black lung claims stakeholders about testing practices.**

OWCP reported to OIG that it implemented a database to record and track physician-related problems. This database became operational in 2009 as a result of the GAO audit and is still functioning; however, no complaints had been reported to OWCP since 2012.

While OWCP implemented the database recommended by GAO, it could do more to address blood gas testing practices that may be contributing to inaccurate disability test

readings. Currently, OWCP regulations<sup>15</sup> only require physicians to draw blood during exercise, and make no distinction as to continuous versus periodic draws. To improve the accuracy of blood gas testing practices, however, OWCP was considering adding physicians to its provider list who are capable of drawing blood continuously during exercise in preference to physicians who can only draw blood at intervals. Essentially, this practice could only be accomplished through the drawing of blood from a catheter inserted into the patient's radial artery, a procedure not all physicians can perform. In general, physicians drew arterial blood gas samples subsequent to exercise, after the claimant's oxygen levels had returned to normal and resulting in erroneous readings. To obtain more reliable test readings, OWCP needs to recruit physicians who are capable of drawing arterial blood gas samples continuously during exercise.

### **Propose Structural Changes to Congress**

**Recommendation 7:** **Examine the following issues and evaluate the potential for proposing structural changes to the program to Congress:**

- (a) Options for enhancing incentives for attorneys and lay representatives to take claimants' cases. Areas that could be explored include alternate pay structures for attorneys and an examination of federal support for lay representation.**

The PDOs issued by OWCP awarding benefits to represented claimants contain language requesting attorneys file their fee petition within 30 days so the district director can award a fee. If the coal operator declines to pay the fee, interest payable to the attorney accrues from the effective date of the award until payment is made.

An alternate payment strategy for claimant representatives is included in S.1416, the Black Lung Health Improvements Act, to which DOL provided technical support. This strategy includes establishing an attorneys' fee payment program to pay attorneys' fees of up to \$4,500 (\$1,500 at each stage of the administrative and legal process) to prevailing parties on a qualifying black lung benefit claim.

- (b) Costs and benefits of allowing compensation for partial disability and settlement of claims**

In early 2011, OWCP performed a limited cost-benefit analysis and proposed a partial compensation program. The analysis discussed the benefits to claimants of partial disability. The analysis also attempted to quantify some of the potential costs, but was not a comprehensive cost-benefit analysis dealing with all the potential variables, costs, and benefits to all the parties involved. Moreover, the analysis included no discussion of the issue of settlements. No action had been

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<sup>15</sup> 20 C.F.R. § 718.105

taken on this proposal. DOL should conduct a comprehensive cost-benefit analysis of both partial disability benefits and settlements.

**(c) Clinical limitations in documenting evidence to prove pneumoconiosis and total disability**

GAO described the challenges faced by claimants as “clinical limitations in documenting evidence to prove pneumoconiosis and total disability.” The enactment of the Byrd Amendments reinstated the presumption that the presence of a totally disabling respiratory impairment was presumed to be caused by the miner’s CME, obviating the need for the miner to demonstrate the presence of the disease by clinical/x-ray evidence. As a result, today miners who can prove 15 years of CME face a lower evidentiary burden than at the time of GAO’s report. To that extent, the Byrd Amendments have somewhat mitigated the challenges faced by certain miners; however, since this presumption is rebuttable, it has not fully eliminated these challenges.

Likewise, the Byrd Amendments also reinstated the automatic entitlement for survivors of miners who were receiving benefits prior to their death, obviating the need for the survivor to prove via clinical evidence that the miner’s death was due to pneumoconiosis and mitigating the challenges survivors might face in proving their black lung claim.

Additionally, miners who are not covered by the provisions of the Byrd Amendments also continue to face challenges sufficiently documenting their total disability and its connection to CME. OWCP had not taken any action to mitigate this challenge.

**(d) New and previous proposals to reduce the amount of time it takes to resolve claims and appeals, including requiring complete evidentiary development at the primary claims processing phase and limiting the need for appeals.**

OWCP has worked with stakeholders to minimize delays in scheduling and examining miners. Also, OWCP has worked with the Health Resource and Services Administration (HRSA) and clinic leadership to understand the importance of meeting OWCP’s 82-day goal for clinics that apply for HRSA grants. OWCP did not have jurisdiction over black lung clinics and therefore cannot require them to introduce timeliness standards. HRSA tried, but was unable to get the goal put into the clinic charters. At the time of our report, there was a statement in the charters that clinics will do their best to honor OWCP’s timeliness goals.

As reported to GAO, the issue of requiring complete evidentiary development at the district director level was included in the 1997 Notice of Proposed

Rulemaking, but public comments were strongly negative and the proposal was excluded from the final rule. These public comments included concerns that: (a) mine operators' costs to develop a defense for every claim would be expensive and unnecessary; (b) unrepresented claimants would likely submit non-complying reports from their treating physicians; and (c) unrepresented claimants would be adversely impacted if medical eligibility were developed at the earliest stage of adjudication.

We concluded OWCP and OALJ had not implemented this recommendation.

### **Other Matter**

We reviewed OWCP's published statistics and determined OWCP reported cases that claimants had abandoned or withdrawn as denied claims. Although these claims may have been abandoned or withdrawn by claimants for valid reasons, OWCP did not have the opportunity to reach a final decision on them. Including statistics that show the number of claims approved, the number denied, the number abandoned, and the number withdrawn would provide readers a more transparent view into the black lung program. In addition, it would be to OWCP's benefit to learn why claims are withdrawn and abandoned and what changes might be made to prevent withdrawals and abandonments.

### **Recommendations**

We recommend the OWCP Director:

1. Continue to enhance and periodically evaluate the effectiveness of incentives to medical providers for turning in completed medical reports within certain timelines.
2. Explore the feasibility of seeking legislative authority for online access to SSA earnings records, and in the interim, attempt to renegotiate with SSA to allow OWCP to submit requests for earnings verification to SSA electronically.
3. Develop a program to periodically screen whether medical providers are properly licensed and in good standing in their state of practice and remove medical providers from the list in appropriate situations.
4. Present OWCP claim statistics that show the number of claims approved, the number denied, the number abandoned, and the number withdrawn.
5. Coordinate with BRB and OALJ to evaluate the feasibility and costs of transmitting OWCP's already digital case files via electronic means instead of hard copy.

6. Evaluate the results of OWCP's pilot program aimed at strengthening the pulmonary evaluation upon its conclusion and decide which actions should be permanently included as part of the claims process.
7. Conduct comprehensive analyses of the benefits and costs of pursuing statutory changes to BLBA to introduce:
  - a. referee medical examinations;
  - b. methods for increasing claimant legal representation;
  - c. compensation for partial disability; and
  - d. settlement of claims.

We recommend OALJ's Acting Chief Administrative Law Judge:

8. Seek resources to replace outgoing judges and law clerks.
9. Add optional extensions to the term of law clerks and stagger the hiring of law clerks.
10. Reinstate the contract writer program.
11. Implement additional formalized training programs for incoming law clerks and judges.
12. Establish and promulgate centralized, written policies, procedures, or templates to improve efficiency and communication among the districts.
13. Implement a distance hearing program, which could include video or telephone hearings, to reduce judges' travel costs and time.
14. Coordinate with OWCP and BRB to evaluate the feasibility and costs of an electronic case management, tracking, and storage system that could exchange case file information electronically with OWCP and BRB.
15. Establish timelines and performance goals for the disposition of cases for OALJ as a whole and for its district offices individually.
16. Consider transitioning the Cincinnati OALJ office to the case assignment methodology currently used by the Pittsburgh OALJ office.
17. Implement a time tracking system for judges and law clerks to record the amount of time spent on each case.
18. Coordinate with BRB to prepare and implement a plan for detailing all staff not directly required for the BRB's own adjudicatory processes.

