One of the most memorable advocates for miners’ rights in the early 20th century was Mary Harris “Mother” Jones, the feisty grandmother figure and union organizer for the United Mine Workers. Famous for beating coal mine operators with brooms, she promised strikers that when she got to heaven, she would raise hell with God Almighty about the desperate conditions of West Virginia coal miners. Not long ago, a retired U.M.W. organizer said, “Either Mother Jones did not make it up there, or the Lord is a coal operator.”

One can understand the frustration many coal miners and their families feel, particularly those who suffer from black lung—pneumoconiosis—a potentially fatal ailment caused by inhaling coal dust. In trying to collect benefits, miners face formidable teams of lawyers, paralegals and doctors that coal companies assemble to challenge those claims.

For the past decade, these workers have had W&L’s Black Lung Administrative Law Clinic squarely in their corner, fighting for their right to compensation.
For 10 years, the Black Lung Clinic has fought for miners' rights to compensation.

by Wendy Lovell '90A

A Social and Educational Mission
Since Washington and Lee's Black Lung Clinic opened its doors in August 1996, 109 students have represented 185 clients. Seventy cases are complete; the remainder continue to proceed through what the students have come to learn is an adversarial, complex, lengthy and often costly process. While its clients are the clinic's first priority, its student lawyers find the lessons they learn invaluable.

Mary Z. Natkin '85 and Jim Phemister, program co-directors and professors of law, guide students through quite a challenging legal struggle. Their clients are a small minority of coal miners who suffer from black lung. While the national Black Lung Benefits Act (1969) exists to ease their suffering, most victims find it next to impossible to collect those benefits. Success depends on experienced representation, and this is where W&L's clinic makes all the difference.

"W&L's Black Lung Clinic allows new lawyers to develop a sense of professionalism and a real understanding of ethics in action," said Natkin. "This is an opportunity to learn skills in terms of depositions, trial preparation and appellate argument. However, those lessons are secondary to the clients' cases, and I don't know of a better forum to teach the strategy and ethics of representing someone."

Under the federal act, miners with black lung pursue their claims against their employers, who often try to block those benefits. Department of Labor administrative law judges hear the claims with an appeals process that can move to the federal courts, resulting in delays that can take years. In fact, two of the cases the clinic took on in 1996 are still in the appeals process, and three of the clinic's clients died before their claims were finalized.

"Only about 7 percent of the miners nationally who make claims are victorious," said Natkin, whose grandfathers were both coal miners and whose grandmother's both received federal black lung benefits. "Private lawyers typically don't take their cases because the financial rewards are not worth the time involved. At the clinic, we are successful in about 50 percent of our cases."

Mary Z. Natkin '85
Co-Director, Black Lung Clinic

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Mary Z. Natkin '85
Co-Director, Black Lung Clinic

FALL 2005
As a leading expert on pulmonary disease who works with W&L’s clinic, Dr. Donald L. Rasmussen helped change the way that America’s medical profession views black lung. Through his extensive research, he was able to dispel the mythology spewed by operator-hired doctors, who often claimed the disease resulted from smoking instead of coal dust.

Dr. Donald L. Rasmussen, a legendary figure who was one of the first medical scientists to recognize the link between coal dust exposure and pneumoconiosis back in the 1960s, is thankful that the clinic exists to meet the needs of the small, but underserved, population of miners. The Beckley, WV, physician examines miners who have black lung symptoms for the Department of Labor. Rasmussen thoroughly knows the challenges his patients face in obtaining benefits, and he doesn’t expect the need for W&L’s clinic to end soon.

“The role W&L’s Law School plays is a very hard one,” said Rasmussen. “There are a lot of issues that make representing these miners difficult, and they accept cases that other attorneys won’t.”

Setting a Course

W&L’s Black Lung Clinic grew out of the University’s Legal Practice Clinic, which worked with patients at Western State Hospital in Staunton until the facility downsized, reducing the number of cases.

While the school was considering other ways to help people in the area, an administrative law judge for the Department of Labor approached former Dean Barry Sullivan about the possibility of the Law School working with miners on their black lung cases.

“My friend thought the Law School could really do something important, and that there was merit to some of these claims,” said Sullivan, now a partner at Jenner & Block in Chicago. “These miners lose their cases not because justice isn’t on their side, but because they don’t have lawyers. The work at Western State dealt largely with government benefits, so it was a good platform to build on for the Black Lung Clinic.”

