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Richard A. Vassallo

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The enactment of the Federal Coal Mine Health and Safety Act of 1969\(^1\) was a relatively recent step in providing benefits for miners stricken by pneumoconiosis. More commonly known as black lung disease because of its X-ray image,\(^2\) the affliction causes interference with the body's ability to transfer oxygen from the lungs to the blood stream.\(^3\) The sufferer may experience shortness of breath, coughing, wheezing, and, in severe cases, death.\(^4\) The magnitude of the disease is reflected in the fact that nationwide, miners have filed nearly one million disability benefits claims since the initiation of the federal program.\(^5\)

While physicians recognized black lung as early as 1661,\(^6\) the causal link between coal mining and the disease was not discovered until nearly two centuries later.\(^7\) Following the discovery of the causal

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4. Id. at 132.

Newcastle Cole as an expert Physician affirms, causeth consumptiones, phthisicks and the indisposition of the lungs, not only by the suffocating abundance of smoak, but also by its virulence, for all subterrany fuel hath a kind of virulent or arsenical vapour rising from it; which, as it speedily destroys those who dig it in the mines, so does it, by little and little, those who use it here above them.

Id.

7. Id. In 1831, a physician named J.C. Gregory reported that the disease had its origin in coal mining, but the specific cause of the disease remained unknown. Id. Other physicians theorized that "the effects of blasting with gunpowder or . . . the inhalation of . . . soot from the oil-lamps of the miners" caused the disease. Id. In 1833, W. Marshall, a
link, improvements in both ventilation and sanitation of coal mines led to a widespread belief at the end of the nineteenth century that pneumoconiosis had been eliminated as a health threat. The mechanization of the coal mining industry early in the twentieth century, however, greatly increased the amount of dust in the mines and thereby caused a recurrence of lung disease among the miners.

Years after this mechanization-induced reappearance of black lung, the federal government enacted a series of statutes authorizing payment of benefits to miners who were totally disabled by the disease. One statute restrictively delegated the establishment of a def-

physician studying three career coal miners, asserted that “the inhalation of fine coal dust and its deposition in the substance of the lung was the cause of [black lung].” Id. at 1013-14.

8. Id. at 1014.

9. Id. at 1014-16. It was during this mechanization period that the works of John Scott Haldane, a physiologist of international repute, led the mining industry engineers astray. Haldane's previous accomplishments were notable. He was recognized for his development of the apparatus and methodology used in blood gas analysis and also for his work leading to the practice of stone-dusting in coal mines to control underground explosions. Additionally, he was appointed a professor of physiology at Oxford and acted as a director of the Mining Research Laboratory of the University of Birmingham. Id. With impressive credentials, Haldane turned his attention to the study of silicosis in miners in the metalliferous mines. Silicosis is a lung disease caused by long-term inhalation of silica dust generated during excavation of silica, a crystalline compound that consists of silicon and oxygen, and which is found as quartz, sand, flint, agate, and other minerals. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1205 (6th ed. 1976). Haldane noted a high tuberculosis death rate among metalliferous miners and a comparatively low tuberculosis death rate among coal miners. From this finding, he concluded that “the inhalation of coal dust causes no danger to life but on the contrary gives even protection against the development of tuberculosis.” D. HUNTER, THE DISEASE OF OCCUPATIONS 1016 (6th ed. 1978). In the wake of Haldane's conclusion, mining industry engineers did not attempt to reduce the amount of coal dust being generated by mechanization. Id. at 1017. The current plight of coal miners may thus be attributed, at least in part, to the incorrect presumptions of the medical profession. Id. (quoting C.M. Fletcher, PNEUMOCONIOSIS OF COAL-MINERS, 1948 BRIT. MED. J. 1015, 1016 (vol. 1). “It must be admitted that medical men by their ill-informed complacency have a heavy load of responsibility to bear for the present high incidence of pneumoconiosis among coal miners.” Id. Regardless of who is to blame, coal miners have suffered greatly.


initional standard for "total disability" to the Department of Labor. There is a dispute, however, as to whether the Department of Labor standard is consistent with the statute's restrictive delegation. Several United States courts of appeals have found that the Secretary of Labor violated the congressional directive that the standards established "not be more restrictive than the criteria [of the interim standards established by the Secretary of Health, Education and Welfare (HEW)]." The dispute turns on whether the statutory term "criteria" refers only to the medical evaluation criteria established by the Secretary of HEW, or alternatively whether it includes the presumptions and evidentiary provisions as well.

This note discusses and evaluates the conflicting interpretations of this controversial provision of the black lung benefits program. Section One provides an overview of title IV of the Federal Coal Mine Health and Safety Act, including its amendments. Section Two discusses the leading cases which have developed conflicting interpretations of the statute. Finally, Section Three examines and evaluates the courts' interpretations in light of traditional canons of statutory construction, the legislative history, and the scope of judicial review of administrative agency decisions.

I. HISTORICAL DEVELOPMENT OF THE BLACK LUNG BENEFITS PROGRAM

The impetus for the first black lung benefits legislation was a disastrous mine accident that claimed seventy-eight lives in Consolidated Coal Company's No. 9 mine in Farmington, West Virginia.

Although the explosion did not relate directly to the issue of black lung disease, it focused attention on the overall lack of protection for


14. 30 U.S.C. § 902(f)(2) (1982) (emphasis added). The Department of Health, Education, and Welfare has since been partitioned, and the relevant segment has been redesignated as the Department of Health and Human Services. For simplicity, this note uses the designation HEW.

15. See infra notes 18-67 and accompanying text.

16. See infra notes 68-118 and accompanying text.

17. See infra notes 119-98 and accompanying text.


the health and safety of coal miners.\textsuperscript{20} Shortly after the disaster, Congress enacted the Federal Coal Mine Health and Safety Act of 1969.\textsuperscript{21}

Title IV of the Act, captioned "Black Lung Benefits," directs assistance to those miners who are totally disabled by black lung and to survivors of those who have died from the disease.\textsuperscript{22} It was a legislative act recognizing the nation's indebtedness to coal miners who fell victim to pneumoconiosis while providing vital fuel for the nation.\textsuperscript{23}

Title IV of the Federal Coal Mine Health and Safety Act of 1969 establishes a two-part framework for the black lung benefits program. The Secretary of HEW and the Secretary of Labor oversee the two components, designated respectively\textsuperscript{24} Part B\textsuperscript{25} and Part C.\textsuperscript{26} The date of filing determines whether a claim is a Part B or a Part C claim. Prior to amendment of the 1969 Act, claims filed on or before December 31, 1972, were reviewed under Part B, while claims filed after that date were reviewed under Part C.\textsuperscript{27} There is a major economic difference between the benefits authorized by the two parts. Part B benefits are reduced by one dollar for every two dollars of earnings above an annual earnings exemption, regardless of the source of the earnings.\textsuperscript{28} Part C benefits are not reduced by additional earnings.\textsuperscript{29} A miner or a beneficiary can draw full Part C benefits even while earning income

\textsuperscript{20} Id. See also Cook, The 1977 Amendments to the Black Lung Benefits Law, 101 MONTHLY LAB. REV. 25, 25 (1978).


\textsuperscript{28} 30 U.S.C. § 922(b) (1982).

\textsuperscript{29} "[T]here is no statutory provision in Part C for an offset against Black Lung benefit amounts due to receipt of unemployment compensation or on account of excess earnings." Fisher v. Bethlehem Mines Corp., [1978] BRBS (M-B) 914, 917, BRB No. 77-151 BLA. A former miner claiming disability benefits will be disqualified by outside employment if it is shown to be "gainful work" in the immediate area of his residence and requires skills and abilities comparable to those of any mine work in which the individual previously engaged. 20 C.F.R. § 410.421(a)(1) (1988).
from outside employment.\textsuperscript{30}

The 1969 Act authorized the Secretary of HEW to establish standards for reviewing benefits claims filed under Part B and C.\textsuperscript{31} The procedures established by the Secretary for Part B and Part C differed greatly, as the following discussion documents.

A. \textit{Part B of Title IV}

Part B of the 1969 Act directed the Secretary of HEW to establish regulations for identifying "total disability" and death "due to pneumoconiosis."\textsuperscript{32} In order to be eligible for a Part B claim, the claimant must have filed previously under the applicable state workers' compensation law.\textsuperscript{33} This requirement was waived, however, if such filing would have been futile because of the expiration of the filing period, if pneumoconiosis was not compensable under such law, or if, in the opinion of the Secretary, filing would be fruitless.\textsuperscript{34} If a miner timely filed and established a Part B claim, the federal government provided lifetime benefits under the 1969 Act.\textsuperscript{35}

\begin{footnotes}
\item[31] 30 U.S.C. §§ 902(f), 932(h) (1976).
\item[32] Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, tit. IV, 83 Stat. 792, 793 (codified as amended at 30 U.S.C. § 921 (1982)). The only limitation on the Secretary's authority was that the regulation established could not provide more restrictive criteria than those applicable under § 223(d) of the Social Security Act, 42 U.S.C. § 223(d) (1982). Section 223(d) establishes disability criteria for determining eligibility for social security insurance benefits. \textsuperscript{Id.}
\item[34] Id. As late as May, 1978, the Department of Labor had not found a state compensation law that "adequately cover[ed] black lung disease." Cook, \textit{supra} note 20, at 28.
\item[35] Solomons, \textit{A Critical Analysis of the Legislative History Surrounding the Black

B. Part C of Title IV

Part C was vastly different from federally funded Part B. Part C was designed to operate like a statutory workers' compensation scheme, whereby an employer was liable for the amount of the claimed benefits if responsibility for the employee's injury could be assessed against that employer.36 As originally enacted, Part C was similar to Part B in that a claim filed under Part C of the federal program first was directed to an applicable state workers' compensation program for settlement. If the state program did not cover pneumoconiosis, or otherwise was inadequate, the Secretary of Labor could process the claim under Part C.37 The Secretary of Labor was empowered to identify a liable coal mine employer and assess it for the benefits paid to the claimant.38 If the Secretary could not identify a responsible employer, then the Secretary was authorized to pay the claimed benefits from federal funds.39

C. Amendments to Title IV

This section reviews the legislative evolution of the black lung benefits program from 1968 to 1977. The first subsection outlines the initial administrative activity following the enactment of the black lung benefits program in 1969 and Congress' response to that activity. The next subsection reviews the 1972 amendment and introduces HEW's interim standards, which play a key role in the dispute over the meaning of the term "criteria." Finally, the third subsection examines the 1977 amendment, briefly compares and contrasts the Secretary of Labor's adopted standards with the Secretary of HEW's interim standards, and then delineates the dispute created by the language of section 902(f)(2).

