

WORKMAN, C. J., dissenting:

These consolidated appeals involve three coal miners and one factory worker with decades of occupational dust exposure including asbestos, silica, and/or coal dust. At their essence, these appeals represent claimants who filed workers' compensation claims seeking to be examined by the Occupational Pneumoconiosis (OP) Board. By utilizing an inapplicable statute of limitations to bar even the filing of a claim, today's opinion is an extreme departure from the long-standing rule of law firmly established in the management of OP claims. The majority is way too eager to radically rewrite West Virginia Code § 23-4-15(b) (2017) with far-reaching and grotesquely unfair consequences. It demonstrates either an ignorance of the law or a callous disregard for those who suffer from OP. While the majority claims to be against judicial activism, apparently it will make exceptions as its agenda requires. Accordingly, I vehemently dissent.

As discussed below, West Virginia law explicitly acknowledges that OP is both a latent and a progressive disease. For this reason, a claimant suffering from OP is not barred from filing multiple claims long after retirement, within certain parameters, to obtain physical examinations from the experts in this field, the OP Board. *Fenton Art Glass Co. v. W.Va. Office of Ins. Comm'r*, 222 W.Va. 420, 428, 664 S.E.2d 761, 769 (2008). Serial claims have always been the nature of the OP beast; they have been fully contemplated in the statutes, regulations, and caselaw over the last fifty years.

In order to file a claim for OP benefits, a claimant must meet the jurisdictional requirements of West Virginia Code § 23-4-1(b) (2017).¹ While allowing for serial claims in light of the progressive nature of the disease, the legislation imposes two outer limitations periods that may serve to bar a claim. A claimant must file within the statute of limitations as set forth in West Virginia Code § 23-4-15(b):

To entitle any employee to compensation for occupational pneumoconiosis under the provisions of this subsection, the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis or within three

¹ West Virginia Code § 23-4-1(b) provides, in part:

For the purposes of this chapter, the terms “injury” and “personal injury” include occupational pneumoconiosis and any other occupational disease, as hereinafter defined, and workers’ compensation benefits shall be paid to the employees of the employers in whose employment the employees have been exposed to the hazards of occupational pneumoconiosis or other occupational disease and have contracted occupational pneumoconiosis or other occupational disease, or have suffered a perceptible aggravation of an existing pneumoconiosis or other occupational disease, or to the dependents, if any, of the employees, in case death has ensued, according to the provisions hereinafter made: Provided, That compensation is not payable for the disease of occupational pneumoconiosis, or death resulting from the disease, unless the employee has been exposed to the hazards of occupational pneumoconiosis in the State of West Virginia over a continuous period of not less than two years during the 10 years immediately preceding the date of his or her last exposure to such hazards, or for any five of the 15 years immediately preceding the date of his or her last exposure.

years from and after a diagnosed impairment due to occupational pneumoconiosis was made known to the employee by a physician and unless filed within the three-year period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, or, in the case of death, the application shall be filed by the dependent of the employee within two years from and after the employee's death, and such time limitation is a condition of the right and hence jurisdictional.

Thus, there are two outer time limitations, after which a claim is barred: 1) three years “after the last day of the last continuous period of sixty days” of exposure; or 2) three years “*after a diagnosed impairment* due to occupational pneumoconiosis was made known to the employee by a physician.” *Id.* (emphasis added). These are, of course, merely limitations periods which ultimately may bar a claim. They do not—nor do they purport to—create a substantive, evidentiary threshold showing necessary by a claimant to obtain an evaluation by the OP Board.²

² Rather, it is West Virginia Code of State Rules § 85-20-52.1 that sets forth the evidentiary requirements for filing an application for OP benefits:

A properly completed application must be received before the potential claim will be considered by the Commission, Insurance Commissioner, private carrier or self-insured employer, whichever is applicable. A properly completed application must include 1) a completed WC-105 form; 2) a completed WC-205 form; 3) an ILO form properly completed by a certified “B” reader; and 4) a listing of all alleged exposures to harmful dust, including type of dust, and extent and duration of exposure with each named employer.

The majority, however, utilized this statutorily enacted “discovery rule” in precisely this manner. The very narrow issue before the Court is whether a claimant must proffer a “diagnosed impairment” before he is able to obtain an evaluation by the OP Board. Utilizing the codified OP discovery rule embodied in West Virginia Code § 23-4-15(b), the majority purported to answer that question. Yet, evading the real issue, the majority holds: “Under the second time limitation, the new application, [sic] will not be referred to the Occupational Pneumoconiosis Board unless the Physician’s Report filed with the claimant’s new application sets forth a diagnosed impairment due to occupational pneumoconiosis.” However, it is nonsensical to convert the language of the statute of limitations into a new, substantive, threshold evidentiary requirement to filing subsequent claims. The majority missed the entire point of this appeal. The majority fully conflates substantive evidentiary requirements with this *statute of limitations*—two distinct legal concepts. The result of this extraordinary fusion is catastrophic and legally fallacious. It represents a remarkable feat of statutory contortion.

