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Black lung benefits and Constitutional challenges: the Byrd Amendments to the Black Lung Benefits Act; and the Kentucky consensus procedure

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This note discusses two recent issues where legislation concerning benefits for coal workers affected by pneumoconiosis (black lung)[1] was challenged under the US Constitution, including issues of due process, equal treatment and the takings clause. Congress has recently restored earlier legislation making it easier for the survivors of workers affected by black lung to qualify for federal benefits. Several courts of appeal have upheld this legislation against constitutional challenges from employers holding that it is neither in breach of the employers' due process rights nor a taking within the meaning of the Fifth Amendment to the Constitution.[2] In contrast, the Kentucky Supreme Court has found unconstitutional, on equal protection grounds, a special 'consensus' procedure by which coal workers affected by pneumoconiosis were required to prove their claim for workers compensation. The cases highlight the rather different standards which are applied by the courts even where they are (nominally) applying a similar standard. For example, the Seventh Circuit, upholding the recent amendments to the Black Lung Benefits Act, stated that

> Due process only requires Congress to have acted rationally, not necessarily intelligently.[3]

In contrast, the Kentucky Supreme Court argued that 'the rational basis standard, while deferential, is certainly not demure'[4] and applied, what Justice O'Connor has described as, 'a more searching form of rational basis review'.[5]

1. The Byrd Amendments to the Black Lung Benefits Act[6]

Many challenges to the constitutionality of the recently enacted Patient Protection and Affordable Care Act (ACA) are before the courts. Most of the litigation centers on the 'individual mandate' which requires individuals to purchase health insurance or pay a

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[1] Pneumoconiosis is defined as: [I]nflammation commonly leading to fibrosis of the lungs due to the irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc.; the most prominent symptoms are: pain in the chest, cough, little or no expectoration, dyspnea, reduced thoracic excursion, sometimes cyanosis, and fatigue after slight exertion. Stedman's Medical Dictionary 1109. It is also known as 'black lung' disease.

[2] Keene v. Consolidation Coal Co., 645 F.3d 844 (7th Cir. 2011); B & G Construction Company, Inc. v. Director, OWCP, 662 F.3d 233, (3d Cir. 2011); West Virginia CWP Fund v. Stacy, __ F.3d __, 2011 WL 6062116 (4th Cir. Dec. 7, 2011).

[3] Keene v Consolidated Coal Co. 645 F.3d 844 (2011) at 850.

[4] Vision Mining, Inc. v. Gardner, 2010-SC-000311-WC; Peabody Coal Co. V Martinez, 2010-SC-000438-WC (Ky. Dec. 22, 2011) at 24.

[5] Lawrence v. Texas, 539 U.S. 558, 580 (2003) (concurring in part).

[6] This section provides only a brief summary of the history of the Act. As the Third Circuit pointed out in 1991 '[t]he statutory background we confront could hardly be more complicated.' Helen Mining Co. v. Dir., OWCP, 924 F.2d 1269, 1271-73 (3d Cir. 1991) (en banc) and as the court stated in *B & G* 'since then with the enactment of the PPACA the statutory background has gotten even more complicated'. A more detailed outline of its history, at least as far as this is relevant to the issues here, is contained in *B & G.*

penalty. However, the cases discussed here involves the constitutionality of a less well-known (and rather less well debated) section of the Act (§ 1556).

The Federal Coal Mine Health and Safety Act of 1969 provided benefits to the dependents of coal miners affected with pneumoconiosis.[7] The relevant provisions of the 1969 Act were amended and redesignated as the Black Lung Benefits Act of 1972 (the Act). There were subsequently numerous amendments to the provisions of the Act including restrictive amendments in 1981 in response to a 'soaring' number of claims and the perceived consequences for the coal mining industry. One of the numerous provisions of the ACA (which has nothing whatsoever to do with Affordable Care) restored two provisions of the Black Lung Act which had been deleted by Congress in 1981.[8] These were that

1) An eligible survivor of a deceased miner, who was determined to be eligible to receive benefits at the time of his death, is not required to file a new claim for benefits after the death of the miner; and
2) If a miner was employed for fifteen years or more in one or more underground coal mines and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis.[9]

Statutory interpretation

The first issue that arose (in two of the cases) was the correct interpretation of the amendment restoring (or purporting to restore) the 'automatic' entitlement to death benefits. While Congress had restored the provision stating that an eligible survivor was not required to file a new claim for death benefits, it did not remove the language Congress inserted in the Act in the 1981 amendments requiring a survivor of a miner to show a causal connection between the miner's pneumoconiosis and the death.[10] The Third Circuit was satisfied that standing alone the meaning of the restored provision was clear and unequivocal and meant that a survivor to be entitled to benefits need not establish that pneumoconiosis contributed to a miner's death.[11] The court rejected some attempted readings of the provision in manner consistent with the other provision of the Act as they would result in the restored provision being without any effect. It concluded that

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[7] For the purposes of the Act, pneumoconiosis is 'a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment.' 20 C.F.R. § 718.201

[8] Section 1556(b) of the PPACA, entitled 'Equity for Certain Eligible Survivors'. Senator Robert C. Byrd of West Virginia, was the sponsor of the amendment.