Sullivan, Natkin and Brian Murchison, now the Charles S. Rowe Professor of Law, embraced the idea, researched the possibility of starting a clinic at the Law School and quickly set into motion what has become a highly successful educational program.

Thanks to funding from the Law School and interested alumni and friends, the clinic was up and running quickly, with nine students and about 20 cases. Natkin recalled the excitement and support of alumni like Judge Sam J. Smith ’64, former administrative law appellate and trial judge, who gave her the money to buy a fax machine. Tony Guarino ’77 and Pam White ’77 appealed to their classmates to support the clinic through a 20th reunion class gift. While the clinic is not entirely self-sufficient, attorneys’ fees from successful cases have helped fund expenses for new ones.

Another resource in the clinic’s infancy was attorney Sandra Fogel and the black lung clinic at Southern Illinois University’s law school. In 1996, the W&L contingency visited Fogel and the clinic in Carbondale to glean ideas about how to start its own. The SIU clinic lost its funding and closed in 1997, making Washington and Lee’s Black Lung Clinic the only one of its kind.

A private law school like ours has an obligation to train lawyers to work in all sectors of the law, to serve the public interest and to serve as an officer of the court. The Law School is trying to produce the “W&L lawyer,” someone who has an awareness of a whole range of issues, who while serving in private practice can help fill in the gaps in a public capacity. This clinic is a great way to teach that.

Brian Murchison
Charles S. Rowe Professor of Law

The Black Lung Clinic can trace its roots to a class taught by Andrew W. “Uncar” McThenia ’88A, ’83, Lawyering for Social and Economic Change introduced students to the intense struggle for social justice in the West Virginia coal fields and focused on the black lung movement. McThenia retired in 2001, but the spirit of his course lives on through the clinic.
"I'm probably the only attorney in the country who takes on black lung cases full time," said Fogel, who now practices with Culley & Wissore in Carbondale. "If W&L's clinical program didn't exist, miners wouldn't get served. But the miners and their families aren't the only ones who benefit; so do the students who get hands-on experience they can't get anywhere else before going out into the real world."

Murchison was overwhelmed by the dedication of people like Fogel to the black lung issue. Another of his heroes is Mike South, a former coal miner and president of the National Black Lung Association, who suffered from an advanced form of the disease but fought aggressively for his fellow miners until his death in 2001 at the age of 54. Advising the Law School on how to establish the clinic was one of South's legacies.

"A private law school like ours has an obligation to train lawyers to work in all sectors of the law, to serve the public interest and to serve as an officer of the court," said Murchison. "The Law School is trying to produce the 'W&L lawyer,' someone who has an awareness of a whole range of issues, who while serving in private practice can help fill in the gaps in a public capacity. This clinic is a great way to teach that."

Despite his passion for the clinic, Murchison returned to full-time teaching in 1999. Pemister stepped in to help Natkin direct the clinic. He planned to be a temporary replacement but enjoyed working with the clinic so much that he stayed.

"I love how the clinic forces our students to make the conversion from being students to being practitioners," he said. "They need to start gearing up to be lawyers while they're here, and taking responsibility for their cases does that. I tell them, 'You know more about the file than I do,' but it takes awhile for them to believe me. They know that a claim won't move forward unless they take charge. It's a big transition for them to make."

While Pemister says most of his students will never try a black lung case again after they graduate, they do take away valuable lessons that serve them well in their careers.

Lessons Learned

The grandchild of coal workers in Pennsylvania, Alexa Socha '97 felt called to take part in the clinic. She met Judge Smith when he visited the clinic during her third year, and he hired her as a clerk in his Long Beach, Calif., office to work primarily with black lung cases. In the process, she learned the ropes of federal Longshore Act cases, which also proceed before the U.S. Department of Labor and administrative law judges.

Now Socha is a partner in the Long Beach law firm of Alecia, Conner & Socha.
which represents maritime employers and insurance companies with respect to claims under the Longshore Act.

