

Congress of the United States
Washington, DC 20510

February 28, 2014

The Honorable Thomas E. Perez
Secretary
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210

Dear Secretary Perez:

We write today to share our deep concerns about a rule proposed by the Department of Labor in December 2012, titled “Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges” (OALJ Rule). Although the stated purpose of the rule is simply to “harmonize administrative hearing procedures” with the Federal Rules of Civil Procedure (FRCP), in at least one important area the changes set forth in the proposal could facilitate parties concealing information needed for the fair adjudication of Black Lung Benefits claims.

Thousands of miners throughout the country suffer from pneumoconiosis, a debilitating and deadly disease commonly referred to as Black Lung. We strongly support the Department’s ongoing efforts to protect miners from developing Black Lung disease in the first place, and also want to ensure that miners receive the relief to which they are lawfully entitled under the Federal Black Lung Benefits Program. The Department’s recent creation of a pilot program to allow long-term miners to compile additional medical evidence in support of their claims is an important step in the right direction. But, there is also a need to address a more discrete, but equally important, issue concerning a miner’s access to medical records that have been prepared by coal operators’ doctors and medical experts – an issue that is directly implicated by the proposed OALJ Rule.

Late last year, an investigation by ABC News and the Center for Public Integrity documented the unfair burden miners face when seeking benefits under the Black Lung Benefits program, and revealed the very real harm that occurs when medical records are concealed from miners who have filed claims. That investigation identified numerous cases in which coal operators and their attorneys intentionally withheld evidence of the existence of Black Lung disease from miners, widows, judges, and even other doctors they hired to testify in these cases. As a result of these practices – which have rightly been described as “misleading”, “deceitful”, “dishonest”, and an “affront to justice” – miners and widows were deprived of their federal benefits and even resumed working in conditions that exacerbated their disease. After years of fighting to prevent miners from receiving benefits, operators, in some cases, have chosen to

concede liability rather than disclosing the very medical evidence that might have proved the existence of Black Lung disease in the first place.

We are very concerned that, if implemented, the OALJ Rule would allow these practices to become more widespread by changing the evidentiary standards under which miners can access medical reports that have been prepared by company-hired doctors or medical experts. Under existing regulations at 29 C.F.R. §18.14(c), miners are entitled to receive copies of medical reports from non-testifying experts as long as they can show a “substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means”. However, under section 18.51(d)(4)(B) of the Department’s proposal, which adopts language nearly identical to Rule 26(b)(4)(D)(ii) of the FRCP, miners would be prohibited from accessing these medical reports unless they can show “exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means”.

Changing this evidentiary standard in this manner would make it all-but-impossible for miners to receive copies of medical reports that were prepared by coal operators’ doctors or their experts. Federal courts have described the “exceptional circumstances” requirement under the FRCP as a “very high” burden, a “heavy burden”, and “an even higher barrier” than the “substantial need” requirement. Furthermore, the Benefits Review Board (BRB), which hears appeals in Black Lung cases, has repeatedly refused to adopt the FRCP for Black Lung claims and has explicitly denied operators’ requests to impose the “exceptional circumstances” requirement on miners who are seeking copies of medical reports. In the 2007 case, *Belcher v. Westmoreland Coal Co.*, the BRB upheld an ALJ’s decision to provide a miner with copies of these reports, and issued a clear decision on this matter:

Employer asserts that the Federal Rules of Civil Procedure (FRCP) are persuasive authority to support its argument that the report of a non-testifying expert witness does not have to be disclosed without a showing of exceptional circumstances. Contrary to employer’s assertion, the administrative law judge properly relied on 29 C.F.R. §18.14 of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). Section 18.14 provides, in pertinent part, that a party may obtain discovery regarding any relevant matter, not privileged, upon showing substantial need of the materials in the preparation of the party’s case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. 29 C.F.R. §18.14.

The importance of enabling miners to access these medical reports cannot be overstated. The reports not only provide evidence concerning miners’ eligibility for Black Lung benefits,

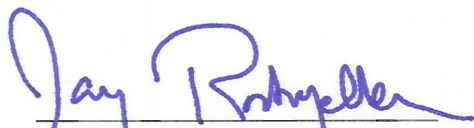
they also contain diagnoses of miners' medical conditions that can assist miners and their doctors as they pursue treatment to manage the disease. Yet, without analysis or justification, the proposed OALJ Rule would overturn this established precedent in the Federal Black Lung Benefits Program, to the clear detriment of miners.

We therefore request that the Department retain the existing standard for the discovery of medical evidence of non-testifying experts in Black Lung claims that is currently found in 29 C.F.R. §18.14(c) – providing access to those reports where the miner shows a “substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means”.

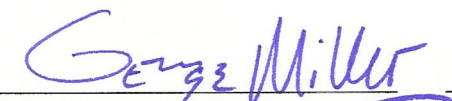
Further, we recognize that the “substantial need” requirement found in the Department’s existing regulations has itself proven to be a difficult burden for miners to meet, warranting your serious consideration of additional ways to improve miners’ access to medical records moving forward. But, under no circumstances should we implement a rule that imposes an even heavier burden on miners and their survivors, and rolls back the minimal rights they are currently afforded to receive copies of these medical reports. We hope you agree that such an outcome is untenable, particularly in light of the investigative report showing that the problems surrounding the concealment of medical evidence may be more pervasive than initially believed.

Should you have any questions, please contact Greg Buzzard, General Counsel, Office of Senator John D. Rockefeller IV (202-224-6472), or Richard Miller, Senior Policy Advisor, House Committee on Education and the Workforce (202-225-3725).

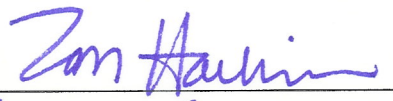
Sincerely,



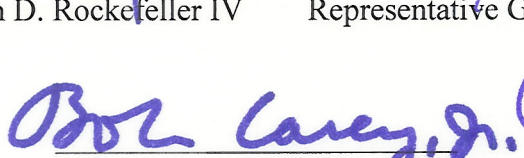
Senator John D. Rockefeller IV



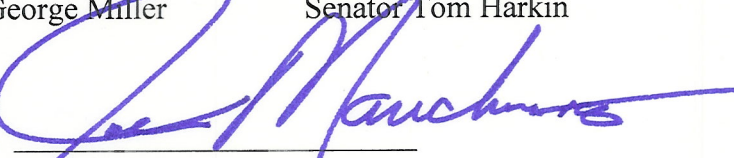
Representative George Miller



Senator Tom Harkin




Senator Robert P. Casey Jr.



Senator Joe Manchin III



Representative Nick J. Rahall



Representative Joe Courtney

cc: The Honorable M. Patricia Smith, Solicitor of Labor