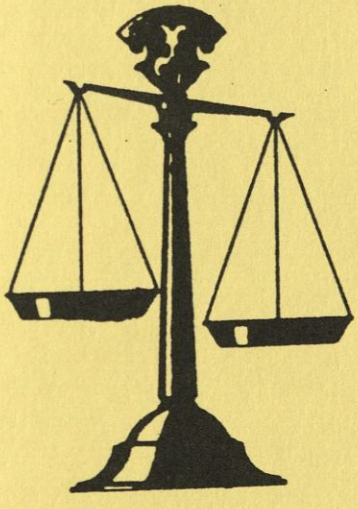
APPALACHIAN RESEARCH AND DEFENSE FUND OF KENTUCKY, INC.

SUMMARY

OF

MAJOR CASE ACTIVITIES

AND LITIGATION



1987 - 1989

INTRODUCTION

We are pleased to set forth a compilation of major litigation and activities as determined by various program staff for the period 1987-89. We are proud of these accomplishments and the positive gains we have been able to realize for our clients.

This time our summary begins with a description of our work in the area of employment law, beginning with cases involving safety discrimination in which companies have retaliated against miners who have lost their jobs for protesting unsafe conditions. We then continue with the description of our work in other substantive areas, as set forth in the table of contents. Generally, we have listed cases decided by appellate courts first, followed by decisions of the lower courts (or settlements reached after a case is filed), then those of administrative agencies, and finally cases which have been settled by negotiation.

These accomplishments are particularly significant since they have been achieved during a time of stagnant funding from the Legal Services Corporation in Washington, D.C., which has in turn resulted in further decreases in our staff.

We do want to mention the excellent work of program paralegals who continue to provide effective representation in cases involving federal and state benefit programs. Many of the appeals to federal court described in this summary were handled at the administrative appeals level by these paralegals. We also emphasize that this compilation represents only a fraction of the approximately 19,000 clients who were assisted by our staff during the three period of this report. This assistance may have come in the form of representation in complex litigation or in the form of a brief legal counseling session.

During 1989, we also expanded the scope of our private bar involvement program. Private attorneys are providing representation on a contract basis primarily in domestic relations cases in approximately 800 cases a year. Additionally, in 1989, we began a new pro bono program, Volunteer Lawyers for

Appalachian Kentucky (VLAK). With a grant from the Kentucky IOLTA Fund, we were able to employ a full-time Pro Bono Coordinator. During 1989, he was able to recruit a panel which now exceeds 100 attorneys in our 28 counties, and he was successful in obtaining free representation for 78 clients. During 1990, we hope to be able to provide free representation to at least 200 clients through this program.

As we enter the 1990's, we hope that we will see a supportive Legal Services Corporation that will seek additional funding for field programs to truly provide effective representation to low-income persons throughout the country.

In that regard, we do note that ARDF of Kentucky is a private, tax-exempt, nonprofit corporation, and that donations to our organization are tax deductible. We welcome your financial support.

John M. Rosenberg
Director
February, 1990

TABLE OF CONTENTS

consider R.J.'s physical and mental impairments in combination and had mechanically applied the Medical-Vocational Guidelines ("GRID") without fully assessing the impact of R.J.'s non-exertional limitations on his ability to perform substantial gainful work. The U. S. District Court reversed the ALJ's decision finding that R.J. had made a prima facie showing of disability and that the Secretary had failed to rebut R.J.'s prima facie case. However, the Court remanded the case to the Secretary for the taking of additional evidence.

On remand, the ALJ issued a recommended decision that R.J. be awarded benefits without a hearing. However, the Appeals Council reversed the ALJ's favorable decision, and ordered that an administrative hearing be held. ARDF then had R.J. examined by a Ph.D. psychologist, who diagnosed R.J. as suffering from a major depressive disorder. The psychologist testified at deposition that R.J. met the SSA's Listing of Impairments based on his depression. At hearing, the vocational expert employed by the SSA opined that R.J. was diaabled. Subsequently, the ALJ issued a decision finding that R.J. was disabled at the time of his initial application; and our client received nearly $10,000 in back benefits.