19. Implement recommendation #1 from GAO's 2009 report and develop a system of regular communication with BRB leadership to better coordinate activities in which both have common interests.

We recommend BRB's Acting Chair and Chief Administrative Appeals Judge:

20. Recall detailees from other agencies and coordinate with OALJ to prepare and implement a plan for detailing to OALJ all staff not directly required for BRB's own adjudicatory processes.
21. Develop a plan for preventing detailees returning from OALJ from working on cases they worked on at OALJ.
22. Develop a system of regular communication with OALJ leadership to better coordinate activities in which BRB and OALJ have common interests.
23. Coordinate with OWCP and OALJ to evaluate the feasibility and costs of an electronic case management, tracking, and storage system that could exchange case file information electronically with OWCP and OALJ.

### **Agency Responses**

In response to our report, the Department indicated that it has already or is in the process of taking action on most of our recommendations, or would conduct further study of such. However, in response to our recommendation that it consider certain changes to the BLBA, OWCP noted it would prefer to further evaluate the long-term impacts of the 2010 amendments to the BLBA (and related 2013 regulations) before pursuing additional amendments. Also, in response to our recommendation that OALJ implement a time tracking system for judges and law clerks, the agency responded that it did not believe this would be an effective mechanism to improve productivity.

The complete responses from the Deputy Secretary, OWCP, OALJ, and BRB are included in Appendices D, E, F, and G, respectively.

We appreciate the cooperation and courtesies OWCP, OALJ, and BRB personnel extended to the Office of Inspector General during this review.

OIG personnel who made major contributions to this report are listed in Appendix H.



Elliot P. Lewis  
Assistant Inspector General  
for Audit

## Exhibits

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**Comparison with Other Benefit Programs****Exhibit 1**

We analyzed five federal and two state benefit payment programs to identify common practices. Some programs are more targeted than others (for example, Energy only compensates claimants who developed certain types of cancer that are attributed to exposure to certain types of radiation); and some are more general in nature (for example, the Social Security Disability Insurance program). Within those programs, we identified several common practices related to the timely adjudication of claims. In general, we found that programs with more of these practices resolved claims faster. Some of the attributes, such as referee medical exams and partial disability, would require changes to the BLBA; most others would not.

| Common Practices                | Energy | Long Shore & Harbor Workers | FECA <sup>16</sup> | WV WCP <sup>17</sup> | RECA <sup>18</sup> | SSDI <sup>19</sup> | KY WCP <sup>20</sup> |
|---------------------------------|--------|-----------------------------|--------------------|----------------------|--------------------|--------------------|----------------------|
| Written Policies and Procedures | ●      | ●                           | ●                  | ●                    | ●                  | ●                  | ●                    |
| Performance Standards/Goals     | ●      | ●                           | ●                  | ●                    | ●                  | ●                  | ●                    |
| Second Opinion Medical Exams    | ●      | ●                           | ●                  |                      |                    |                    |                      |
| Referee Medical Exams           |        |                             | ● <sup>21</sup>    |                      |                    |                    |                      |
| VTC Hearings                    | ●      |                             | ●                  |                      |                    | ●                  |                      |
| Partial Disability              |        | ●                           | ●                  | ●                    |                    |                    | ●                    |
| Settlements of Cases            |        | ●                           |                    | ●                    |                    |                    | ●                    |

<sup>16</sup> Federal Employees' Compensation Act

<sup>17</sup> West Virginia Workers' Compensation Program

<sup>18</sup> Radiation Exposure Compensation Act

<sup>19</sup> Social Security Disability Insurance

<sup>20</sup> Kentucky Workers' Compensation Program

<sup>21</sup> Both FECA and its implementing regulations, at 5 U.S.C. §8123 and 20 C.F.R. §10.321, respectively, provide for referee medical examinations, although neither makes the examination binding on the parties.

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## Appendices

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## **Background**

## **Appendix A**

In October 2013, CPI, in collaboration with ABC News, published the results of its year-long investigation examining how doctors and lawyers, working on behalf of the coal industry, have contributed to the defeat and denial of benefits to miners sick and dying of black lung.

After the publication of CPI's report, the Committee, in a letter dated November 7, 2013, requested that the OIG investigate publicly reported allegations of misconduct by doctors and lawyers working on behalf of the coal industry that has resulted in coal miners being improperly denied health-related benefits and compensation. The OIG met with staff from the Committee and agreed to review the black lung program to identify factors that might adversely impact the claims adjudication process.

On February 18, 2014, six Democratic Congressmen sent a letter to President Obama encouraging the White House to make the elimination of the backlog of ALJ cases a priority in the FY 2015 budget. This backlog represents another obstacle for black lung claimants. According to the letter, black lung claimants wait an average of 429 days for their cases to be assigned to an ALJ and an additional 90-120 days after assignment before their cases go to court. Apart from black lung benefits, ALJs hear and decide a growing number of Longshore Act and immigration cases, whistleblower complaints, and other labor-related statutes and regulations. Added to the backlog, the number of judges has dwindled as the number of claims has increased in recent years.

The BLBA provides for monthly compensation payments, and medical treatment for, coal miners totally disabled from pneumoconiosis arising from employment in or around coal mines. The Act also provides monthly benefits to certain miners' dependent survivors. In general, the last coal mine operator that employed the miner for at least one year is liable for benefits. However, if that operator is unable to pay benefits (because it was uninsured or did not otherwise have the financial capability to pay), several other entities may be held liable. These include the next most recent operator that employed the miner for at least a year, a defunct operator's corporate parent, or even a successor operator who bought the mine's assets. Only when all these avenues fail does the Trust Fund pay benefits. The Trust Fund also makes interim payments when a liable operator fails to pay an effective award entered prior to final adjudication of the claim. Moreover, according to OWCP, the Trust Fund was not established simply to pay benefits prior to final adjudication. Instead, the Trust Fund's primary responsibility is to pay benefits to deserving claimants when there is no operator (or insurance carrier) liable for their payment. In 2014, the basic monthly benefit from the Trust Fund for a totally disabled miner or the surviving spouse of the miner was \$631.80. This payment could be increased to a maximum of \$1,263.60 per month for claimants with three or more qualified dependents.

Regulations implementing the BLBA require diagnostic testing for all miner-claimants to determine the presence or absence of black lung and the degree of associated disability. Upon approval, miners are entitled to monthly benefits and medical coverage for treatment of black lung and related disability. Diagnostic testing includes a chest x-ray, pulmonary function study (breathing test), arterial blood gas study, and a physical examination. Medical coverage includes (but is not limited to) costs for prescription drugs, office visits, and hospitalizations. Also provided, with specific approval, are items of durable medical equipment, such as hospital beds, home oxygen, and nebulizers; outpatient pulmonary rehabilitation therapy; and home nursing visits. Lung transplants must be approved on a case by case basis.

#### Clinical Versus Legal Pneumoconiosis

The BLBA defines compensable pneumoconiosis broadly as “a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of CME.” (30 U.S.C. § 902(b)). The black lung program has implemented this definition by using the terms “legal pneumoconiosis” and “clinical pneumoconiosis.” The concept of “legal pneumoconiosis,” as employed by OWCP, differs from the clinical definition of pneumoconiosis commonly understood by the medical community. “Clinical pneumoconiosis” includes a wide variety of pulmonary diseases recognized by the medical community. “Legal pneumoconiosis” includes any chronic lung disease or impairment arising out of CME. This definition includes, among others, any chronic restrictive or obstructive pulmonary disease arising out of CME. Although there is overlap between the two concepts, legal pneumoconiosis is usually proved by different medical evidence.