[9] This presumption could be rebutted only by establishing that (a) the miner did not, have pneumoconiosis, or that (b) his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine.

[10] In addition the general purpose section of the Act provides that 'the purpose of this subchapter [is to] provide benefits . . . to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners *whose death was due to such disease*[.]' 30 U.S.C. § 901(a) (my emphasis).

[11] *B & G* at p. 35.

> Congress made its intentions clear and manifest: retroactively to January 1, 2005, to provide benefits automatically to the eligible survivors of miners who were receiving benefits at the time of their death. Even though we take the presumption against implied repeals into consideration, we are constrained to hold section 1556, as Congress' latest legislation on the subject of survivors' benefits, negates any language suggesting that an eligible survivor of a miner who was eligible to receive benefits at the time of his death must file a new claim in order to prove that the miner's death was due to the effects of pneumoconiosis.[12]

The Fourth Circuit in *Stacy* adopted a similar approach, following the Third Circuit decision in *B & G* (although it held that the issue had been waived by the insurer).[13]

Due process

The employers/insurers argued that the ACA amendment violated the Fifth Amendment's Due Process Clause which prohibited the United State from depriving any person of property without due process of law. Due process arguments encompass both procedural and substantive issues.

B & G v Director OWCP

In the Third Circuit case, B & G argued that the amendment violated its procedural due process rights inasmuch as it precluded a mining company from introducing evidence that a miner who was receiving benefits during his or her lifetime died from causes unrelated to pneumoconiosis and thus denied the employer of all opportunity to a fair and just hearing. The Court rejected the view that the provision created a presumption at all. Rather Congress had simply

> set forth as substantive law a provision that the survivor of a miner receiving benefits is entitled to survivor's benefits regardless of the absence of causation between the miner's pneumoconiosis and his death.[14]

Even if the Court had agreed that the provision involved a rebuttable presumption, it would have rejected the argument on the basis that the question is not one of procedural fairness, but rather whether the plaintiff could demonstrate that the inference is not 'rationally related' to a legitimate legislative classification.[15]

Turning to substantive due process, B & G contended that the amendment had no rational basis and ran counter to the stated purpose of the Act in transforming ‘what has always been a compensation system based on death due to pneumoconiosis, into a pension system that awards survivor benefits upon the death of a miner, without regard to the cause of the miner's death.’ The Court pointed out that the basic premise of B & G's argument was faulty

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[12] At. P. 45. Judge Hardiman, concurring in the judgment, was left ‘befuddled’ by the internal inconsistencies of the statute, as amended. Readers of his opinion may, however, be equally befuddled as to his own conclusions on the issues or rather as to the lack thereof.

[13] *Stacy* at pp. 18-22.

[14] *B & G* at p. 52.

[15] Citing Michael H. v. Gerald D., 491 U.S. 110, 120-21, (1989) (plurality op.).

as from 1977 until 1981 the Act provided for survivors' benefits in cases of miners who died with, even if not from, pneumoconiosis. In order to prove that a statute 'adjusting the burdens and benefits of economic life' violates substantive due process, B & G would have to show that Congress acted in an arbitrary and irrational way by enacting the legislation. The plaintiffs were faced by the barrier that the Supreme Court had already rejected challenges to the Act itself in *Usery v. Turner Elkhorn Mining Co*.[16] B & G argued that section 1556 had no rational basis by pointing to the lack of legislative history relating to the amendment compared to prior amendments to the Act which, according to B & G, 'were preceded by lengthy and detailed reports and public hearings . . . .' Given that the Supreme Court has never required a rational purpose to be articulated by the legislature, the court shortly disposed of this argument. Second, B & G argued that section 1556 violated substantive due process inasmuch as it was incompatible with the general purpose of the Act. Given that the Supreme Court in *Turner Elkhorn* had rejected similar challenges to the Act, the court also rejected this argument. The court also disagreed with B & G's argument that the amended section *was* inconsistent with the Act's general statement of purpose. The court ruled that the automatic award of benefits to dependents would further Congress' goal of 'ensur[ing] that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.'[17] The fact that the amendment might be more inclusive than it need be to further that particular goal was not grounds to invalidate it under a rational basis review.