1. The 1969 Act

Part B of the 1969 Act quickly became a topic of debate. In car-


39. Id.
rying out the congressionally imposed duty of developing appropriate diagnostic determinants of claimant eligibility, the Secretary of HEW adopted the much criticized X-ray diagnosis, according to which a negative X-ray was positive proof of the absence of pneumoconiosis. Under the X-ray diagnosis standard, the approval rate of Part B claims was less than fifty percent. Advocates of a more reliable diagnosis criticized the accuracy of the X-ray as a definitive test for pneumoconiosis, but, in spite of mounting evidence of its fallibility, the X-ray diagnostic standard was defended and maintained by HEW. Dissatisfied with HEW’s performance in administering Part B in general, and the X-ray standard in particular, Congress amended the 1969 Act in 1972.

2. The 1972 Amendment

The 1972 amendment to the 1969 Act was aimed at liberalizing eligibility requirements and reducing the large backlog of pending Part B claims. In addition to the amendment, Congress exerted pressure...
on the Secretary of HEW to adopt interim standards to expedite pending Part B claims while permanent regulations were being developed. The Secretary of HEW responded to the congressional pressure by promulgating the interim adjudicatory rules in 1972. Applicable only to Part B claims, the rules established a presumption whereby a person who worked in a mine for ten or more years is presumed totally disabled if certain medical requirements are met. If the claimant can establish the existence of pneumoconiosis but cannot meet the required ten years of employment, an evidentiary provision of the interim rules nevertheless allows a presumption of total disability if the claimant can prove that the disease arose out of coal mine employment.

Congressional pressure to adopt interim standards for expeditious claim processing pertained only to Part B of the program. HEW already had established permanent medical standards for Part C.

under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials.

(g) The amendments made by this section shall be effective as of December 30, 1969.


51. 20 C.F.R. § 410.490 (1988). The interim adjudicatory rules only were applicable to a miner's Part B claims filed on or before June 30, 1973, and to survivors' claims if the miner died before January 1, 1974. Id. Any claim filed subsequently was reviewed under permanent standards which were drafted during the interim period.

52. A miner employed for 10 or more years would be presumed totally disabled if the claimant established the existence of pneumoconiosis by X-ray, biopsy, or autopsy. 20 C.F.R. §§ 410.490(b)(1)(i), 410.490(b)(3) (1988). The Secretary of HEW intended the medical criteria in the interim presumption to detect merely the disease, not the disabling effects of it. "[T]here were too many claims . . . to allow 'physical performance tests.' . . . [I]t was necessary to establish 'criteria which would detect disease,' but not necessarily a disabling level of impairment." Halon, 713 F.2d at 27-28 (Weis, J., concurring and dissenting) (quoting statements made during Senate hearings, Oversight of the Admin. of the Black Lung Benefits Program 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 193 (1977) [hereinafter Oversight] (statement of Herbert Blumenfeld, M.D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, Social Security Administration)).


Those permanent standards, however, proved much more burdensome to claimants than the interim standards of Part B claims. Consequently, the approval rate of Part C claims noticeably lagged behind that of Part B claims. In response to the discrepancy, Congress once again mobilized to amend the Act.

3. The 1977 Amendment

The 1977 amendment developed after much debate in the House and Senate subcommittees and between the House and Senate. As early as 1975, the House considered several amendments directing the Secretary of HEW to rewrite the Part C regulations to conform to the Part B interim regulations. Parties who were opposed to those regulations argued that the medical criteria incorporated into the interim standards of Part B were not accurate scientifically. Nevertheless, in 1976, the House approved H.R. 10760, which directed the Secretary of HEW to promulgate regulations for Part C claims which “shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.” The Senate rejected the House bill by neglecting to act on it prior to adjournment. In 1977, the House approved a new bill with identical language.

The Senate Subcommittee on Labor heard testimony from opponents of the HEW interim standards. Representatives of the Department of Labor stressed that because Parts B and C were different in nature, the Department should not be forced to adopt the Part B interim standards but should be permitted to draft its own. The Department of Labor persuaded the Senate to adopt a bill that, unlike the House bill, empowered the Department of Labor to draft its own standards for Part C without reference to the HEW interim regulations.

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55. Solomons, supra note 35, at 873. See also Halon, 713 F.2d at 26 (Weis, J., concurring and dissenting).
56. Halon, 713 F.2d at 28 (Weis, J., concurring and dissenting).
57. Id. at 26.
60. Oversight, supra note 52, at 142.
61. S. 1538, 95th Cong., 2d Sess. § 2(c) (1977). Empowering the Secretary of Labor to promulgate regulations for Part C was a significant change in the black lung benefits program. Since the inception of the program, it had been the duty of the Secretary of HEW to promulgate regulations for both Part B and Part C. See supra note 31 and accompanying text.
The House and Senate bills were sent to a conference committee, which produced a compromise version that Congress enacted as the Black Lung Benefits Reform Act of 1977.\footnote{Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified at 30 U.S.C. § 902(f)(2) (1982)); The compromise version conforms to the Senate amendment in providing the Secretary of Labor with the power to draft the regulations for Part C. CONFERENCE Comm. JOINT EXPLANATORY STATEMENT OF THE Comm. OF CONFERENCE, 95th Cong., 2d Sess. 886 (1977).} The statute empowered the Secretary of Labor, for Part C claims, to establish criteria for medical tests which accurately would reflect total disability in coal miners.\footnote{30 U.S.C. § 902(f)(1) (1982) provides: The term "total disability" has the meaning given it by regulations of the Secretary of ... subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that- (D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).} Pursuant to this amendment, the Secretary of Labor promulgated section 727.203 of title 20 of the Code of Federal Regulations for reviewing claims under Part C.\footnote{The 1977 amendment extended the limits of the Secretary of Labor's standards beyond Part C claims through the inclusion of a provision whereby all pending or previously denied claims, upon request of the claimant, would be either: 1) referred directly by the Secretary of HEW to the Secretary of Labor for determination using the new Part C standards, or 2) reviewed by the Secretary of Labor using Part C standards after being denied by the Secretary of HEW under Part B review. Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, 103 § 15 (1978) (codified as amended at 30 U.S.C. § 945 (1982)). Previously-denied Part B claims which had been filed after the June 30, 1973 cut-off date were likely candidates for review under the less demanding Part C standards promulgated by the Secretary of Labor.}

These regulations adopted evaluative medical criteria that were identical to those contained in the HEW interim standards,\footnote{The Secretary of Labor's regulations adopted the exact medical criteria established by the Secretary of HEW, while adding several other medical tests through which a claimant could establish a claim. Compare 20 C.F.R. § 727.203(a)(1), (2), (3), (4), (5) (1988) with 20 C.F.R. § 410.490(b) (1988). See also Halon v. Director, Office of Workers' Compensation Programs, 713 F.2d 21, 29 (3d Cir. 1983) (Weis, J., concurring and dissenting).} and established a similar presumption of total disability for a claimant able to prove ten years of coal mine employment. While appearing similar, there is a critical difference between using the HEW interim standards\footnote{See supra text accompanying notes 50-52.} and using the Secretary of Labor's standards. Under the Secretary of Labor's standards, a claimant satisfying the medical criteria but not the requisite ten years of employment was not provisionally...
permitted to take advantage of the presumption through proof that the disease arose from coal mine employment.

The absence of the evidentiary provision differentiates the HEW interim standards from the Secretary of Labor's standards, and is at the center of the dispute. Section 902(f)(2) directs the Secretary of Labor to promulgate standards that would "not be more restrictive than the criteria [of the interim standards established by the Secretary of HEW]."67 Because the standards established by the Secretary of Labor condition availability of the presumption of total disability on proof of ten years of employment and do not include an alternate evidentiary provision, they are more restrictive than the interim presumption established by the Secretary of HEW. If Congress intended the term "criteria" to include medical evaluation criteria, presumptions, and evidentiary provisions, then the Secretary of Labor violated section 902(f)(2) by promulgating the presumption without the accompanying evidentiary provision. Conversely, if Congress intended the term "criteria" to include only medical evaluation criteria, then the Secretary of Labor complied with the statute. The next section of this note examines recent cases which have interpreted the term "criteria" as it appears in 30 U.S.C. section 902(f)(2), and explores whether the Secretary of Labor violated that section by promulgating 20 C.F.R. section 727.203.

II. "CRITERIA" INTERPRETED

The controversy over the interpretation of the term "criteria" appearing in 30 U.S.C. section 902(f)(2) swiftly is coming to a head. The United States Supreme Court is expected to decide whether the Secretary of Labor violated 30 U.S.C. section 902(f)(2) when it hears arguments in Director, Office of Workers' Compensation Programs v. Broyles.68 Because the Broyles opinion substantively is a cursory reiteration of the exhaustive opinion in Halon v. Director, Office of Workers' Compensation Programs,69 this note focuses its discussion on the latter.