#### Byrd Amendments

The Byrd Amendments, named for the late Senator Robert Byrd, reinstated two provisions that had been removed in 1981. The first was a rebuttable presumption that may establish both disease and cause of disability or death. Upon proof of at least 15 years of underground (or comparable surface) CME and a totally disabling respiratory impairment, a miner is presumed to have/had pneumoconiosis, and it is also presumed that pneumoconiosis contributed to the miner’s disability and/or death. The liable party may rebut this presumption by producing evidence sufficient to negate the presumed facts. After 1981, a victim’s family had to prove black lung disease killed their loved one. The second amendment helps victims’ families by providing automatic entitlement to a deceased miner’s eligible survivors if the miner was entitled to benefits prior to death. Only those claims filed after January 1, 2005, that remained pending on March 10, 2010, or thereafter are governed by the Byrd Amendments.

Subsequent to the Byrd amendments, DOL experienced an increase in case filings in FY 2010 followed by a drop in FY 2011 and FY 2012. Another significant increase in claims occurred in FY 2013 and continued into FY 2014. On July 22, 2014, DOL's Deputy Secretary reported to the U.S. Senate's Subcommittee on Employment and Workplace Safety that the likely drivers of the FY 2014 increase were OWCP's publication of regulations implementing the Byrd Amendments in September 2013, the increased publicity the program has received, and OWCP's outreach efforts to the coal-mining community.

According to data provided by OWCP, new black lung claims increased by 68 percent from 1,597 in FY 2009 to 2,683 in FY 2010. In addition, the OWCP approval rate for claims increased by 1.5 percentage points between FYs 2011 and 2012, subsequent to the Byrd Amendments.

OALJ leadership indicated the agency saw a marked increase in approvals when the Byrd Amendments came into effect. The number of cases heard by OALJ increased by 42 percent in FY 2011 and began declining thereafter. The number of cases appealed to the BRB did not change substantially, but according to BRB officials, the nature of issues raised on appeal changed as parties litigated the effect of the Byrd Amendments.

While the data on cases did not show any discernible changes in case outcomes through FY 2013, the data shows a significant increase in the number of new cases. Consistent with the 68 percent increase in new claims in FY 2010, there was a 43 percent increase in the number of OALJ hearing requests in FY 2011. New black lung cases have been declining at OALJ, from 1,618 new cases in FY 2011 to 1,104 new cases in FY 2014, a decrease of 32 percent.

The Byrd Amendments had no discernible impact on BRB case outcomes or process. While there has been a small increase in appeals, the BRB told us the impact of the Byrd Amendments has been largely in the composition of cases. Appeals from the OALJ to the BRB have declined, from 422 new cases in FY 2013 to 312 new cases in FY 2014, a 26 percent decrease. Additionally, between FY 2010 and FY 2013, the number of decisions issued varied narrowly between 529 decisions and 582 decisions, with FY 2013 declining to 582 decisions from the 623 decisions in FY 2012. However, these outcomes may be a product of the delay in cases from OALJ's backlog.

#### Black Lung Claims Process

DCMWC of OWCP administers the BLBA. DCMWC is headquartered in Washington, D.C. and operates eight district offices in five states. Its FY 2014 budget included \$33 million and 159 FTE staff.

The claims process starts with the miner or survivor filing a claim form and employment history form at the OWCP district director's office nearest to his or her residence. The district director schedules the miner for a physical examination with the claimant's selection of one of the medical providers on the DOL provider list. The district director also coordinates the collection of evidence, including hospitalization and treatment records, and investigates the miner's employment history to determine which employer will be responsible for the payment of any benefits.

After reviewing the miner's claim and all of the evidence, the district director issues a SSAE. The district director sends a copy of the SSAE, together with a copy of the evidence developed, to the claimant and all designated potentially liable operators. The SSAE includes: 1) a summary of the results of the initial complete pulmonary evaluation or, for survivors' claims, a summary of the medical evidence developed; 2) the district director's preliminary analysis of the medical evidence; 3) the district director's designation of the RO liable for the payment of benefits; and 4) a notice to the claimant and the designated RO that they have a right to submit evidence on the claimant's entitlement to benefits and the RO's liability for them.

The SSAE gives the claimant and the RO no less than 60 days to submit additional evidence on both the liability and entitlement issues, and allows an additional 30 days within which to respond to evidence the other party submits. These time periods may be extended for good cause if an extension request is filed with the district director before the time period expires.

At the end of the period for submission of additional evidence, the district director reviews the claim on the basis of all evidence submitted. The district director may notify additional operators of their potential liability, issue a new SSAE identifying another potentially liable operator as the RO, schedule an informal conference, issue a PDO, or take any other action that the district director considers appropriate.

The PDO approves or denies the claim and explains the reasons for the decision. The district director informs the claimant and the mine operator (if one is liable for the claim) of the options for challenging the decision and the time limits for taking any further action. These options include asking the district director to reconsider the decision or asking for a hearing before an ALJ.

Any dissatisfied party (miner-claimant or mine operator) may request a hearing within 30 days of the date of the PDO. If a hearing is requested, the claim is referred to the OALJ. At the hearing, the miner or survivor will usually testify. Testimony generally covers the miner's employment history as well as his or her physical condition, medical treatment, and any medications s/he has been prescribed.

The ALJ's decisions are based on testimony at the hearing as well as all documentary evidence admitted at the hearing and any closing arguments by the parties. The ALJ's decision is *de novo*, which means that any findings and conclusions of the district director are not binding on the ALJ or entitled to any deference. Any party that is dissatisfied with the ALJ's decision may file an appeal with the BRB. The BRB may affirm, or modify the ALJ's decision, or it may remand the claim to the ALJ for further consideration. The BRB's decision is the final decision in the federal black lung claims process and any further appeal must be made to the appropriate United States Circuit Court of Appeals.

#### Trust Fund

The last coal mine operator for whom the miner worked for a cumulative period of at least one year is usually responsible for the payment of benefits; however, the Trust Fund pays benefits when: (a) the miner's last coal mine employment was before January 1, 1970; (b) no liable coal mine operator can be identified; or (c) the miner's most recent employment of at least one year ended while the operator was authorized to self-insure, and such operator is no longer financially capable of securing benefit payments.

The Trust Fund is jointly administered by the Secretaries of Labor, Treasury, and Health and Human Services and provides for payments of benefits, administrative expenses, and interest on advances related to the operation of the program. Resources for the Trust Fund are derived from an excise tax on each ton of coal sold or used, reimbursements and interests, fines and penalties assessed against responsible mine operators, and short-term advances from the Treasury Department. Although beyond the scope of our review, we believe it is essential to provide insight and perspective on the current state of the fund and its future viability.

As of September 30, 2013, total liabilities of the Trust Fund exceeded assets by nearly \$5.9 billion. This net position represents the accumulated shortfall of excise taxes necessary to meet benefit payments, administrative costs, and interest expense incurred prior to and subsequent to the debt refinancing pursuant to P.L. 110-343. In addition, any shortfall was financed with debt instruments similar in form to zero-coupon bonds. Prior to the enactment of P.L. 110-343, this shortfall was funded by repayable advances to the Trust Fund, which were repayable with interest.<sup>22</sup>

Projections, in constant dollars, made over the 27-year period ending September 30, 2040, indicate that cash inflows from excise taxes will exceed cash outflows for benefit payments and administrative expenses for each period projected.

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<sup>22</sup> All of the information and analysis contained in this paragraph and the next was obtained from the U.S. Department of Labor's Fiscal Year 2013 Agency Financial Report.

