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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 267
November 2014 – January 2015

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

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

[there are no decisions to report]

B. Benefits Review Board

***Jackson v. Ceres Marine Terminals, Inc.*, __ BRBS __ (2014).**

The Board affirmed the ALJ's award of temporary total disability (TTD) and medical benefits to claimant for post-traumatic stress disorder (PTSD) arising from an incident when claimant, while operating a forklift in the course of his employment, accidentally struck and killed a fellow employee.

Claimant's treating psychologist, Dr. Newfield, diagnosed claimant with severe PTSD, with significant anxiety and depression, resulting from the work incident. Further, employer's examining psychiatrist, Dr. Thrasher, diagnosed disabling PTSD and depression, attributed to the incident. Claimant was also referred by the OWCP for an independent medical examination (IME) with psychiatrist Dr. Mansheim, who opined that claimant does not meet the criteria for a diagnosis of PTSD and found no psychiatric contraindication to employment.

The Board initially rejected employer's contention that the "zone of danger" test that limits recovery in tort actions for the negligent infliction of emotional distress should be extended to workers' compensation claims under the LHWCA. Accordingly, the Board affirmed the ALJ's determination that the lack of an actual physical injury or immediate risk of such did not bar claimant from recovery for his psychological injury. It is well-established that a work-related psychological impairment, with or without an underlying physical harm, may be compensable under the Act. Agreeing with the OWCP Director, the Board concluded

[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 refer to the Westlaw identifier.

that the "zone of danger" test is a tort concept which does not apply to the workers' compensation provisions of the LHWCA. While tort actions rely on common law fault and negligence principles, workers' compensation claims are not governed by those principles. Thus, the cases cited by employer are inapposite, as each involved a negligence action (including a FELA claim and claims under § 5(b) of the LHWCA).

Further, the ALJ did not err in finding, based on the record as a whole, that claimant suffers from work-related PTSD. Rejecting employer's contention, the Board reaffirmed its longstanding precedent that an ALJ is not required to give dispositive weight to the opinion of an independent medical examiner appointed by the Department of Labor under § 7(e) of the Act.[2] It also noted a statement by the Fourth Circuit (within whose jurisdiction this case arose) that "we have consistently recognized that a physician's statement is not conclusive of the ultimate fact in issue." Slip op. at 7, citing *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 326 F.3d 434, 440 n.3 (4th Cir. 2003) (internal quotations and citation omitted). The Board also rejected employer's alternative contention that the opinion of a § 7(e) examiner must be given more weight than the other medical opinions in the record. The Board recognized that § 7(e) medical examinations are intended to provide a reliable, independent evaluation of a claimant's medical condition. However, employer's position is inconsistent with the Fourth Circuit's admonition that in considering the medical opinions of record, an ALJ must examine the logic of a physician's conclusions and the evidence upon which those conclusions are based, and evaluate the physician's opinion in light of the other evidence in the record. In *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), in an analogous context, the U.S. Supreme Court has proscribed a judicially-imposed rule requiring that special deference be given to the opinions of treating physicians in cases arising under the ERISA. The Board had previously stated that *Nord* does not prohibit a fact-finder from giving special weight to the opinions of treating physicians; rather, the Court held that, in ERISA cases, a court may not impose a rule requiring such deference.[3] Under the same reasoning, while it is permissible for an ALJ to give greater weight to the opinion of a § 7(e) independent medical expert, there is no rule requiring that the ALJ do so.

In this case, the ALJ properly found that the opinions of Drs. Newfield and Thrasher outweighed the contrary opinion of Dr. Mansheim. The ALJ "appropriately examined the logic of Dr. Mansheim's conclusions and evaluated the evidence upon which they were based, and he found the physician's opinion to have a questionable basis." Slip op. at 8 (citation omitted). Specifically, the ALJ "rationally accorded Dr. Mansheim's opinion less weight based on the limited nature of the doctor's contact with claimant and the [ALJ's] concerns regarding one of the premises for the doctor's view that claimant does not have PTSD, and, less significantly, on the doctor's reliance on a standardized personality assessment inventory administered to claimant.[4] The ALJ properly accorded greater weight

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[2] *See also* 20 C.F.R. §§702.408, 702.409.