Two United States Circuit Courts of Appeals70 have shaped the

69. 713 F.2d 21 (3d Cir. 1983).
70. Strike v. Director, Office of Workers' Compensation Programs, 817 F.2d 395 (7th Cir. 1987); Halon v. Director, Office of Workers' Compensation Programs, 713 F.2d 21 (3d Cir. 1983). Three additional courts of appeals have decided cases on point, and have adopted the reasoning of the Third Circuit Court of Appeals rather than engaging in their own analyses. See Broyles v. Director, Office of Workers' Compensation Programs, 824
(A) any claim which is subject to review by the Secretary of . . . [HEW], or subject to a determination by the Secretary of Labor, under section 945(a) of this title;
(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and
(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor; shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

Id. (emphasis added).} Both courts employed similar approaches in defining the term but reached different results. In accordance with traditional canons of statutory construction, the courts first examined the plain meaning of the language of the statute\footnote{See 2 J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 366, at 698 (J. Lewis 2d ed. 1904). “Where . . . resolution of a question of federal law turns on a statute and the intention of Congress . . . [courts] look first to the statutory language and then to the legislative history if the statutory language is unclear.” Blum v. Stenson, 465 U.S. 886, 896 (1984). “It is elementary that the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.” Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted).} and then reviewed its legislative history.\footnote{“But words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how ‘clear the words may appear on superficial examination.’” Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) (quoting United States v. American Trucking Ass’ns, 310 U.S. 534, 543-44 (1940)).} Going a step further, one court considered policy arguments supporting a particular interpretation of the statute.\footnote{Halon, 713 F.2d at 24-25.} The following discussion presents the two cases. The subsequent section evaluates the competing arguments raised in the cases and discusses the important issue of scope of judicial review of an administrative agency decision. This latter issue was not addressed by the reviewing courts.

A. \textit{Halon v. Director, Office of Workers’ Compensation Programs}\footnote{713 F.2d 21 (3d Cir. 1983).} \footnote{Kyle v. Director, Office of Workers’ Compensation Programs, 819 F.2d 139 (6th Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3463 (U.S. Dec. 21, 1987) (No. 87-1045); Coughlan v. Director, Office of Workers’ Compensation Programs, 757 F.2d 966 (8th Cir. 1985).} On August 28, 1974, Mrs. Bertha Kubilus, the widow of a man who had been a coal miner for approximately eight years, filed a claim with the Secretary of HEW under Part B of the Black Lung Benefits Act.\footnote{F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988); F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988); F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988); F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988); F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988); F.2d 327 (4th Cir. 1987), cert. granted, 108 S. Ct. 1288 (1988).} The claims were dismissed for lack of jurisdiction under Part B of the Act, and Mrs. Kubilus appealed to the Fourth Circuit Court of Appeals. The court reversed and remanded the case for further proceedings.

\textit{Id.}
Act of 1972. Because Mr. Kubilus died prior to January 1, 1974, the claim was reviewed using the Part B interim standards. Although Mrs. Kubilus supplied evidence establishing that her husband had pneumoconiosis, the Secretary of HEW denied the claim because she was unable to prove the requisite ten years of coal mine employment. Subsequent to the passage of the Black Lung Benefits Reform Act of 1977, Mr. Charles Halon requested review of the previously denied claim. The Secretary of HEW again denied the claim. In accordance with the 1977 amendment, the Secretary of HEW then referred the claim to the Secretary of Labor for review under Part C standards. Under the Part C standards, as promulgated by the Secretary of Labor, the claim was denied once more. Mr. Halon appealed the decision to the Benefits Review Board, which upheld the Secretary of Labor's decision.

Halon sought review of the Board's decision in the United States Court of Appeals for the Third Circuit, claiming that the board erred in not interpreting 30 U.S.C. section 902(f)(2) to mandate application of the presumption of total disability as set forth in 20 C.F.R.

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76. The fact that Mr. Kubilus died prior to January 1, 1974, is inferred from the court's statement that 20 C.F.R. § 410.490(b) was the regulation relevant to the case. Halon, 713 F.2d at 23. See supra note 51.

77. See supra note 51.

78. Under 30 U.S.C. § 921(c)(1) (1982), a survivor establishing 10 years of coal mine employment is entitled to the rebuttable presumption that the decedent's pneumoconiosis arose out of such employment. Absent proof of 10 years of employment, a survivor must prove that decedent had contracted pneumoconiosis as a result of that employment.

79. Mrs. Kubilus died while her claim was pending. Charles J. Halon, Jr., the appointed executor of her estate, petitioned for review of the denied benefits claim. Halon, 713 F.2d at 22.

80. See supra note 64 for the 1977 amendment provisions regarding review of previously denied claims.

81. See supra note 64 for the 1977 amendment provisions regarding review by the Secretary of Labor under Part C standards.

82. Halon, 713 F.2d at 23.

83. The Benefits Review Board is a regulatory institution designed to take the place of federal district courts in hearing appeals. The purpose is to facilitate "uniformity and continuity to the judicial interpretation of the Black Lung Act." Smith, Black Lung Benefits Reform Act of 1977—Complicated But Simple, KY. BENCH & B., Apr. 1979, at 20, 20.

84. Halon, 713 F.2d at 24. Stating that improper criteria were used in reaching the decision, Judge Miller of the Review Board dissented on the ground "that by virtue of 30 U.S.C. § 902(f)(2), Mrs. Kubilus was entitled to the presumption of the cause of the permanent disability in 20 C.F.R. § 410.490(b)." Id. at 24.

85. The claims procedure under the black lung benefits program begins with an initial determination, followed by an informal conference, then a hearing before an administrative law judge, appeal to the Benefits Review Board, and further appeal to the United States Circuit Court of Appeals where the claim originated. 33 U.S.C. §§ 919, 921; 20 C.F.R. § 720.200, 20 C.F.R. § 725.401.
section 410.490(b), HEW's interim standards. After reviewing the plain language of the statute, the legislative history, and policy arguments, the court construed section 902(f)(2) to require the use of the interim standard presumption provisions.

The government contended that "[section] 902(f)(2) should be understood as if it read: 'Medical criteria applied by the Secretary of Labor in case[s] of [adjudications pursuant to 30 U.S.C. § 945] shall not be more restrictive than the medical criteria applicable to a claim filed on June 30, 1973.'" In support of its position, the government referred to specific comments made during congressional debate, and argued that adoption of the section 410.490(b) presumption would be costly.

To persuade the court that the term "criteria" in section 902(f)(2) was not a generic term, the government cited several references to medical criteria made during legislative debate. First, Representative Paul Simon, a member of the House subcommittee and of the conference committee responsible for drafting the bill, stated that the language of the bill is clear in that "[t]he Department of Labor is required to apply medical criteria no more restrictive than criteria being used . . . on June 30, 1973.'" Then, during Senate debate on the conference committee bill, Senator Jennings Randolph commented that the Department of Labor's review of previously denied claims "'will be accomplished with the use of the "interim" medical standards which were in use after the Black Lung Amendments of 1972.'" Finally, the conference committee reported that the compromise version of the bill "'conforms to the Senate amendment with the proviso that the so-called "interim" part B medical standards are to be applied to all reviewed and pending claims.'"

The court rejected the government's reading of the statute, stating that the "plain language of the statute does not suggest that Congress

86. Halon, 713 F.2d at 24.
87. Id. For an analysis of the Halon court's review of the statutory language, see infra notes 122-43 and accompanying text.
88. Halon, 713 F.2d at 24. For an analysis of the legislative history, see infra notes 144-54 and accompanying text.
89. Halon, 713 F.2d at 24-25. Concurring in part and dissenting in part, Judge Weis rejected the majority's broad reading of section 902(f)(2). Halon, 713 F.2d at 25 (Weis, J., concurring and dissenting).
90. Id. at 24 (citation omitted).
91. Id.
92. Id. at 29 (Weis, J., concurring and dissenting) (citing 124 CONG. REC. 3431 (1978)).
93. Id. (citing 124 CONG. REC. 2331 (1978)).
94. Id. at 28-29 (citing H.R. CONF. REP. NO. 864, 95th Cong., 2d Sess. 16 (1978)).
intended any such modification of the generic term ‘criteria.’” In dismissing the government’s interpretation of the legislative history, the court stated that “[r]eferences in debate to medical criteria are not dispositive, since medical criteria are included [in the text of the statute].” The court cited other congressional remarks that suggested that “criteria” included both adjudicatory and medical standards.

The government argued that the additional costs of requiring the presumption could be as great as $190,800,000.00. In response, the court stated that the whole rehearing mechanism mandated by 30 U.S.C. section 945 was costly and that the overall thrust of the amended act was to liberalize the standards for availability of benefits. The court offered an additional policy argument, suggesting that the interpretation the government proffered “would produce the anomalous result that in cases adjudicated [by the Secretary of HEW] the . . . presumption would apply, whereas in cases transferred to the Secretary of Labor it would not.”

In his concurring and dissenting opinion, Judge Weis concluded that the legislative history supported the Department of Labor’s reading of section 902(f)(2). He commented that “[t]he testimony of hearing witnesses, the reports of the congressional committees, and the statements of the legislators who guided the legisla-

95. Id. at 24.
96. Id.
97. Representative Carl Perkins stated:
All claims filed before the date that the Secretary of Labor promulgates new medical standards under part C are subject to evaluation under standards that are no more restrictive than those in effect as of June 30, 1973. And that means the so-called interim standards. These are the standards HEW has applied under part B and they are the precise and only standards HEW will apply to these old claims it must review according to this legislation. As for the Labor Department, it too must apply the interim standards to all of the claims filed under part C, at least until such time as the Secretary of Labor promulgates new standards consistent with the authority this legislation gives him.


