No. 16-1891

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GLENN A. STEWART,

Petitioner,

v.

RIVERSIDE TECHNOLOGY, INC. and
TRANSPORTATION INSURANCE and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

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Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT, DIRECTOR, OWCP

_____

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case concerns a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act or

Act) filed by Petitioner Glenn A. Stewart, who was injured while employed by Riverside Technology, Inc. (Employer). The United States Department of Labor, Office of Administrative Law Judges had jurisdiction over the claim under 33 U.S.C. § 919(c), (d). On June 30, 2015, Administrative Law Judge Alan L. Bergstrom granted the Employer's motion for summary decision. Appendix (App.) 53. His order became effective when it was filed in the office of the District Director on July 2, 2015. App. 50-52; *see* 33 U.S.C. § 921(a).

The Claimant filed a Notice of Appeal with the Benefits Review Board (Board) on August 3, 2015, within the thirty-day period allowed by 33 U.S.C. § 921(a).[1] App. 62-64. That appeal invoked the Board's review jurisdiction pursuant to 33 U.S.C. § 921(b)(3). The Board issued a Decision and Order affirming the ALJ's grant of summary decision on June 6, 2016. App. 149.

Stewart was aggrieved by the Board's decision, and filed a petition for review with this Court on August 5, 2016, within the sixty days allowed by 33 U.S.C. § 921(c). App. 154. Appellate jurisdiction lies in the circuit in which the injury occurred. 33 U.S.C. § 921(c). Stewarts's injury occurred off the coast of North Carolina, within this Court's territorial jurisdiction. Accordingly, this Court has jurisdiction over this petition for review.

[1] August 1 and 2 fell on a weekend.

ISSUE PRESENTED

Stewart worked as an observer under the Fisheries Conservation Management Act (Fisheries Act), which provides that "[a]n observer on a vessel and under contract to carry out responsibilities under this chapter . . . shall be deemed to be a Federal employee for the purpose of compensation under the Federal Employee Compensation Act [FECA] (5 U.S.C.A. 8101 et seq.)." 16 U.S.C. § 1881b(c). Stewart claimed, and has received, benefits under FECA. He has also filed a claim for benefits under the Longshore Act. The Longshore Act, however, provides that "[n]o compensation shall be payable in respect of the disability or death of an . . . employee of the United States." 33 U.S.C. § 903(b). Does Stewart's status as a federal employee for purposes of FECA disqualify him from coverage under the Longshore Act?

STATEMENT OF THE CASE

I. FACTS

A. STEWART'S WORK AS A FISHERIES CONSERVATION MANAGEMENT ACT OBSERVER

Stewart worked for the Employer, as a fisheries observer. App. 15. Fisheries observers are authorized under the Magnuson-Stevens Fisheries Conservation and Management Act, 16 U.S.C. §§ 1801 et seq. (Fisheries Act). The purposes of that statute are, *inter alia,* to "conserve and manage the fishery resources found off the coasts of the United States," and "provide for the

preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery[.]" 16 U.S.C. § 1801(b)(1), (4). To further those aims, the Fisheries Act establishes regional councils that develop and prepare fishery management plans which are then approved, implemented, and enforced by the National Marine Fisheries Service (NMFS), an office of the National Oceanic and Atmospheric Administration (NOAA) within the United States Department of Commerce. 16 U.S.C. §§ 1853-54; *Anglers Conservation Network v. Pritzker*, 139 F.Supp.3d 102, 105 (D.D.C. 2015).[2] The federal government is authorized to require that a NMFS-certified fisheries observer be carried on board any vessel engaged in fishing for marine species that are subject to a fishery management plan. 16 U.S.C. § 1853(b)(8); 50 C.F.R. § 648.11; *Bauer v. MRAG Americas, Inc.*, 624 F.3d 1210, 1211 (9th Cir. 2010).

As with all Fisheries Act observers, Stewart was trained by the NMFS at its facilities. App. 15. He began working for Riverside Technology, Inc., on October 10, 2013. App. 15. Riverside contracted with NOAA and NMFS to support those agencies' mission under the Fisheries Act by providing observers that could be placed on commercial fishing vessels. App. 16. Stewart was assigned to one such vessel, the F/V Big Eye. App. 27. As Stewart explained, the crew's mission was

[2] *See generally* www.nmfs.noaa.gov/aboutus/aboutus.html (last visited 10/13/2016).

to "catch tuna and swordfish to make money." App. 28. Stewart, on the other hand, was on the ship to "collect biological data for the government" which was required for the Big Eye to legally fish. *Id.*

On October 12, 2014, while aboard the F/V Big Eye in the course of his employment, a wave hit the side of the vessel. Stewart was thrown into the vessel's fishing line spool and broke his right ankle. App. 48, 57. He sought compensation for the resulting disability from three separate workers' compensation systems.