[3] *See Monta v. Navy Service Exch.,* 39 BRBS 104, 107 n.2 (2005).

[4] The Board elaborated that:

> "Moreover, the [ALJ] properly examined the logic of Dr. Mansheim's opinion that claimant does not meet the criteria for a PTSD diagnosis, and rationally found that the doctor did not adequately support his opinion. Specifically, Dr. Mansheim testified on deposition that the work incident does not qualify as a traumatic event under the PTSD diagnostic criteria. Dr. Mansheim reasoned in this regard that if every person who was 'presented with that sort of image were diagnosed with post-traumatic stress disorder, more than half the population would meet the criteria for the diagnosis.' The [ALJ] reasonably

to the opinion of Dr. Newfield, which he found to be supported by Dr. Thrasher's opinion and by claimant's credible complaints. "In this regard, he found that both Drs. Newfield and Thrasher provided well-reasoned and well-documented reports explaining their respective opinions that claimant suffers from PTSD which renders him incapable of returning to work." Slip op. at 10, citing S*.K. [Kamal] v. ITT Industries, Inc*., 43 BRBS 78 (2009), *aff'd in part and rev'd in part mem.*, No. 4:09-MC-348, 2011 WL 798464 (S.D. Tex. Mar. 1, 2011).

Finally, the Board rejected claimant's assertion that the ALJ erred in excluding vacation, holiday, and container royalty pay from his Average Weekly Wage (AWW) calculation. As this case arises in the Fourth Circuit, the holding in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1999), is dispositive. In *Wright*, the court held that vacation, holiday and container royalty payments are considered "wages" under § 2(13) of the Act only when they are earned with the requisite number of hours of actual work; payments received on the basis of disability credit are not paid for "services" and therefore are not "wages." Here, at the time of his injury, claimant did not have the requisite number of actual work hours for either the 2010 or 2011 contract year to be entitled to such payments. Rather, he received these payments in both contract years based upon a combination of actual hours worked and workers' compensation disability credit hours (*i.e.*, in 2010, he received disability credit hours for benefits paid under the Act for a back injury, while in 2011, voluntary payments made by employer for the psychological injury entitled him to disability credit hours).

[Topic 2.2.4 Physical Harm as an Injury; Psychological Impairment; Topic 2.2.18 Representative Injuries/Diseases – Psychological Problems; Topic 7.8 § 7(e) Impartial Examiner; Topic 23 EVIDENCE (23.5 ALJ Can Accept or Reject Medical Testimony; 23.6 ALJ Determines Credibility of Witnesses); Topic 10.1.3 Average Weekly Wage – Definition of Wages; Topic 2.13 SECTION 2(13) WAGES]

***O'Donnell v. Nautilus Marine Protection, Inc.*, __ BRBS __ (2014).**

The Board affirmed the ALJ's denial of benefits under the Act based on the ALJ's determination that the site of claimant's work-related injuries – *i.e.*, a temporary facility created for the purpose of placing a boom to collect debris from the Los Angeles River and to deflect it into a storm channel – was not an "adjoining area" to "navigable waters," and thus claimant's injuries did not occur on a § 3(a) covered situs.

To be covered by the Act, the site of a land-based injury must be an enumerated situs adjoining navigable water (pier, wharf, dry dock, etc.), or an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). A site must have a functional and geographic nexus with navigable waters. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Here, claimant was injured on employer's land-based worksite along the Los Angeles River, and the issue was whether the injury occurred on an "other adjoining area" to "navigable waters." The ALJ's finding that the storm channel and Los Angeles River are

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> exercised his discretion as trier-of-fact to question the logic of Dr. Mansheim's rationale, and correctly observed that the doctor offered no evidence to support his assumption that more than half the population has witnessed an image as traumatic as that experienced by claimant."