Cumulative net cash inflows are projected to reach \$5.1 billion by FY 2040. However, when payments from the Trust Fund's maturing debt are applied against this surplus cash inflow, the Trust Fund's cash flow turns negative in all periods included in the projections. Net cash outflows after payments on maturing debt are projected to reach \$3.8 billion by the end of FY 2040, resulting in a projected deficit of \$6.0 billion at September 30, 2040.

These projections were made using the historical rate of claims disposition and acceptance and did not include any additional variables, such as a more expeditious claims and adjudication process. Additionally, the economic downturn in the coal industry will likely result in fewer coal companies being financially capable of paying miners, and hence more miners drawing on the Trust Fund, and an upturn in the number of claims, further exacerbating the illiquidity of the Trust Fund.

| Table C: Black Lung Disability Trust Fund Cash Position and Projections <sup>23</sup> |               |               |               |               |               |               |
|---------------------------------------------------------------------------------------|---------------|---------------|---------------|---------------|---------------|---------------|
| Projected                                                                             | 2014          | 2015          | 2016          | 2017          | 2018          | 2019-2040     |
| Balance - Beginning of Year                                                           | \$(5,894,222) | \$(5,619,550) | \$(5,351,096) | \$(5,130,160) | \$(4,933,985) | \$(4,750,935) |
| Cash Inflows                                                                          | 577,021       | 576,238       | 538,824       | 531,072       | 539,994       | 5,450,839     |
| Cash Outflows                                                                         | 692,977       | 688,514       | 691,120       | 697,359       | 705,473       | 8,544,856     |
| ROD Refinanced 10/08                                                                  | 390,627       | 380,730       | 373,233       | 362,462       | 348,529       | 1,899,790     |
| Balance End of Year                                                                   | \$(5,619,550) | \$(5,351,096) | \$(5,130,160) | \$(4,933,985) | \$(4,750,935) | \$(5,945,162) |

<sup>23</sup> Source: U.S. Department of Labor's Fiscal Year 2013 Agency Financial Report.

Procedural Changes Could Reduce the Amount of Time Required to  
Adjudicate Federal Black Lung Benefit Claims  
Report No. 05-15-001-50-598

## **Objectives, Scope, Methodology, and Criteria**

## **Appendix B**

### **Objectives**

Our objectives were to answer the following questions:

1. Did DOL have controls and processes in place to effectively and efficiently adjudicate black lung claims?
2. Has DOL implemented the recommendations from GAO's October 2009 report, *Black Lung Benefits Program: Administrative and Structural Changes Could Improve Miners' Ability to Pursue Claims?*

### **Scope**

We reviewed black lung policies and procedures, performed walkthroughs of the claims and adjudication processes, conducted extensive interviews with program management and staff, and tested a sample of claims closed at OWCP, OALJ, and BRB during FYs 2011-2013. We analyzed data for black lung claims closed during FYs 2008-2013 to identify timelines and potential bottlenecks associated with the process. We reviewed agency reports containing FY 2014 black lung data. We also analyzed other benefit payment programs to derive possible best practices.

### **Methodology**

We conducted site visits and interviewed officials at the three DOL agencies responsible for claims processing and adjudication – OWCP/DCMWC, OALJ and BRB. Specifically, we visited DCMWC, OALJ, and BRB headquarters (Washington, DC), four DCMWC field offices (Charleston, WV, Pikeville, KY, Johnstown, PA, and Greensburg, PA), two DCMWC field sub-offices (Parkersburg, WV and Mount Sterling, KY), and two OALJ districts (Cincinnati, OH and Pittsburgh, PA). These DCMWC and OALJ districts were selected because they handled the highest volumes of black lung claims filings and cases on appeal, respectively. To enhance our coverage of key personnel, we also designed and administered survey questionnaires to all DCMWC claims examiners, and OALJ judges, law clerks, and legal assistants located throughout the country. Our interviews and surveys with DOL officials focused on the department's policies, procedures, and guidance for administering the program and for providing and assisting claimants with obtaining medical and legal services to develop sound evidence for their cases.

To determine the characteristics of approved and denied claims, including reasons why claims are approved and denied, we selected and analyzed a sample of OWCP claims closed during FYs 2011-2013. To determine how long it takes to process black lung

claims, how long claims remain in the claims and appeals process, and rates at which black lung claims are denied by DOL, we relied on data contained in agency performance reports and information available through their websites. We did not verify this data as part of this review, but we will conduct a separate data reliability review and report our results in a subsequent report.

We reviewed relevant federal statutes, regulations, and program policies and procedures. We also performed a review of comparable DOL and state benefit payment programs to identify potential best practices.

To determine the actions OWCP, OALJ, and BRB took to address GAO's recommendations, we interviewed members of the GAO team that conducted the 2009 review and coordinated with the three DOL agencies to obtain additional information and documentation. We also based our conclusions on the results of our own work.

### **Criteria**

Title IV of the Federal Coal Mine Health & Safety Act of 1969

20 C.F.R. § 718.105, 201, 305(b)

Black Lung Benefits Act of 1972

Black Lung Reform Act of 1977

Black Lung Benefits Revenue Act of 1977

Black Lung Benefits Amendments of 1981

Black Lung Benefits Revenue Act of 1981

Black Lung Consolidation of Administrative Responsibility Act of 2002

Patient Protection and Affordable Care Act of 2010

**Acronyms and Abbreviations****Appendix C**

|               |                                                                         |
|---------------|-------------------------------------------------------------------------|
| ACA           | Patient Protection and Affordable Care Act                              |
| ALJ           | Administrative Law Judge                                                |
| BLBA          | Black Lung Benefits Act                                                 |
| BRB           | Benefits Review Board                                                   |
| CME           | Coal mine employment                                                    |
| Committee     | U.S. House of Representatives' Committee on Education and the Workforce |
| CPI           | Center for Public Integrity                                             |
| CTS           | Case Tracking System                                                    |
| DCMWC         | Division of Coal Mine Workers' Compensation                             |
| DOL           | U.S. Department of Labor                                                |
| Energy        | Energy Employees Occupational Illness Compensation Program              |
| EHR           | Electronic Health Record                                                |
| FECA          | Federal Employees' Compensation Act                                     |
| FTE           | Full-Time Equivalent                                                    |
| FY            | Fiscal Year                                                             |
| GAO           | Government Accountability Office                                        |
| HRSA          | Health Resource and Services Administration                             |
| IT            | Information Technology                                                  |
| KY WCP        | Kentucky Workers' Compensation Program                                  |
| Longshore Act | Longshore and Harbor Workers' Compensation Act                          |
| MOU           | Memorandum of Understanding                                             |
| NIOSH         | National Institute for Occupational Safety and Health                   |
| NOC           | Notice of Claim                                                         |
| OALJ          | Office of Administrative Law Judges                                     |
| OIG           | Office of Inspector General                                             |
| OPM           | Office of Personnel Management                                          |
| OWCP          | Office of Workers' Compensation Program                                 |
| PDO           | Proposed Decision and Order                                             |
| RECA          | Radiation Exposure Compensation Act                                     |
| RO            | Responsible Operator                                                    |
| SSDI          | Social Security Disability Insurance                                    |
| SSA           | Social Security Administration                                          |
| SSAE          | Schedule for the Submission of Additional Evidence                      |
| Trust Fund    | Black Lung Disability Trust Fund                                        |
| VTC           | Video Tele-Conference                                                   |
| WV WCP        | West Virginia Workers' Compensation Program                             |

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**Deputy Secretary Response to Draft Report**

**Appendix D**

**DEPUTY SECRETARY OF LABOR  
WASHINGTON, D.C. 20210**

**MAR 31 2015**

MEMORANDUM FOR SCOTT S. DAHL  
Inspector General

FROM: CHRISTOPHER P. LU 

SUBJECT: Response to OIG Audit Report: "Procedural Changes Could Reduce the Time Required to Adjudicate Federal Black Lung Benefit Claims" (No. 05-15-001-50-598)

Thank you for the opportunity to respond to your office's audit report titled, "Procedural Changes Could Reduce the Time Required to Adjudicate Federal Black Lung Benefit Claims." I appreciate the many hours your staff has spent evaluating the Black Lung Program and developing concrete suggestions for ways in which the Department can improve the claims and adjudication process. I asked each of the three agencies whose individual processes you evaluated to prepare a memorandum addressing the recommendations directed to it. Accordingly, I have attached responses from the Director of the Office of Workers' Compensation Programs, the Acting Chief Administrative Law Judge of the Office of Administrative Law Judges, and the Acting Chair and Chief Administrative Appeals Judge of the Benefits Review Board. Together, these memoranda constitute the Department's substantive response to your report.