Keene v Consol

Consol argued that retroactive application of the amendment deprived it of due process. Again the Seventh Circuit shortly rejected this argument as the Supreme Court in *Turner Elkhorn* had already rejected an argument that the Act as a whole violated due process because it imposed retroactive liability on coal mine operators.[18] There, the Supreme Court concluded that

> the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor—the operators and the coal consumers.[19]

Consol argued that, because Congress did not discuss the retroactive nature of section 1556, the legislation was irrational. But the Seventh Circuit pointed out that Congress is not required to discuss an act's purpose to satisfy due process. It is enough that a rational basis exists and the court had no difficulty conceiving of such a basis, i.e. to ease the path to recovery for claimants who could prove at least 15 years of coal mine employment and a totally disabling pulmonary impairment. Consol also argued that, because the General Accounting Office (GAO) findings led to Congress's decision to limit the 15-year presumption in 1981, it was

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[16] 428 U.S. 1, (1976).

[17] 30 U.S.C. § 901(a).

[18] *See Turner Elkhorn,* 428 U.S. at 19-20.

[19] *Id.* at 18.

irrational to resurrect the presumption in 2010 absent new evidence. The Court showed little sympathy for this argument:

> Due process only requires Congress to have acted rationally, not necessarily intelligently. Just because some members of Congress once believed that the 15-year presumption was unwise or unnecessary doesn't mean that they can't change their minds.[20]

West Virginia CWP v Stacy

Very similar arguments were advanced in the most recent case and rejected for more or less the same reasons. The Fourth Circuit quoted extensively from both the *B & G* and *Keene* decisions in rejecting the due process argument. It also pointed out that the 'absence of arbitrariness' in the amendment was underscored by the measured approach Congress adopted in the automatic survivorship amendments by limiting retroactivity to claims made after January 1, 2005.[21]

Takings clause

The employers/insurers also argued that the amendment was in breach of the takings clause. The takings clause of the Fifth Amendment provides that

> ... nor shall private property be taken for public use, without just compensation.

Here the courts differed as to whether the clause was applicable or not. The Third Circuit stated that a 'taking' under the Fifth Amendment 'is not limited to the government's physical invasion of property but also may result from the application of an economic regulation, such as the Act.'[22] However, the Fourth Circuit held that because the amendment 'merely requires petitioner to pay money— and thus does not infringe a specific, identifiable property interest—the Takings Clause does not apply'.[23] The Seventh Circuit did not discuss applicability moving straight to a consideration of whether the clause was breached.

The confusion as to the scope of the takings clause arises from the well-known decision in *Eastern Enterprises*. In that case the Supreme Court found that the Coal Act was unconstitutional as regards Eastern Enterprises on the basis that even though it never signed onto the 1974 agreement providing lifetime health benefits to retired miners, the Coal Act imposed severe financial liability on it for such benefits disproportionate to Eastern Enterprises' experience with the benefits program.[24] However, although five justices agreed that the provision was unconstitutional, there is no majority as to the basis of that decision. A plurality of four found an infringement of the takings clause. However, Justice Kennedy

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[20] At 850.

[21] At page 9.

[22] Citing Eastern Enterprises v. Apfel, 524 U.S. 498, 522-23 (1998) (plurality op.). Although the court noted the 'fractured nature' of the opinion.

[23] At 12. The court would have rejected the takings argument even assuming it applied (at 14-15). See also Holland v. Big River Minerals Corp., 181 F.3d 597 (4th Cir. 1999),

[24] See Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

who concurred in the judgment based his decision on a breach of due process. Not only that but he specifically rejected the application of the takings clause to the facts of the case stating that the clause only applied to the taking of 'an identified property interest', a position also adopted by the dissent. So a majority of five rejected the application of the takings clause to facts similar to those arising in the Black Lung Benefit Act cases.

In any case, all three courts rejected the takings clause arguments. It was accepted that a party characterizing governmental action as an unconstitutional taking 'bears a substantial burden.'[25] Evaluating constitutionality under the takings clause involves an examination of the 'justice and fairness' of the regulation. Three factors have 'particular significance' to this inquiry: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.[26] The Seventh Circuit shortly rejected the challenge arguing that the employer had produced only vague evidence of the financial burden and the impact on investment-backed expectations. On the third point, it ruled that it would be surprising if an Act which had already withstood constitutional challenge in *Turner Elkhorn* was now found to be a breach of the takings clause.