Slip op. at 8, n.8 (citations to record omitted). Further, the ALJ did not abuse his discretion in according slightly less weight to Dr. Mansheim's opinion based on the doctor's reliance on the computer-graded results of the standardized personality assessment inventory which had not been interpreted.

not "navigable in fact" near the site of the injury was supported by substantial evidence.[5] The ALJ found no evidence that any commercial activity occurred on either the channel or the river, or that either is used as a "commercial highway." Rather, the ALJ found that the storm channel is a man-made section that feeds rain run-off into the Los Angeles River, is only 16 feet deep, is not used for any commercial activity, and that there are no piers, wharves, or docking areas at employer's work site. The ALJ further found that the Los Angeles River itself does not appear to be navigable above the buoys which are located several hundred yards downstream from the site of the injury. The fact that employer deployed small skiffs on the water is not sufficient to satisfy the Act's "navigability" test, as the boats are not used in interstate commerce.

Further, the ALJ rationally found the evidence insufficient to establish that employer's temporary facility had any functional nexus with the maritime purposes of the Act, and thus the site of claimant's injury is not an "adjoining area." The Ninth Circuit, within whose jurisdiction this case arose, has held that the phrase "other adjoining area" in § 3(a) is qualified so as to require a relationship to maritime activity; specifically the area must have a functional relationship and geographical relationship with navigable waters, which, though it need not depend on physical contiguity with navigable waters, must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." Slip op. at 6 (citation omitted). Here, the ALJ found that employer's facility was not an integral part of any maritime operation; rather, it was a temporary facility created for the purpose of placing a boom to collect trash and, thus, it was not used in "loading, unloading, repairing, dismantling, or building a vessel." A letter issued by the Director of Public Works for the County of Los Angeles noted that "[r]emoval of vegetation, urban trash, and debris at the mouth of the Los Angeles River will improve navigation in the Port of Long Beach, reduce deposition onto recreational areas and aquatic habitats, and improve water quality and visual aesthetics." The Board noted witness testimony clarifying that the boom primarily served environmental purpose and had no relationship to the loading and unloading of vessels. Thus, the ALJ "rationally found that there is no evidence that employer's temporary facility was being used for the maritime purposes of the Act, i.e., the loading, unloading, repairing, dismantling, or building of a vessel, or that it had any relationship to such activities at the Port of Long Beach." *Id.* at 6-7. Further, there was no evidence of neighboring properties used in maritime commerce, or that the construction of the boom required a site particularly suited for maritime uses. Moreover, the ALJ found that employer and its facility lack any relationship with Long Beach Harbor, which is more than four miles downstream.

[Topic 1.6.2 JURISDICTION/COVERAGE – SITUS – "Over land"]

***Myshka v. Electric Boat Corp.*, __ BRBS __ (2015).**

The Board held that, in denying a claim for scheduled permanent partial disability (PPD) benefits for the impairment to claimant's right hand, the ALJ erroneously found that claimant did not establish a new injury or aggravation of his carpel tunnel condition attributable to his work for employer. The fact that claimant may have a lower impairment rating after his recovery from carpal tunnel release surgery than the rating assigned by one of the physicians in 1999 does not establish the absence of a work injury occurring in 2011.

Prior to commencing his current period of employment with Electric Boat Corporation, claimant filed claims under the LHWCA and state workers' compensation act against his prior employer, Pequot River Shipworks, for bilateral cumulative trauma injuries

[5] The fact that the United States Coast Guard and the Army Corps of Engineers have declared that the Los Angeles River is navigable at the point of claimant's accident is not dispositive of the "navigability in fact" inquiry under the Act.

to his hands and arms allegedly sustained while working for that employer as a welder. In 2001, claimant entered into approved settlement agreements with Pequot River Shipworks pursuant to § 8(i) of the LHWCA, and the state act. The § 8(i) settlement application set forth impairment ratings provided in 1999 by Dr. Browning and Dr. Dr. Wainwright, who assigned a 14 percent and a three percent impairment rating to each hand, respectively. The settlement application further indicated that the nature and extent of claimant's disability were disputed issues, and provided for a lump sum payment of $9,400.

In 2002, began his most recent period of employment as a welder for Electric Boat Corporation. By 2011, claimant's hand problems had worsened and he underwent three surgical procedures with Dr. Cambridge, including right carpal tunnel release. In 2012, Dr. Cambridge released claimant to return to his regular work with employer without restrictions, and he assigned a PPD rating of eight percent to claimant's right upper extremity based on the combination of his right fourth trigger finger, right cubital tunnel syndrome, and right carpal tunnel syndrome, under the Sixth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*. He further testified that he rated claimant's carpal tunnel condition at five percent. Employer voluntarily paid TTD and medical benefits in 2011-2012. Prior to the hearing, the parties resolved the compensation issues regarding claimant's right elbow and right fourth finger conditions, and employer paid scheduled benefits for these conditions.

