U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 279
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Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Alexander Smith
Senior Attorney

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

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

***Metro Mach. Corp. v. Dir., OWCP [Stephenson]*, 846 F.3d 680 (4th Cir. 2017).**[2]

The Fourth Circuit affirmed the ALJ/BRB's award of medical benefits to claimant for his lung (primary) and vertebra (secondary) injuries.

Claimant worked for employer as a pipefitter from 1983 until 2011. He has a long history of breathing problems, and has been taking steroids for his wheezing and coughing since 1986. He was diagnosed with chronic obstructive pulmonary disease ("COPD") in 1996 and emphysema in 2001. On February 18, 2008, during his workday, which lasted more than eight hours, claimant inhaled fumes from welding and burning and the application of epoxy paint. He was admitted to the hospital the following day, where he remained for eight days and was diagnosed with an exacerbation of his COPD. He was prescribed a nebulizer and oxygen concentrator, which he had not used previously. Claimant continued to work, with restrictions, until his voluntary retirement in 2011. In October 2011, claimant was treated for a fracture at the T7 vertebra, which his treating physician opined was most likely due to excessive coughing. The ALJ awarded medical

[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.

[2] This decision was issued in January 2017.

benefits for claimant's work-related COPD and fracture, and the Board affirmed. Employer appealed.

The court initially outlined the relevant legal concepts and emphasized that the Act must be liberally construed in conformance with its remedial purpose. "Injury" is defined in § 2(2) as an "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury." Because Congress recognized that the elements of § 2(2) would be difficult to prove, Congress provided the § 20(a) presumption. Section § 20(a) provides, "In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary ... [t]hat the claim comes within the provisions of this Act." To invoke the presumption, an employee must allege a prima facie case that (1) an injury or death (2) arose out of and in the course of (3) his maritime employment. To establish this prima facie case, a claimant must show (1) that he suffered physical harm and (2) that a workplace accident or workplace conditions could have caused, aggravated, or accelerated the harm. Once the prima facie case is established, the burden of production shifts to the employer, who must produce evidence that could justify a reasonable factfinder in concluding that the claimant either did not suffer physical harm or that no workplace accident or workplace conditions caused, aggravated, or accelerated the harm. If the employer satisfies this burden, the presumption falls out of the case, and the factfinder is left to find the necessary facts without considering the presumption.

In this case, substantial evidence supported the ALJ's finding that claimant established a prima facie case regarding his COPD, as claimant produced evidence raising the possibility that the exposure had permanently aggravated his COPD. Regardless of the changing opinions of claimant's treating physician, Dr. Ripoll, regarding whether he could say to a reasonable degree of medical certainty that a permanent worsening occurred, he never opined that it was not possible. Further, the ALJ properly found that employer failed to rebut the presumption as it failed to proffer evidence that could allow a reasonable factfinder to infer that claimant's lung condition was not permanently aggravated by the exposure. Dr. Ripoll's opinion that there was no permanent aggravation could not rebut the presumption since he later abandoned that opinion.

The court also upheld the ALJ's finding that claimant's vertebra injury is compensable. Employer asserted that because the fracture was a secondary injury and was not identified in claimant's claim form, the § 20(a) presumption should not have applied concerning the fracture's compensability. Agreeing with the OWCP Director, the Fourth Circuit rejected employer's argument that the § 20(a) presumption does not apply to "secondary injuries," and held that the presumption unambiguously applies to all types of claims. It reasoned that § 20(a) does not distinguish between claims concerning primary injuries and those concerning secondary injuries, and in fact makes no reference to "injuries." The court also noted that it knows of no reason why Congress would have put the initial burden on the claimant to produce evidence actually proving the causation link and other elements in secondary-injury cases while relieving claimants of that burden in other cases.

In this case, claimant filed a claim for compensation form that included only his lung injury, but asserted a claim for both his lung (primary) and vertebra (secondary) injuries before the district director and the ALJ. Thus, a claim had been made for the vertebra injury and the § 20(a) presumption applied. The court rejected the holdings in *Ins. Co. of the State of Pennsylvania v. Director, OWCP [Vickers]*, 713 F.3d 779, 47 BRBS 19(CRT) (5th Cir. 2013), and *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir. 2008), wherein the Fifth Circuit concluded that the § 20(a) presumption does not apply to secondary injuries. The court noted that the Fifth Circuit's split decisions appeared to have been based on the fact that (unlike in this case) the secondary injuries were not included in the claimants' claims, and, to the extent there were other reasons, the Fourth Circuit was unclear on what those reasons might be.