"The clinic taught me to take pride and honor in my work and zealously defend a client, and I believe I have carried these lessons with me throughout my legal career," she said. "The work I do now includes administrative hearings and court appearances, depositions, meeting with doctors and interpreting medical evidence. The clinic was my first opportunity to perform this type of hands-on work, so I feel it helped me a great deal in providing a slight edge over other recent graduates who did not yet have any type of practical legal experience."

That kind of experience is just what Helena Joly '05 was looking for when she applied to serve in the Black Lung Clinic. As she moves into the professional sector, she's confident her clinic experience will benefit her, too.

"Working in the clinic helped me keep track of deadlines, see firsthand some of the obstacles and delays in developing evidence and to be prepared for the task at hand," said Joly. "One of the students I worked with got to argue before the Fourth Circuit (see page 25), and there were many who took

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**Significant Dates in the History of Clinical Programs**

**1965**
Legal Aid and Legal Research Association established. The two functions split in 1972. This was the first instance of a legal clinical program at W&L.

**1970**
Alderson Legal Assistance Program established, offering legal assistance to the women inmates at Alderson Federal Prison.

**1973**
Legal Aid Association begins work at Western State Hospital. This association later becomes contractual and continues until 1997.

**1989**
Virginia Capital Clearinghouse established, providing resources for the legal community in capital cases.

**1996**
Black Lung Claimants unit added to Legal Practice Clinic.

**2003**
Alderson Prison contract ended, and the Alderson Legal Assistance Program becomes Community Legal Practice Center.

depositions. We were doing things new lawyers don’t get to do for the first three or four years in practice.”

While legal training is a strong element of the educational mission of the clinic, Natkin thinks one of the most important lessons it offers students is how to interact with clients.

“We have the luxury of having wonderful clients who are warm, loving, giving people,” said Natkin. “So that makes it difficult for our students when they determine that a case is not viable and they have to say no. Our clients view our students as their lawyers, and that makes for an intense learning experience.”

Because these cases can take five to seven years—or more—to be determined, students become frustrated that they can’t see the case through to the end. For that reason, Natkin and Phemister keep a close tab on each case to provide continuity from one student to the next. The students and graduates who have worked on the same case often keep in touch through phone calls and e-mails.

The clinic’s directors not only advise their students and other attorneys interested in the issue but also represent the Law School at conferences and meetings on the black lung issue. This fall, they will teach and present in the legal track of a conference for the National Coalition of Black Lung and Respiratory Disease Clinics.

“I’m pleased with where we’ve come so far, but I’d like to see us do more,” said Natkin. “I’d really like to share our materials online—and have practitioners in other parts of the country share theirs on the site, too—so that miners and the lay advocates who assist them with their claims have the tools they need when we can’t take on their cases. We’ve learned a lot since we began, lessons that are of tremendous benefit to our students, but also to a small population that will likely need our help well into the future.”

Sullivan agrees, adding the hopes he had for the clinic when it was organized in 1996 have largely been fulfilled.

“The Black Lung Clinic provides terrific experience for W&L’s students and terrific legal services for people who really need them,” he said. “I think the clinic has enhanced the reputation of the Law School.”

Shellie Sewell ’04 Prevails

Three days before her May graduation in 2004, Shellie Lynne Sewell presented oral arguments in a black lung case before the U.S. Fourth Circuit Court of Appeals.

About six weeks later Sewell, of Randalstown, Md., learned that her arguments on behalf of Jimmy Lucas, a longtime coal miner who was denied black lung benefits shortly after his retirement, were successful. “I was in the middle of studying for the bar exam when Mary [Natkin] and Jim [Phemister] called with the good news,” Sewell said. “We had prepared so thoroughly; I thought, ‘How could we not win?’ But you can never take anything for granted.”

The court’s ruling in Williams Mountain Coal Company v. Jimmy Lucas was a victory not only for Lucas and Sewell but also for the Legal Clinic at Washington and Lee University’s School of Law.

Also working on the case were Jennifer Nelson ’04 and Matthew Smith-Kennedy ’03.

The case began in November 1997 when Lucas, who retired because of an ankle injury, filed an application for black lung benefits with the Office of Workers’ Compensation Programs (OWCP). After denying his claim, the OWCP referred his case to an Administrative Law Judge (ALJ).

