



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 314
March 2021**

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Carrie Bland
Associate Chief Judge for Black Lung

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**I. Longshore and Harbor Workers' Compensation Act
and Related Acts**

A. U.S. Circuit Courts of Appeals¹

No published decisions were issued by the courts in March of 2021.

[Robirds v. ICTSI Oregon, Inc., 839 Fed.Appx. 201 \(Mem\) \(9th Cir. Mar. 11, 2021\) \(unpub.\)](#)

This unpublished decision is included for informational purposes only. The Ninth Circuit vacated as moot the Benefit Review Board's published decision in [Robirds v. ICTSI Oregon, Inc., 52 BRBS 79 \(2019\) \(en banc\) \(Boggs, J., concurring\)](#). In *Robirds*, the Board held that claimant is entitled to post-judgment interest on past-due § 14(e) payments, overruling its prior holding in *Cox v. Army Times Publ'g Co.*, 19 BRBS 195 (1987) (interest is not to be imposed on § 14(e) assessments). The Board reasoned that such payments are "additional compensation" and there is no basis for treating them differently from § 14(f) payments.

The Ninth Circuit vacated the Board's decision, as it found the issue was moot when it came before the Benefits Review Board. Employer overpaid claimant's benefits, and the amount of that overpayment exceeded the amount of interest claimant sought. Further, employer subsequently waived its right to receive credit for overpayment. Contrary to the Board's finding that employer could still retract the waiver, employer would be judicially estopped from doing so in any future proceeding. Further, the conduct in question was not likely to recur as to these parties, and employer did not exhibit the kind of gamesmanship

¹ Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at ___) pertain to the cases being summarized and, where citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *___).

that could warrant review. The case was remanded to the Board with instructions to vacate its decision with respect to interest under § 14(e).

[INTEREST; Section 14(e) - Failure to Pay or Controvert]

B. Benefits Review Board

No published decisions were issued by the Benefits Review Board in March of 2021.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

[Bailey v. Dir., OWCP](#), 990 F.3d 1066 (7th Cir. 2021): The miner received a state workers' compensation claim for partial disability from pneumoconiosis. After the payment of attorney's fees, his settlement equated to \$135.67 per month for 17 years. He was later awarded federal black lung benefits beginning on October 2013 through May 2016. He was entitled to \$52,088.60 for this time period without an offset. Before going Bankrupt, the responsible operator paid benefits in the amount of \$30,507.70. The claimant sought the unpaid portion of the award (\$21,508.90) from the Trust Fund.

The District Director re-evaluated the claim and determined that some of the miner's state workers' compensation benefits ran concurrently with the federal black lung award. As such, it was entitled to an offset in the amount of \$7,461.85, which it deducted from the amount of remaining benefits. The claimant asked for a hearing before an Administrative Law Judge. The ALJ agreed with the Director and the Benefits Review Board affirmed the decision. The claimant then appealed to the Court of Appeals.

The Court first points out that 20 CFR §725.535 includes a provision that reduces the federal benefit by the amount of a state award when it is for the same months as the federal benefit or, if it is paid in a lump sum, it is a substitute for periodic payments that would otherwise cover the same benefits period as the federal award. The Court then stated that the issue to be determined was whether the settlement the miner received was a lump sum substitute for periodic payments. In order to determine whether this was the case, it looked at the terms in the state settlement agreement which said that the lump sum benefit represented 17 years of the miner's weekly or monthly benefit. The claimant argued that the agreement indicated that the lump sum payment was not a substitute for periodic payments based upon language in the settlement agreement. The Court disagreed since the agreement clarified this statement. It further stated that the claimant's argument ran afoul of state contract laws which say that language must be given its "plain and ordinary" meaning. Finally, the Court rejected the claimant's argument that an offset of benefits frustrates the Act since the Act's goal is to "provide benefits, in cooperation with the States." It noted as well that the total amount the miner received was in excess of the federal minimum benefit.

[Offset of Federal Benefit by State Benefit]

2. Unpublished decisions: There were no unpublished appellate court decisions in March.

B. Benefits Review Board

1. Published decisions: There were no published Board decisions in March.

2. Unpublished decisions:

[Griffith v. Drummond Co. Inc.](#), BRB No. 19-0452 BLA (Mar. 2021)(unpub.): The ALJ found that the miner in this case had 22 years of coal mine employment and was totally disabled. He also found that the miner had clinical pneumoconiosis based upon the chest x-ray evidence in the record. However, the ALJ went on to find that the miner's disability was not due to pneumoconiosis based upon the opinions of Drs. Goldstein and Rosenberg, both of whom found that the miner did not have clinical pneumoconiosis. Their only explanation for finding no relationship between the total disability and pneumoconiosis was that they did not believe he had clinical pneumoconiosis. The Board stated that the ALJ erred in finding that the miner's disability was rebutted by the opinions of Drs. Goldstein and Rosenberg since their

opinions on disability causation cannot be separated from their opinions on existence of pneumoconiosis.

