U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 305
April 2020

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Counsel for Longshore

William S. Colwell
Associate Chief Judge for Black Lung

Francesca Ford
Senior Counsel for Black Lung

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

A. U.S. Circuit Courts of Appeals[1]

[*Hale v. BAE Systems San Francisco Ship Repair, Inc.*, 801 Fed.Appx. 600 (Mem) (9th Cir. 2020)(unpub.).]

In an unpublished decision in two consolidated cases, the Ninth Circuit reversed the Board's published decision in *Hale v. BAE Systems San Francisco Ship Repair*, 52 BRBS 57 (2018).[2] Petitioners, both widows of shipyard workers who allegedly suffered fatal illness as a result of asbestos exposure on the job, sought death benefits under the LHWCA. The Board held that petitioners forfeited their benefits under § 33(g) of the LHWCA, which terminates benefits when "the person entitled to compensation (or the person's representative) enters into a settlement with a third person" for the employee's disability or death for an amount less than that to which they would otherwise be entitled under the Act and fails to obtain the approval of the employer before doing so. The widows did not sign the third-party settlements in question. Rather, the settlements were between third parties and the decedents' daughters, who were successors-in-interest to legal claims their fathers filed while still alive. The Board reasoned that because the settlements bound all heirs—including the widows—the agreements triggered the § 33(g) forfeiture provision.

Reversing the Board, the Ninth Circuit held that the forfeiture provision of § 33(g) was not triggered, because neither the "person entitled to compensation" nor any relevant "representative" entered into a third-party settlement. *See* 33 U.S.C. § 933(g)(1). It was undisputed that the "person entitled to compensation" in each case is the surviving spouse. Even if the widows were ultimately bound by the third-party settlements signed by the daughters, no record evidence suggested that the widows personally entered into the

---

[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 *__).
[2] *See Recent Significant Decisions – Monthly Digest # 291*.

settlements. There was similarly a dearth of record evidence to suggest that the daughters acted as agents on the widows' behalves.

Nor did any "person's representative" enter into a settlement with a third party. The statutory phrase "the person's representative" refers to the legal representative of the deceased, and did not apply in these cases.

Accordingly, the Board decisions were reversed and the cases remanded.
were "person[s] entitled to compensation" under the Act and that decedents' daughters did not act as petitioners' agents when they executed the third-party settlements. However, he disagree with the majority as to whether petitioners themselves entered into the settlements.The majority concluded that petitioners did not enter into the third-party settlements because they did not sign the settlements and there was no record evidence to suggest that they subjectively intended to become parties. To determine whether Petitioners entered into the settlements, the court must apply California contract law and first look to the plain language of the settlements. Here, the plain language of the settlements binds petitioners to its terms as "heirs" to the decedents. Accordingly, the settlements expressed an objective intention that Petitioners be bound by and parties to the settlements. If Petitioners had filed disclaimers, or if the attorneys who orchestrated the settlements—the same attorneys who represented Petitioners—had specifically excluded Petitioners from the settlements, then the settlements would not have evidenced such an intention.

[Section 33(g)(1) – ENSURING EMPLOYER'S RIGHTS – Written Approval of Settlement]

B. Benefits Review Board

***Harper v. Temco, LLC,* ___ BRBS ___ (2020).**

The Board held that its regulation at 20 C.F.R. § 802.206(c) applies in determining whether a motion for reconsideration filed with the OALJ by mail is timely.

The ALJ denied claimant's motion for reconsideration of an award of attorney's fees as untimely filed, because the OALJ received it more than 10 days after the district director filed the attorney fee order. The ALJ found that the district director filed and served the attorney fee order on 06/24/19. Counting from 06/25/19, the day after the event that triggered the time period, the ALJ found that under the program-specific regulation at Section 802.206(b)(1) the tenth day fell on 07/04/19, a legal holiday. He therefore found that 07/05/19 was the due date. Citing a general OALJ Rule at 29 C.F.R. § 18.30, which states that a "paper is filed when received," the ALJ held that claimant's motion should have been received by the OALJ on 07/05/19, and not 07/09/19. Claimant appealed.