II. STEWART'S WORKERS' COMPENSATION CLAIMS

A. Stewart's North Carolina claim

After his October 12, 2014 injury, Stewart filed a workers' compensation claim under North Carolina law. The Employer was notified of Stewart's state claim on October 22, 2014, and paid him $446.16 per week in disability compensation for 39 weeks, a total of $17,400.24. App. 100, 110. The Employer applied to stop payments on the basis that Stewart was a federal employee for purposes of workers' compensation, and therefore excluded from coverage under the North Carolina Workers' Compensation Act, N.C.G.S. § 97-13(b). App. 104.

B. Stewart's FECA claim

The Fisheries Act extends federal workers' compensation coverage under the Federal Employees' Compensation Act to observers like Stewart. 16 U.S.C.

§ 1881b(c). Accordingly, Stewart filed a claim for FECA benefits on October 15, 2014. App. 113-16. On November 4, 2014, he was informed that, for his claim to be accepted, his attending physician had to submit a narrative medical report with specific information. App. 42-43. He was informed that his case would be held open for 30 days, and that a decision would be made on the evidence in the file if the narrative was not submitted within that time. App. 42, 121.

On December 8, 2014, Stewart was informed that his claim for a fractured right ankle had been accepted. App. 150, 152 n.2; Attachment 3 to Director's Response Brief to the Board. The program subsequently paid several of Stewart's medical bills. App. 150, 152 n.2; Attachment 4 to Director's Response Brief to the Board. And as Stewart acknowledges, he received FECA compensation beginning in August 2016.[3] Petr's Reply to Employer's Resp. Brf at 1.

[3] Stewart was informed of his entitlement to FECA compensation in a letter dated August 18, 2016. The Director has moved to supplement the record with this letter, which was issued after the filing of this appeal. It shows Stewart's entitlement to lump-sum compensation payments of $6,104.60 (for the period from October 12, 2014, to March 6, 2015) and $20,808.67 (for the period from March 20, 2015, to July 23, 2016), as well as regular payments of $1,195.00 every 28 days for as long as he remains totally disabled.

C. Stewart's Longshore Act claim

On November 19, 2014, Stewart filed a claim for compensation under the Longshore Act. App. 112. The Employer controverted its liability, App. 94-95, and the claim was referred to the Office of Administrative Law Judges for a hearing.

III. LONGSHORE DECISIONS BELOW

A. The ALJ's Decision

The ALJ granted summary judgment in the Employer's favor on June 2, 2015, ruling that Stewart was not covered by the Longshore Act. App. 1, 53. He found that Stewart was an "observer" as defined in the Fisheries Act, 16 U.S.C. § 1802(31), that Fisheries Act observers are deemed to be federal employees for purposes of FECA, 16 U.S.C. § 1881b(c), and that the Longshore Act specifically excluded federal employees from its coverage, 33 U.S.C § 903(b). App. 57. The ALJ also rejected Stewart's assertion that his FECA claim had been denied, noting that November 4, 2014 letter from the FECA program merely informed him that additional medical information was required. *Id.;* App. 42, 121.

B. The Board's Decision

The Board affirmed the ALJ's grant of summary decision on June 6, 2016. App. 149. It agreed that Stewart was deemed a federal employee under the Fisheries Act for purposes of workers' compensation benefits, and thus excluded

from coverage under the Longshore Act. It also agreed with the ALJ that the letter sent to Stewart on November 4, 2014, merely requested additional information, and did not deny his FECA claim. Finally, the Board held that Stewart's claim had been accepted under FECA on December 8, 2014, and that several of his medical bills had been paid under FECA. App. 150, 152 n.2; *see* Attachments 3 and 4 to Director's Response Brief to the Board.

SUMMARY OF THE ARGUMENT

As a fisheries observer, Stewart is "deemed" to be a federal employee for purposes of receiving workers' compensation under FECA. 16 U.S.C. § 1881b(c). That fact renders Stewart ineligible for benefits under the Longshore Act, which specifically excludes federal employees from its workers' compensation system. 33 U.S.C. § 903(b). The ALJ's grant of summary decision should be affirmed.