In November 2000, the ALJ awarded Lucas benefits, but that decision, appealed by the coal company, was vacated by the Benefits Review Board (BRB) because of questions over medical evidence concerning the existence of pneumoconiosis and the cause of Lucas’s disability. The BRB remanded the case to the ALJ, who further explained his reasoning and again awarded benefits. The BRB upheld the award on appeal; that ruling also was challenged by the Morgantown, W.Va., coal company.

In recently upholding the BRB’s award of benefits to Lucas, the panel of Fourth Circuit Court judges rejected the coal company’s appeal, saying the ALJ “properly analyzed the relevant evidence, adequately explained his resolution of conflicting evidence and reached a decision supported by substantial evidence in the record.”
CLEARING THE AIR

Student by Student, Case by Case, W&L’s Legal Practice Clinic Comes to the Relief of West Virginia’s Coal Miners

Pneumoconiosis is not a disease that most students need to worry about. But at Washington and Lee, nine law students are learning to deal with it. Pneumoconiosis is the medical term for “black lung” disease, a disabling and potentially fatal respiratory condition, caused by inhalation of coal dust, that afflicts coal miners. Miners with pneumoconiosis can seek federal disability payments under the Black Lung Benefits Act passed in 1968. Only about six percent of claimants are awarded benefits, however, due in large part to the fact that the miners frequently lack professional representation. Few private lawyers will take black lung cases because they can drag on for years and promise scant remuneration. The claims are also vigorously contested by lawyers who represent the coal companies. And then there are the ever-changing laws.
BUILDING A CASE, PIECE BY PIECE
Mark Graham '97L and his colleagues begin with basics in learning about black lung disease and its diagnosis.

GAINING KNOWLEDGE FIRSTHAND
Clinic participant Amy Layton '98L, pictured with National Black Lung Association President Mike South.

This obvious need for legal services, coupled with the educational benefits of participating in this type of litigation, led to the creation of a new component to Washington and Lee's Legal Practice Clinic—the black lung clinical program. Created last August under the direction of Legal Practice Clinic director Mary Z. Natkin and law professor Brian C. Murchison, students enrolled in the clinic provide legal assistance to coal miners, or their widows, who are seeking federal disability payments under the Black Lung Benefits Act.

"While we are providing a service, our goal is educational," Natkin explains. "We are not sacrificing quality for quantity—we realize we can't address the needs of all miners." There are currently about 1,500 active black lung claims in West Virginia, of which the W&L clinic is handling about 20. "The few lawyers who take claimants' cases do so because they feel it is the right thing to do," she adds. "not for the monetary incentive."

The short supply of legal services in this setting created just the sort of need that the Law School could address. In addition, the educational challenges involving the complex black lung legislation and regulations, and the development of medical evidence are providing valuable litigation experience for the students who are participating in the black lung clinic. "Teaching the students the painstaking process of building a case, piece by piece, gathering legal and evidentiary support in the form of medical evidence, has great applicability in preparing them for the legal profession," says Murchison.

In addition, the U.S. Department of Labor is currently proposing sweeping changes in the black lung benefits process. The students have also been at work analyzing those changes and the clinic will be filing comments at the labor department's administrative proceedings. In addition to building cases for their clients, clinic participants are also gaining experience in rule-making, adjudication, and policy analysis.

Last August, Natkin and Murchison took their students to Beckley, West Virginia, where they met with clients, doctors, and members of the Black Lung Association. They also met with Dr. Donald Rasmussen, a legendary figure who was one of the first medical scientists to recognize the link between coal dust exposure and pneumoconiosis back in the 1960s. Rasmussen runs the Southern West Virginia Clinic where he examines coal miners and consults in numerous cases. During this visit, the students acquired
firsthand knowledge about black lung diagnosis through demonstrations of examinations and breathing tests.

The students have since met with Mike South, president of the National Black Lung Association, and with West Virginia Secretary of State Ken Hechler, a former U.S. Congressman and longtime advocate for better occupational safety and health. And last fall Rasmussen, Hechler, and Sonny Wells, another physician who was active in the black lung debate in the 1960s, made a presentation at the Law School on the history of that debate and the legislation that emerged from it.

The nine students currently enrolled in the black lung clinic commit themselves for two semesters and receive three hours' credit each semester. The first semester is a weekly two-hour seminar in which they learn the statutes and begin to review individual cases. During the second semester, they focus on actual cases by preparing pre-hearing motions, conducting discovery, and developing medical evidence. If a student's case is scheduled for hearing, the student and either Natkin or Murchison will try the case.