Hazard Office

B. Black Lung

Rapier v. Secretary of Health and Human Services. 808 F.2d 456 (6th Cir. 1986). Mrs. Rapier is a widow who applied in 1971 with the Social Security Administration for black lung benefits. The case was appealed to U.S. District Court which remanded the case in 1980. The administrative law judge denied the claim a second time based upon the fact that there was no medical evidence in the record to document that Mr. Rapier suffered from a severe respiratory condition at the time of his death. On appeal to the 6th Circuit Court of Appeals, Mrs. Rapier claimed that she was entitled to the rebuttable presumption found at 20 CFR 410.414 which states that lay evidence must be considered by the Secretary in determining whether or not the miner is totally disabled due to black lung. The Court of Appeals held that lay evidence alone was sufficient to invoke the presumption and remanded the matter to the Secretary. Upon remand, the Appeals Council held that there was insufficient lay evidence to invoke the presumption finding that the lay evidence came from interested witnesses such as the Claimant. On the third appeal to the U.S. District Court, the Magistrate recommended award of benefits, and judgment was entered on behalf of the Claimant 17 years after she applied for benefits.

Barbourville Office

Gray v. Director, Office of Workers' Compensation Programs and D. Y. v. Director, Office of Workers' Compensation Programs. Both Mr. Gray and Mr. Y. filed claims for black lung benefits with the Department of Labor before the permanent regulations (20 CFR Part 718) went into effect. In both cases, the administrative law judge found that the claimant had less than 10 years coal mine employment. The ALJ also found that the weight of the x-ray evidence established that both miners had pneumoconiosis. Because each miner had less than 10 years coal mine employment, neither miner was able to prove disability under 20 CFR Part 727. Therefore, their claims had to be evaluated under the requirements of 20 CFR Part 410 (regulations applying to black lung claims filed with the Social Security Administration prior to June 30, 1973). Both cases were appealed to the Benefits Review Board where it was argued that claimants were entitled to invoke the presumption of total disability found at 20 CFR 410.490(b) which allows for a finding of total disability due to pneumoconiosis if a chest x-ray establishes the existence of pneumoconiosis. There is no minimum amount of coal mine employment required in order

to invoke this presumption. Based on 30 U.S.C. 902(f)(2), the Secretary of Labor may not apply more restrictive criteria to any claim filed prior to March 31, 1980 than would be applicable to a claim filed on June 30, 1973. The Secretary of Labor contended that this statute only applied to medical criteria and not to the issue of length of coal mine employment. The Benefits Review Board upheld the denial of Mr. Gray's claim, and an appeal was filed with the U.S. Court of Appeals for the 6th Circuit. Soon after the appeal was docketed, the 6th Circuit issued the decision of Kyle v. Director, Office of Workers' Compensation Programs, 819 F.2d 139 (6th Cir. 1987) which adopted the arguments raised by Mr. Gray and Mr. Y. The parties agreed to remand Mr. Gray's case and the administrative law judge awarded benefits. The Benefits Review Board awarded Mr. Y. benefits.

Barbourville Office

OWCP v. D.Y. and OWCP v. B.G. The Department of Labor has begun reopening cases of persons who have been receiving black lung benefits for many years. The Department (OWCP) is saying that a mistake was made by them in the award of benefits initially and so they are reopening for a totally new determination of eligibility. We are challenging the Department's authority to reopen these cases where the information, upon which the reopening was based, was available to them at the time of the original award.

Barbourville and Harlan offices

Old Republic Insurance v. B. C. We represent B.C. in a proceeding in the Department of Labor for payment of Medical Expenses he has incurred in connection with the treatment of his Black Lung condition. Mr. C., a sixty-seven (67) year old former underground coal miner, was awarded Black Lung benefits in 1973. Subsequently the Department of Labor identified BEBE Coal Company as the coal mine operator responsible for payment of medical benefits under the Black Lung Act and in 1986 BEBE Coal and Old Republic Insurance Company agreed to pay for the medical treatment for Mr. C.'s Black Lung condition. However, when Mr. Case submitted his bills the Old Republic Insurance Company consistently refused to pay, claiming that the treatment was not in connection with his Black Lung condition. We represented Mr. C. before the Department of Labor seeking to compel the Old Republic Insurance Company to pay for the treatment received by Mr. C. After lengthy delays on the part

of the Department of Labor, in April, 1989, the Deputy Commissioner issued an order requiring the operator to pay for the majority of the charges Mr. C. had submitted. The operator has since appealed and the case is pending before the Office of Administrative Law Judges.