98. Halon, 713 F.2d at 25 n.1 (Weis, J., concurring and dissenting).
99. Id. at 24.
100. Id. at 25. The court explained that reading sections 902(f)(2) and 945 together “suggests that in cases adjudicated pursuant to section 945 the rules of adjudication will be at least as favorable in the Labor Department as in the Department of [HEW].”
101. Judge Weis concurred in the portion of the opinion that found that Mr. Kubilus had less than 10 years of coal mine employment and in the decision to remand because of the administrative law judge’s failure to apply the Secretary of Labor’s permanent regulations. Id. at 25 (Weis, J., concurring and dissenting).
102. Id. at 29.
tion from introduction to final passage are all consistent in designating the criteria referred to in section 402(f)(2) as ‘medical criteria.’”

B. *Strike v. Director, Office of Workers’ Compensation Programs* 104

Opal Strike is the widow of Roy Strike, a coal miner of nine and one-half years’ employment. On June 12, 1975, she filed a claim for survivors’ benefits under the Black Lung Benefits Act of 1972. On November 28, 1979, the Department of Labor denied the claim.105 After a formal hearing, an administrative law judge concluded that the Department of Labor was correct in its denial of the claim.106 Strike appealed the decision to the Benefits Review Board, arguing that section 902(f)(2) prohibited the Secretary of Labor from denying the claim for failure to prove ten years of coal mine employment.107 The Board rejected Strike’s argument and upheld the decision of the administrative law judge.

In her action for review of the Board’s decision in the United States Court of Appeals for the Seventh Circuit, Strike argued that Congress intended the term “criteria” in section 902(f)(2) to include evidentiary rules and adjudicatory standards, as well as medical standards.108 Rejecting her claim, the court examined the plain language and the legislative history of the statute and affirmed the Department of Labor’s interpretation of section 902(f)(2).109

The government argued that the statute was ambiguous on its face, implying that this ambiguity thus allowed the court to resort to legislative history.110 The court readily accepted this view, stating that “[w]hen section 902(f) is read as a whole, the plain language of the statute in no way unambiguously suggests that the term ‘criteria’ was intended to be generic.”111 In support of the restrictive reading of “criteria,” the court pointed to the use of the term in section 902(f)(1)(D),112 which immediately precedes section 902(f)(2). Read-

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103. *Id.*
104. 817 F.2d 395 (7th Cir. 1987).
105. *Strike*, 817 F.2d at 399.
106. *Id.* at 400. The administrative law judge found that, while medical evidence established pneumoconiosis, Mrs. Strike could not prove the requisite 10 years of employment to take advantage of the interim presumption of total disability. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 400-01. For an analysis of the plain language and legislative history, see *infra* notes 122-54.
110. *Strike*, 817 F.2d at 401. See generally *infra* notes 122-52 and accompanying text.
111. *Strike*, 817 F.2d at 400-01.
ing both sections together, "it is certainly arguable . . . that the ‘criteria’ referred to in (f)(2) are the ‘criteria for all appropriate medical tests . . . which accurately reflect total disability in coal miners’ which the Secretary of Labor was directed to establish in (f)(1)(D).”

The court found that Judge Weis’ careful review of the legislative history in the Halon decision was persuasive and supported a narrow interpretation of the term “criteria.”113 As presented by Judge Weis, the conference committee’s only mention of the use of presumptions concerned the intention to incorporate the section 411(c) presumption into all standards.115 Section 411(c) presumes that a miner of ten or more years’ employment, afflicted with pneumoconiosis, derived the condition from his or her coal mine employment.

The court echoed Judge Weis’ remark that the standards drafted by the Secretary of Labor, including the regulatory standard at issue, had been reviewed without comment by the same members of Congress who originally drafted the “not more restrictive” language.116 Finally, the court cited a House Report accompanying the bill, which stated that “[t]his provision . . . [section 902(f)(2),] would require that standards no more restrictive than the ‘interim’ medical standards [under part B] shall be equally applicable to part C claims.”117 The fact that this was a House Report, as opposed to Senate Report, is particularly significant, in that during the drafting of the 1977 amendment, it was the House version which sought to restrict the new Part C standards by tying them to the HEW interim standards.118 By referring solely to the “‘interim’ medical standards,” the House Report suggests that the sole concern of the House was to restrict the medical criteria of the Part C standards.

Both the Halon and Strike courts confronted the issue of whether the term “criteria” appearing in section 902(f)(2) meant medical evaluation criteria, presumptions, and evidentiary provisions, or, alternatively, meant only medical evaluation criteria. The Halon court held that the plain language of the statute revealed that “criteria” meant medical evaluation criteria, presumptions, and evidentiary provisions.

113. Strike, 817 F.2d at 401.
114. Id.
115. Id. at 403. See also Halon, 713 F.2d at 25, 29 (Weis, J., concurring and dissenting).
116. Strike, 817 F.2d at 404. See also Halon, 713 F.2d at 30 (Weis, J., concurring and dissenting).
117. H.R. REP. NO. 151, 95th Cong., 1st Sess. 15, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 237, 251. This supporting evidence was not mentioned by Judge Weis in his concurring and dissenting opinion.
118. See supra notes 56-61 and accompanying text.
The *Strike* court held that the statute was ambiguous on its face, and that the legislative history revealed that "criteria" meant only medical evaluation criteria.

III. ANALYSIS OF THE *HALON* AND *STRIKE* OPINIONS

This section evaluates the *Halon* and *Strike* decisions in light of traditional canons of statutory construction, the legislative history of the Act, and the scope of judicial review of an administrative agency decision. The first subsection focuses on "the plain meaning rule" and its application to section 902(f)(2), with particular attention to the role of the "whole statute" rule. The following subsection examines the persuasiveness of the legislative history arguments raised in both *Halon* and *Strike*.

A. Statutory Construction

Statutory construction invariably begins with "[t]he primary and general rule . . . that the intent of the lawmaker is to be found in the language that he has used."1 As quoted in the Sutherland treatise, "'[w]here the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.' "1 This rule is typically termed "the plain meaning rule.”

The corollary to the plain meaning rule is that if the meaning is not plain, that is, where a natural reading of the language connotes more than one intent, the statute must be interpreted using standard rules of construction. Thus, before the court considers the issue of

119. See infra notes 122-39 and accompanying text.
120. See infra notes 144-54 and accompanying text.
121. See infra notes 155-98 and accompanying text.
123. 2A J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.01, at 73 (N. Singer 4th ed. 1984) (quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)). Sutherland stated:

The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.

2 J.G. SUTHERLAND, supra note 72, § 366, at 698-99 (citing Green v. Weller, 32 Miss. 650 (1856)).
124. 2A J.G. SUTHERLAND, supra note 123, § 46.01, at 73.
whether the legislature intended a broad or restrictive reading of "criteria" in section 902(f)(2), the court must first decide the threshold issue of whether the term "criteria" has a plain or an ambiguous meaning. If the meaning is plain, the task simply is to apply that meaning and look no further. If the meaning is ambiguous, the court must probe more deeply to discover the legislative intent.

In determining whether the statutory language has a plain or an ambiguous meaning, a court might proceed in one of two ways. The court might focus narrowly on the specific language in the precise section of the statute, excluding from examination the remainder of the statute, or the court might read the statute in its entirety, extracting the plain meaning of any one part or section from the whole.

The Halon court applied the plain meaning rule and narrowly focused on the language of subsection 902(f)(2). Electing not to examine other parts of the statute, the court found the language of section 902(f)(2) to be simple and concise. The majority opinion referred to "criteria" as a generic term, attributing to it great flexibility in application. Indeed, as opposed to a technical term of art, the word "criteria" is a common word, and should be understood in its popular sense. Accordingly, the term "criteria" in section 902(f)(2) would encompass all of the elements comprising the HEW interim standards. In other words, the Secretary of Labor must not utilize more demanding medical test results for proof of the existence of pneumoconiosis, nor shall the Secretary of Labor employ a less attainable presumption of total disability.

Because nothing in the language of section 902(f)(2) suggests a limitation or restriction on this all-inclusive reading of "criteria," the Halon court concluded that the term had but one unambiguous mean-

125. See supra note 71 for text of § 902(f)(2).
126. Halon v. Director, Office of Workers' Compensation Programs, 713 F.2d 21, 24 (3d Cir. 1983).
127. "In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'” Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985), reh'g denied, 470 U.S. 1065 (1985) (quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 153, 164 (1985)). "'[I]t should be generally assumed that Congress expresses its purpose through the ordinary meaning of the words it uses . . . .” Escondido Mut. Water Co. v. La Jolla Bond of Mission Indians, 466 U.S. 765, 772 (1984), reh'g denied, 467 U.S. 1267 (1984). “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” Perrin v. United States, 444 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580-81 (1975)). See also 2 J.G. Sutherland, supra note 72, § 389, at 747-48. Criteria is defined as "standard[s], rule[s], or test[s] on which a judgment or decision can be based.” The American Heritage Dictionary of the English Language 314 (6th ed. 1976).
ing. In this narrowly focused examination, the language of section 902(f)(2) suggests an unrestricted application of the term “criteria.” Such a narrow focus, however, is not in accordance with other principles of statutory construction.

Focusing solely on a provision of an act is not definitive as to legislative intent, but merely suggests an intent which must be evaluated in relation to other factors. An important rule of statutory construction is that a statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus it is not proper to confine interpretation to the one section to be construed.

