

DOMES

BY JASON K. HOWARD

IN SEARCH OF ANSWERS FOR EAST KENTUCKY COAL MINERS



REBORN

Teddy Fuson's patience is wearing thin. And at 76, who can blame him? After a lifetime of waiting—waiting for the next coal boom, waiting for a better home, waiting for his check—he has grown weary of it. He is waiting for benefits and back pay for his medical condition, though prospects look bleak. There's an old proverb that mountainfolk are fond of repeating: "Hope deferred makes the heart sick." Fuson's heart is sick. So are his lungs.

His "puffer" is his constant companion, the security blanket that gives him courage as he scans the small plot of ground surrounding his trailer, contemplating whether he has the strength to mow his grass today. He is holding his inhaler and waiting for a burst of energy. He is also waiting for the decision of an administrative law judge, who will determine whether he will receive more than \$40,000 from his former employer, a small southeastern Kentucky coal mining company, for its role in his sickly condition. "We're waitin' and hopin' to get it," he says.

The coal industry generates 52 percent of the America's electricity, making mining the primary source of blue-collar jobs in mountain communities like Middlesboro, Ky., where Fuson lives. He first entered the mines in 1948 when he was 20. His Social Security record is a mile long, an extended chronicle of the many mining companies that have employed him—a microcosm of the boom-bust cycle

of Appalachian coal country these past 70 years. "Made me a dozer man," Fuson says proudly. "I can do it all."

While deep miners are most at risk of contracting black lung, strip miners working above ground like Fuson also breathe in harmful levels of coal dust. Prior to the enactment of federal mining health and safety regulations in the

late sixties and early seventies, few, if any, protections were available to miners.

While operating heavy machinery, Fuson was exposed to the elements. His bulldozer had no cab, forcing him to breathe the coal dust and dirt dust during 12-hour days in the mines. His breathing difficulties began back in 1969, but leaving his job in the mines was not an option, not in these parts, not with a family to support and a static local job market almost completely dependent on coal. So the choice before him was stark: a perilous job and near poverty vs. no job and deep poverty. Like countless other miners in eastern Kentucky, Fuson offered up his personal health as collateral in order to keep his family fed, a debt his body is now paying in full.

It took him 12 years of fighting just to get workers' compensation benefits for the healthy lungs he left back in the

mines as a young man. Limited benefits finally were paid out in 2001. His lawyer, however, does not expect a decision anytime soon on \$40,000 in retroactive benefits dating back to 1994 when Fuson originally filed his claim. He fears he will die without a resolution. Such is hope deferred in the craggy, mournful mountains of southeastern Kentucky.

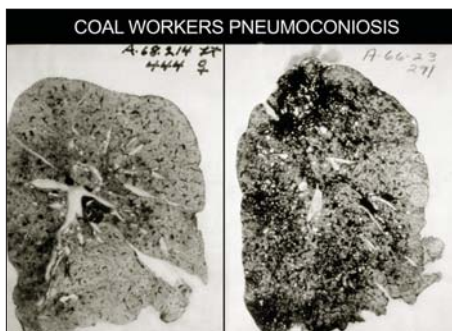
DYING TO MAKE A LIVING

*My grandfather's dad crossed the Cumberland Mountains
Where he took a pretty girl to be his bride
Said "Won't you walk with me out the mouth of this holler
Or we'll never leave Harlan alive."*

*No one ever knew there was coal in them mountains
Till a man from the northeast arrived
Waving hundred dollar bills
Said "I'll pay you for your minerals"
But he never left Harlan alive.*

Country singer Patty Loveless, a native of eastern Kentucky, underscored the dangers of working in the coal industry of Appalachia in her sober ballad, "You'll Never Leave Harlan Alive," which ends with the line "and you spend your life digging coal from the bottom of your grave." For many miners—the ones who haven't perished in a mine fall or explosion—these words ring eerily true.