The Department agrees with many of your recommendations and has taken a significant number of actions consistent with them. For instance, earlier this year OALJ began to aggressively address the Black Lung case backlog by redistributing cases among its regional offices and changing the case-assignment methodology within certain offices. With additional funding, OALJ has also committed to hiring more judges and law clerks this fiscal year to replace those who have left the Department. These, along with other changes OALJ plans to introduce, will help reduce the average amount of time it takes for OALJ to adjudicate a Black Lung case. OWCP and the BRB have also fully implemented new processes in response to OIG's recommendations. OWCP has launched a program to periodically screen its medical providers, and the BRB has adopted guidelines to ensure that BRB staff detailed to OALJ to assist with Black Lung decision making will not encounter conflicts of interest upon their return.

Although more progress needs to be made, all three agencies are working together to continue to improve Black Lung claims handling within the confines of available resources.

Again, our thanks to the OIG team that conducted this audit. We look forward to using your recommendations as we continue our ongoing efforts to improve the Black Lung program.

Procedural Changes Could Reduce the Amount of Time Required to  
Adjudicate Federal Black Lung Benefit Claims  
Report No. 05-15-001-50-598

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**OWCP Response to Draft Report**

**Appendix E**

**U.S. Department of Labor**

Office of Workers' Compensation Programs  
Washington, D.C. 20210



File Number:

March 30, 2015

MEMORANDUM FOR ELLIOT P. LEWIS  
Assistant Inspector General for Audit

FROM: LEONARD J. HOWIE III Director, Office of Workers' Compensation Programs

SUBJECT: Response to the Office of Inspector General's Report, "Procedural Changes Could Reduce the Time Required to Adjudicate Federal Black Lung Benefit Claims"

The Office of Workers' Compensation Programs (OWCP) has received and reviewed the Inspector General's (OIG) report, "Procedural Changes Could Reduce the Time Required to Adjudicate Federal Black Lung Benefit Claims," and responds to those OIG findings and recommendations specifically addressed to it.<sup>1</sup> OWCP thanks the OIG audit team for its hard work and extensive study of the black lung benefits program and appreciates the OIG's recognition of the many improvements that OWCP has already made to the program. (See OIG Report at 5-11.) OWCP also thanks the team for its suggestions regarding possible changes to the program's administration to effectuate the common goal of increasing efficiency and accuracy in black-lung decision-making.

**I. Responses to OWCP Recommendations**

<sup>1</sup> The OIG's report discusses whether the Department has implemented recommendations made by the Government Accountability Office (GAO) in its October 2009 Report on the Black Lung Benefits Program. (See <http://www.gao.gov/assets/300/297807.pdf>) Several of the OIG's findings and recommendations overlap with those made by GAO. In Parts I and II, we reference the relevant GAO recommendations, and the response provided serves as a response to both the OIG and GAO recommendations.

- Recommendation 1:** Continue to enhance and periodically evaluate the effectiveness of incentives to medical providers for turning in completed medical reports within certain timelines.

The medical report referred to in this recommendation is the DOL-sponsored complete pulmonary evaluation mandated by statute, 30 U.S.C. § 923(b), which forms the basis for OWCP's initial adjudication of each miner's entitlement to benefits. As noted by the OIG, OWCP already closely monitors both the timeliness and quality of physicians' reports and is conducting a multi-pronged effort to address physicians' reporting delays when they do occur, including when OWCP needs to request clarification of certain physicians' opinions. As a result, at the time of the OIG's review in June 2014, 82% of medical reports were timely submitted as measured against OWCP's goal of submitting reports within 85 days of the date of the medical examination. OWCP's efforts continue to increase both the reports' timeliness and quality.

OWCP encourages the submission of timely, high-quality medical reports by paying its physicians promptly, but only after their evaluations are complete and need no further clarification. OWCP enhanced this incentive on December 30, 2013, increasing fees for completing the diagnostic physical examination by 29% and fees for completing a supplemental report by 200%.

OWCP has also initiated training to further improve the completeness of medical reports, thereby preventing clarification requests and increasing medical report timeliness. On March 16, 2015, OWCP launched a new training program for its medical providers entitled, "Black Lung Disability Evaluation and Claims Training for Medical Examiners." The training, developed in collaboration with the University of Illinois at Chicago, is free, offered online, and is specifically aimed at physicians conducting disability evaluations for the black lung program. The training covers topics such as coal-mine induced lung diseases, one of the issues commonly in dispute in black lung claims. Providers who complete it will earn continuing medical education credits. The training is substantive and will also teach providers how to correctly complete the black lung program medical evaluation form. A link to module 1 of the four part training is now available on OWCP's website at <http://www.dol.gov/owcp/dcmwc/>, and the remaining three modules will be available within the next several months. At the time the training was launched, OWCP sent letters to all approved physicians informing them of its availability. OWCP will do the same as subsequent training modules are issued.

In order to further improve the quality and timeliness of its medical opinions, on March 11, 2015, OWCP issued a bulletin to its district offices, outlining procedures for adding, reviewing, and removing physicians from its list of approved providers. The bulletin, which can be found on OWCP's website at <http://www.dol.gov/owcp/dcmwc/blba/indexes/BL15.05OCR.pdf>, emphasizes that a provider can be removed from the list for failure to submit timely or complete opinions.

Additionally, in order to improve report timeliness, OWCP has been actively recruiting additional doctors to perform DOL-sponsored complete pulmonary evaluations. The remote and rural surroundings of many coal mining communities create a dearth of available, qualified physicians. When there are additional doctors to complete required examinations and testing, timeliness of

reports improves. Thus, in January 2015, OWCP sent targeted recruitment mailings to doctors in medically underserved geographic areas.

In sum, the vast majority of OWCP's DOL-sponsored pulmonary evaluation reports are complete and delivered in a timely fashion. OWCP will continue, however, to evaluate—and if necessary, enhance—the effectiveness of incentives for medical providers to turn in complete medical reports in a timely manner. OWCP will also continue efforts to improve report quality by focusing on incentives that reward quality as well as timeliness.

**Recommendation 2:** Explore the feasibility of seeking legislative authority for online access to SSA earnings records, and in the interim, attempt to renegotiate with SSA to allow OWCP to submit requests for earning verification to SSA electronically.

As the OIG recognizes, OWCP does not currently possess the requisite legislative authority to access SSA earnings records electronically in black lung cases. OWCP will evaluate this suggestion further, consulting as appropriate with SSA, the Department of Treasury, and the Office of Management and Budget (OMB). In the interim, on February 27, 2015, OWCP asked SSA for permission to submit requests for earnings records electronically by fax in the black lung program and is awaiting that agency's response. In this manner, OWCP hopes to follow the example of the Energy Employees Occupational Illness Compensation Act program, which is currently submitting such requests electronically as part of a pilot program.