Because Congress enacted section 902(f)(2) contemporaneously with section 902(f)(1), both must be read to determine the meaning of either. Construing section 902(f)(2) with reference to section 902(f)(1) creates ambiguity as to the meaning of “criteria.”

128. Halon, 713 F.2d at 24.
129. “[A] single provision will not be interpreted so as to defeat the general purpose that animates and informs a particular legislative scheme.” Milwaukee County, Wis. v. Donovan, 771 F.2d 983, 986 (7th Cir. 1985), cert. denied, 476 U.S. 1140 (1986). “[S]tatutory meaning is of course to be derived, not from the reading of a single sentence or section, but from consideration of an entire enactment against the backdrop of its policies and objectives.” Don’t Tear it Down, Inc. v. Pennsylvania Ave. Dev. Corp., 642 F.2d 527, 533 (D.C. Cir. 1980).

Evaluating the accuracy of a plain meaning interpretation requires: 1) examination of “other section[s] of the act [for expan[sion] or restrict[ion] [of the provision’s] meaning”; 2) determination of whether the “provision itself is repugnant to the general purview of the act”; and 3) “consider[ation] in pari materia with other acts, or with the legislative history . . . [for suggestion of] a different meaning.” 2A J.G. Sutherland, supra note 123, § 46.01, at 74 (footnote omitted).

130. 2A J.G. Sutherland, supra note 123, § 46.05, at 90 (footnote omitted). “A statute is passed in whole and not piecemeal. Thus, in interpreting a statute, examination of the whole, not isolated words, will disclose legislative intent.” Moorhead v. United States, 774 F.2d 936, 941 (9th Cir. 1985). “[I]t is an established rule, in construing a statute, that the intention of the lawgiver and the meaning of the law are to be ascertained by viewing the whole and every part of the Act.” United States v. Anderson, 626 F.2d 1358, 1370 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981) (quoting H. Broom, A Selection of Legal Maxims 585 (8th ed. 1882)). See also Note, Rules and Aids to Statutory Construction, 1 Va. L. Reg. 512, 512 (1915); Monnett, Statutory Construction, 52 Alba. L.J. 120, 122 (1895).

132. See supra notes 63 and 113 and accompanying text. The inclusion of a limiting reference restricts the definition of “criteria” in § 902(f)(1)(D). In reading the whole statute, this restriction alerts the reader to the fact that subsequent uses of the term “criteria,” for example as in § 902(f)(2), also may be restricted.
Congress has revised section 902(f) twice, once in 1972 and then in 1977. In the original 1969 Act, section 902(f) simply instructed the Secretary of HEW to establish regulations defining “total disability” for Parts B and C. The 1972 amendment altered section 902(f) by adding a congressional presumption of “total disability” if the miner is unable to perform work comparable to mining.

The 1977 amendment greatly expanded section 902(f), adding subsections (1) and (2). Subsection (1) removed the regulatory control of Part C from the Secretary of HEW and granted it to the Secretary of Labor. Provisions (1)(A), (1)(B), and (1)(C) imposed restrictions on both the Secretary of HEW and the Secretary of Labor in their regulation of Parts B and C. Provision (1)(D), however, concerns only the Secretary of Labor’s establishment of criteria for medical tests which shall reflect total disability accurately. Subsection (2), also specific to the Secretary of Labor, imposed the “not more restrictive”


134. The term “total disability” has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time. Such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act.


136. Section 902(f)(1)(A) requires that the regulations established by the Secretary of HEW and the regulations established by the Secretary of Labor both provide a presumption of total disability for a miner who is prevented by pneumoconiosis from engaging in gainful employment requiring skills and abilities comparable to those previously utilized while employed as a miner. 30 U.S.C. § 902(f)(1)(A) (1982). Section 902(f)(1)(B) requires that the regulations established by the Secretary of HEW and the regulations established by the Secretary of Labor both provide that: 1) if a deceased miner was employed in a mine at the time of death, such employment shall not be used as conclusive evidence that the miner was not totally disabled; and 2) if a living miner is employed in a mine but the employment circumstances reflect a change indicative of a diminished capacity to perform usual coal mine work, employment in the mine shall not be used as conclusive evidence that the miner is not totally disabled. 30 U.S.C. § 902(f)(1)(B) (1982). Section 902(f)(1)(C) requires that the regulations established by the Secretary of HEW and the regulations established by the Secretary of Labor not provide more restrictive criteria than those of section 223(d) of the Social Security Act. 30 U.S.C. § 902(f)(1)(C).

limitation on the "criteria" to be applied to claims reviewed or determined by the Secretary of Labor. In accordance with the canons of statutory construction, when read "as a whole," sections 902(f)(1)(D) and (f)(2) create some doubt as to the legislative intent for the meaning of "criteria." The converse argument, that occurrence of the same general term in both a restricted and unrestricted form within the same act does not create ambiguity, is supported by the contention that Congress is presumed to act with intent. Arguably, Congress knew how to restrict the meaning of "criteria" to encompass only medical criteria, and it chose to do so only in section 902(f)(1)(D). The logical inference is that Congress intended an unrestricted meaning of "criteria" in section 902(f)(2).

The weakness of this argument, however, is in its premise. It is unrealistic to presume infallibility on the part of Congress. Errors and omissions are commonplace. To presume congressional intent based on the exclusion of language is to run the risk of reaching an interpretation against that which was truly intended.

B. Legislative History

When a statute, read as a whole, yields an ambiguous legislative

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138. See supra note 71.

139. See supra notes 63 and 71 for the text of § 902(f)(1)(D) and § 902(f)(2). Section (f)(1)(D) uses the language "criteria for all appropriate medical tests," obviously meaning medical criteria. Section (f)(2), immediately following § (f)(1)(D), simply uses "criteria." The reader is left to ponder whether the "criteria" in § (f)(2) are to be understood as the same criteria earlier referred to in § (f)(1)(D).

140. See supra note 132 and text accompanying note 113 for a discussion of the relationship between § 902(f)(1)(D) and § 902(f)(2).

141. "[D]ischarge of . . . [a court's] obligation to follow the intent of Congress requires that . . . [the court] assume that Congress said what it meant and meant what it said." Pettis ex rel. United States v. Morrison-Knudsen Co., 577 F.2d 668, 672 (9th Cir. 1978). See also 2A J.G. SUTHERLAND, supra note 123, § 46.01, at 74.


143. "Ordinarily, the use of different language creates an inference that Congress meant different things. However, when the statutory purpose and legislative history establish that no difference was in fact intended, the inference is negated." United States v. Stauffer Chem. Co., 684 F.2d 1174, 1186 (6th Cir. 1982), aff'd, 464 U.S. 165 (1984) (citing Moore v. Harris, 623 F.2d 908 (4th Cir. 1980)).
purpose, courts can and should explore the legislative history in order to resolve the ambiguity. Legislative history provides valuable insight into influential conditions and circumstances surrounding legislative acts.

As previously discussed, the legislative history of Title IV of the Black Lung Benefits Reform Act provides arguments for both a restrictive and a general interpretation of “criteria.” The more defensible reading of that history, however, is that Congress intended a narrow definition. The legislative history supporting this restrictive reading is more numerous and persuasive. It includes supportive comments made by committee members during debate, acquiescence to the restrictive use of “criteria” by the members of the conference committee and staff responsible for drafting the statute, and incorporation of the narrow view in written reports accompanying the legislation. The only contrary legislative history offered by the Halon court is language used during floor debate. However, reliance on

144. Legislative history often is afforded great influence in determining legislative intent. If a court derives a meaning from the legislative history that is contrary to the “plain meaning,” the Supreme Court has declared that “even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.” National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (citing Neuberger v. Commissioner, 311 U.S. 83, 88 (1940)). See also 2A J.G. SUTHERLAND, supra note 123, § 48.01, at 278; Note, supra note 130, at 514.

145. “Although an examination of the motives and intentions of those who enacted a measure is no substitute for a reading of its plain language, such an inquiry can provide useful context for understanding the real meaning and import of legislation.” Rollins Envtl. Servs. (FS), Inc. v. Parish of St. James, 775 F.2d 627, 635 (5th Cir. 1985); Premachandra v. Mitts, 727 F.2d 717, 727 (8th Cir. 1984), rev’d, 753 F.2d 635 (8th Cir. 1985) (quoting Lambur v. Yates, 148 F.2d 137, 139 (8th Cir. 1945)). See also 2A J.G. SUTHERLAND, supra note 123, § 48.02, at 283.

146. See supra text accompanying notes 98-103.

147. Legislative history, like any historical data, can be analyzed both generally and specifically. 2A J.G. SUTHERLAND, supra note 123, § 48.02, at 284. A “general” analysis “leads to an arbitrary quantitative method of evaluation where the winning conclusion is that one supported by the greatest number of facts.” Id. A “specific” analysis provides “qualitative judgments with detailed historical perspective.” Id. Using either analytical approach, both the opinion of the Strike court and the concurring and dissenting opinion of Judge Weis in Halon prove superior to the Halon majority decision.

148. See supra text accompanying notes 92 and 93.

149. See supra notes 115-16 and accompanying text.

150. See supra note 117 and accompanying text.

151. See supra note 97.
any language from floor debate must be tempered by the lack of accuracy in the choice of words during debate.\textsuperscript{152} Explanatory comments by committee members and the bill's sponsors commonly are given greater weight than floor debate, because these legislators are generally more familiar with the legislation.\textsuperscript{153} In consideration of the foregoing, the legislative history of the Black Lung Benefits Reform Act weighs heavily against the broad interpretation of "criteria" advanced by the \textit{Halon} court.\textsuperscript{154}

\textbf{C. Scope of Review}

The analysis thus far has focused on traditional judicial interpretation of a statute. The actual cases, however, present an additional concern: determining the appropriate scope of judicial review of an administrative agency's decisions. Although neither the \textit{Halon} nor the \textit{Strike} court expressly addressed this issue, both necessarily made a determination about the appropriate scope of review of the Secretary of Labor's interpretation of the statutory term "criteria."