When meeting clients, students gather all the information they can, most of which is medical data, such as physicians' reports and X-rays, to develop the case legally. They work the rest of the year on pre-hearing motions, discovery, developing medical evidence, and trying the cases. (Many of the miners are smokers, which complicates the medical evidence even more.) Each student works some 10 to 15 hours a week on his or her case, more when hearings are pending.

Craig Allen, a third-year law student from Palm Harbor, Florida, and one of the nine currently enrolled in the clinic, helped with the formation of the black lung clinic while working at the Law School as a research assistant last summer. Like many of the students in the clinic, he first became interested in the plight of the coal miners last year as a student in Lawyering for Social and Economic Change, taught by law professor Andrew W. (Uncas) McThenia '58, '65L. McThenia took the class to some coal mines "to hang with the miners," Allen says.

"I coughed up soot for days after being there only a couple of hours," he adds. "When I realized that many of these men had spent 10 to 12 hours a day, six days a week, for maybe 30 years, I felt the coal operators should help these miners who risked their lives." Allen's client was a widow who stopped receiving state benefits for black lung following her husband's death in 1994 (she was seeking widow's benefits). Allen won the case in March—the clinic's first victory—after the insurance carrier for the deceased miner conceded his eligibility.

Most of the cases are referred to the clinic by John Cline, a former VISTA volunteer and dedicated lay claimants' representative from the New River Health Center in Fayette County, West Virginia. If McThenia was the inspiration for the clinic, then Cline is its hero, according to Allen: "John Cline has so much spirit, so much energy."

Alexa Socha, another third-year student enrolled in the clinic, has two clients, one of whom is a widow whose husband died of a heart attack a few days after knee surgery. For her client to qualify for widow's benefits, Socha needs to prove that it was the pneumoconiosis that made the miner more susceptible to the heart attack that killed him. Socha comes from the coal region of Pennsylvania, where her grandfather and other relatives worked in the coal mines. Her grandfather died 20 years ago and her grandmother received black lung checks, which helped her to go to college. "Since coal money helped pay my way," says Socha, "I thought it fitting that I would pay something back by helping the miners."

In laying the groundwork for the new clinic, Natkin and Murchison were not surprised by the overwhelming
.response of the students. "Our students see the value of filling in the gaps where the market has broken down," says Murchison. "We had many more students who were interested in doing the clinic than we could take on."

With so much student interest, and an overwhelming list of clients, the black lung clinic is sure to succeed. Murchison hopes to expand the program by establishing a one-year fellowship, ideally for a recent graduate who has been in the program, to assist in supervising the students with their cases. "We would also like to serve as a clearinghouse for other lawyers and lay representatives who represent claimants in these cases, and serve as a repository for documents that can be shared," he adds.

A black lung clearinghouse could serve as a resource by collecting interrogatories, motions, briefs, depositions, and similar documents which have been used by claimants' representatives in black lung litigation. This would allow lawyers and lay representatives to share useful work. Annual seminars on black lung litigation could also help lay representatives solve complicated legal issues in black lung cases. Craig Allen has developed a Web page where the clinic can share information on pulmonary research [http://liberty.uc.wlu.edu/~coalmine/].

The clinic has a small fund that fronts some of the costs, mostly for medical reviews, for the pending cases. The clients reimburse the clinic for these costs, but most often this creates a hardship for the clients and it takes a while for them to pay back the costs. Contributions have come from a number of alumni, including Toni Guarino '77L and trustee Pam White '77L, who recently appealed to their classmates for support for the clinic as a reunion gift: "We have an opportunity before us to help current and future law students get some meaningful practical experience, we can help some disabled miners get legal representation, and we can support the Law School in a tangible way."

Belying the outcome of Allen's case, most black-lung cases take years to settle, so the students will rarely get to work a case from start to finish. Thanks to the clinic, others will follow in their footsteps. "Even though we don't see a case to the end, it is still a very rewarding experience," says Alexa Socha, who has pored over many medical articles to understand all the terminology involved. "I'm not just playing lawyer, I'm really doing legal work."

Evan Atkins is associate director of the news office at Washington and Lee.