A claimant has never been required to bear the burden and expense of having pulmonary function tests performed and evaluated *before* filing a claim. Because “it is and has been the function of the OP Board to determine all medical questions relating to cases of compensation for occupational pneumoconiosis. W.Va. Code § 23-4-8a (2005).” *Fenton*, 222 W.Va. at 431, 664 S.E.2d at 772. Moreover, “the percentage of permanent disability is determined by the degree of medical impairment that is found by the occupational pneumoconiosis board.’ W.Va. Code § 23-4-6a (2005).” *Fenton*, 222 W.Va.

at 431, 664 S.E.2d at 772. It is therefore nonsensical to require a claimant to produce evidence of the very thing the OP Board serves to provide before being permitted to present one's claim to the OP Board.

The majority completely distorts the plain language of West Virginia Code § 23-4-15(b), which merely provides a time limit for the filing of workers' compensation claims for OP and creates out of whole cloth a new requirement for filing by holding these claimants must have a physician's diagnosis of impairment due to OP. I am appalled that the majority would ignore established precedent and West Virginia Code § 23-4-8c(e), which provides a claimant may file a new claim for OP (three years from the date of the last OP Board's decision) if his or her earlier filings were premature, considering the progressive nature of this dreadful disease.³ The majority's analysis of this important issue is woefully under-developed and its conclusion is blatantly wrong.⁴

Inexplicably, the majority relegates the most relevant case to the issue before us—*Lester v. State Workmen's Compensation Commissioner*, 161 W.Va. 299, 242 S.E.2d 443 (1978)—to a footnote. The *Lester* Court recognized forty years ago that OP “often

³ The majority barely mentions West Virginia Code § 23-4-8c(e) in a footnote and states it “is not in contention” here because the “appeals before us do not involve previously filed, but unrulled upon, OP claims, or requests to modify rulings in prior OP claims.” However, West Virginia Code § 23-4-8c(e) is clearly implicated in these consolidated appeals because it expressly covers a claimant “filing a new claim[.]” *Id.*

⁴ In the discussion section, the majority cites only two workers' compensation cases.

does not become manifest until years after the victim was last exposed to the causes of the disease.” *Id.* at 303, 242 S.E.2d 445. The majority disregards this Court’s declaration that “the legislature has expressly abandoned any fixed and rigid time restrictions within which a claim for occupational pneumoconiosis benefits must be filed and has opted instead for a limitation period based on the claimant’s discovery of the occupational disease.” *Id.* at 302, 242 S.E.2d 443. The *Lester* Court examined previous amendments to West Virginia Code § 23-4-15,⁵ and recognized

[t]he legislature’s actions signify an awareness that occupational pneumoconiosis may go undetected for a long time, for this disease often does not become manifest until years after the victim was last exposed to the causes of the disease. The amendments also manifest legislative recognition of the fact that a fixed and rigid time restriction on the filing of a claim would occasionally result in a harsh and unjust result. It would serve as a trap for the unwary worker whose claim would be barred for an injury which was unknown to him at the time filing was required. A set time limitation could conceivably lapse before the symptoms of this insidious disease became evident or before the disease results in disability. It was just this kind of result the legislature expressly sought to prevent.

⁵ Effective July 1, 1971, the statute provided:

To entitle any employee to compensation for occupational pneumoconiosis . . . the application . . . must be . . . filed . . . within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis, or within three years from and after the employee’s occupational pneumoconiosis was made known to him by a physician or which he should reasonably have known, whichever shall last occur 1971 W.Va.Acts ch. 177.

Lester, 161 W.Va. at 301 n.2, 242 S.E.2d 445 n.2.

Id. at 302-03, 242 S.E.2d at 445.

The necessary implication arising from *Lester* and the Legislature's liberalizing amendments of the statute is a legislative intent to ensure that workers who have contracted OP must have a reasonable opportunity, after learning of its presence, to present subsequent claims for the remainder of their lives in order to receive examinations to determine their entitlement to benefits. Requiring claimants to have the very thing they seek to obtain from the OP Board before they may reach the OP Board creates an entirely new and frankly preposterous requirement.

The majority's confusion is occasioned by its misreading of the statute of limitations contained in West Virginia Code § 23-4-15(b). The statute provides for a "discovery rule"—a codification of this common law principle. The statute of limitations for an OP claim, much as a traditional statute of limitations, is three years from effectively the date of last exposure. The discovery rule provided in the alternative allows for three years from a "diagnosed impairment." The second time limitation set forth in West Virginia Code § 23-4-15(b), is *only* triggered "after a diagnosed impairment due to occupational pneumoconiosis was made known to the claimant by a physician." Consequently, a claim is only time barred when a claimant has not filed within three years after he or she receives a diagnosed impairment, from whatever medical provider.