In reviewing agency decisions, the judiciary's role is to ensure

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\textsuperscript{152} 2A J.G. Sutherland, \textit{supra} note 123, \S\ 48.13, at 329 ("As further reason for discounting the value of statements made in floor debate, it has been noted 'in the course of oral argument on the . . . floor, the choice of words . . . is not always accurate or exact.'") (quoting \textit{In re} Carlson, 292 F. Supp. 778, 783 (C.D. Cal. 1968)) \textit{aff'd}, 423 F.2d 714 (9th Cir.), \textit{cert. denied}, 400 U.S. 819 (1970). ["[C]omments . . . made during the . . . floor debates . . . are not entitled to the same respect as carefully prepared committee reports." Vermont \textit{v.} Brinegar, 379 F. Supp. 606, 611 (D. Vt. 1974).]

\textsuperscript{153} See 2A J.G. Sutherland, \textit{supra} note 123, \S\ 48.14, at 334. "Remarks . . . made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight." Ernst \& Ernst \textit{v.} Hochfelder, 425 U.S. 185, 204 n.24 (1976), \textit{reh'g denied}, 425 U.S. 986 (1976).

\textsuperscript{154} The \textit{Halon} court, in an attempt to diminish the significance of the legislative history, stated that the history was "at best, equivocal," \textit{Halon}, 713 F.2d at 24, and professed its own policy arguments supporting a broad reading of "criteria." See \textit{supra} notes 98-100 and accompanying text.

While statutes "enacted to relieve personal disadvantage, hardship, and suffering are generally accorded generous judicial acceptance and liberal construction," 2A J.G. Sutherland, \textit{supra} note 123, \S\ 58.04, at 716, the court is not at liberty to ignore the legislative intent and substitute its own policy goals. "No rule of statutory construction is more readily applied by the courts than that public statutes dealing with the welfare of the whole people are to have a liberal construction." Hall \textit{v.} Union Light, Heat \& Power Co., 53 F. Supp. 817, 818-19 (D. Ky. 1944). Allowing a court to substitute its own policy for the legislature's is to invest the court with lawmaking power. The judiciary has no authority to assume such a power. "A court cannot second-guess and substitute its judgment for that of the legislature or insert what it deems has been omitted." Harmon \textit{v.} Phillips Petroleum Co., 555 F. Supp. 447, 452 (D. Mont. 1982). "[I]t is the duty of the court to interpret the statute as it is and not to read into it something that is not there." Northern Pac. Ry. Co. \textit{v.} Reynolds, 68 F. Supp. 492, 499 (D. Minn. 1946), \textit{aff'd}, 168 F.2d 934 (1948), \textit{cert. denied}, 335 U.S. 828 (1948).
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that the agency has acted within the prescribed limits defined by Congress in the enabling act. A court, armed with this policy, evaluates whether the agency is functioning in accordance with its directive. However, a court encounters great difficulty in determining compliance with congressional policy when Congress has failed to reflect, or has ambiguously reflected, a policy decision in the statutory language.

The proper scope of judicial review traditionally is governed by the affixation of artificial labels to the agency decision. The court predominantly characterizes a decision as one of two types: a finding of fact or a conclusion of law. Each characterization commands a


"The choice of goals and objectives is a policy choice of the legislature, and the court's function is to ascertain the legislature's choice and to apply it, including the assurance of faithful application by agencies ...." National Ass'n of Greeting Card Publishers v. United States Postal Serv., 607 F.2d 392, 404 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980). See also R. PIERCE, JR., S. SHAPIRO & P. VERKUIJL, ADMINISTRATIVE LAW AND PROCESS § 5.1.4, at 124, § 7.1, at 350 (1985) [hereinafter R. PIERCE, JR.]. "When Congress grants an agency power to act in an area, it accompanies that grant of power with statutory limits on the type of action the agency can take and the factual circumstances in which it is empowered to act." Id. § 7.1, at 350.

156. R. PIERCE, JR., supra note 155, § 7.1, at 350. But see Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 553 (1985) ("Does statutory text have any intrinsic meaning apart from context?").

157. "Administrative determinations must have a basis in law and must be within the granted authority." Social Sec. Bd. v. Nierotko, 327 U.S. 358, 369 (1946). "An agency action is ultra vires when the agency has acted beyond the scope of its defined authority." Kenda Rubber Indus. Co. v. United States, 630 F. Supp. 354, 356 (Ct. Int'l Trade 1986). By reviewing an agency's actions, a court ensures that those actions harmonize with the "legislative policy decisions reflected in [the] statute[ ] ... delegating power to [the] agency[ ]." R. PIERCE, JR., supra note 155, § 7.1, at 350.

158. R. PIERCE, JR., supra note 155, § 7.1, at 352.

159. "[T]he focus has been on fitting the questions presented on review into hoary categories ...." W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW CASES AND COMMENTS 352 (8th ed. 1987) [hereinafter W. GELLHORN].

160. W. GELLHORN, supra note 159, at 352. Scholars employ the labels "questions of fact" and "questions of law" to characterize the type of agency decision.

No two terms of legal science have rendered better service than "law" and "fact." They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them. In them and their kind a science of law finds its
different standard of review.

An agency decision categorized by a reviewing court as a finding of fact is sub-categorized for purposes of determining the appropriate standard of review. A finding of fact, made by an agency using formal procedures,\textsuperscript{161} is subject to judicial review under the substantial evidence test.\textsuperscript{162} Agency findings arrived at through informal procedures\textsuperscript{163} are subject to review under the arbitrary and capricious test.\textsuperscript{164} Some argue that, as applied to findings of fact, the "substantial evidence" test and the "arbitrary and capricious" test are functionally indistinguishable.\textsuperscript{165}

An agency decision categorized by a reviewing court as a conclusion of law also is subject to varying degrees of review. Some conclu-

\textsuperscript{161} "Formal rulemaking" is the statutory requirement that an agency rule be made "on the record" through an agency hearing open to the public. Administrative Procedure Act §§ 4(b), 7 & 8, 5 U.S.C. §§ 553(c), 556 & 557 (1982). "Formal adjudication" is the statutory requirement that an agency judgment be made subsequent to a trial-type hearing. Administrative Procedure Act § 5, 5 U.S.C. § 554 (1982).

\textsuperscript{162} "Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C § 553 or when the agency action is based on a public adjudicatory hearing." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971) (citation omitted). See Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1982). Under the substantial evidence test, a court must sustain an agency’s finding of fact as long as there is substantial evidence, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), when the record is considered as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951). See also R. Pierce, Jr., supra note 155, §§ 7.3 & 7.3.1, at 357.

\textsuperscript{163} "Informal rulemaking" is the statutory requirement that the agency merely publish proposed rules and receive comments from interested parties before publishing final regulations and a "concise general statement of their basis and purpose." Administrative Procedure Act § 4, 5 U.S.C. § 553(c) (1982). "Informal adjudication" is the "catchall category covering a multitude of ‘final’ agency decisions which do not fit anywhere else and which have no common theme or pattern." Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 40 n.14 (1975).

\textsuperscript{164} "[T]he court must consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Volpe, 401 U.S. at 416. See also Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982); L. Jaffe, Judicial Control of Administrative Action 182 (abr. ed. 1965). The arbitrary and capricious test requires the court to set aside an agency action determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (1982). The court should defer to an agency decision made under express delegation of authority unless the decision is "arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). See also R. Pierce, Jr., supra note 155, § 7.3.2, at 360.

\textsuperscript{165} R. Pierce, Jr., supra note 155, § 7.3.3, at 363.
sions of law are reviewed under the rarely-employed de novo standard.\textsuperscript{166} Other conclusions of law are reviewed under the rational basis standard.\textsuperscript{167}

Despite the seeming simplicity of this categorization scheme, the agency decision often inextricably combines findings of fact and conclusions of law.\textsuperscript{168} In such situations, courts have solved the dilemma by classifying these "mixed questions"\textsuperscript{169} as questions of fact when they desire limited review of the agency decision and as questions of law when they desire expansive review.\textsuperscript{170} In using this approach,

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166. In "narrow circumstances the reviewing court is to engage in a \textit{de novo} review of the action and set it aside if it was 'unwarranted by the facts.'" \textit{Volpe}, 401 U.S. at 414. Pursuant to Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(F), de novo review is authorized only when the agency action is adjudicatory in nature and the factfinding procedures are inadequate, and when "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action." \textit{Volpe}, 401 U.S. at 415. \textit{See also} R. Pierce, Jr., \textit{supra} note 155, § 7.4, at 370.

Under de novo review, the court does not defer to the agency conclusion; rather, it substitutes its independent judgment. \textit{Id.} § 7.4.1, at 370. See, e.g., Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 96-108 (1983) (the Court disregarded the FLRA's reading of a statute as allowing order of payment of travel expenses and per diem in addition to salary to a union employee appointed to negotiate a dispute, holding that the statute only permitted payment of salary); SEC v. Sloan, 436 U.S. 103, 110-23 (1978) (the Court substituted its judgment after the SEC interpreted a statutory provision allowing a 10-day suspension of stock trading for suspected stock manipulation to empower the agency to issue consecutive suspensions (totaling over one year) as long as it was in the public interest).