Prestonsburg Office

C. v. Karst Robbins Coal Company. This is a case of first impression regarding whether an award of benefits for black lung under Kentucky Workers Compensation can start the statute of limitations running on one's federal black lung claim. The pertinent regulation, 20 CFR 725.308 states a claim "shall be filed within three years after a medical determination of total disabilty." The Benefits Review Board upheld the hearing officer's ruling which agreeed with us and the Department of Labor that the fact an individualis found to be totally disabled due to black lung (pneumoconiosis) under the laws of any state, is not, by itself, sufficient notice to a miner of a need to file for federal benefits; and that only a medical determination by a physician and communicated to the miner or person responsible for his care should trigger the start of the three year period in which the claimant must file an application for benefits. The case has been remanded on other grounds.

Harlan Office

Kentucky Black Lung Association - We are working with the representatives of the local and state level Black Lung Associations at the request of Congressman Chris Perkins to develop an analysis of the shortcomings of the current Black Lung Program with the view towards a presentation at Congressional hearings which Congressman Perkins wishes to convene, along with other coal field congressional representatives. Currently the Black Lung claims denial rate is approximately 97%; there are extremely long delays in the claims process, and there are numerous difficulties with the administration of the program. Among other things claimants are simply not able to compete in the claims process with the opposing insurance companies who are able to employ an unlimited number of doctors to issue adverse opinions on the results of tests and the physical condition of the coal miner. The elimination of presumptions by the 1981 Black Lung Reform Act has also made it virtually impossible for disabled miners and widows to obtain benefits.

Prestonsburg Office

W. H. vs. D & R Coal Company. This is a Worker's Compensation case currently before the Board on motion for payment of claimant's reasonable medical expenses. D & R Coal Company and its insurer, Old Republic Companies, refuse to pay for any medical expenses relating to claimant's occupational disease, simple pneumoconiosis, for which he was awarded worker's compensation benefits. The award ordered that the Defendant-Employer and/or its insurance carrier pay for such medical, surgical and hospital expenses as may be reasonably required for the treatment of claimant's occupational disease. The employer claims that simple pneumoconiosis is asymptomatic and untreatable and, therefore, it has no liability. The employer claims that the claimant's symptoms are the same as those found in the general population, i.e., caused by smoking and pollution, and are not compensable.

The case then presents two issues:

1) Does simply pneumoconiosis have symptoms and, if so, can they be treated?

2) Does the statute's "cure and relief" provision mean that the employer is liable for palliative measures when the disease is incurable?

Case law in other states is favorable on the second issue. The first issue has a divergence of opinions, though the old Comp Board had previously gone along with the employer.

This motion was tried on depositions of the claimant and various doctors. It has been briefed and argued, and is now awaiting a decision from the administrative law judge.

Prestonsburg Office

B. AFDC

Swain v. Austin. This is a successful AFDC court appeal. The Appeals Council had approved the Hearing Officer's decision denying benefits, even though claimant had proved that her husband had cirrhosis of the liver, as well as ulcers, gastritis, anxiety, and severe weight loss. The McCreary Circuit Court found that the Hearing Officer and Appeal Board had failed to mention the various documented physical and mental impairments of the Petitioner's husband, nor given consideration to her husband's age, work experience or training as required by the applicable regulation. The court also held that the Hearing Officer and Appeal Board failed to consider "all relevant, social, and economic factors". The court concluded that the Respondent had acted arbitrarily and abused its discretion "in considering only the medical evidence that was favorable to its position to deny benefits to Mr. Swain. Accordingly, the circuit court ordered benefits to be made retroactively to the date of application, approximately one and a half years prior to the decision.

Somerset Office

B.M. et al. v. Cabinet for Human Resources. Under federal law, an AFDC recipient will be disqualified for a certain period from receiving AFDC benefits if the recipient received a lump sum payment. Examples of lump sum payments include settlements from personal injury claim and back pay for Social Security Disability awards. The recipient is disqualified for a number of months determined by dividing the monthly AFDC grant into the lump sum payment. The resulting number is the number of months the recipient is disqualified from receiving AFDC benefits. We have had a number of AFDC recipients who have informed their local workers that they were either going to receive a lump sum payment or had received a lump sum payment. The workers informed the recipients that they could spend the lump sum payment on exempt resources and regain AFDC eligibility. All of our clients spent their lump sum payments and subsequently were notified that the advise given by the workers was incorrect and the AFDC grants would be terminated. The period of disqualification was imposed on these people. Petitions for review have been filed in court.

Barbourville & Somerset Offices