The Board agreed with claimant, citing *Zumwalt v. National Steel & Shipbuilding Co.*, 52 BRBS 17 (2018) (en banc), *aff'd*, ___ F. App'x ___, No. 18-72257, 2019 WL 6999492 (9th Cir. 2019). In *Zumwalt*, the Board held that the period for filing a motion for reconsideration with an ALJ is determined by Section 802.206(b)(1) because it is a governing program regulation that takes precedence over the general OALJ Rule at 29 C.F.R. § 18.93. *See* 29 C.F.R. § 18.10(a). In that case, claimant's motion for reconsideration of the ALJ's decision, submitted by fax thirteen calendar days after the decision was filed in the district director's office, was untimely. The Ninth Circuit affirmed, holding that the Board regulations govern the deadline to file a motion for reconsideration.

In the present case, the ALJ erred by not applying Section 802.206(c), which states in pertinent part:

> If the motion for reconsideration [to the OALJ] is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of reconsideration rights, it will be considered to have been filed as of the date of mailing.

20 C.F.R. § 802.206(c). The Board reasoned that

> [p]ursuant to the Board's holding in *Zumwalt* that its regulation at 20 C.F.R. §802.206(b)(1) governs the filing of motions for reconsideration with the OALJ, Section 802.206(c) is equally applicable to determining whether a motion for reconsideration, sent by mail, was timely filed. This regulation, too, is a Longshore Act-specific rule that takes precedence over the general OALJ regulation at 29 C.F.R. §18.30(b)(2). *Zumwalt*, 52 BRBS at 20; 29 C.F.R. §18.10.

Slip op. at 4. Section 802.206(c) was not discussed in *Zumwalt* because in that case claimant filed his motion for reconsideration with the OALJ by fax, not by mail. In the present case, because claimant mailed his motion for reconsideration to the OALJ on Friday, 07/05/19, it was filed in a timely manner.

Accordingly, the Board reversed the ALJ's denial of the motion for reconsideration and remanded the case for the ALJ to address its merits.

[PROCEDURE - motion for reconsideration]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

There were no published black lung decisions in April. Here is a summary of the sole unpublished black lung decision that was issued:

In *Elkhorn Eagle Mining Co. v. Atlantia Higgins, et al,* No. 18-3926, 2020 WL 2095821, (6th Cir. April 30, 2020), the Court of Appeals held that the Employer's attempt to raise the Appointments Clause challenge was untimely as it was not raised in its initial brief to the BRB. This was a subsequent claim filed on May 3, 2013. Benefits were awarded against the Employer by the District Director. The Employer appealed to the OALJ on the RO issue. The ALJ found that it was correctly named as the RO as the evidence showed that the miner worked 125 days for the Employer. The Employer appealed to the BRB on June 6, 2017. Its brief was filed on July 18, 2017, but did not include a challenge of the ALJ's authority under the Appointments Clause. On June 21, 2018, while this claim was still pending before the BRB, the Supreme Court issued its decision in *Lucia v. SEC*, 1380 S.Ct. 923 (2018). On July 9, 2018, the Employer filed a motion to remand citing *Lucia*. The BRB issued its decision on July 30, 2018, affirming the ALJ's findings on the merits and rejecting the Employer's Appointments Clause challenge as untimely. The Court of Appeals agreed. It pointed out that it has repeatedly found the Appointments Clause challenge untimely when not raised promptly on appeal in decisions such as *Jones Brothers, Inc. v. Secretary of Labor*, 898 F3d 669, 677 (6th Cir. 2018) (issue raised for the first time on appeal to Court of Appeals), *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) (issue forfeited when first raised in a reply brief at the Court of Appeals), *Island Creek Coal Company v. Bryan* 937 F.3d 738 (6th Cir. 2019) (issue first raised at BRB in a motion for reconsideration), and *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (issue first raised in motion to file supplemental brief to BRB). The court further found that the Employer's challenge did not fall under any exception for a facial constitutional challenge or extraordinary circumstances. Specifically, although it stated that the BRB could review constitutional challenges, the Employer failed to present one in this case as it did not challenge how the ALJ was appointed, but rather how the DOL chose to apply the BLBA statute by allowing the ALJs to be appointed by someone other than the Secretary of Labor. The court further found that the fact that the Employer's BRB brief was filed prior to the *Lucia* decision did not qualify as an extraordinary circumstance since *Lucia* was not a necessary predicate for such a challenge. Finally, the court affirmed the designation of the Employer as RO as the miner worked 125 days in and around the mine.