167. \textit{See} NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944); Gray v. Powell, 314 U.S. 402, 412 (1941). \textit{See also} R. Pierce, Jr., \textit{supra} note 155, § 7.4.2, at 372. Under the rational basis standard, the scope of review is limited and the court defers to an agency's procedure, finding, and conclusion if there is a "rational basis" for the decision. Camp v. Pitts, 411 U.S. 138 (1973); \textit{Hearst}, 322 U.S. at 131 (the Court upheld the NLRB's interpretation of the broad term "employee" to include newspaper vendors, stating that "the Board's determination . . . is to be accepted if it has warrant in the record and a reasonable basis in the law.").

Judicial deference is founded on three grounds: 1) agencies often have superior knowledge and resources in the particular area; 2) the constitutional role of courts does not permit substitution of judicial policy for regulatory policy; and 3) Congress often demonstrates its intent, explicitly or implicitly, that agencies have a measure of discretion in decision-making. R. Pierce, Jr., \textit{supra} note 155, § 5.1.4, at 124-26, § 7.1, at 351-52. When Congress chooses to delegate decisionmaking authority to an agency instead of making the decision itself, the agency seemingly has unbridled discretion. In order to minimize the potential for abuse, reviewing courts seek rationality and consistency in agency decisions. \textit{Id.} § 7.1, at 353.

168. "[T]he distinction between 'law' and 'fact,' on which the scope of review is based, is not nearly so well defined as is often supposed." B. Schwartz, \textit{An Introduction to American Administrative Law} 202 (1962).

169. 4 K. Davis, \textit{Administrative Law Treatise} § 30.01, at 189 (1958).

170. "The reviewing Court itself has the final word upon whether the particular finding is one of 'law' or 'fact,' and, in deciding that question it, in effect, determines whether the review of that finding is to be a broad or narrow one." B. Schwartz, \textit{supra} note 168,
courts abandon the “analytical” or literal meaning of the characterizing terms in favor of a “practical” meaning. Alternatively, some courts faced with the “mixed question” scenario avoid the law-fact distinction entirely by utilizing the rational basis test. With this method, the courts, believing substitution of judgment to be inappropriate, recite that the agency decision “must be upheld if it has warrant in the record and rational basis in law.”

Regardless of whether a court elects the law-fact distinction or the rational basis test to determine the scope of review, the fact remains that the court’s choice between substituting judgment or deferring to the agency is highly discretionary. However, three major

at 203. See also 4 K. DAVIS, supra note 169, § 30.01, at 190 (Supreme Court classifies mixed questions solely as questions of “fact” when it desires to limit review). Factors that guide a court in its determination of whether to review broadly or narrowly are examined subsequently in this note. See infra notes 175-84 and accompanying text.

171. For a thorough discussion of the “analytical” and “practical” approaches to the law-fact distinction, see 4 K. DAVIS, supra note 169, § 30.02, at 192-98. Confusion surrounding the “analytical” approach to the law-fact distinction has caused commentators to reject it as a viable method. G. HENDERSON, THE FEDERAL TRADE COMMISSION 97-98 (1924) (“[T]he Supreme Court . . . has created . . . a category of ‘administrative questions,’ upon which it will refuse to substitute its judgment. . . . These cases do not rest upon any supposed distinction between questions of fact or law; generally they are neither, but merely judgments of a practical character.”). See also E. PATTERSON, THE INSURANCE COMMISSIONER IN THE UNITED STATES 491 (1927) (“The classical analysis of administrative problems into ‘questions of law’ and ‘questions of fact’ is too uncertain and confusing to be of much value.”); Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact, 57 HARV. L. REV. 753, 812 (1944) (footnotes omitted) (“What is law to one Justice is fact to another, and perhaps vice versa when the next case comes along . . . Congenial assumptions are frequently rushed in as synthetic substitutes for analysis, and ‘fact’ and ‘law’ fly thick and fast. Verbal ingenuity easily fits the desired result.”).

172. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944) (“[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court’s function is limited. . . . The [agency’s decision] is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”); Gray v. Powell, 314 U.S. 402, 411 (1941) (“In a matter left specifically by Congress to the determination of an administrative body . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing . . . and an application of the statute in a just and reasoned manner.”); Rochester Tel. Corp. v. United States, 307 U.S. 125, 145-46 (1939) (quoting Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286-87 (1934)) (“So long as there is warrant in the record for the judgment of the expert body it must stand. . . . ‘The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.’”). See also 4 K. DAVIS, supra note 169, § 30.01, at 192, § 30.05, at 214.

173. 4 K. DAVIS, supra note 169, § 30.05, at 214.

174. Id., § 30.14, at 269.

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factors guide a court in setting the scope of review of an administrative agency decision: 1) "the comparative qualification of court and agency to decide the particular issue;"\textsuperscript{175} 2) "the extent to which the legislative body has committed particular problems to administrative or to judicial determination;"\textsuperscript{176} and 3) "the tendency of the courts to substitute judgment on broad generalizations, especially important ones, and to avoid such substitution of judgment on narrow or unique applications of law."\textsuperscript{177}

\textit{Id.}, § 30.01, at 189.

\begin{itemize}
\item Courts sometimes substitute judgment and sometimes use the rational basis test on problems of applying legal concepts to established facts, and . . . which of the two courses a court will follow in a particular case is usually a matter of judicial discretion and is not governed by formula or by systematic theory.
\end{itemize}

\textit{Id.}, § 30.09, at 240.

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\item 175. \textit{Id.}, § 30.14, at 269. "If the issue falls outside the area generally entrusted to the agency, and is one in which the courts have a special competence, i.e., the common law or the constitutional law, there is little reason for the judiciary to defer to an administrative interpretation." Hi-Craft Clothing Co. v. NLRB, 660 F.2d 910, 914-15 (3d Cir. 1981) (citing Piper v. Chris Craft Indus., 430 U.S. 1, 41 n.27 (1977)). \textit{See also} Institute for Scientific Information, Inc. v. United States Postal Serv., 555 F.2d 128, 132 (3d Cir. 1977).
\item 176. 4 K. DAVIS, supra note 169, § 30.14, at 270. "In areas where Congress has delegated authority to an administrative body to determine arcane areas of regulatory law, the courts should defer to the will of Congress." Delaware and Hudson Ry. v. Consolidated Rail Corp., 533 F. Supp. 692, 698 (N.D.N.Y. 1981). "[W]here an agency's decision rests in large part on technical and scientific data and is in an area in which discretion has been delegated to it by Congress, such judgments should be respected." American Meat Inst. v. Bergland, 459 F. Supp. 1308, 1316 (D.D.C. 1978).
\item 177. 4 K. DAVIS, supra note 169, § 30.14, at 270. "[L]egal issues presented—that is, the identification of governing legal standards . . . are . . . for the courts to resolve . . . ." FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986). "[W]hen the question is one of law and does not involve the expertise of an agency, [the court is] not bound by that agency's decision." Charter Limousine, Inc. v. Dade County Bd. of County Comm'rs, 678 F.2d 586, 588 (5th Cir. 1982).
\end{itemize}

In addition to the three main influencing factors, there exist several supporting factors. For example, the soundness, thoroughness, and consistency evident in the agency's consideration, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); and the longevity of the interpretation, and congressional acquiescence through reenactment of the same language while aware of the interpretation, NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); Massachusetts Trustees of E. Gas & Fuel Assoc. v. United States, 377 U.S. 235, 241 (1964); Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933) may be important considerations. Still more support favoring judicial deference is found in policy arguments suggesting that the agency is better situated to know what Congress intended. These arguments are: 1) where Congress authorized the agency to issue regulations, it is foreseeable that the issuance of such regulations will require interpretation by the administrative agency of its authority; 2) where Congress involved the agency in the enactment of the enabling statute, the agency gains an inside perspective as to the intent of the legislature; and 3) "congressional reliance on the agency's expertise in the area" is enough to support deference to the agency's interpretation of the statute. Hetzel, \textit{Instilling Legislative Interpretation Skills in the Classroom and the Courtroom}, 48 U. PITT. L. REV. 663, 680-81 (1987).
The comparative qualification of the court or agency is perhaps the most influential of the three factors bearing on the court's discretion in establishing scope of review.\(^\text{178}\) In assessing the comparative qualification, "the courts are generally the experts, as compared with agencies, on many types of issues, and this fact alone is frequently a sufficient reason for substitution of judicial for administrative judgment on problems of applying legal concepts to established facts."\(^\text{179}\) Statutory interpretation, absent technical and non-legal subject matter, is manifestly within the province of the judiciary.\(^\text{180}\)

The extent to which the legislative body has delegated the particular issue to the administrative agency is another factor influencing the scope of review. For example, where the agency is acting legislatively within congressionally delegated authority, the Supreme Court consistently has declared that judicial judgment should not be substituted for the agency rule.\(^\text{181}\) Absent congressional delegation of au-

\(^{178}\) 4 K. DAVIS, supra note 169, § 30.09, at 240-41, § 30.14, at 269.

\(^{179}\) Id., § 30.09, at 241. "[C]ourts ... are comparatively the experts in ... constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the particular field of the agency." Id.

\(^{180}\) "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute." NLRB v. Hearst Publications, Inc., 322 U.S. 111, 130-31 (1944) (citation omitted). See also Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922); ("When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law.") 4 K. DAVIS, supra note 169, § 30.09, at 242. ("[C]ourts are the specialists, whether analysis of legislative history is called for, or whether the main process is one of finding the meaning of the words.") (footnote omitted).

\(^{181}\) NBC v. United States, 319 U.S. 190 (1943). Describing its role, the Court stated:

- Our duty is at an end when we find that the action of the ... [agency] was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the [agency regulation].

