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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 293
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I. Longshore and Harbor Workers' Compensation Act and Related Acts

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

***Global Linguist Solutions, LLC v. Abdelmeged*, 913 F.3d 921 (9th Cir. 2019).**

The Ninth Circuit held that petitions for review of compensation orders arising under the Defense Base Act ("DBA") should be filed in the circuit where the relevant district director is located, rather than in the circuit where the ALJ's office is located.

In *Pearce v. Director, OWCP*, 603 F.2d 763 (9th Cir. 1979), the court held that petitions for review of compensation orders arising under the DBA are to be filed directly in the Court of Appeals and not in district courts (there is presently a circuit split on this issue). However, this court never firmly resolved whether appeals in DBA cases should be filed in the circuit where the relevant district director is located, or in the circuit where the ALJ's office is located. In the present case, despite a dictum in *Pearce* to the contrary, the court held that the location of the relevant district director controls, based on the plain text of the DBA, 42 U.S.C. § 1653(b). This rule is also practical, since the district directors are assigned to claims based on where the claimant lives, while ALJs are assigned randomly and may travel across the country from other office locations for hearings. Additionally, the court did not wish to create an unnecessary circuit split, noting that the D.C. Circuit previously reached the same conclusion.

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[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 citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

Turning to the merits of the claim, the court upheld the Board's decision affirming the ALJ's award of benefits. Claimant worked for employer as a linguist in Iraq for two years. Almost two years after claimant returned from Iraq, he filed a claim under the DBA, alleging that work-related Post Traumatic Stress Disorder ("PTSD") rendered him incapable of earning his former wages. The Board affirmed the ALJ's decision that claimant could not work because of his psychiatric condition that developed from or was aggravated by employment in Iraq, and concluded that claimant was entitled to compensation from the date he returned from Iraq. The court concluded that:

> "Substantial evidence supports the ALJ's determination that beginning in November 2009, claimant met both the 'medical' and the 'economic' aspect of 'disability' as defined by the statute. *See* 33 U.S.C. § 902(10). That evidence includes [claimant's] credible testimony, the opinion of his treating psychiatrist, and his demonstrated inability to earn his former wages upon his return from Iraq. Although other evidence in the record might adequately support a different conclusion, that evidence does not negate or nullify the substantial evidence supporting the ALJ's conclusion.

Id. at 921 (additional citations omitted). The ALJ reasonably relied on the opinion of claimant's treating psychiatrist, Dr. Pock. Dr. Pock was qualified to express an opinion about how claimant's condition affected him in the past, and his opinion was supported by claimant's credible testimony. The evidence that Dr. Pock did not consider, including claimant's previous medical records and request for unemployment benefits, did not necessarily conflict with his opinion.

[The Defense Base Act – Procedure]

B. Benefits Review Board

***Robirds v. ICTSI Oregon, Inc.*, __ BRBS __ (2019)(en banc).**

Agreeing with the OWCP Director, the Board held, en banc, that post-judgment interest is payable on a Section 14(e) assessment, overruling *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987).

Claimant sustained various work-related injuries. He reached maximum medical improvement and was released to return to work on 11/15/2012. Due to a lack of job openings on the hiring board, he did not return to work until 11/18/2012. The ALJ awarded claimant permanent partial disability ("PPD") compensation under the schedule for his right leg injury, with interest. He also awarded a Section 14(e) assessment for the period between 11/20/2012 and 04/03/2013, because employer did not timely controvert claimant's claim for PPD.[2] However, the ALJ denied interest on the 14(e) assessment in light of *Cox*. He also

[2] The ALJ found that a controversy arose on 12/07/2012, when a doctor rated claimant's impairment, to the extent that it would entitle claimant to compensation exceeding the PPD

denied permanent total disability ("PTD") benefits from 11/15/2012 to 11/18/2012. Claimant appealed.

Initially, the Board agreed with the OWCP Director in rejecting employer's contention that the controversy was rendered moot by its overpayment of benefits and its waiver of the right to receive a credit for the overpayment. The Board reasoned that "[w]ithout modifying the [ALJ's] compensation order, employer could still be relieved of the obligation to waive its credit for the overpayment. . . . . Moreover, without our review, the Director's legal challenge to the Board's holding in *Cox* will inevitably recur." Slip op. at 6 (citations omitted).

Turning to the merits, the Board agreed with the Director's contention that assessments under both subsections 14(e) and (f) constitute "additional compensation" on which interest is awardable. The Board noted that the titles of these provisions support this conclusion. Further, most courts (*i.e.*, the Ninth, Fourth and Federal Circuits, but not the Second Circuit) have concluded that assessments under subsections 14(e) and (f) are payments of "compensation" as opposed to "penalties" or "fines." Several courts have noted that casual references in the case law to the 14(e) or 14(f) payments as "penalties" are merely a convenient method of distinguishing such payments from underlying awards. The only circuit court to specifically address whether the 14(e) assessment is "compensation," concluded that it is. *Ingalls Shipbuilding, Inc. v. Dalton*, 119 F.3d 972, 31 BRBS 77(CRT) (Fed. Cir. 1997). The Board concluded that:

> [T]here is no basis in the statutory scheme of the Act for treating Section 14(e) payments differently from Section 14(f) payments. Although the Section 14(e) and (f) payments have a punitive characteristic in that they require an employer to make additional payments for certain untimely actions, they are predominantly compensation-like in that they are related to the claimant's benefit entitlement and are paid directly to him. *See* 33 U.S.C. §902(12). Therefore, as Section 14(f) payments have been held to be compensation, we agree with the *Dalton* court that Section 14(e) payments are also "compensation." *Dalton*, 119 F.3d at 978-979, 31 BRBS at 82-83(CRT). Because it is well established that interest is awardable on past-due compensation for disability and death benefits, as well as for overdue payments of Section 14(f) additional compensation, we hold that interest is awardable on overdue payments of Section 14(e) additional compensation, and thus overrule this aspect of the Board's decision in *Cox*. We further hold that interest on a Section 14(e) payment is to be awarded on a post-judgment basis, to be calculated from the date the [ALJ] enters the Section 14(e) award.