The Third Circuit considered the arguments in some more detail but again rejected them. It concluded that

> even if the plurality opinion was binding precedent, which it is not, the lesson of *Eastern Enterprises* is that a regulation violates the Takings Clause in circumstances in which it imposes liability which is not proportional to a party's experience with the problem that the regulation addresses.[27]

Although B & G provided some more detailed (if rather speculative) estimates of the economic impact, the court concluded that the amendment did not pose a disproportionate burden on the employer because B & G would only be liable for paying benefits to the survivors of the miners it employs or employed and who received federal black lung benefits at the time of their death.

As to interference with investment-backed expectations, B & G argued that the 2010 amendments, reversing the 'progress that has been achieved' since the 1981 amendments, could not have been predicted. However, the Third Circuit had already stated, in relation to the Coal Act, that

> [coal] companies had no reasonable expectation that the government would not expand its regulation of health benefits in the coal industry, given the history of labor unrest and government intervention.[28]

Equally, it was unreasonable for B & G to argue that it was 'blindsided' by Congress' amendment.

Finally, as regards the 'character' of government action, B & G fell back on its due process argument that Congress did not debate, discuss, or study adequately the Act before

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[25] Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998).

[26] Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986).

[27] *B & G* at p. 74.

[28] Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999).

amending it in the ACA. The court had already rejected this but, in any case, held that it misapplied the governmental action factor of the Taking Clause inquiry, which normally asks whether the regulation 'is a physical invasion of land and thus more likely to constitute a taking or a 'public program adjusting the benefits and burdens of economic life to promote the common good,' which ordinarily will not be compensable.'' [29] Clearly the current case did not involve such as physical invasion of property. Nor did it implicate 'fundamental principles of fairness underlying the Takings Clause' as the challenged statute did in Eastern Enterprises. Thus the three courts also rejected the takings clause argument and upheld the amendments.

2. The Kentucky consensus procedure

Kentucky has one of the highest pneumoconiosis incidence rates in the United States of America and claims related to coal workers pneumoconiosis made up over 40% of all occupational disease claims filed in Kentucky in the period 2000-2010.[30] The Kentucky Revised Statutes (KRS) 342.316 mandates a special 'consensus' procedure in coal workers' pneumoconiosis claims under the workers compensation scheme. Under this procedure, the worker and the employer each submits a chest x-ray and a 'B' reader's interpretation of the x-ray. If there is a consensus between the interpretations, this can be accepted.[31] If there is no consensus, KRS 342.316(3)(b)4.e requires that the x-rays be interpreted by a panel of three 'B' readers. KRS 342.316(13) provides a rebuttable presumption that a consensus of the three 'B' readers is correct but allows a worker to rebut this with 'clear and convincing evidence'.[32] If no consensus is reached the administrative law judge (ALJ) must make a decision based on the evidence.

Durham v Peabody Coal[33]

The issue had earlier been considered by the Kentucky Supreme Court in *Durham v Peabody Coal*. In *Durham*, the workers argued that the consensus procedure found in KRS 342.316 discriminated unlawfully between workers who were injured by a harmful occupational

[29] New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996).

[30] Minton CJ dissenting in *Gardner* at 41-42.

[31] KRS 342.316(3)(b)4.f. requires two x-ray interpretations to be within the same major classification and within one minor classification to be in consensus.

[32] This has been defined as 'evidence substantially more persuasive than a preponderance of the evidence, but not beyond a reasonable doubt': Fitch v. Burns, 782 S.W.2d 618, 622 (Ky.1989).

[33] 272 S.W.3d 192 (Ky. 2008). See M.A. Cocanougher, 'Breathing Easier: Equal Protection and Workers' Compensation for Coal Workers' Pneumoconiosis in Durham v. Peabody Coal Company' Kentucky Journal of Equine, Agriculture, & Natural Resources Law, 2(2) (2009-2010) 249-60. In Hunter Excavating v. Bartrum, 168 S.W.3d 381, 385 (Ky.2005), the Supreme Court had earlier decided that the consensus procedure did not deny due process to workers who suffer from coal workers' pneumoconiosis. The Court found an as-applied equal protection violation with respect to the consensus procedure in *Cain v. Lodestar Energy, Inc.,* 302 S.W.3d 39 (2009). For a criticism of that decision see, Mel Cousins. 2010. 'Coal workers' pneumoconiosis and equal protection in Kentucky – Cain v Lodestar Energy, Gardner v Vision Mining and Martinez v Peabody Coal'. Available at: http://works.bepress.com/mel_cousins/14

exposure to coal dust and those who became disabled by a traumatic injury. They argued that the procedure denied them equal protection in two ways.