[Rebuttal of Total Disability Causation]

[Gooslin v. Mate Creek Trucking, Inc.](#), BRB No. 20-0062 BLA (Mar. 2021)(unpub.): On appeal to the Board, Employer challenged its designation as the responsible operator. Employer was identified as the responsible operator by the district director as the Social Security Earnings Records indicated that it was the last to employ the claimant for a year and as it was insured on the claimant's last date of employment. The ALJ found that Employer waived the issue because it failed to raise the issue before the district director and declined to consider it. The Board found that the ALJ's finding that the issue was waived, by Employer's failure to raise the issue before the district director, was in error as Employer had designated it as an issue in its response to the Notice of Claim and in its response to the Schedule for the Submission of Additional Evidence. The Board further found that the ALJ erred in requiring Employer to submit evidence to contest its operator liability as the Director bears the burden of proving Employer is the potentially liability operator.

Employer also argued that it was deprived of due process due to the OWCP's destruction of records from Miner's 1992 claim. First, it argued that the destruction of the records deprived it of the opportunity to determine whether Miner had a change in condition. However, the Board rejected this argument since the determination of whether there has been a change in condition is based upon new evidence rather than evidence from the prior claim. Then, Employer argued that it could not understand Miner's prior medical condition. The Board rejected this argument as well since Employer could not explain how the contents of the record from 23 years ago could defeat the more recent evidence.

[Challenging RO Designation; Burden of Proof for RO Designation; Destruction of Records]

[Moore v. Consolidated Energy, Inc.](#), BRB No. 20-0185 BLA (Mar. 2021)(unpub.): Employer did not contest its designation as responsible operator at the hearing before the ALJ. In his decision, the ALJ found that the Miner had complicated pneumoconiosis and applied the irrebuttable presumption of total disability and awarded benefits. Employer then filed a Motion for Reconsideration arguing that the ALJ erred in finding that Miner had complicated pneumoconiosis and requesting leave to withdraw its stipulation that it is the responsible operator based on the *Shepherd v. Incoal* decision which provides a less restrictive method for calculating the length of coal mine employment. The ALJ denied Employer's motion. Employer appealed to the Benefits Review Board.

The Board remanded the case to the ALJ on the issue of complicated pneumoconiosis. Of the 9 x-ray readings in the record, 4 were negative for pneumoconiosis, 4 were positive for simple pneumoconiosis, and 1 was positive for complicated pneumoconiosis. The ALJ relied on the most recent x-ray interpretation to find complicated pneumoconiosis. However, there were only 12 days between the most recent x-ray and the second most recent x-ray. Although it is generally reasonable to assign more weight to the most recent x-ray due to the progressive nature of the disease, the Board found that the ALJ failed to explain his reason for assigning greater weight to the most recent x-ray.

The Board went on to find that the ALJ erred in summarily denying Employer's motion for reconsideration and directed the ALJ to address the merits of Employer's request to withdraw its stipulation on remand.

[Complicated Pneumoconiosis; Withdrawing RO Stipulation; Motion for Reconsideration]

Burke v. Kiah Creek Mining Co., BRB No. 20-0218 (Mar. 202)(unpub.): The district director named Kiah Creek Mining Co. (Kiah) as the responsible operator. Before the ALJ, Kiah argued that Branham and Baker (Branham) should be the responsible operator under successor liability. Its argument relied upon the hearing and deposition testimony of Claimant and the Articles of Merger between Kiah and Branham. The ALJ found that the Articles of Merger evidence was not timely submitted before the district director, and he therefore declined to hear it. The ALJ then found that Kiah was the responsible operator. He further found that the irrebuttable presumption of total disability had been invoked and awarded benefits. The ALJ also made an alternate finding that the miner had invoked the Section 411(c)(4) presumption of total disability and the employer had not rebutted it. Kiah appealed.

On appeal, the Board first found that Kiah is precluded from relying upon Claimant's testimony because he was not designated as a liability witness as required by 20 CFR §§725.414(c), 456(b)(1), (2). Further, the Board found that no extraordinary circumstances existed that would allow the testimony to be admitted. The Board went on to find that substantial evidence supported the ALJ's finding that Kiah is the responsible operator.

Next, the Board reviewed the ALJ's finding of complicated pneumoconiosis and found that he did not adequately explain his rationale for resolving the conflicting x-ray interpretations. There were 7 interpretations of 3 films in the record. There were 3 interpretations that were positive for complicated pneumoconiosis and 4 that were negative for complicated pneumoconiosis. One of the readers, Dr. Kendall, read a 3/31/17 film as positive for complicated pneumoconiosis, but read a 5/10/17 film as negative for complicated pneumoconiosis. The Board found that the ALJ did not adequately explain why he found two of the films in equipoise and did not resolve the issue of Dr. Kendall's conflicting interpretations.

The Board also vacated the ALJ's alternative finding that the miner was totally disabled based upon the medical opinion evidence of Dr. Nadar and Dr. Go. Drs. Nadar and Go found that the miner was totally disabled based on non-qualifying exercise ABG testing. Drs. Dahhan and Rosenberg disagreed with their interpretation of the evidence. The Board held that the ALJ erred in not making a finding regarding the exertional requirement of the miner's usual coal mine employment since such a finding was central to resolving the conflicting ABG results and interpretations.

[Designation of Liability Witness; Weighing Evidence]