Further, contrary to employer's contention, the Supreme Court decision in *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), does not suggest that the § 20(a) presumption does not apply to claims of secondary injuries. Rather, the case stands for two propositions: (1) the presumption applies only to claims of injuries that are actually made, and (2) a claim must include a primary injury, which, by definition, must arise during work. In this case, the ALJ and BRB properly treated claimant's claim to include the fracture. As the Board determined, employer was not prejudiced by claimant's failure to identify the fracture on his original claim form. Thus, the § 20(a) presumption applies to both injuries.

Employer alternatively argued that, even if the § 20(a) presumption can apply to secondary injuries, the ALJ erred by treating the fracture claim as if it were a primary-injury claim and thus failed to apply the "naturally or unavoidably results" standard. The Fourth Circuit agreed, stating that the ALJ should have recognized that the compensability of the fracture depended on the fracture (or its aggravation or hastening) naturally or unavoidably resulting from the primary injury. Thus, for claimant to establish his prima facie case, he had to produce evidence that the primary injury could have naturally or unavoidably caused, aggravated, or accelerated the secondary injury. The ALJ found that "features of the COPD, namely steroid treatment and excessive coughing," could have caused, aggravated, or accelerated the fracture. The ALJ should have gone the next step and considered whether claimant produced evidence that the fracture (or its aggravation or hastening) could have naturally or unavoidably resulted from the primary injury. However, the ALJ's error made no difference on the facts of this case. "Naturally or unavoidably results" is a disjunctive requirement. Thus, claimant could establish his prima facie case simply by showing unavoidability, and employer never suggested any way that he could have avoided any effect that the exacerbation of his COPD had on his fracture. Thus, the court concluded that a remand was not warranted, as the ALJ would certainly conclude, for the same reasons that he found claimant proved that the fracture or its aggravation or hastening could have resulted, that it also could have unavoidably resulted.

Finally, the ALJ did not err in concluding that employer did not rebut the § 20(a) presumption regarding the fracture. Employer argued that it rebutted the presumption with evidence of claimant's use of steroids for 22 years prior to the exposure. This evidence, however, does not support a reasonable inference that the fracture would have occurred regardless of whether the exposure occurred, as this would be mere speculation. There is no evidence whatsoever that any medical professional believed that the aggravation of

claimant's lung condition, his increased steroid use, or his increased cough did not hasten, aggravate, or cause the fracture. At best, employer produced evidence that gave rise to a reasonable inference that it was possible that the fracture was not hastened, aggravated, or caused by the exposure, which is not enough to rebut the presumption. Further, although the ALJ did not apply the "naturally or unavoidably results" standard as it pertains to rebuttal, remand was not warranted, as employer has not suggested any way that claimant could have avoided the fracture (or its hastening or aggravation) once the exposure occurred.

[Topic 20.2 SECTION 20(a) - CLAIM COMES WITHIN PROVISIONS OF THE LHWCA; Topic 20.2.1 Prima Facie Case; Topic 20.3 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE]

B. Benefits Review Board

***Robinson v. Electric Boat Corp.*, __ BRBS __ (2017).**

In a case of first impression, agreeing with the OWCP Director, the Board held that the payment of settlement proceeds under a state workers' compensation award constitutes the "payment of compensation" so as to toll the statute of limitations for filing a claim for occupational disease under Section 13(b)(2).

Claimant worked for employer as a welder in the 1970s. Thereafter, he worked for non-covered employers and retired voluntarily. He was exposed to asbestos during the course of his employment with employer and, in 2009, was diagnosed with lung cancer. In August 2010, claimant filed a claim for benefits under the Connecticut workers' compensation law. In January 2011, Dr. Christiani concluded that claimant's history of smoking and work-related asbestos exposure combined to result in claimant's lung cancer. The state commissioner approved the parties' settlement on December 5, 2012, and claimant received payment from employer on or about the same day. In October 2013, Claimant filed a claim under the Longshore Act. Employer filed a motion for summary decision, asserting that the claim was untimely filed. The ALJ denied the motion and awarded benefits to claimant.

