

## PART III

### PROCEDURAL ISSUES

#### B. CONSEQUENCES OF FILING A PART B CLAIM

The 1972 Act divided claims into three categories. Part B of the 1972 Act provided that those claims filed before July 1, 1973, were to be administered by the Social Security Administration (SSA) of the Department of Health, Education and Welfare (HEW) and benefits were to be payable from federal funds. See 30 U.S.C. §§921-924; 20 C.F.R. §725.1(b). Part B also provided that those claims filed between July 1, 1973 and December 31, 1973 were to be administered by the Department of Labor (DOL). See 30 U.S.C. §925; 20 C.F.R. §§725.1(c), 727.303(b). For these claims, the "transition period" claims, any benefits due for time periods prior to January 1, 1974, were to be paid from federal funds, and benefits for any time after that date were to be paid by employers, where designated. *Id.*; see **Foley v. Director, OWCP**, 7 BLR 1-896 (1985). The final group of claims was designated by Part C of the 1972 Act. See 30 U.S.C. §§931-945. Part C claims are those claims that are filed after December 31, 1973. 30 U.S.C. §931. These claims were also administered by DOL and were to be paid by the employers, where designated. See **Jordan v. Benefits Review Board**, 876 F.2d 1455, 1457 n.1, 12 BLR 2-371, 2-372 n.1 (11th Cir. 1989); **Director, OWCP v. Goudy**, 771 F.2d 1122, 1125-26, 8 BLR 2-74, 2-77-81 (6th Cir. 1985).

The claimant has the right to file a claim under DOL jurisdiction, even though he previously filed one under Part B with the SSA, provided the claim has been finally denied by SSA. **Hileman v. Clinchfield Coal Co.**, 1 BLR 1-531, 1-534 (1978); **Maggard v. Jewell Ridge Coal Corp.**, 1 BLR 1-112, 1-114-15 (1977). Prior to the 1972 Amendments, a miner seeking benefits pursuant to Part B of the Act was not entitled to medical benefits. The amended law, however, required that, under Part C, medical as well as disability benefits be provided for those miners who qualify under Part C. 30 U.S.C. §§925, 932(a). Miners approved for benefits under Part B were allowed to file a new claim under Section 415 of Part B, 30 U.S.C. §925, ("transition period" claims) or Section 422 of Part C, 30 U.S.C. §932, for "additional benefits, including medical benefits." 20 C.F.R. §725.102, 720.109 (1978); see **Goddard v. Warner Coal Co.**, 6 BLR 1-1026 (1984); **Powers v. United States Steel Corp.**, 1 BLR 1-36 (1976).

The 1977 Amendments provide that the Part B recipient may file for medical benefits only. 30 U.S.C. §924a. Thus, claims filed pre-March 1, 1978 under Part C by Part B recipients who seek additional benefits including medical benefits must be distinguished from those post-March 1, 1978 claims filed under Part C by Part B recipients who seek and are limited to medical benefits only under the Reform Act. 20

C.F.R. §725.701A; see **Kosh v. Director, OWCP**, 8 BLR 1-168, 1-171 (1985), *aff'd*, No. 85-3508 (3d Cir. May 6, 1986)(unpub.). See Part III.B.1. Medical Benefits Only *infra*.

A claimant whose SSA claim has not been finally adjudicated is said to have a "claim in progress," thus suspending DOL adjudication of the Part C claim. See **Hinkle v. Sewell Coal Co.**, 1 BLR 1-637 (1978); **Green v. Old Ben Coal Co.**, 1 BLR 1-64 (1977), see also 20 C.F.R. §§727.103(c) (1984), 725.102(c) (1977). In **Hinkle**, the Board addressed employer's attempt to forestall DOL jurisdiction in the case by intervening in the claimant's previously denied SSA claim, and held that such intervention does not constitute a "claim in progress" as contemplated by the provision formerly found at 20 C.F.R. §725.102(c). **Hinkle**, 1 BLR at 1-642-44; see also **Kincaid v. Slab Fork Coal Co.**, 1 BLR 1-722 (1978). The passage of the Black Lung Benefits Reform Act of 1977 (the Reform Act) complicated the dual claims situation. Since cases reviewed under Section 435 of the Act, 30 U.S.C. §945, may originate in SSA and be forwarded to DOL, dual claims procedures have been greatly modified. See 20 C.F.R. §§727.101-727.109.

A prior denial of benefits by the SSA may be admitted into evidence to establish the procedural history of the case, but may not be given any evidentiary weight with respect to the merits of the claim. **Bain v. Old Ben Coal Co.**, 2 BLR 1-1219 (1980); **Sebben v. Director, OWCP**, 2 BLR 1-177 (1979). Except as provided in Section 410.470, SSA's findings are not binding upon the DOL adjudication officer. **Reightnouer v. Director, OWCP**, 2 BLR 1-334 (1979); see also **Beck v. Mathews**, 601 F.2d 376 (9th Cir. 1978); *but see* **Settlemoir v. Old Ben Coal Co.**, 9 BLR 1-109, 1-112 (1986).