Coal has a scent that you can't wash out of your skin and a dust that you can't filter out of your lungs. Coal dust particles take up permanent residence, evicting healthy tissues that extract oxygen from the air. Constant inhalation leads the particles to become embedded in the lungs, which then harden. Pneumoconiosis, commonly known as black lung disease, is described by the Mine Safety and Health Administration (MSHA) as "a job-related disease caused by continued exposure to excessive amounts of respirable coal mine dust." The early stages of the disease are sometimes unnoticeable. However, as the disease progresses to a stage known as progressive massive fibrosis, shortness of breath and breathing pain are common symptoms, according to MSHA literature. A minor cough becomes a persistent gurgling cough. Wheezing turns into desperate gasping for air. Spitting up black phlegm is



Lungs afflicted with black lung disease, described by the Mine Safety and Health Administration (MSHA) as "a job-related disease caused by continued exposure to excessive amounts of respirable coal mine dust."

replaced by spitting up blood. Permanent disability and premature death are the final stage. As with many occupational diseases, prevention is the only cure.

One form of black lung called silicosis—contracted from inhaling dust particles containing silica—has been called the oldest-known occupational disease, its origins traced back to the ancient Greeks. Today, despite increased safety precautions taken by mining companies, black lung is still an occupational health hazard, killing approximately 1,500 miners each year across the country, according to the National Black Lung Association. Before the enactment of workers' compensation laws, miners with black lung had few options when the disease took hold. Quitting work was not an option for low-wage workers who hadn't reached retirement age, so these miners were forced to literally work themselves to death. The Federal Coal Miners Health and Safety Act, passed by Congress and signed by President Nixon in 1969, created a federal black lung benefits program. The legislatures in some coal-mining states already had provisions on the books to compensate afflicted miners. Those that didn't soon followed Congress' lead, thereby creating both state and federal avenues for black lung sufferers to pursue disability pay.

Yet in recent years, there has been a backlash in places like Kentucky. The coal-mining industry has successfully lobbied for tighter restrictions on the recovery of black lung benefits, resulting in new laws making it harder to bring a successful black lung claim. In Kentucky, a controversial law was passed in 1996 and signed into law by Gov.

Paul Patton, himself a former coal operator. To the consternation of black lung sufferers and their advocates, the Patton administration supported the coal industry, which contended that present-day dust levels are not high enough to cause black lung disease, workers' compensation costs places the state's companies at a competitive disadvantage, and black lung disease is seldom disabling.

Try telling that to Teddy Fuson, who cannot cut the grass in his tiny yard without gasping for air. "If I do any work, I just have to be real easy," he says. "I can mow my grass, make about two or three rounds and sit down every few minutes. I ain't got much to mow, just about four swipes on each side of my trailer here. But to labor, it weakens my legs and then I just can't breathe. I've just gotta quit and lay down."

The 1996 state law required doctors at Kentucky's two medical schools, the University of Kentucky and the University of Louisville, to evaluate all claims of black lung. The law dictated that their opinions be given greater weight than those of other doctors, including miners' personal physicians. The 1996 reforms also halved the insurance premiums paid by coal industry and lowered their required contributions to Kentucky's Coal Workers' Pneumoconiosis Fund. In the three years prior to the law's passage, nearly 80 percent of miners who applied for black lung compensation received it, according to reporting by the *Louisville Courier-Journal*. In the first year following its adoption, that percentage dropped to less than one percent. During the five-year period after its passage, the



Kentucky Department of Workers' Claims approved only 11 claims, the *Courier-Journal* reported.

"Patton came in and said, 'We're paying out so much money that the funds are going to be broke and the insurance rates are going to be higher,' so he pushed through those reforms," State Rep. Rick Nelson (D-Middlesboro) says. "It drastically reduced the number of people that actually received a black lung benefit, down to almost zero."

Criticism has been fierce, especially in eastern Kentucky. In 2001, lawmakers responded to the reform's chilling effect by passing a bill calling for three randomly selected physicians to ascertain the legitimacy of black lung claims before sending the case to an administrative law judge for review. The three-doctor panel makes its determination without considering the assessment of the miners' personal physicians, who in many cases have been treating the disease for decades. The new law had little effect, however. Only 44 of the 1,062 miners who have applied for benefits since its passage have been approved, reports the *Louisville Courier Journal*. Last year, an initiative that would have further reformed the process stalled in the state Senate after unanimously passing the House.