> First, it requires them to submit clear and convincing evidence to rebut the panel's consensus, while other workers may prove an injury with only a preponderance of the evidence. Second, it limits them to proving the existence of the disease with x-ray evidence, which strips the ALJ of the discretion to consider a worker's credible testimony regarding breathing difficulties and the length and nature of the exposure to coal dust.

However, the Supreme Court concluded that although KRS 342.316 treated workers who suffer from coal workers' pneumoconiosis differently from those who sustain a traumatic injury, it was neither arbitrary nor unfair to the former group. In particular, the Court took the view that that inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment.[34] The Court pointed out that pneumoconiosis develops gradually and can be difficult to diagnose, whereas traumatic injuries generally occur suddenly and are more easily diagnosed. In addition, medical evidence was that coal workers who suffer from pneumoconiosis should be encouraged to find other employment[35] whereas workers who sustain traumatic injuries are not, as a rule, advised to change employment to avoid the risk of further injury. Thus the Court was not convinced that the two groups were similarly situated. In addition, it took the view that although KRS 342.316(13) might appear to be discriminatory, it did not actually impose a greater burden of proof on workers who claim benefits as a result of traumatic injury (under KRS 342.732). The Court held that KRS 342.316(13) only acknowledged the reality that, faced with equally convincing evidence, the claimant must offer more persuasive evidence in rebuttal or lose. It ruled that the provision 'impose[d] no greater burden than on any other worker whose evidence is met with very persuasive contrary evidence'.

Gardner* and *Martinez

In *Durham*, the Supreme Court noted that the workers had failed to raise the argument that the statute unfairly treats individuals who suffer from coal workers' pneumoconiosis differently from those who suffer from other occupational pneumoconioses or diseases before the court of appeals and thus, the argument was not properly before the *Durham* court. However, it was subsequently raised and decided in favor of the workers in two separate decisions of the court of appeals.[36] The Kentucky Supreme Court has now given a decision on both these cases upholding the constitutional challenge to the consensus procedure.

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[34] Sections 1, 2, and 3 of the Kentucky Constitution provide that the legislature does not have arbitrary power and shall treat all persons equally. A statute complies with Kentucky equal protection requirements if a 'reasonable basis' or 'substantial and justifiable reason' supports the classifications that it creates.

[35] Kentucky Harlan Coal Company v. Holmes, 872 S.W.2d 446 (Ky. 1994).

[36] Gardner v Vision Mining No. 2009-CA-000874-WC (Ky. Ct. App. 2010); and Martinez v Peabody Coal No. 2009-CA-000927-WC (Ky. Ct. App. 2010). The facts and analysis of these decisions are set out in Mel Cousins. 2010. 'Coal workers' pneumoconiosis and equal protection in Kentucky – Cain v Lodestar Energy, Gardner v Vision Mining and Martinez v Peabody Coal'. Available at: http://works.bepress.com/mel_cousins/14

Despite the rather lengthy decision, the approach adopted by the majority of the Court was quite straightforward. It first clarified that there was no medical difference between pneumoconiosis affecting coal workers and the same disease as it affected other workers. The Court found that, simply put, 'pneumoconiosis is pneumoconiosis is pneumoconiosis.'[37]

Second, it found that Kentucky law treated coal workers differently, and less favorably, than those from other occupations with respect to workers compensation. The Court found that 'overcoming the presumption created by a 'B' reader consensus is practically impossible.'[38]

Based upon the statutory language (but noticeably not on any statistical evidence), the Court concluded that

> coal workers' pneumoconiosis claimants are subjected to much more stringent statutory treatment than all other pneumoconiosis claimants. Specifically, a coal workers' pneumoconiosis claimant must endure a more exacting procedure to prove his claim and is subjected to a much higher rebuttable standard, if rebuttable at all (in life, at least).

The Court acknowledged that this conclusion 'seemed to contravene' the Court's logic in *Durham* where it had found that the procedure 'imposes no greater burden than on any other worker whose evidence is met with very persuasive contrary evidence'. The Court stated that '[t]his viewpoint, however, would require us to ascribe an unreasonable meaning to language … '.[39] It would appear that the Court here acknowledges that its approach is inconsistent with *Durham* though it does not explicitly overrule that decision (or part thereof).

Therefore, there was different (and less favorable) treatment of a similar disease. The Court turned to consider whether this was allowed under the equal protection guarantee of the Fourteenth Amendment and Sections 1, 2, and 3 of the Kentucky Constitution which provide that the legislature does not have arbitrary power and shall treat similarly situated persons equally. The Court found that rational basis review applied as the classification did not involve a suspect (or quasi-suspect) class. The Court (somewhat defensively) pointed out that both the US and Kentucky Supreme Courts had found equal protection violations based upon the rational basis standard.[40] The Court concluded that

> our precedent, along with that of the United States Supreme Court, demonstrates that the rational basis standard, while deferential, is certainly not demure.