At the hearing, the only remaining issue was claimant's entitlement to a scheduled PPD award for the impairment to his right hand due to his carpal tunnel condition. The ALJ found that claimant failed to establish a *prima facie* case that he had suffered a work-related injury to his right hand. Based on his determination that the present impairment rating to claimant's right hand is lower than the 14 percent impairment rating assessed by Dr. Browning in 1999, the ALJ concluded that claimant did not establish a new injury or an aggravation of his pre-existing right hand condition.

The Board vacated the denial of benefits, stating that the ALJ's reasoning reflects a misperception of the operation of the § 20(a) presumption and the aggravation rule. Uncontroverted evidence established that claimant satisfied both elements of his *prima facie* case: he sustained a harm, right carpal tunnel syndrome, and working conditions existed (e.g., use of welding and grinding tools), which could have worsened his hand condition. Claimant testified that his hand condition had worsened after his employment at Pequot River Shipworks, and Dr. Cambridge wrote that claimant had a five-year history of paresthesias preceding his 2011 examination. Additionally, the parties stipulated that claimant sustained injuries at work in 2011, and it was undisputed that he was entitled to TTD and medical benefits for his work-related carpal tunnel syndrome. Thus, the issue presented for adjudication appeared to be whether the permanent impairment to claimant's right hand after he reached maximum medical improvement following his carpal tunnel release surgery is causally related to his employment with employer. If claimant's employment with employer aggravated, contributed to or combined with claimant's pre-existing right hand condition, the entire resulting permanent disability is compensable, subject to the credit doctrine which provides a credit to an employer in a scheduled PPD case where scheduled benefits have been paid under the Act for prior disability to the same member. Contrary to the ALJ's reasoning, the fact that claimant may have a lower impairment rating after his recovery from carpal tunnel release surgery than the rating assigned by Dr. Browning in 1999 does not establish the absence of a work injury occurring in 2011. The Board also noted that the ALJ failed to consider that the percentage of impairment to claimant's hands was disputed at the time of his 2001 settlement with his prior employer, and the order approving the settlement did not include a finding on this issue. The Board instructed that, if the ALJ determines on remand that claimant has a permanent right hand impairment that was caused or aggravated by his employment with

employer, he may not deny the claim simply because the percentage of claimant's residual impairment following surgery is lower than that previously found by Dr. Browning.

[Topic 2.2.6 INJURY – Aggravation/Combination; Topic 8.3 PERMANENT PARTIAL DISABILITY; Topic 8.3.26 Section 8(c)(22) Multiple Scheduled Injuries; Topic 20.2 PRESUMTIONS -- CLAIM COMES WITHIN PROVISIONS OF THE LHWCA]

C. Other Jurisdictions

[***Ed. Note***: the following decision is included for informational purposes only.]

***Uveges v. Uveges*, 103 A.3d 825 (Pa. Super. Ct. 2014).**

The Superior Court of Pennsylvania held, as a matter of first impression in Pennsylvania, that the anti-attachment clause in Section 16 of the LHWCA did not preclude attachment of LHWCA benefits to pay alimony. The court reasoned that the husband's benefits, which were paid to him under federal law, constituted "remuneration for employment" within the meaning of the Social Security Statute's "Garnishment provision," 42 U.S.C. § 659. Further, the alimony support is not money owed to a "creditor" nor is it a "debt" within the meaning of § 16 of the LHWCA. In so holding, the court agreed with the rationale in *Moyle v. Director, OWCP*, 147 F.3d 1116 (9th Cir.1998), *certiorari denied,* 526 U.S. 1064 (1999)(holding that LHWCA disability benefits could be garnished to satisfy spousal support obligation; such benefits could be considered as "remuneration for employment," because the SSA Garnishment provision defines that term to include workers' compensation benefits paid or payable under Federal or State law; the later-enacted SSA Garnishment provision impliedly repealed § 16 of the LHWCA, and permitted garnishment). The court rejected the husband's assertion that *Moyle* is distinguishable because the recipient of LHWCA benefits in that case received them from the Special Fund under § 8(f) of the LHWCA. Additionally, this decision is consistent with the historical treatment by Pennsylvania appellate courts of anti-attachment clauses vis-à-vis a claim for support or alimony.