STANDARD OF REVIEW

This case presents only a question of law. On questions of law, including interpretations of the Longshore Act, this Court exercises de novo review. *See Humphries v. Director, OWCP*, 834 F.2d 372, 374 (4th Cir. 1987). The Board's statutory interpretations are not entitled to deference, *Gilchrist v. Newport News Shipbuilding & Dry Dock Co*., 135 F.3d 915, 918 (4th Cir. 1998), but the Court owes some deference to the Director "because of his policy-making authority with regard to the Act." *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 268 (4th

Cir. 1997). When – as here – the Director's position is being advanced in litigation, it is "'entitled to respect' . . . to the extent that [it has] the 'power to persuade[.]'" *W. Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011), *as amended* (Dec. 21, 2011) (deferring to Director's construction of the Black Lung Benefits Act)[4] (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

ARGUMENT

I. BECAUSE STEWART IS DEEMED A FEDERAL EMPLOYEE FOR PURPOSES OF WORKERS' COMPENSATION, HE IS EXCLUDED FROM COVERAGE UNDER THE LONGSHORE ACT.

The controlling statutory provisions dictate the outcome of this case. The Fisheries Act deems Stewart, as a fisheries observer, to be a federal employee for purposes of workers' compensation. 16 U.S.C. § 1881b(c) ("An observer on a vessel and under contract to carry out responsibilities under this chapter . . . shall be deemed to be a Federal employee for the purpose of compensation under the Federal Employee Compensation Act ."); *cf. Bauer*, 624 F.3d at 1211 ("observers are considered federal employees, not employees of the vessel owner").[5] And

[4] The Black Lung Benefits Act, 30 U.S.C. §§ 901-944, incorporates much of the Longshore Act, including its claim adjudication provisions. 30 U.S.C. § 932(a); *see Clinchfield Coal Co. v. Cox*, 611 F.2d 47, 48 (4th Cir. 1979).

[5] The Director notes that the Secretary of Labor's determination that an injury is covered by FECA is not subject to review by this court. *See* 5 U.S.C. § 8128 (b). The Supreme Court has described section 8128 (b) as an example of the

Section 3(b) of the Longshore Act specifically excludes federal employees from coverage. 33 U.S.C § 903(b) ("No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof[.]"). The evident purpose of the Longshore Act's exclusion of federal employees is to exclude those workers who are already covered under FECA.[6] This exclusion defeats Stewart's argument that there is concurrent jurisdiction between the two acts. In short, contrary to Stewart's argument, he may not "choose which compensation system to pursue his claims" when one of those systems statutorily excludes him from its coverage. *See* Petr's Brf. at 5.

While Stewart argues that he is not an actual federal employee, it is clear that Congress intended to treat him as one for purposes of workers' compensation, the only relevant inquiry here. If it had wished to bring fisheries observers working under government contracts within the coverage of the Longshore Act, Congress clearly knew how to do so. Indeed, it provided just such coverage for certain other government contractor employees in the Defense Base Act, 42 U.S.C. §§ 1651 *et seq*. There, Congress specifically extended the Longshore Act's

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unambiguous and comprehensive language Congress uses when it intends to bar judicial review altogether. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 779-80 & n.13 (1985); *see Hanauer v. Reich*, 82 F.3d 1304 (4th Cir. 1996).

[6] The FECA was enacted in 1916, *see* Act of September 7, 1916, Pub. L, No. 64-267, 39 Stat. 742 ch. 458. The Longshore Act was enacted in 1927, *see* Act of March 4, 1927, Pub. L. No. 69-803, 44 Stat. 1224 ch. 509.

provisions to cover employees injured while working overseas under a contract with the United States or any of its agencies. 42 U.S.C. § 1651(a)(3), (4). It could easily have done the same for fisheries observers, but instead chose to provide them with workers' compensation coverage under FECA[7].

To be sure, the linguistic match between 16 U.S.C. § 1881b(c), which "deem[s]" Stewart to be a federal employee for FECA purposes, and 33 U.S.C. § 903(b), which excludes "employee[s] of the United States" from Longshore Act coverage, is not perfect. But this imperfect fit hardly justifies the conclusion that fisheries observers are covered by both statutes. Stewart points to no decision finding that *any* category of worker is covered by both the Longshore Act and FECA. Nor have we identified any such authority.

Congress has extended Longshore Act coverage to one category of federal workers – those employed by nonappropriated fund instrumentalities.[8] But it did so explicitly. 5 U.S.C. § 8171(a) ("The Longshor[e Act] shall apply with respect

[7] In addition to fisheries observers, many other categories of individuals who are not federal civilian employees of the United States in the traditional sense are covered as "federal employees" by FECA. *See, e.g.*, 5 U.S.C. §§ 8142 (Peace Corps volunteers), 8143 (Job Corps students and Volunteers in Service to America), 8143a (National Teachers Corps).