"The reality is, if anybody looks at this from just a moral standpoint, there are a lot of miners who are being wronged based on the actions of the legislative process there," contends Joseph Main, Administrator of Health and Safety for the United Mine Workers of America (UMWA), the largest coal miners' union in the country. "The state of Kentucky has possibly the highest exposure of coal dust, leading to a larger population being afflicted with pneumoconiosis. There's an abundance of evidence that shows that these miners were placed in very difficult mining environments, where they had to breathe unhealthy amounts of coal dust. And the employers who make money off of this are left with their profits, and the miners are left afflicted with this disease and nowhere to turn."

Historically, private attorneys have assumed much of the responsibility for helping miners file for benefits within Kentucky's system. But since passage of the 1996 reforms, they do so at great financial risk, given the statistically slim probability of filing a successful claim. Furthermore, workers' compensation cases are notoriously drawn-out, often taking several years for a decision that is unlikely to result in an award for the applicant or a fee for the attorney. As a result, fewer private attorneys are willing to represent afflicted miners, public interest advocates relay. This means legal aid is often the only avenue available for miners seeking benefits. However, legal services lawyers must be discriminating in taking black lung cases because of their limited resources and the long odds against recovering benefits. This is especially true in Kentucky, where legal services programs are facing a 26-percent state appropriations cut totaling \$343,650 this year, according to Jamie Hamon, executive director Access to Justice Foundation based in Lexington, Ky.

"Approximately one out of twenty [black lung] applicants actually wins benefits, and now in Kentucky it's much less than that with the workers' comp program," notes John Grigsby, a staff attorney with the Appalachian Research and Defense Fund of Kentucky (Appalred). "It

seems to me that it's clearly unfair, and I think that in terms of what avenues the miners are left with, basically, they're doing a lot of appealing right now."

Grigsby has worked on about a hundred black lung cases, including Fuson's, during his eight-year tenure as an Appalred attorney serving Knox, Bell, and Harlan counties in the southeast corner of the state. In 2003, Appalred handled 46 cases involving black lung, a caseload that figures to grow as the number of private attorneys willing to take the cases continues to shrink. Grigsby is faced with difficult choices in deciding whether to take a case, noting that he can only represent approximately one of twenty people that need his assistance.

"Which ones do you take?" he asks. "That's the agonizing decision for me. Who can you help the most? Given the evidence, what is the likelihood that your work is going to make a difference and result in success?"

MAKING A FEDERAL CASE

Stringent state laws compel many Kentucky miners to seek relief from the Federal Black Lung Disability Program, which has become more forgiving since a series of new federal regulations were adopted in 2001. Negotiated during the final weeks of the Clinton Administration, these regulations fill nearly 200 pages of the Federal Register. The key provisions limited evidence to two medical opinions from the plaintiff and defendant, restricted rebuttal evidence, and updated the legal definition of black lung.

"The goal of those new regulations is to level the playing field and to be more claimant-friendly," says Professor Mary Natkin, who co-runs the Black Lung Clinic at Washington and Lee School of Law in Lexington, Va. "We're in a system where we're not only fighting for their benefits, but we're fighting to uphold these regulations. Every case is a challenge to the regulations."

Even with the 2001 reforms, miners must meet an extremely high evidentiary burden to collect black lung benefits under state or federal law. Resource-rich coal companies and insurance firms can retain highly credentialed doctors, who are paid for their medical opinions casting doubt on black lung claimants whom they seldom examine in person, Grigsby says. So it is not surprising that, according to the U.S. Department of Labor, only 7.6 percent of federal claims for black lung benefits succeed.

Grigsby says he commonly introduces testimony from the miner's personal physician that is quite compelling. The mining company responds with experts from Birmingham, Cleveland, and St. Louis "who have twenty-page résumés," Grigsby says. "My role is to try, as much as possible, to undercut those experts, which is very tough to do because they are highly intelligent people who are being paid very well. We just don't have the resources to go to depositions and face these doctors, which is your best chance to undercut their conclusions and opinion."

Grigsby says the federal process has become fairer, although it remains extremely difficult to get compensation, especially for a miner who has smoked cigarettes regularly as an adult. Attorneys representing the coal companies frequently allege the miner's smoking caused

the lung problems. Medical experts hired by the industry argue that it is possible to differentiate between black lung and lung disease caused by puffing too many cigarettes, a position that is debated within the medical community.