[Topic 16 ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, BLR (6th Cir. 2014), Claimant, after an initial hearing before the administrative law judge (ALJ), established that he had worked for 16.5 years in qualifying coal mine employment and that he suffered from a totally disabling respiratory or pulmonary impairment, based on the medical opinion evidence and pulmonary function studies. Therefore, the ALJ found that Claimant was entitled to the rebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(4). However, the ALJ further found that Employer rebutted the presumption by offering medical opinion evidence, in the form of testimony by Dr. Broudy, that Claimant did not suffer from pneumoconiosis. The ALJ therefore denied benefits.

On appeal, the Benefits Review Board identified two errors in the ALJ's analysis: (1) his weighing of the pulmonary function studies amounted to simply counting qualifying pulmonary function studies against non-qualifying pulmonary function studies, and (2) he failed to address whether Dr. Broudy's basis for excluding coal mine employment as a cause for Claimant's impairment was inconsistent with the implementing regulations of the Black Lung Benefits Act. The Board therefore vacated the ALJ's decision and remanded the case for further consideration.

On remand, the ALJ reassessed the pulmonary function study evidence. The ALJ noted that Claimant submitted seven pulmonary function studies, five of which were qualifying and two of which were non-qualifying. The ALJ, in evaluating the pulmonary function studies, noted that (1) all of the tests met DOL's regulatory standards, and (2) no doctor had questioned the validity of any of the pulmonary function study results; therefore, the ALJ found the pulmonary function study results to be "clearly valid representations of [Claimant's] pulmonary function at the time of each test." The ALJ also found all of the pulmonary function studies to be "sufficiently contemporaneous to provide a probative assessment," as all were taken within a seven month period. Finally, the ALJ noted that a blanket preference for the two non-qualifying tests would be contrary to the implementing regulations. The ALJ therefore concluded that each of the seven pulmonary function studies were "equally probative" but that, because five of the "conforming, valid, and probative" studies were qualifying, Claimant had established the existence of a total disabling respiratory or pulmonary impairment. Therefore, the ALJ once again found that Claimant had invoked the rebuttable presumption of total disability due to pneumoconiosis at 30 U.S.C. §921(c)(4). In determining whether Employer rebutted the presumption, the ALJ reconsidered Dr. Broudy's medical opinion. This time, the ALJ found his opinion failed to rebut the presumption, as Dr. Broudy's diagnosis was inconsistent with the regulations and insufficiently reasoned. The ALJ therefore awarded benefits, and the Board subsequently affirmed the award.

On appeal before the Sixth Circuit, Employer's only challenge to the ALJ's weighing of the pulmonary function studies was that, because the ALJ found each of the pulmonary function studies to be equally probative, he should have found the pulmonary function study evidence to be in equipoise. The court rejected this argument, noting that *Woodward v. Director, Office of Workers' Compensation Programs*, 991 F.2d 314 (6th Cir. 1993), which pertained to the consideration of quantitative differences in evidence in conjunction with qualitative differences, was "not a *per se* ban on using differences in the quantity of evidence to reach conclusions." The court further noted that "the evidence was not in equipoise because the ALJ found that medical opinion evidence also supported a finding of total disability."