**Recommendation 3:** Develop a program to periodically screen whether providers are properly licensed and in good standing in their state of practice and remove providers from the list in appropriate situations.

OWCP has fully implemented this recommendation. On March 11, 2015, OWCP issued a bulletin to its district offices outlining procedures for adding, reviewing, and removing providers from the list of providers authorized to perform DOL-sponsored complete pulmonary evaluations. These procedures include annual screening to ensure providers are properly licensed and in good standing with their states of practice. If, during this review, OWCP obtains information suggesting that a physician should be removed from the approved provider list, it may temporarily suspend the provider pending investigation of the information. The physician will be notified of OWCP's concerns and given the opportunity to respond and to work with OWCP to remedy them. After completion of attempts to rehabilitate the physician, and OWCP's confirmation of all relevant facts, the black lung program director or his delegate will make a removal determination. The bulletin and all procedures for adding, reviewing, and removing providers from the list of providers authorized to perform DOL-sponsored complete pulmonary evaluations can be found on OWCP's website at <http://www.dol.gov/owcp/dcmwc/blba/indexes/BL15.05OCR.pdf>.

**Recommendation 4:** Present claim statistics that show the number of claims approved, the number denied, the number abandoned, and the number withdrawn.

OWCP has fully implemented this recommendation. In addition to the claim statistics already on its website, OWCP has now published FY 2014 claim statistics that show the number of claims approved, the number denied, the number abandoned, and the number withdrawn. These statistics can be found at <http://www.dol.gov/owcp/dcmwc/statistics/PartCClaimOutcomes.htm>. OWCP also intends to publish these claim statistics at the end of each fiscal year going forward.

**Recommendation 5:** Coordinate with the BRB and OALJ to evaluate the feasibility and costs of transmitting OWCP's fully electronic case files (i.e., those created in FY 2015 and later) electronically rather than in hard copy.

OWCP agrees that it would be ideal to have a unified system, or at least three systems that interface with one another, to effectively and efficiently transfer case files among OWCP, the OALJ, and the BRB. OWCP looks forward to coordinating with the BRB and the OALJ to evaluate the feasibility and cost of transmitting fully electronic case files electronically. OWCP anticipates that the BRB and the OALJ will be willing partners and has already begun preliminary discussions with them. Similarly, GAO recommendation 2 asks the Department to create an automated system to track cases through the entire adjudication process. (*See* GAO Report at 32.) As OIG acknowledges, OWCP's claim tracking system is robust and can track claims through the entire adjudication process on an ad hoc reporting basis (*see* OIG Report at 23), but OWCP agrees that having an automated method for tracking all claims through the entire adjudication process would be optimal.

**Recommendation 6:** Evaluate the results of its pilot program aimed at strengthening the pulmonary evaluation upon its conclusion and decide which actions should be permanently included as part of the claims process.

Since its launch in February 2014, OWCP has collected pilot program data on an ongoing basis. As of March 1, 2015, OWCP had included 252 claims in the pilot program. OWCP's medical providers had completed 183 supplemental medical reports, and district directors had issued proposed decisions and orders in 164 pilot cases. In 112 of those cases decided, the initial finding of eligibility was upheld, and in 52, it was not. It is too soon, however, to evaluate the overall impact of the program. Additional information is necessary before determining whether the program should be made a permanent part of the claims process. OWCP hopes to determine whether the pilot program has resulted in: (1) submission of higher quality DOL-sponsored medical reports; (2) issuance of higher quality proposed decisions and orders; (3) fewer requests for hearing before the OALJ; and (4) fewer reversals after hearing and decision by the OALJ. OWCP will be better positioned to evaluate the pilot program after more cases have resulted in

OALJ decisions. Additionally, the Department has contracted with the University of Illinois at Chicago to conduct a process study of the pilot program, which is scheduled to conclude on September 19, 2015 unless extended.

- Recommendation 7:** Conduct comprehensive analyses of the benefits and costs of pursuing statutory changes to the BLBA to introduce:
- a. referee medical examinations;
  - b. methods for increasing claimant legal representation;
  - c. compensation for partial disability; and
  - d. settlement of claims.

Each of the statutory changes the OIG lists and that GAO listed in its 2009 report, requires careful exploration and consideration, both by the Department and the Office of Management and Budget. (*See OIG Report at 27-28; GAO Report at 32-33.*)

Most of the statutory changes above were included in the GAO report as recommendation number 7. (*See GAO Report at 32-33.*) The GAO suggested compensation for partial disability and the settlement of claims as means of resolving the difficulties claimants face proving the existence of coal-mine-related lung disease and disability due to such disease. (*See GAO Report at 21-23.*) Since issuance of the GAO report, however, the BLBA was substantively amended to reintroduce (1) derivative survivors' benefits, which automatically entitle certain survivors to benefits, provided the miner was awarded benefits, 30 U.S.C. 932(l); and (2) the 15-year presumption, which provides a rebuttable presumption of total disability or death due to pneumoconiosis to former miners with at least 15 years of qualifying coal mine employment and a totally disabling pulmonary impairment, 30 U.S.C. § 921(c)(4). The 15-year amendment aids certain miners by presuming both the existence of coal-mine-related lung disease and disability causation. The amendment providing automatic entitlement for certain survivors totally eliminates the need to prove death due to pneumoconiosis. Thus, the 2010 amendments may sufficiently improve approval rates over time so as to obviate the need for some of the suggested amendments. The black lung benefits program is better served by allowing the Department additional time to evaluate the long-term impact of amendments already passed and the 2013 regulations implementing them, before devoting the extensive resources required to evaluate the benefits and costs of possible statutory changes.

## **II. Responses to Additional OIG Findings Regarding Quality of Medical Reports and Claim Determinations**

OWCP has explained in detail many of its efforts to improve the quality and timeliness of its current medical reports in response to Recommendations 1, 2, and 6, above. The OIG Report makes additional recommendations, such as using a multiple-choice, check-box or decision-tree medical reporting form, aimed at improving the documentation supporting DOL's physicians' opinions. (*See OIG Report at 25.*) OIG also recommends improving the accuracy of claims

determinations by using DOL-sponsored second medical opinions and/or chest x-ray readings. (*See* OIG Report at 6-8.) Based on its many years of experience as program administrator, OWCP does not believe that either change is justified currently. As recommended by GAO (recommendation number 4), OWCP modified the form used to report the DOL-provided physical examination results in 2011 based on physician input. (*See* GAO Report at 32.) The form was improved by asking specific questions about relevant entitlement issues and by adding additional space to encourage physicians to provide narrative opinions in response to those questions. Both changes were intended to encourage physicians to make necessary findings and to explain their conclusions. In addition, OWCP intends to query physicians taking its upcoming, online training for additional suggestions to improve the current medical reporting forms. Turning the form into a multiple-choice or decision-tree exercise, however, would support arguments that such decisions are not as well reasoned as possible because they are not explained in detail. Defeating such arguments is critical because entitlement determinations, when reviewed by the BRB and the courts of appeals, often turn on the credibility of conflicting doctors' opinions.

As for the OIG's suggestion that OWCP use second medical opinions and/or chest x-ray readings, such a change would require the program's use of many more physicians with a resulting increase in cost. It would also require significant regulatory amendments—all without any guarantee of improved decision-making. OWCP's more than 40 years of experience as program administrator has demonstrated that simply adding more medical evidence does not "bolster the accuracy of claims determinations." (*See* OIG Report at 6.) In fact, the Department limited the amount of medical evidence admissible in each black lung claim in its 2000 regulatory amendments, believing that a "fairer, more credible evaluation[] of black lung claims" would result from "resolv[ing] issues of eligibility based on the quality of the medical evidence developed by the parties rather than merely the quantity of [that] evidence." Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended; Final Rule, 65 Fed. Reg. 79920, 79992 (Dec. 20, 2000). Thus, OWCP prefers to continue to improve the quality of the medical evidence it currently develops rather than increase its quantity.