The Court could

> discern no rational basis or substantial and justifiable reason for the singular two-step 'consensus procedure' or the 'clear and convincing' evidentiary standard, as it is

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[37] Citing Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 456 (Ky. 1994) (Stephens, C.J., dissenting).

[38] At 7 (although the Court does not cite any statistical evidence as to the number of cases in which such evidence is or is not overturned).

[39] Fn. 10.

[40] In the case of the US Supreme Court, the Court cited the usual suspects including City of Cleburne v. Cleburne Living Center 473 U.S. 432 (1985) and Romer v. Evans, 517 U.S. 620 (1996). (The Court also cited to Plyler v. Doe, 457 U.S. 202 (1982) although, in that case, the Supreme Court did specifically apply a higher standard of review (ibid. at 224)). The Kentucky cases cited included Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718, 723 (Ky. 2005).

> simply counterintuitive to prescribe differing standard of proof requirements for the same disease. Nor can the disparate treatment of coal workers be justified as a cost-saving measure, as it is axiomatic that, if the enhanced procedure saves money, the state would save more money by subjecting all occupational pneumoconiosis claimants to the more exacting procedure and higher rebuttable standard.[41]

It also rejected any argument that the two-step procedure promoted prompt and efficient processing of coal mining pneumoconiosis cases, as 'an additional step presents nothing more than another formidable hurdle for the coal worker before he or she can receive compensation'.[42] Finally, it shortly rejected the argument that the provision of somewhat different benefits to coal workers with pneumoconiosis could justify this difference in treatment arguing that 'one type of disparate treatment does not constitute a rational basis or substantial and justifiable reason for another form of disparate treatment'.[43] Accordingly the Court held that the consensus procedure and the clear and convincing evidentiary standard were unconstitutional.[44]

Minton CJ (joined by Abramson, J.) dissented, arguing that the consensus procedure and the clear and convincing burden of proof are both rationally related to the legitimate government objectives of obtaining unbiased medical diagnoses and prompt and efficient processing of occupational disease claims. Unlike the majority, Minton CJ referred to the high level of coal workers pneumoconiosis claims, making up over 40 per cent of all occupational disease claims in the period 2000-2010. He correctly pointed out that equal protection law did not require a classification between coal-related pneumoconiosis claims and claims of pneumoconiosis from other dust sources to be based on science. He also argued that the special benefits awarded to coal workers with pneumoconiosis further justified applying different procedures and standards to coal-related pneumoconiosis claims.

Reviewing the rationale for the consensus procedure, Minton CJ argued that rather than enacting the procedure out of a desire to harm coal workers, the legislature intended the amendments to benefit coal workers by allowing coal miners with pneumoconiosis to receive more benefits in an efficient manner. He argued that whether or not the amendments succeeded in achieving these goals was not the Court's concern under proper equal protection analysis. Rather the deciding factor was that the legislature could have rationally believed the consensus procedure and the clear and convincing rebuttal standard would ensure unbiased, prompt, and efficient processing of coal-related pneumoconiosis claims.

Minton CJ correctly criticized the majority's view that the difference in treatment could not be justified as a cost-saving measure as its logic would require expansion to all

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[41] At 30.

[42] At 30-31.

[43] At 33.

[44] Schroder J concurred in the judgment but argued that the constitutional violation arose as a result of the language of KRS 342.316(3)(b)4.b. which excluded coal workers from the normal procedure for the assessment of claims. He would have held that the legislature could constitutionally provide additional presumptions and benefits to those with radiographic evidence of the disease, and require additional evidence and burdens of proof in order to secure such additional benefits.

pneumoconiosis claims. As he pointed out, there was a heightened need for accuracy and efficiency for coal-related pneumoconiosis claims because of the sheer number of such claims. In any case, it is well established under equal protection law that the legislature need not tackle all problems in the workers' compensation system at once.

As to the requirement of 'clear and convincing' evidence for rebuttal, Minton CJ took the view that the majority opinion unquestionably overruled *Durham*.[45] In his view, even viewing the clear and convincing rebuttal standard as more burdensome, it was rationally related to the legitimate government interest in accurate findings of coal-related pneumoconiosis.

Discussion

The Black Lung Benefits Act

The decisions of the courts of appeal are clearly correct. Faced with the difficulty of establishing a breach of substantive due process and given the existing precedent upholding the Act itself against multiple challenges in *Turner Elkhorn,* it would have been very surprising if a breach of due process had been found. On the takings clause, even assuming it applied, there was little evidence to support a takings clause challenge. However, it is surely undesirable that the important issue as to whether the takings clause applies at all to an obligation to pay undifferentiated, fungible money should remain unclear.