Pursuant to Section 435(a)(1), 30 U.S.C. §945(a)(1), SSA shall promptly notify each claimant who has filed a claim for benefits under Part B, excluding miners who have filed under Section 415 of the Act, 30 U.S.C. §925, and whose claim was either pending or had been denied by SSA or the courts on or before March 1, 1978, that at his or her request the claim will be reviewed under the Reform Act. See 20 C.F.R. §727.104(a). Claimant has six months from the date of notification by SSA to exercise the review option, absent which he waives the right to Reform Act review of the Part B claim, unless "good cause" can be established for not responding within this time period. 20 C.F.R. §410.704(d).

The Board has held that Section 435 requires a claimant to make a specific request for review of his Part B claim under the Reform Act, but such a request can be accomplished by the filing of an election card or by any other means that adequately documents claimant's decision to elect Section 435 review. **Chadwick v. Island Creek Coal Co.**, 7 BLR 1-883 (1985), *aff'd*, 8 BLR 1-447 (1986)(en banc recon.); see also **Treadway v. Califano**, 584 F.2d 48 (4th Cir. 1978). In **Chadwick**, the Board rejected employer's "implied election theory" which rests on the supposition that a specific Part B request is superfluous in cases where claimant has also filed a pending pre-Reform Act

Part C claim which is automatically reviewed. **Chadwick**, 7 BLR at 1-893.

Review of a previously denied or pending Part B claim can occur in one of three ways: 1) the Secretary of Health and Human Services (HHS) can review the claim based on evidence in the file; if approved, the claim is forwarded to DOL to make or otherwise provide for payment, see 30 U.S.C. §945(a)(1)(A), (a)(2)(A); 2) if denied by the Secretary of HHS, the claim is forwarded to DOL and claimant is given an opportunity to present additional evidence, see 30 U.S.C. §945(a)(2)(B)(i), (a)(3)(A), (b)(2)(B); 3) a claimant can request the Secretary of HHS to forward the claim directly to DOL, which provides the claimant an opportunity to present additional evidence, see 30 U.S.C. §945(a)(1)(B), (a)(3)(A), (b)(2)(B).

Claimants who elect to have their pending Part B claims reviewed under the Reform Act would then have two separate and independent claims pending for benefits. The election by claimants does not affect the processing of their pending Part B claims under the old law for payment of benefits under Part B prior to January 1, 1974. 20 C.F.R. §410.704(c). On the other hand, if entitlement to benefits is established under the Reform Act, benefits will be paid under Part C of the Act for a period which begins no earlier than January 1, 1974. 30 U.S.C. §945(c). Nevertheless, in the case of a claimant who has filed one or more claims with both SSA and DOL, under no circumstances are duplicate benefits payable for concurrent periods of eligibility. See 20 C.F.R. §727.103(d), (e).

If claimant's original Part B claim is approved by DOL following Reform Act review under 30 U.S.C. §945(a)(2)(B)(i), (a)(1)(B), it will be treated as a Part C claim for purposes of payment. 30 U.S.C. §945(3)(A). The Board held in **Yakubco v. Republic Steel Corp.**, 2 BLR 1-1116 (1980), that DOL could neither identify a responsible operator nor hold a new hearing in cases in which the application for benefits was originally filed prior to July 1, 1973, the claim was denied by SSA under the 1972 Act and, following the passage of the 1977 Reform Act, was reviewed and approved at claimant's request by SSA under Section 435(a)(1)(A) of the Act, and then forwarded to DOL for payment pursuant to Section 435(a)(2)(A). Thus, the Black Lung Disability Trust Fund, rather than the employer, is responsible for the payment of benefits under such circumstances and DOL, on behalf of the Fund, cannot contest claimant's entitlement inasmuch as DOL is bound by SSA's approval of the claim. **Yakubco, supra**. The Board's holding in **Yakubco** was affirmed in a *per curiam* decision by the Third Circuit. **Director, OWCP v. Republic Steel Corp.**, 663 F.2d 8, 3 BLR 2-73 (3d Cir. 1981). The Board's analysis in **Yakubco** has, however, been rejected by the United States Courts of Appeals for the Seventh Circuit, **Director, OWCP v. Forsyth Energy, Inc.**, 666 F.2d 1104, 4 BLR 2-26 (7th Cir. 1981), the Fourth Circuit, **Director, OWCP v. Bethlehem Mines Corp.**, 669 F.2d 187, 4 BLR 2-44 (4th Cir. 1982), and the Sixth Circuit, **Director, OWCP v. Goudy**, 777 F.2d 1122, 8 BLR 2-74 (6th Cir. 1985).

## CASE LISTINGS

### DIGESTS

The Board held that Section 435(c) of the Act, 30 U.S.C. §945(c), sets January 1, 1974, as the cutoff date for the retroactive payment of benefits. This section does not provide when benefits may commence *after* January 1, 1974. Such determination, in the absence of evidence of onset of total disability, is based on the filing date of the claim as provided at 20 C.F.R. §§725.503(b), 727.302(c). The Board further held that these regulations are consistent with the language and intent of Section 435(c), and do not discriminate unfairly against Part B claimants, as opposed to Part C claimants, with respect to the commencement of benefits. ***New v. Director, OWCP***, 11 BLR 1-139 (1987), *aff'd sub nom. Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988), cited in ***Lykins v. Director, OWCP***, 12 BLR 1-181, 1-182 (1989).

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