Finally, OIG recognizes that OWCP implemented GAO recommendation 6 (*see* GAO Report at 32), which recommended that the Department develop a feedback mechanism to track stakeholder complaints about arterial blood gas testing practices. (*See* OIG Report at 26-27.) The OIG suggests that OWCP could do more to improve the accuracy of blood gas testing by recruiting physicians capable of drawing blood throughout the exercise portion of a blood gas study. (*See* OIG Report at 27.) OWCP will continue to consider this factor in recruiting additional physicians for the program.

### **III. Conclusion**

OWCP appreciates the OIG's extensive study of the black lung program and its suggestions for improvement. OWCP will continue to improve the quality and timeliness of its medical reports (Recommendation 1) and is exploring methods to improve the timeliness of its access to SSA earnings information (Recommendation 2). OWCP agrees with and has fully implemented

Recommendations 3 and 4. In addition, OWCP will evaluate the feasibility and costs of transmitting fully electronic case files with the BRB and the OALJ (Recommendation 5) and will evaluate the results of its pilot program when the necessary data becomes available (Recommendation 6). As for the OIG's list of possible statutory amendments (Recommendation 7), the concern motivating some of these changes may be obviated by the long-term results of the 2010 amendments to the Black Lung Benefits Act and their implementing regulations. The other statutory suggestions require careful policy and cost evaluation by both the Department and OMB.

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**OALJ Response to Draft Report**

**Appendix F**

**U.S. Department of Labor**

Office of Administrative Law Judges  
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March 30, 2015

MEMORANDUM FOR: ELLIOT P. LEWIS  
Assistant Inspector General for Audit

FROM: STEPHEN R. HENLEY *Stephen R. Henley*  
Acting Chief Administrative Law Judge

SUBJECT: Response to the Office of Inspector General's Report,  
"Procedural Changes Could Reduce the Time Required to  
Adjudicate Federal Black Lung Benefit Claims"

The Office of Administrative Law Judges (OALJ) welcomes the opportunity to respond to the findings and recommendations of the Office of the Inspector General's (OIG) Draft Report No. 05-15-001-50-598. OALJ acknowledges the efforts expended by the OIG and appreciates the report's recommendations. Most of the recommendations pertaining to OALJ have already been adopted, incorporated or implemented.

**I. Responses to the OIG Recommendations for OALJ**

The OIG's report addresses whether OALJ has implemented recommendations made by the Government Accountability Office (GAO) in its 2009 Report on the Black Lung Benefits Program. Several of OIG's recommendations overlap with those made by GAO. In those instances, we have referenced the GAO recommendation, and the response provided serves as a response to both agencies' recommendations. For those GAO recommendations that address unrelated subjects, we have provided a response in section II. below.

**OIG Recommendation 8:** Seek resources to replace outgoing judges and law clerks.

OALJ is hiring 31 FTEs in FY 2015 (4 judges, 16 clerks, 2 attorneys and 9 legal assistants) due to increased Black Lung funding, in addition to replacing retiring judges, departing clerks and support personnel.

**OIG Recommendation 9:** Add optional extensions to the term of law clerks and stagger the hiring of law clerks.

OALJ has added an optional one year extension to the law clerks' current two-year term of employment and is staggering hiring.

**OIG Recommendation 10:** Reinstate the contract writer program.

OALJ is researching the viability of instituting a new contract writer program. To that end, OALJ issued a Request for Information in January 2015 to contractors and black lung practitioners requesting information on the availability of contract writers and the anticipated cost of reinstating the contract writer program. The information received in response to the Request for Information is currently under review. A decision whether to reinstate the program will be made in late summer of 2015, based on available writers, costs and funding.

**OIG Recommendation 11:** Implement additional formalized training programs for incoming law clerks and judges.

OALJ has prepared and scheduled formal black lung training classes for judges and law clerks to be held in April 2015 in Pittsburgh, PA and San Francisco, CA.

**OIG Recommendation 12:** Establish and promulgate centralized written policies, procedures, or templates to improve efficiency and communication among the districts.

OALJ has established a centralized repository on OALJ's Intranet allowing judges and law clerks access to some of the more common orders, office policies and procedures, and decisional guides to improve efficiency.

**OIG Recommendation 13:** Implement a distance hearing program, which could include video or telephone hearings, to reduce judges' travel costs and time.

OALJ has initiated a test project to determine the viability of utilizing video conferencing technology to minimize travel for ALJs. The black lung hearings held as part of this project will use existing Department of Labor resources and are scheduled for the summer of 2015. [This response also pertains to GAO Recommendation 3].

**OIG Recommendation 14:** Coordinate with OWCP and BRB to evaluate the feasibility and costs of an electronic case management, tracking, and storage system that could exchange case file information electronically with OWCP and BRB.

OALJ, OWCP and the BRB have established a working group. The discussions from this group will be used to assist OALJ in development of an electronic case management system that is able to easily interface with the BRB and OWCP case management systems in order to track and transmit cases between the agencies. OALJ, OWCP, and the

BRB met collectively on January 23, 2015. OALJ had an additional meeting with OWCP technical staff on February 3, 2015. Based on determinations made in the technical meeting, OALJ is updating our new system requirements to integrate with OWCP's system. [This response also pertains to GAO Recommendation 2].

**OIG Recommendation 15:** Establish timelines and performance goals for the disposition of cases for the Office as a whole and for the District Offices individually.

OALJ is formalizing timelines and performance goals for the disposition of cases for the National and District Offices and implemented measures to monitor judges' productivity. However, because the range of cases handled by OALJ is so broad, and the time required to adjudicate each case varies so much depending not only on the type of case but also on the individual facts of each case, imposing strict timelines and performance goals would not be an effective management tool. [This response also pertains to GAO Recommendation 2].

**OIG Recommendation 16:** Consider transitioning the Cincinnati OALJ office to the case assignment methodology currently used by the Pittsburgh OALJ office.

OALJ has changed the assignment policy for black lung cases in the Cincinnati District Office to three additional dockets of cases annually per judge, regardless of the number of pending black lung cases before each judge.

**OIG Recommendation 17:** Implement a time tracking system for judges and law clerks to record the amount of time spent on each case.

Given the complexity of issues each individual black lung case may engender, OALJ submits that implementing a time tracking system for judges and law clerks to record the amount of time spent on each case would not be an effective mechanism to improve productivity or result in any meaningful metric, because each case is different. The Chief ALJ, the Associate Chief ALJs, and the seven District Chief Judges track and discuss District Office and individual ALJ docketing and disposition numbers and overage cases on a monthly basis. The Associate Chief ALJs and the District Chief Judges are responsible to then manage productivity and performance of subordinate judges.

**OIG Recommendation 18:** Coordinate with BRB to prepare and implement a plan for detailing all staff not directly required for the BRB's own adjudicatory processes.

OALJ has coordinated with the BRB in response to this recommendation and has already arranged for the detail of at least one black lung staff attorney to OALJ to assist in decision writing and black lung program management.

**OIG Recommendation 19:** Implement recommendation #1 from GAO's 2009 report and develop a system of regular communication with BRB leadership to better coordinate activities in which both have common interests.

OALJ is now regularly communicating with the BRB leadership on issues of common interest. [This response also pertains to GAO Recommendation 1].

**II. Additional Responses to GAO Recommendations**

**GAO Recommendation No. 1:** Take steps to reduce the number of black lung cases remanded from BRB to OALJ by convening a group to determine the causes of these remands and develop solutions for reducing their incidence.