To paraphrase the Seventh Circuit in *Keene*, the employers/insurers made some strong arguments as to why the provisions should not have been revived. And it may be, that Congress 'slipped § 1556 into page 142 of the 906-page piece of legislation known as the ACA.' 'But ... these assertions do not amount to grounds for sustaining [] constitutional challenges.'[46] The Fourth Circuit also took the view that

> petitioner's argument that the BLBA amendments only passed due to their 'inclusion . . . in approximately 2,700 pages of healthcare legislation,' ... threatens the separation of powers by inviting courts to scrutinize the process by which a coordinate branch of government goes about its business. Likewise, it invites every loser in a legislative fight to contest not only the constitutionality of Congress's final product, but the way that Congress went about enacting it. Such a plunge into the depths of Capitol Hill should be undertaken —if at all—only in the most extraordinary of circumstances, circumstances that are plainly not presented here. In sum, the difficulties with petitioner's view are evident and legion.[47]

Clearly the courts were correct not to strike down legislation on the basis of such assertions. However, it is equally difficult to see how the inclusion of these provisions in a largely

[45] At 55. Though he gets rather carried away in asserting that it also overrules Kentucky Harlan Coal Co. v. Holmes, 872 S.W.2d 446, 458 (Ky. 1994) simply because it relies on a dissenting opinion for its view that coal workers and others with pneumoconiosis are similarly situated and its approach is arguably inconsistent with that adopted in the earlier case.

[46] Keene at 851.

[47] At p. 8.

unrelated piece of legislation, without any formal discussion, could be described as legislative good practice.

The Kentucky consensus procedure

The Supreme Court majority's conclusion that coal workers pneumoconiosis claimants *are* similarly situated to those who have developed pneumoconiosis from another source (at least from a medical perspective) seems correct. But does the panel procedure amount to a denial of equal treatment? It will be recalled that the *Durham* court rejected the challenge in that case not only because coal workers pneumoconiosis and trauma injury claimants were not similarly situated but also because the procedure did not 'actually impose a greater burden of proof' on coal workers pneumoconiosis claimants. The *Durham* court noted that the Kentucky workers compensation system required a work-related harmful change in the human organism to be evidenced by 'objective medical findings'. Therefore anyone claiming workers' compensation benefits is required to prove the existence of injury or disease through the evidence of a doctor 'gained through direct observation and/or testing that utilizes objective or standardized methods'. The court ruled that the x-ray is 'the objective method by which physicians diagnose the presence of pneumoconiosis and categorize its severity'. In contrast, a worker's statements concerning the nature and duration of his exposure to coal dust could – according to the court - assist in determining the *cause* of pneumoconiosis but did not constitute 'objective medical findings' as regards the *presence* or *category* of the disease. But in *Gardner* the Supreme Court appears to have taken the view that the ALJ was precluded from considering the years of exposure to coal dust, the type of work performed, or the claimant's testimonial evidence of pulmonary dysfunction – all evidence which the *Durham* court appeared to consider irrelevant to the presence or category of pneumoconiosis.

As to the 'clear and convincing' evidence requirement, the *Gardner* court's interpretation of this requirement (as being 'practically impossible' to satisfy) is clearly inconsistent with the interpretation in *Durham* as imposing 'no greater burden than on any other worker whose evidence is met with very persuasive contrary evidence'. In *Hunter Excavating v. Bartrum*,[48] the Supreme Court also specifically stated that

> [N]othing in KRS 342.316(3) . . . prevents a party from introducing the type of evidence that will rebut a consensus classification.[49]

In reality, it is impossible to separate out the rebuttal standard from the operation of the consensus procedure itself. If the consensus procedure provides a 'fair' system of assessment, then it is not unreasonable to require clear and convincing evidence to rebut it. It is unfortunate that none of the decisions contain any statistical evidence as to how the consensus procedure actually works in practice. Thus we do not know whether coal workers are more or less likely to qualify for benefits than persons with other form of pneumoconiosis.

But even if the consensus procedure does provide less favorable treatment to coal workers, the majority decision is very questionable under rational basis review. As the dissent points

[48] 168 S.W.3d 381 (Ky. 2005).