As to these claimants, the second time limitation set forth in West Virginia Code § 23-4-15(b) has not triggered. The claimants submitted medical evidence of OP diagnoses, but their physicians have not diagnosed impairment due to OP. Accordingly, the claims are not time barred and these claimants should have been referred to the OP Board for further examinations.

Our Legislature has long recognized that OP evolves into a chronic and progressive respiratory disease that may lay dormant for years before totally disabling and killing many of these coal miners. *Lester*, 161 W.Va. 299, 242 S.E.2d 443. The progressive nature of pneumoconiosis demands reading West Virginia Code § 23-4-15(b) in a literal manner to ensure that any worker afflicted with the disease, including its progressive form, is given an appropriate opportunity to appear before the OP Board for subsequent examinations.

This conclusion is consistent with the Federal Mine Safety and Health Act's ("Federal Act") treatment of subsequent OP claims.⁶ The Federal Act explicitly recognizes

⁶ See 30 U.S.C. § 801 to § 964 (1977). Under the Federal Act, any claim for benefits "shall be filed within three years after whichever of the following occurs later—(1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. § 932(f). The implementing regulation, 20 C.F.R. § 725.308, further explains that the three-year statute of limitations is *triggered* when the miner receives a medical determination of total disability arising from pneumoconiosis. See *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 615 (4th Cir. 2006).

that pneumoconiosis is a “latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.” 20 C.F.R. § 718.201(c).

Based on this understanding of OP, courts examining the Federal Act acknowledge that “nothing bars or should bar claimants from filing claims seriatim, and the regulations recognize that many will.” *Lisa Lee Mines v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 86 F.3d 1358, 1362 (4th Cir. 1996); *see also Arch of Kentucky, Inc. v. Dir., Office of Workers' Comp. Programs*, 556 F.3d 472, 481 (6th Cir. 2009) (recognizing restrictive interpretation on statute of limitation would be in tension with Federal Act's provision permitting successive claims when limitations period begins *after* medical determination of OP).

The majority holds otherwise based on its irrational fear that repeat claims “would unreasonably burden” the OP Board. However, the Annual Report of the OP Board belies this false alarm. From July 1, 2015 to June 30, 2016, the OP Board performed repeat examinations on 321 claimants and 131 of them (41%) received an additional award.⁷ From July 1, 2016 to June 30, 2017, the OP Board performed repeat examinations on 409 claimants and 179 of them (44%) received an additional award.⁸ The very fact that these

⁷ West Virginia Occupational Pneumoconiosis Board 2016-2017 Annual Report, http://www.wvlegislature.gov/legisdocs/reports/agency/I02_FY_2017_13746.pdf

⁸ *Id.*

successive claims are regularly permitted—and result in additional OP awards—is strong evidence of the deteriorating health of workers exposed to occupational dust and the need for subsequent examinations considering the progressive nature of this disease. Moreover, these results make the majority’s interpretation of the statute of limitations—that effectively impedes such subsequent claims—completely untenable.

Across America, OP claims the lives of almost 1,500 coal miners every year.⁹ “It’s as if the Titanic sank every year, and no ships came to the rescue. While that long-ago disaster continues to fascinate the nation, the miners slip into cold, early graves almost unnoticed.”¹⁰ In light of this ongoing tragedy, our Legislature has implemented statutes and regulations to ensure workers exposed to the hazards of OP receive follow-up medical examinations for the remainder of their lives so that they may receive appropriate compensation. Yet, the majority rewrites long-standing legislation, ignores this Court’s precedent, and creates new law encumbering workers’ access to the OP Board. The

⁹ Brian L. Hager, *Is There Light at the End of the Tunnel? Balancing Finality and Accuracy for Federal Black Lung Benefits Awards*, 60 Wash. & Lee L. Rev. 1561, 1562–63 (2003).

¹⁰ Gardiner Harris & Ralph Dunlop, *Dust, Deception, and Death: Why Black Lung Hasn’t Been Wiped Out*, Courier-J. (Louisville, Ky.), Apr. 19, 1998 (examining number of death certificates listing pneumoconiosis as cause of death), <http://www.courier-journal.com/dust/>.

majority either grossly misunderstands these legal principles or chooses to show gross insensitivity to the plight of West Virginia's coal miners.¹¹

¹¹ See e.g., Brian C. Murchison, *Due Process, Black Lung, and the Shaping of Administrative Justice*, 54 Admin. L. Rev. 1025, 1028 (2002) (chronicling protracted litigation in federal black lung case of West Virginia coal miner Harold Terry who worked nineteen years in coal mining before federal law mandated dust controls, and another ten years, shoveling coal, working drill, and replacing belts; Mr. Terry's health deteriorated dramatically, with multiple lung collapses and surgeries, long after his exposure to coal dust ended).