Employer further challenged the ALJ's decision to discount Dr. Broudy's deposition testimony for being inconsistent with 20 CFR §718.201(c), which recognizes pneumoconiosis "as a latent and progressive disease that may first become detectable only after the cessation of coal mine dust exposure." The court rejected Employer's argument:

> The ALJ could reasonably find that Dr. Broudy's medical opinion about legal pneumoconiosis was based on a premise inconsistent with the Act. When asked how he ruled out coal dust exposure as a cause, Dr. Broudy replied that 'for one thing, the bronchitis associated with coal dust exposure usually ceases with cessation of exposure.' But this was not just 'one thing'; it was the only thing. It was the sole reason Dr. Broudy gave for eliminating coal dust exposure as the cause of Keathley's chronic bronchitis. The ALJ considered the possibility that the statement 'may have just represented a generalized comment upon which Dr. Broudy did not rely,' but Dr. Broudy never disclaimed reliance on the statement and gave no other reason for ruling out coal dust exposure during the deposition. Sunny Ridge argues that the words 'usually ceases with cessation of exposure,' when properly read, are not inconsistent with the Act. But the ALJ's interpretation of Dr. Broudy's testimony is nonetheless supported by substantial evidence, even if there are other ways of interpreting the testimony.

The court therefore denied the petition for review and affirmed the award of benefits.

[Progression of pneumoconiosis after exposure to dust ceases] [General principles of weighing medical evidence]

B. Benefits Review Board

In *Sharpe v. Westmoreland Coal Co.*, BRB Nos. 14-0136 BLA, 14-0136 BLA-A, 14-0156 BLA and 14-0156 BLA-A (Nov. 6, 2014) (unpub.), Claimant's counsel appealed, and Employer cross-appealed, the ALJ's decision awarding attorney's fees and costs associated with the successful prosecution of a miner's claim and a survivor's claim.

Specifically, Claimant's counsel challenged (1) the ALJ's disallowance of 22.5 hours claimed for preparing briefs on remand before the ALJ, (2) the ALJ's disallowance of 2.75 hours requested for work that the ALJ deemed to be clerical in nature, and (3) the ALJ's approval of an hourly rate of $300.00 as opposed to the $325.00 hourly rate counsel requested. Employer cross-appealed, contending that, if the Board were to remand the matter to the ALJ for further consideration based on Claimant's arguments, the ALJ should be instructed to more fully describe her reasons for rejecting Employer's arguments raised below.

In addressing Claimant's counsel's contentions on appeal, the Board first concluded that the ALJ, in assessing Claimant's counsel's requested hourly rate of $325.00, conducted the appropriate analysis as required by 20 C.F.R. §725.366(b). In determining that an hourly rate of $300.00 was reasonable under the facts of the case, the ALJ noted the following:

> Claimant's counsel provided no evidence to support my awarding him an hourly rate of $325: no evidence to show (1) such a rate has been charged in the community for comparable attorneys for similar services or (2) he had been awarded $325.00 per hour in the past . . . .

The Board therefore affirmed the ALJ's determination that Claimant's counsel was not entitled to an hourly rate of $325.00, and concluded that the ALJ "acted within her

discretion in determining that claimant's counsel provided insufficient evidence to support the reasonableness of the hourly rate requested for work performed before the OALJ . . . ." The Board also affirmed the ALJ's finding that the 2.75 hours counsel spent faxing correspondence was purely clerical.

Finally, the Board addressed Claimant's counsel's contention that the ALJ erred in disallowing 22.25 hours of the 42.25 hours counsel requested in connection with his preparation of briefs on remand. In support of his fee petition, "counsel referred to 'the complexity of the legal issues involved in this matter,' i.e., modification requests, offensive non-mutual collateral estoppel, complicated pneumoconiosis, finality, accuracy and justice under the Act." In limiting the time compensable for the preparation of counsel's 2004 brief and 2008 brief to 10.00 hours for each, as opposed to 18.50 hours and 23.75 hours, respectively, the ALJ noted that she found merit in Employer's objections to counsel's requested time. In vacating this portion of the ALJ's decision, the Board noted the following:

> The administrative law judge did not elaborate on the rationale underlying her disallowance of the hours claimed by claimant's counsel, nor did she set forth the basis for her determination that the hours requested were excessive. The administrative law judge also omitted an explanation for her decision to accept employer's suggestion that allowing ten hours for each brief was more appropriate. Absent adequate explanations, the Board cannot discern the basis for the [ALJ's] reduction in the number of hours she approved.

Accordingly, the Board vacated this portion of the ALJ's decision and remanded the matter to the ALJ for further consideration. Finally, the Board rejected the arguments Employer raised in its cross appeal.