[49] At 385.

out, the legislature could rationally have believed that the consensus procedure would promote the prompt and efficient processing of occupational disease claims. Coal workers are not a suspect group and there was not any evidence of any desire to harm this group which might justify a more stringent application of rational basis review. The fact that the legislature could have included all pneumoconiosis cases is simply irrelevant in equal protection law applying rational basis review. Whether the extra benefits provided could justify differential treatment is perhaps more questionable. However, it is not necessary to address this issue as the legislation is clearly constitutional in any case.

More generally, worker's compensation schemes (and not only in the USA) are riddled with specific measures which treat particular injuries and diseases in particular ways. These are, in part, a historical accumulation but many were initially adopted at a time when equal protection issues did not loom large for policy makers. Reviewing the case law, one can identify the following general principles:

1) There should be no difficulty in providing different (and more beneficial) treatment for specific diseases where this reflects the particular nature of the disease or the particular economic and social context;[50]

2) Likewise it should be acceptable to impose an additional burden on persons suffering from a particular disease where (but only where) this relates to the particular nature of or issues relating to the disease;[51]

3) However, where a requirement in relation to a specific disability treats persons differently (either by denying a benefit or imposing an additional burden) *without any relevant justification* it would seem possible that it would be inconsistent with the Federal and/or state guarantees of equal protection.[52]

It is arguable that the consensus procedure was justified by the particular issues relating to coal workers pneumoconiosis in Kentucky. However, the Supreme Court has found that

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[50] For example, in Jones v Weyerhaeuser Co. 141 NC App 482 (NC App, 2000) the court upheld a special compensation scheme for workers suffering from asbestosis or silicosis as this related to the 'incurable, latent and unique nature of these diseases, factors not apparent in other occupational diseases'. See also Kentucky Harlan Coal Co. v. Holmes 872 S.W.2d 446 (Ky. 1994).

[51] Thus in Sakotas v Workers Comp. Appeals Bd. 80 Cal. App. 4th 262 (Cal App, 2000) the court upheld a requirement requiring a higher threshold of compensability in the case of psychiatric claims given the difficulty of defining the injury and establishing causation. Similarly in Tomsha v. City of Colorado Springs, 856 P.2d 13, 14 (Colo. App. 1992) the court upheld a requirement that a psychic injury claim be supported by the evidence of a physician or psychologist.

[52] As regards an additional probative burden, see, for example, Walters v Algernon Blair 120 NC App 398 (NC CA, 1995) (aff'd per curiam, 344 N.C. 628, 476 S.E.2d 105 (NC SC, 1996), cert. denied, 520 U.S. 1196 (1997)) in which an additional requirement on persons affected by silicosis or asbestosis for which the court found no valid reason was struck down (see also Payne v Charlotte Heating (NC CA, 2005) 172 NC App 496). In Esser v. Industrial Claim Appeals Office of the State of Colorado 8 P.3d 1218 (Colo. App., 2000) the court struck down a requirement that in a mental injury claim oral medical evidence was required (whereas for other injuries written evidence was acceptable) on the basis that there was no legitimate purpose for this additional requirement. As regards restrictions on benefit, see Henry v. State Compensation Ins, Fund (Mont, 1999) 1999 MT 126 where the court ruled that denying vocational rehabilitation benefits to persons with occupational diseases (which were provided to persons injured by accident) was a breach of equal protection. Similarly in Schmill v. Liberty Northwest Ins. Corp., (Mont, 2003) 2003 MT 80 the court held that reducing benefits in the case of occupational diseases (due to non-occupational factors) was in breach of equal protection as this did not apply to occupational accidents.

there was no relevant justification for the procedure and has, accordingly, found the law to be unconstitutional.

Judicial inconsistency

As noted in the introduction to this piece, one of the issues highlighted by these cases is the different standards applied to rational basis review by the courts in these cases.[53] The federal courts correctly applied a deferential rational basis review while the Kentucky court applied (arguably incorrectly) a more stringent form of review. It appears to be a feature of equal protection jurisprudence that while the federal courts apply a fairly consistent approach to rational basis review, the State courts are more inclined to apply heightened standards without any obvious justification.[54] This is, of course, in part a function of the Supreme Court's own application of a heightened standard of review in cases such as *City of Cleburne* and *Romer v Evans* while continuing to deny that it is doing so, thus leaving it open to other courts to do the same.[55] However, it is also, in part, an inevitable outcome of the USA's bifurcated form of jurisdiction.

[53] While one involved a due process claim and the other equal protection, the same standards should apply to rational basis review.

[54] See, for other exmaples, see Mel Cousins. 2010. 'Equal protection, workers compensation and offset of benefits – Merrill v Utah Labor Commission and Satterlee v Lumberman's Mutual Casualty Company'. Available at: http://works.bepress.com/mel_cousins/12

[55] 517 U.S. 620, 631 (1996).