The report notes that OALJ and the BRB held one meeting to discuss the causes of remands and possible solutions for reducing their incidence. The report suggests that this group be reconvened. As noted in OIG Recommendation 19, OALJ and the BRB are already meeting regularly to discuss items of common interest. To the extent they remain focused on general trends or system-wide concerns in black lung cases and not on any individual case or judge, such discussions may assist in reducing the number of remands. Discussions of specific cases or judges, however, would be inappropriate and create an appearance that OALJ and the BRB lack institutional independence.

**GAO Recommendation No. 2:** Obtain summary information on how long it takes to resolve claims using its current automated system to routinely track cases through the entire adjudication process and develop associated performance measures.

See responses to OIG Recommendations 14 and 15.

**GAO Recommendation No. 3:** Consider shortening the time required to schedule hearings for black lung cases by examining the feasibility of using video teleconferencing technology to streamline the scheduling of hearings in remote areas.

See response to OIG Recommendation 13.

**GAO Recommendation No. 5:** Evaluate and report on claimant access to legal and lay representation by implementing changes to the data management systems of OWCP, OALJ, and BRB that will permit accurate data about claimant representation throughout the claims appeals process.

OALJ's existing case tracking system cannot capture this information; however, OALJ is implementing a Modernization Project of its system during FY 2015 which will allow the capturing and analysis of this type of information when implemented during FY 2016.

**III. Conclusion**

As previously acknowledged, OALJ appreciates the OIG's suggestions to improve the Federal Black Lung Benefits Program. OALJ has implemented or is implementing most of the recommendations (Recommendations 8-9, 11-12, 15-16, 18-19) and is exploring several others (Recommendations 10, 13, 14). The only OIG recommendation pertaining to OALJ not implemented or considered for further study is establishing a system to track the amount of time judges and clerks spend on an individual case (Recommendation 17). OALJ believes this recommendation would not improve productivity or result in any meaningful metric given the differences in each case. As noted, however, OALJ has implemented measures to monitor judges' productivity.

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**BRB Response to Draft Report**

**Appendix G**

**U.S. Department of Labor**

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



March 30, 2015

MEMORANDUM FOR ELLIOTT P. LEWIS  
Assistant Inspector General for Audit

FROM: BETTY JEAN HALL *Betty Jean Hall*  
Acting Chairman of the Board and  
Chief Administrative Appeals Judge  
Benefits Review Board

SUBJECT: Response to the Office of Inspector General's Report,  
"Procedural Changes Could Reduce the Time Required  
to Adjudicate Federal Black Lung Benefit Claims"

The Benefits Review Board (BRB) has received and reviewed the Inspector General's report, "Procedural Changes Could Reduce the Time Required to Adjudicate Federal Black Lung Benefit Claims," and responds to those OIG findings and recommendations specifically addressed to it. BRB thanks the OIG audit team for its hard work and extensive study of the black lung benefits program. The BRB remains committed to the common goal of increasing efficiency and accuracy in black lung decision-making.

**I. Responses to BRB Recommendations<sup>1</sup>**

**Recommendation 20:**

Recall detailees from other agencies and coordinate with

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<sup>1</sup> OIG's report addresses whether the Department has implemented recommendations made by GAO in its 2009 Report on the Black Lung Benefits Program. Several of OIG's recommendations overlap with those made by GAO. In those instances, we have referenced the GAO recommendation, and the response provided serves as a response to both agencies' recommendations. For those GAO recommendations that address unrelated subjects, we have provided a response in a separate section below.

OALJ to prepare and implement a plan for detailing to OALJ all staff not directly required for BRB's own adjudicatory processes.

BRB and OALJ are finalizing plans to detail additional BRB black lung attorneys to OALJ, as needed by OALJ, in the months ahead. Several BRB black lung attorneys have been identified as excellent candidates for OALJ details, and will be interviewed for selection by OALJ. If more candidates are needed, detailees to other agencies will be recalled. If possible, however, the BRB would like to allow the short-term details in progress, including details under the Secretary's ROAD Program, to be completed.

One BRB staff attorney is currently on detail to the OALJ. A Memorandum of Understanding has been signed by the Acting Chair of BRB and the Acting Chief Judge for OALJ, spelling out the terms of this six month detail. In addition, it is worth noting that BRB recently recommended two of its former staff attorneys for positions in OALJ, and both have been hired.

**Recommendation 21:**

Develop a plan for preventing detailees returning from OALJ from working on cases they worked on at the OALJ.

This recommendation has been fully implemented. BRB and OALJ have cleared a set of guidelines with DOL's Counsel for Ethics, Rob M. Sadler, that will assist returning BRB staff in avoiding conflicts of interest. Most critically, the guidelines provide safeguards to ensure that detailees returning from OALJ will not work on cases they worked on at OALJ.

**Recommendation 22:**

Develop a system of regular communication with OALJ leadership to better coordinate activities in which both have common interests.

BRB and OALJ have met to discuss and coordinate activities in which they have common interests. These issues include the detailing of staff to OALJ and various IT issues, including how to better share information electronically. BRB and OALJ have agreed to meet on a semiannual basis to continue to discuss and coordinate these and other relevant matters.

**Recommendation 23:**

Coordinate with OWCP and OALJ to evaluate the feasibility and costs of an electronic case management, tracking, and storage system that could exchange case file information electronically with OWCP and OALJ.

On February 9, 2015, OWCP, OALJ and BRB met to discuss and evaluate the ability to electronically exchange information and records among the agencies. Because all of the records in cases on appeal to BRB are sent from OWCP, the IT staffs of BRB and OWCP have had ongoing discussions to assess the ability of the agencies to transfer electronic records in the Black Lung program between the agencies, using BRB's DOL Appeals case tracking system and OWCP's OIS system. BRB looks forward to continuing these discussions in an effort to improve the efficiency of the Black Lung appeals process. BRB and OWCP envision establishing a pilot program for the exchange of electronic records for the Black Lung program in the near future. Discussions have also been held among OWCP, OALJ and BRB regarding the development of the new OALJ case tracking system. BRB's actions on these issues are also responsive to Recommendation #2 of the 2009 GAO report.

**II. Objective 2 – Has DOL implemented the recommendations made by GAO in its October 2009 report?**

***DOL could take more action on GAO's recommendations:***

The OIG report recommends that DOL take more action to implement the recommendations made by GAO in its October 2009 report. Recommendation #'s 1, 2 and 5 of the 2009 GAO report pertained to the BRB. The OIG Report concludes that GAO Recommendation #5 had been implemented by the BRB. See BRB's response to OIG Recommendation 23 above, for action on GAO Recommendation #2.

In Recommendation #1, GAO recommended that the BRB take steps necessary to reduce the number of cases that are remanded from BRB to OALJ. OIG suggests that BRB and OALJ convene a group to determine the causes of remands and to develop solutions for reducing their incidence. As noted in BRB's response to OIG Recommendation 22, BRB and OALJ have agreed to meet on a regular basis to discuss issues relevant to both agencies. It is anticipated that these discussions will touch on broader, system-wide concerns, as well as issues and ideas presented in the OIG report and the responses thereto. Thus, although it would be inappropriate for the BRB to engage in discussions with OALJ regarding the

possible disposition of individual cases that are appealed to the BRB from OALJ, it is anticipated that ongoing discussions will shed additional light on the reasons for remands and reduce their numbers going forward.

## Acknowledgements

## Appendix H

Key contributors to this report were Nicholas Christopher (Audit Director), Silke Marisela Sookraj (Audit Manager), Fernando Paredes, Jerry Howe, Charmane Miller, Janet Cucunato, Carmelle Paytes, N. Renee Kelly, Elizabeth Garcia, and Aaron Talbert.

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