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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 240 February 2012

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

A. U.S. Circuit Courts of Appeals

[there are no decisions to report for this month]

B. U.S. District Courts

[there are no decisions to report for this month]

C. Benefits Review Board[1]

***Brown v. Avondale Industries, Inc.*, __ BRBS __ (2012).**

The Board affirmed in part and vacated in part the ALJ's summary decision dismissing as untimely claimant's claim that employer was in default of awarded compensation for purposes of § 18(a), which provides for the issuance of an order of default by the district director.

Claimant had previously obtained the following compensation awards in this claim: (1) permanent partial disability ("PPD") benefits for 1993-97, awarded on 11/18/02; (2) temporary total disability ("TTD") benefits for 1997-2005, awarded on 4/12/99, as clarified by an order of 1/22/03; and

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

permanent total disability ("PTD") compensation continuing from 2/25/05, awarded on 4/15/08. The Act has two provisions by which a claimant may seek to enforce compensation orders. First, under § 18(a) and 20 C.F.R. §702.372, claimant may, within one year of an alleged default, apply to the district director for a supplemental order declaring default, and then seek its enforcement in federal district court. An employer is in default, for purposes of § 18(a), if payment has not occurred within thirty days of the award's effective date, the date of filing with the district director. Second, § 21(d) authorizes the claimant to apply to the district court for enforcement of a compensation order that has become final. Thus, while § 18(a) permits enforcement of effective, but not-yet-final awards, § 21(d) permits the enforcement of final awards.

The Board initially rejected claimant's contention that the ALJ's compensation orders are ambiguous, making § 18(a) inapplicable. Where a compensation order is ambiguous or unclear and thus does not explicitly address a question which emerges during the period of payment, further proceedings to address the ambiguity may be instituted under § 18(a) and 20 C.F.R. § 702.372(a). In such a case, the order is not yet final or subject to the one-year limitations period in § 18(a). Here, however, the ALJ decisions were not ambiguous. The Board further found that employer's alleged failure to make voluntary payments in 1993 and 1995 was not subject to default provisions in §§ 18(a) and 21(d), as both provisions require the issuance of a compensation award. Further, claimant's allegations of underpayments relating to PPD and TTD were not within the scope of § 18(a), since claimant sought a default order in 2008, more than one year after the alleged defaults.

The Board, however, found § 18(a) potentially applicable to claimant's allegation of PTD underpayment, to the extent that the disputed payments fall within the period of PTD compensation awarded by the ALJ in his April 2008 decision. Claimant alleged a default in this regard on 12/10/08, which is within the one-year limitations period of § 18(a). The ALJ found that the 4/15/08 decision was irrelevant to the timeliness of claimant's seeking a default order because claimant alleged a default in 2003, more than one year before December 2008. However, claimant's allegation of a default "after" 2/13/03 could encompass an underpayment of the PTD benefits awarded in 2008. Finally, the BRB noted that there was an issue of material fact whether employer paid PTD compensation in the proper amounts awarded for the period prior to April 2008.

[Topic 18.2 SUPPLEMENTAL ORDER DECLARING DEFAULT; Topic 21.5 COMPLIANCE]

II. Black Lung Benefits Act

A. The U.S. Circuit Courts of Appeals

In *Bridger Coal Co. v. Director, OWCP*, ___ F.3d ___, Case No. 11-9531 (10th Cir. Feb. 28, 2012), the Tenth circuit declined to require an "equivalency determination" where a Claimant relies on autopsy or biopsy evidence at 20 C.F.R. § 718.304(b) to establish complicated pneumoconiosis. Following the Eleventh Circuit's holding in *Pittsburgh & Midway Coal Mining Co. v. Director, OWCP*, 508 F.3d 975 (11th Cir. 2007), the Tenth Circuit concluded that Claimant may establish complicated pneumoconiosis under any one of the three prongs without the necessity of demonstrating "equivalency." However, the court also stated:

> [R]egardless of whether equivalency determinations are required, the ALJ is not relieved of its obligation to consider 'all relevant evidence' in making a benefits determination. *See* 30 U.S.C. § 923(c).

Slip op. at 20. On review of the autopsy evidence, the circuit court found that the Administrative Law Judge properly accorded greater weight to the prosector, Dr. Dobersen, who diagnosed complicated pneumoconiosis over the contrary opinions of Drs. Crouch and Tomashefski. Notably, the court stated:

> The ALJ provided four reasons for preferring the opinion of Dr. Dobersen: his board certifications in the most sub-disciplines of pathology, his position as prosector, his detailed findings, and his demonstrated understanding of complicated and simple pneumoconiosis. Dr. Dobersen's opinion included an observation of a 2.5 inch (6.35 cm) lesion of anthracotic scarring in Lambright's lung, which was consistent with one of (Employer's) doctor's observation of a 'large node' on earlier CT scans.
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> . . .
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> …[T]he other reasons (Employer) advances for preferring the opinions of its experts over that of Dr. Dobersen might be persuasive on *de novo* review, but they ultimately amount to invitations to re-weigh the evidence, which this court may not do.

Slip op. at 21-22.

[**no equivalency determination required under § 718.304(b)**]

B. Benefits Review Board

In *Styka v. Jeddo-Highland Coal Co.*, ___ B.L.R. ___, BRB No. 11-0150 BLA (Feb. 27, 2012), the Board held that "fundamental fairness and due process would require relief from . . . a formal stipulation made prior to change in the law effectuated by passage of (the PPACA)[2], and the reallocation of the burden of proof to employer on rebuttal under amended Section 411(c)(4), if applicable."

Turning to the merits of the claim, the Board affirmed the Administrative Law Judge's use of pulmonary function study table values for a 71 year old miner for a miner who was tested at the ages of 76 and 77 years. *See K.J.M. [Meade] v. Clinchfield Coal Co.,* 24 B.L.R. 1-40 (2008). Employer argued that this was error and the judge "should have extrapolated the table values to reflect claimant's age". The Board disagreed:

> [A]s employer submitted no evidence to show that this test, which produced qualifying values for age 71, was actually normal or otherwise did not demonstrate a totally disabling pulmonary impairment, we affirm the administrative law judge's finding . . ..

Slip op. at 5.

[**pre-PPACA length of coal mine employment stipulation not binding in post-PPACA litigation; use of pulmonary function study tables for miner over the age of 71 years**]

[2] The Patient Protection and Affordable Care Act was enacted on March 23, 2010.