B. Benefits Review Board

There were no published BRB black lung decisions in April. Here are brief summaries of some of the unpublished decisions:

Appointments Clause

In *Huff v. Shamrock Coal Company,* BRB Nos. 19-0160 BLA and 19-0167 BLA (April 8, 2020) (unpub), the Employer challenged the Secretary's ratification of the ALJ's appointment as a "rubber-stamping" of the original improper procedure. The Board disagreed. It held that the Secretary's ratification brought the ALJ's appointment into compliance. The Employer, citing *Texas v United States*, 340 F.Supp.3d 579, also argued that Section 1556 of the ACA is unconstitutional. The Board found that this decision does not apply. Further, it stated that the constitutionality of the ACA has already been decided by the Supreme Court. On the merits, the BRB upheld the ALJ's calculation of the duration of coal mine employment under the *Shepherd* decision, but remanded the claim for further findings on whether certain period of employment was coal mine employment.

In *Abston v. Abston Construction Company*, BRB No. 19-0211 BLA (April 8, 2020), the Board found that the presumption of regularity had not been rebutted and rejected the Employer's argument that the Secretary's ratification of the ALJ was insufficient. Instead, it found that the there was a valid ratification of the ALJ appointment. It further found that the ALJ's issuance of orders (Notice of Hearing, Notice of Canceling Hearing, and Order Granting Director's Motion for Protective Order, Denying Employer's Motion to Place Claim in Abeyance, and Establishing Briefing Schedule) prior to ratification did not taint the adjudication. Finally, the Board declined to hear the Employer's removal provisions argument as it was not adequately briefed.

Royce v. Lone Mountain Processing, BRB Nos. 19-0244 BLA and 19-0309 BLA (April 23, 2020), the Employer challenged the Secretary's ratification of the ALJ's appointment stating that it was insufficient to cure the constitutional defect of her original appointment. The hearing was held on June 13, 2017. On January 18, 2018, the Employer moved to hold the claim in abeyance pending the Supreme Court's decision in *Lucia*. The ALJ denied the motion on February 23, 2018, citing the Secretary's ratification of the ALJ's appointment. *Lucia* was decided on June 21, 2018. Thereafter, the ALJ issued an order directing the Employer to advise if it wanted the claim to be reassigned. The Employer responded that it did not want an ALJ reassignment. The ALJ subsequently issued an award of benefits. The Board held that the Employer waived its Appointments Clause challenge when it indicated that it wanted the claim to remain with the ALJ.

Chappelle v. Whitaker Coal, BRB No. 19-0168 BLA (August 28, 2020), the Board held that the Employer's failure to raise the Appointments Clause challenge at the ALJ level constituted a forfeiture of the issue.

Rebuttal of the 15 year Presumption

In *Hall v. Clinchfield Coal Company,* BRB No. 19-0080 BLA (April 8, 2020), the Board held that treatment records that were silent as to the existence of CWP, do not constitute affirmative evidence and did not satisfy the Employer's burden of rebutting the Section 411(c)(4) presumption.

Miner

The Board agreed with the ALJ's finding that the Claimant was a miner under the Act in *Back v. Bowie Refined Coal,* BRB No. 19-0203 BLA (April 28, 2020). The Claimant's last coal mine employment was, for a period of time, at a prep plant that had been converted into a space for waste storage. He performed replacing pipelines, performing maintenance, installing a pump, and moving a booster plant. The ALJ found that this was coal mine construction work and that the Claimant was a miner.