[Proponent of petition carries burden of demonstrating reasonable and necessary] [Clerical work] ["Necessary work" defined]

In *Parks v. Pinnacle Mining Co.*, BRB No. 14-0131 BLA (Nov. 24, 2014) (unpub.), Claimant appealed, *pro se*, the ALJ's decision denying benefits. The ALJ found that Claimant failed to establish the existence of simple or complicated pneumoconiosis, and further found that Claimant was not totally disabled by a respiratory or pulmonary impairment.

Relevant to her determination that Claimant did not establish complicated pneumoconiosis, the ALJ considered thirteen interpretations of four x-rays dated April 21, 2010, June 4, 2010, March 24, 2011, and February 6, 2012. In weighing the conflicting x-ray evidence, the ALJ found the April 21, 2010, June 4, 2010, and March 24, 2011 x-rays to be in equipoise, as there were an equal number of positive and negative readings by dually-qualified radiologists for each x-ray. The ALJ further found the February 6, 2012 x-ray to be negative for complicated pneumoconiosis, as there was only one uncontradicted negative reading for this x-ray. Therefore, the ALJ found that Claimant did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

In determining whether the medical opinion evidence established complicated pneumoconiosis at 20 C.F.R. §718.304(c), the ALJ considered the medical opinions of Drs. Forehand and Hippensteel. The ALJ discounted Dr. Forehand's opinion diagnosing complicated pneumoconiosis because he relied, in part, on his positive reading of the April 21, 2010 x-ray, which was contrary to the ALJ's findings regarding that x-ray and the x-ray evidence as a whole. In addition, the ALJ credited Dr. Hippensteel's opinion, that Claimant does not have complicated pneumoconiosis, noting that Dr. Hippensteel "explained the basis for his findings by reference to specific characteristics of x-ray evidence." Therefore, the ALJ found that the medical opinion evidence, and the evidence overall, failed to establish

the existence of complicated pneumoconiosis. The ALJ also applied her analysis of the x-ray evidence in finding that Claimant failed to establish the existence of simple pneumoconiosis, and denied benefits.

On appeal, the Board agreed with the Director that the ALJ "erred in 'doing a head count of the x-ray readers' and by failing to perform a qualitative analysis of the x-ray evidence, prior to finding that Claimant does not have complicated pneumoconiosis." The Board noted that, while the doctors agreed that Claimant's x-rays showed large masses in his lungs, the doctors disagreed as to whether these masses were large opacities of complicated pneumoconiosis. For example, the Board pointed out that Dr. Wheeler identified multiple large masses in Claimant's lungs, which the doctor stated were "compatible with conglomerate granulomatous disease: histoplasmosis or mycobacterium avium complex (MAC) more likely than [tuberculosis]." Furthermore, Dr. Hippensteel noted "some type of granulomatous inflammation," and Dr. Scott identified "histoplasmosis, mycobacterium avium complex, tuberculosis, and sarcoidosis, as possible alternative diagnoses for claimant's radiological findings." Finally, while Dr. Forehand diagnosed complicated pneumoconiosis, he "recommended a CT scan to rule out cancer, infection, and granulomatous disease."

In agreeing with the Director, the Board noted that, while the ALJ "specifically observed that 'claimant['s] designated treatment records . . . indicate that he does not have tuberculosis, histoplasmosis, or sarcoidosis,' she did not address the credibility of the x-ray evidence in light of this relevant evidence." Furthermore, the Board pointed out that Dr. Forehand provided remarks, and Dr. Hippensteel provided testimony, "concerning negative test results for tuberculosis and histoplasmosis." Accordingly, the Board concluded the following:

> Because the [ALJ] failed to explain the weight she accorded all the relevant evidence on the issue of whether claimant has complicated pneumoconiosis, we vacate her finding that claimant failed to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a) . . . . Additionally, to the extent that the [ALJ's] x-ray findings affected her credibility determinations with regard to the medical opinions of Drs. Forehand and Hippensteel, we also vacate her finding that claimant failed to establish complicated pneumoconiosis at 20 C.F.R. §718.304(c) . . . .

Therefore, the Board vacated the denial of benefits and remanded the matter to the ALJ for further consideration.

[Weighing the evidence as a whole]