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benefits paid by employer. Because employer's November 2012 notice of controversion controverted the payment of additional TTD benefits but did not controvert the payment of additional PPD benefits, the ALJ found that it did not address the correct dispute. He determined that the controversy was retroactive to 11/20/2012, when employer ceased payment, and that a proper notice of controversion was not filed until 04/03/2013, thus defining the period for the 14(e) assessment. This assessment was not appealed.

Slip op. at 10-11 (additional citations and footnote omitted). Accordingly, the Board reversed the ALJ's denial of interest and remanded the case to the district director for a calculation of the interest due claimant on the award of § 14(e) compensation.

Next, the Board affirmed the ALJ's denial of PTD benefits. The ALJ rationally found that claimant's inability to work on the days in question was not due to his injury but, rather, was due to the lack of available work. The Board refused to consider claimant's argument that he was unable to work on these days because his injury placed him too far down on the hiring board. Claimant did not raise this theory before the ALJ and cannot raise it for the first time on appeal.

Administrative Appeals Judges Buzzard, Gilligan, and Rolfe concurred in the decision. In a separate concurring opinion, Administrative Appeals Judge Boggs expressed doubts regarding the majority's conclusion that the appeal is not moot, stating that it appears incapable of repetition as to these parties. On the merits, Judge Boggs agreed that post-judgment interest was payable on the 14(e) assessment in this case, which arose in the Ninth Circuit. As to the determination that the 14(e) assessment is compensation, Judge Boggs concurred based on the Ninth Circuit's prior holding that 14(f) payments are "compensation" and the substantial similarity between the two subsections. He opined that it was not necessary to further analyze this issue or to overrule *Cox* generally.

[Section 14(e) - Failure to Pay or Controvert; Interest; Section 21 Appellate procedure - New Issue Raised on Appeal]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Southern Ohio Coal Co.. v. Dir., OWCP* [*Johnston*], No. 18-3367, 2019 U.S. App. LEXIS 3053 (6th Cir. Jan. 30, 2019), the U.S. Court of Appeals for the Sixth Circuit addressed an appeal concerning a miner's claim for black lung benefits. Below, the ALJ had awarded benefits, and the Benefits Review Board had affirmed on appeal.

Before the Sixth Circuit, the employer alleged that (1) the ALJ and the Board applied the incorrect standard when determining whether the miner's total disability was due to his pneumoconiosis, and (2) the ALJ's finding that the miner's COPD caused a totally disabling impairment was not supported by substantial evidence. The court disagreed on both points. First, it noted that the ALJ acknowledged at the outset the proper disability causation standard and never clearly applied a contrary standard. Moreover, the Board similarly focused on the physician's opinion that supported a finding of total disability due to pneumoconiosis. The court, therefore, found no error committed by either the ALJ or the Board. Second, the court rejected the employer's argument that substantial failed to support the ALJ's disability causation finding, concluding that the ALJ permissibly weighed both medical opinions at issue.

Accordingly, the court denied the employer's petition for review.

[Etiology of total disability: For claims filed after January 19, 2001]

In *Liberty Mutual Fire Ins. Co. v. Woolman*, No. 17-3249, 2019 U.S. App. LEXIS 1149 (10th Cir. Jan. 14, 2019), the U.S. Court of Appeals for the Tenth Circuit addressed a challenge by Dennis Woolman, the former president of the Clemens Coal Co. ("Clemens"), to the lower court's finding that Liberty Mutual Fire Ins. Co. ("Liberty Mutual") did not breach a duty to him when it failed to provide to Clemens an insurance policy covering black lung-related claims. Woolman also alleged that the district court erred when it rejected his contention that Liberty Mutual should be barred from denying black lung coverage because he relied on it providing this type of coverage. The court affirmed the district court in all respects.

[Determination of insurance coverage]

B. Benefits Review Board

In *Haynes v. Good Coal Co., Inc.*, BRB Nos. 18-0021 BLA and 18-0023 BLA (Jan. 18, 2019) (unpub.), the Board affirmed the ALJ's decision on remand awarding benefits in the miner's claim and the survivor's claim. Of note, the Board stated the following concerning the treatment of digital x-ray readings in black lung claims:

> We note that in claims such as this one, filed before May 19, 2014, readings of digital x-rays performed before that date must be considered as "other medical evidence" pursuant to 20 C.F.R. §718.107, which requires the party submitting the digital x-ray to establish that it is "medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits." 20 C.F.R. §718.107(b). The administrative law judge's error in weighing the digital x-rays with the analog x-rays at 20 C.F.R. §718.202(a)(1) and failing to determine whether employer established their medical acceptability is harmless, however, as he provided a valid reason for discounting Dr. Shipley's negative readings. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). For claims filed after May 19, 2014, the Department of Labor adopted quality standards for

> digital x-rays, with the intent of placing them on "equal footing" with analog x-rays. 79 Fed. Reg. 21,606 (Apr. 17, 2014); Black Lung Benefits Act Bulletin Nos. 14-08 (June 2, 2014), 14-11 (Sept. 29, 2014).

Slip op at 10 n.14.

[Digital x-rays, weighed under 20 C.F.R. § 718.202(a)(1) or 20 C.F.R. § 718.304(a)]