Grigsby has tried many black lung cases in which the miner smoked, yet the claimant's doctor testified forcefully that black lung was the primary cause of lung disease. Fortunately for claimants, a new rule adopted in the 2001 reforms asserts that if a miner's disability is linked to an outside source, such as smoking, he or she is still qualified to receive benefits if black lung disease results in "further deterioration" of the lungs.

There are federal requirements that coal operators must obey to help shield miners from coal dust exposure. The *Louisville Courier-Journal* published a series of articles in 1998 titled "Dust, Deception and Death," alleging that a number of local mining companies were falsifying dust

suasive argument. The bipartisan bill passed the House 88-0 and was referred to the Senate Committee on Appropriations and Revenue, where it died. "We didn't even get a hearing," Rep. Webb recalls.

"I feel the pendulum has swung to the point of prejudice to the miner," she says. "There's plenty of money in the fund that is intended to accommodate this illness, and the millions of dollars are piling up in there."

Thirty-five years after the enactment of the first federal black lung legislation, the debate over this issue continues to rage just below the radar, much like the disease itself. According to recent analysis from the U.S. National Coal Workers' X-ray Surveillance Program, even though the prevalence of black lung is declining, "new cases are occurring among miners who have worked exclusively under current dust exposure limits." Professor Natkin bristles at those who label it a "disease of the past" or an

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tests and ignoring government-mandated dust controls. Many miners interviewed said that they were coerced into lying and helping coal operators cheat on the tests in order to protect their jobs.

"Miners will tell you they knew when the inspectors were coming in the mines, and that was when they were told to put the dust collection monitors where the air intake vents were," Professor Natkin says. "Every one of them tells me that there was widespread fraud in collecting those dust samples."

Joseph Main of the UMWA argues that economic factors lead coal operators to engage in fraudulent behavior of this type. "It takes a bit of time to do those tests, but they are absolutely essential to protect miners from coal dust," Main says. "Those coal operators that didn't do that were able to produce more coal at the end of the day and put a cheaper product on the market, thus beating out some of the competition. For several years, the market has been just extremely tight, so shaving off even a few cents a ton meant a whole lot of difference."

The industry has assumed much of the burden for paying out black lung benefits in Kentucky, where a tax is levied upon each ton of coal mined, a portion of which is allocated to the Coal Workers' Pneumoconiosis Fund. In addition, high employer insurance premiums and substantial legal fees have become fixed costs for mining companies, according to state legislators and the *Courier-Journal*.

Given the economic issues at stake, it comes as no surprise that the coal industry maintains a powerful presence in the state capital of Frankfort. During the last session of the Kentucky legislature, State Rep. Robin Webb (D-Grayson) confronted the powerful mining lobby when she introduced a measure that would have again reformed Kentucky's black lung law. As a former underground and surface coal miner and the former general counsel for a coal company, Rep. Webb made a per-

"historical disease" that has been taken care of by dust controls from the 1960s. "I don't think people have any conception that it's still a current health risk to these workers today," she says.

HOPING FOR THE BEST

Perhaps the group most in touch with the burden carried by black lung sufferers, aside from the coal workers themselves, is the small band of legal services advocates who fight against the odds to secure relief that will make the miners' final years a bit more comfortable.

"Legal aid performs functions across the board in civil litigation that would go unfilled," Rep. Webb acknowledges. "They protect the rights and benefits of many citizens, and if the current mentality continues—and that is to make it less profitable for lawyers to pursue these types of claims—then legal aid will be shouldering much of the burden for this population of low-income people who find themselves suddenly sick."

Teddy Fuson's heart and lungs are sick. His hope has been deferred to a judge who will decide whether he'll be compensated for a lifetime of debilitating work in the coal mines. However, the process continues to drag on; his two most recent employers each claim the other is responsible for the compensation. The smaller of the two companies is uninsured and claims it will go bankrupt if forced to pay. Whether or not he sees any additional dollars, Fuson is grateful to have met John Grigsby. "He's a good lawyer and a nice man," Fuson says. "He's helped me. I owe him a lot." People in these mountains are raised not to be beholden to anyone. For men like Fuson, sometimes it's hard to know what to say. But legal aid has helped him find his voice. And as it echos down through the deep hollows of the Cumberlands like a rumbling coal train, Fuson holds out hope that justice may yet be his. ■