[8] Nonappropriated fund instrumentalities include military base and post exchanges, "and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces." 5 U.S.C. § 2105(c). Employment with one of these instrumentalities is paid from funds generated by the instrumentalities themselves, rather than from funds appropriated by Congress.

to the disability or death resulting from injury . . . occurring to a civilian employee of any nonappropriated fund instrumentality[.]"). The notion that Congress extended Longshore Act coverage to fisheries observers only implicitly – by using slightly different language in 16 U.S.C. § 1881b(c) than it used in 33 U.S.C. § 903(b) – strains credulity. It is far more reasonable to infer that Congress intended fisheries observers to be covered by FECA and excluded from the Longshore Act.

Nor does 5 U.S.C. § 8116(b), a FECA election-of-remedies provision on which Stewart relies, say otherwise. That provision merely requires federal employees to elect between FECA benefits and any other benefits *which they are entitled to receive from the United States under the terms of another statute.*[9] Stewart's reliance on this provision is doubly flawed. First, by its very terms section 8116(b) only applies to benefits received "from the United States[.]" As Stewart points out, the Longshore Act benefits he seeks here would not be received

[9] The provision states: "An individual entitled to benefits under this subchapter because of his injury, or because of the death of an employee, *who also is entitled to receive* from the United States under a provision of statute other than this subchapter payments or benefits for that injury or death (except proceeds of an insurance policy), because of service by him (or in the case of death, by the deceased) as an employee or in the armed forces, shall elect which benefits he will receive. The individual shall make the election within 1 year after the injury or death or within a further time allowed for good cause by the Secretary of Labor. The election when made is irrevocable, except as otherwise provided by statute." 5 U.S.C. § 8116(b) (emphasis added).

from the United States, but from the Employer and its Longshore Act carrier. Brf. at 6. More importantly, section 8116(b) does not, itself, create an entitlement to benefits under the Longshore Act or any other program. It merely allows FECA-covered workers who are independently entitled to benefits under another statute to choose their remedy. *See Teplitsky v. Bureau of Compensation*, 398 F.2d 820 (2d Cir. 1968) (employee required to choose between Veterans Administration benefits and FECA benefits).[10] The determinative question in this case is whether Stewart is excluded from Longshore Act coverage by 33 U.S.C. § 903(b). FECA section 8116(b) is simply irrelevant to that inquiry.

Nor does 5 U.S.C. § 8116(c) – FECA's exclusivity provision – provide any support for Stewart's theory. Section 8116(c) provides that the United States' liability under FECA for a given injury is "exclusive and instead of all other liability *of the United States*" for the same injury. *Id.* (emphasis added). Stewart argues that this provision does not exclude liability for compensation under the Longshore Act because such liability is not the United States' liability. That may be true as far as it

[10] In *Wolf Creek Collieries v. Sammons*, 142 Fed.Appx. 854 (6th Cir. 2005), 2005 WL 1385936, the court held that FECA's election of remedies provision was not triggered where a widow's claims for benefits under the Black Lung Benefits Act and FECA were for different injuries: her husband's pneumoconiosis due to coal-dust exposure under the BLBA, and her husband's death from a mine cave-in while working as government mine inspector under FECA. Stewart, in contrast, seeks Longshore Act benefits for the same ankle injury that his FECA injury was based on.

goes. But here again, the relevant question is not whether section 8116(c) – or any other FECA provision – excludes Stewart from Longshore Act coverage. Rather, it is whether he is covered by the Longshore Act under its own terms. And he is not, because he is considered a federal employee for workers' compensation purposes, and federal employees are specifically excluded from Longshore Act coverage by 33 U.S.C. § 903(b).

Finally, Stewart's reliance on *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980), is also misplaced. While *Sun Ship* recognizes concurrent jurisdiction between state workers' compensation laws and the Longshore Act for some injuries, it did not involve either a federal employee or a FECA claim, and thus does not address whether there is concurrent jurisdiction between the FECA and the Longshore Act.[11] It certainly does not stand for the broad proposition, suggested by Stewart, that he may choose "the compensation program that will best compensate him" regardless of whether a particular program covers him under its own terms. Petr's Brf. at 7-8. In reality, Stewart may only choose among compensation programs that cover his employment. And as noted above, Stewart's employment as a fisheries observer is simply not covered by the Longshore Act.

[11] *Sun Ship* recognized that the Supreme Court had previously found concurrent jurisdiction between state workers' compensation laws and the Longshore Act before the Act was amended in 1972. It held that Congress did not intend to eliminate that concurrency when it amended the Act to move its coverage landward past the shoreline of navigable waters.

CONCLUSION

The Court should affirm the ALJ's grant of summary decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached brief for the Federal Respondent is proportionally spaced, was prepared in Microsoft Word Times New Roman 14-point typeface, and contains 3,440 words.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2016, the required copies of this Brief were served electronically, through the Court's CM/ECF system, on the following:

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