Id. at 224. In American Telephone & Telegraph Co. v. United States, 299 U.S. 232 (1936), the Court professed:

- This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the ... [agency action] shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of . . . [the delegated task]" as to be the expression of a whim rather than an exercise of judgment.

Id. at 236-37 (citation omitted). The obvious reason for the judicial restraint in reviewing legislative rules is that Congress delegated the power to legislate to the agency and not to the court. 4 K. DAVIS, supra note 169, § 30.10, at 249.
thority, agency regulations are not legislation, but are merely interpretative rules subject to broad review.\textsuperscript{182}

Finally, the last influential factor in determining scope of review is whether the issue before the agency calls for proclamation of a general proposition or procedure, or merely requires the application of such a proposition or procedure to unique facts.\textsuperscript{183} When the issue involves a general statement of what the law is, as opposed to how it is applied, the court is likely to substitute judgment.\textsuperscript{184}

In a 1984 decision, the Supreme Court attempted to dispel lingering confusion surrounding the scope of review of an administrative agency determination of a "mixed question" by solidifying the "reasonableness" and "rightness" test. The standard of judicial deference was set forth clearly and concisely in \textit{Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.}\textsuperscript{185} Under a two-pronged test developed by the Supreme Court in \textit{Chevron}, a reviewing court must first

\textsuperscript{182} "The weight of such a judgment in a particular case will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944). \textit{See also} \textit{Batterson v. Marshall}, 648 F.2d 694, 702 (D.C. Cir. 1980) ("Although an agency empowered to enact legislative rules may choose to issue non-legislative statements, an agency without legislative rulemaking authority may issue only non-binding statements. Unlike legislative rules, non-binding agency statements carry no more weight on judicial review than their inherent persuasiveness commands.") (footnote omitted); 4 K. DAVIS, \textit{supra} note 169, § 30.10, at 249.

\textsuperscript{183} 4 K. DAVIS, \textit{supra} note 169, § 30.11, at 253.

\textsuperscript{184} For example, in \textit{Hearst}, the NLRB, in administering the National Labor Relations Act, determined that newsboys were "employees" for purposes of the statute. The respondent argued that the definition of "employee" must take into account common law standards, and that common law usage would not allow the characterization of newsboys as "employees." The Supreme Court substituted judgment, proclaiming the general proposition that the definition of a statutory term is not restricted by common law, but rather it takes its definition "from the history, terms and purposes of the legislation." \textit{NLRB v. Hearst Publications, Inc.}, 322 U.S. 111, 124 (1944).

\textsuperscript{185} 467 U.S. 837 (1984). Congress, in passing the Clean Air Act Amendments of 1977, required states not in conformity with the national air quality standard established by earlier legislation to establish a program regulating "new or modified major stationary sources" of pollution. \textit{Id.} at 839-40. Neither the amendment nor the legislative history provided insight into Congress' envisioned definition of "stationary source." \textit{Id.} at 841. The Environmental Protection Agency (EPA), charged with administering the Act, promulgated a regulation that allowed a state to choose a plant-wide definition of "stationary source," thereby allowing the installation or modification of a single piece of equipment, provided that the alteration would not add to the total emission from the plant. \textit{Id.} at 840. Natural Resources Defense Council, Inc. challenged the agency regulation and the Court of Appeals set it aside, finding it "inappropriate" because the purpose of the Act was to improve, not merely to maintain, the air quality. \textit{Id.} at 840-41. In reversing the decision, the Supreme Court elaborated a two-part inquiry for reviewing an agency's interpretation of a statute. \textit{Id.} at 842-43.
determine "whether Congress has directly spoken to the precise ques-
tion at issue." If the court, using traditional methods of statutory
construction, determines that the intent of Congress is clear, then the
court must effectuate that intent, rejecting contrary agency interpreta-
tions. Alternatively, if the court finds the congressional intent am-
biguous, the second prong of the test is applied, and the court need
only determine whether the agency's interpretation is a permissible
construction. The court must defer to the agency interpretation if
the court deems it a permissible construction. Intrinsic to this second
prong of the test is the notion that congressional silence or ambiguity
is an implicit delegation of authority to the agency to fill the gaps in
the statute. The remainder of this note examines the scope of re-
view established in Halon and Strike in light of the Chevron test and
the underlying influential factors.

Both the Halon and Strike courts faced the specific problem of
how much deference to give to the Secretary of Labor's interpretation
of "criteria" in section 902(f)(2). While neither court deferred to the
agency, they reached opposite conclusions. Regardless of the differ-
ence in outcome, both decisions were in accord with conventional
thinking in administrative law.

In Halon and Strike, the determination of scope of review was
obvious. By its terms, the statute did not expressly delegate authority
to make policy decisions. In fact, the statute left no policy gaps to fill.
Congress controlled the contraction of the standards by authorizing

186. Id. at 842.
187. Id. at 842-43. See, e.g., FEC v. Democratic Senatorial Campaign Comm., 454
U.S. 27, 32 (1981) (the Court reviewed and upheld a Federal Election Commission's inter-
pretation of a provision in the Federal Election Campaign Act of 1971). This first prong of
the Chevron test contemplates the most influential of the three aforementioned factors bear-
ing on the court's discretion in establishing scope of review. Requiring the court to deter-
mine whether Congress has expressed its intent with regard to the issue recognizes the
comparative expertise of the court over the agency in matters of statutory interpretation.
See supra notes 178-80 and accompanying text.
188. Chevron, 467 U.S. at 843. To be a permissible construction, a construction need
not be the only possible one, nor the construction that the court would adopt had the issue
been presented to the court originally. Campaign Committee, 454 U.S. at 39.
189. Chevron, 467 U.S. at 844. See also Leading Cases of the 1983 Term, 98 Harv.
L. Rev. 87, 250 (1984). For example, in Chevron, Congress' silence concerning the in-
tended meaning of "stationary source" should be viewed as an authorization for the EPA
to establish a definition that reflects a reasonable policy choice. The second prong of the
test clearly considers the second factor as influencing the court's discretion in establishing
scope of review. Requiring the court to consider the reasonableness of the agency's inter-
pretation subsequent to concluding that Congress has not spoken to the issue recognizes the
implicit delegation of authority by Congress to the agency to fill in the gaps. See supra
notes 181-82 and accompanying text.
the promulgation of standards that would "not be more restrictive than the criteria [of the interim standards established by the Secretary of HEW]." Congress governed the expansion of the standards by requiring that they "accurately reflect total disability." The statutory instruction directs performance of a task within explicit limitations. The significance of the limitations is two-fold. First, they indicate that Congress did, in fact, have an intent with respect to the promulgation of standards. Second, by indicating the existence of congressional intent, the limitations charged the court with the duty to ensure that the Secretary of Labor act within the authority granted. In carrying out this duty, the court, and not the agency, determines any interpretation of congressional intent.

The Halon court determined that congressional intent was clearly expressed in the plain meaning of the statute, and did not defer to the Secretary of Labor’s interpretation of section 902(f)(2). The court concluded that Congress intended the term “criteria” to encompass medical criteria as well as the elements of the interim presumption, and, therefore, rejected the Secretary of Labor’s interpretation of “criteria.” Because congressional intent was clear, the Halon court apparently concluded that it was free to impose the “correct” interpretation of the statute without regard to the agency’s interpretation.

The Strike court, likewise, did not defer to the Secretary of Labor’s interpretation. Unlike the Halon court, however, the Strike court concluded that the congressional intent was expressed ambiguously in the language of the statute. The court then ascertained congressional intent from the legislative history. The court determined that the Secretary of Labor’s construction was in accordance with Congress’ intended meaning, and affirmed the agency’s interpretation.

If the Secretary of Labor interpreted “criteria” to include medical criteria as well as the elements of the interim presumption, the Strike court would not and should not have supported this interpretation. Deference to an administrative agency’s interpretation is appropriate only when neither the plain meaning of the statute nor the legislative

193. Strike v. Director, Office of Workers’ Compensation Programs, 817 F.2d 395, 401 (7th Cir. 1987).
194. Id.
195. Id.
196. Id.
history yields the congressional intent as to the issue in question. The legislative history of the Black Lung Benefits Reform Act of 1977 indicates that Congress intended the term "criteria" in section 902(f)(2) to mean "medical criteria." The court in *Strike* therefore would have and should have applied the interpretation that it developed without regard to the agency interpretation.

Although employment of this scope of review analysis does not alter the results reached by the *Strike* and *Halon* courts, it nevertheless is interesting. It illuminates the difficulty that the courts have had in dealing with this issue, and the difficulty that the United States Supreme Court will face in *Director, Office of Workers' Compensation Programs v. Broyles*.198

**CONCLUSION**

The text199 and legislative history200 of Title IV of the Federal Coal Mine Health and Safety Act indicate that the term "criteria" in section 902(f)(2) includes only "medical criteria," and not interim adjudicatory and evidentiary standards. Because the congressional intent of section 902(f)(2), as revealed by the text and legislative history, is not violated by the enactment of the Part C standards without the evidentiary provisions contained in the HEW interim standards, the *Strike* court properly affirmed the Secretary of Labor's interpretation. In deciding *Director, Office of Workers' Compensation Programs v. Broyles*,201 the Supreme Court should adopt the "statute as a whole" construction of section 902(f)(2) suggested by the concurring and dissenting opinion of Judge Weis in *Halon* and endorsed by the court in *Strike*.

*Richard A. Vassallo*

197. *Id.* For a discussion of the legislative history, see *supra* notes 144-54 and accompanying text.
199. *See supra* notes 122-43 and accompanying text.
200. *See supra* notes 144-54 and accompanying text.
201. *See supra* notes 68-70 and accompanying text.