Section 13(b)(2) provides:

> "*Notwithstanding the provisions of subsection (a) of this section*, a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability, *or within one year of the date of the* ***last payment of compensation***, *whichever is later.*"

33 U.S.C. §913(b)(2) (all emphasis added by the Board); 20 C.F.R. § 702.222(c). In this

case, because claimant's claim under the Act was not filed within two years of his date of awareness, the claim is time-barred unless the statute of limitations is tolled by virtue of employer's "payment of compensation" under the state award.[3]

The Board observed that the term "compensation" is defined in § 2(12) of the Act as: "the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." Recognizing the absence of cases directly addressing the meaning of "payment of compensation" under § 13(b)(2), the Board looked to the case law interpreting the tolling provision of § 13(a). Section 13(a) tolls the statute of limitations for filing a claim "if payment of compensation has been made without an award." This language has been interpreted broadly to include payments made under a state award because they were not made pursuant to an award under the Act. The Board reasoned that § 13(b)(2) uses less restrictive language, basing its tolling provision on the "last payment of compensation," which, therefore, demands an equal or even broader interpretation. Thus, the payment employer made to claimant in December 2012 pursuant to the state settlement award in this case is a "payment of compensation" for the purposes of tolling the § 13(b)(2) statute of limitations. Therefore, claimant's October 2013 claim was timely filed within one year after the last payment of compensation in December 2012.

[Topic 13 TIME FOR FILING OF CLAIMS – § 13(b)(2) Occupational Diseases -- Tolling the statute]

[3] The Board noted that § 13(d) does not apply in this case, because it refers only to the statute of limitations set forth in § 13(a), which also is not applicable in this occupational disease case.

II. Black Lung Benefits Act

Update: The September 2016 digest included a summary of the Board's decision in *Barker v. Arch of West Virginia*, BRB No. 15-0399 BLA (Sept. 30, 2016) (unpub.). *Barker* involved an appeal in a survivor's claim in which the claimant had invoked the fifteen-year presumption of death due to pneumoconiosis at Section 411(c)(4). On appeal, the Board affirmed the ALJ's finding that the employer had established that no part of the miner's death was caused by pneumoconiosis. Accordingly, the Board affirmed both the ALJ's finding that the employer had rebutted the presumption of death due to pneumoconiosis and his denial of benefits. However, on December 1, 2016, the Board granted motions for reconsideration filed by both the claimant and the Director. According to the Board's Order on reconsideration, the Director had filed a motion to remand the claim for payment of benefits in light of the Alpha bankruptcy prior to the Board's issuing its Decision and Order on September 30, 2016. Because the Director conceded liability prior to the Board's issuance of the Decision and Order and sought remand for the payment of benefits by the Black Lung Disability Trust Fund, the Board granted the motions for reconsideration, vacated its prior Decision and Order, and remanded the claim to the District Director for the payment of benefits by the Trust Fund.

A. Circuit Courts of Appeals

[There are no published Circuit Court decisions to report, though the Third Circuit issued an unpublished black lung decision in *Helvetia Coal Co. v. Director, OWCP* [*Arduini*], ___ Fed. Appx. ___, 2017 WL 464442 (3rd Cir. Feb. 3, 2017). The decision is available via Google Scholar here.]

B. Benefits Review Board

In *North v. Harlan Cumberland Coal Co., LLC*, BRB No. 16-0200 BLA (Feb. 2, 2017) (Hall, J., concurring and dissenting) (unpub.), which involved a miner's subsequent claim,[4] the ALJ found that Claimant established at least fifteen years of qualifying coal mine employment ("CME") and the existence of a totally disabling respiratory impairment; therefore, the ALJ further found that Claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Finding that Employer did not rebut the presumption, the ALJ concluded that Claimant was entitled to benefits.

First, a majority of the Benefits Review Board ("Board") addressed Employer's contention that the ALJ erred in rejecting its request to compel Claimant to submit to post-bronchodilator pulmonary function testing. At both examinations with Employer-provided physicians, Claimant refused to submit to post-bronchodilator testing, and on each occasion the physician related that Claimant was refusing based on the advice of his attorney. Following Claimant's refusals to submit to such testing, Employer filed a motion to deny the claim by reason of abandonment or, in the alternative, to compel Claimant to submit to the requested testing.[5] The ALJ denied Employer's motion, stating that it had "not

[4] Claimant's most recent prior claim was denied because he failed to establish the existence of a totally disabling respiratory impairment.

[5] In his response to Employer's motion, Claimant noted that he "has severe breathing problems and a fear of taking the post-bronchodilator testing, which he feels at his age could cause his heart to become erratic or cause other problems."

demonstrated that Claimant has unreasonably refused to submit to any testing it has requested" and that "the pertinent regulations do not require Claimant to undergo post-bronchodilator pulmonary function testing." The ALJ subsequently declined to alter her conclusion at the hearing and later rejected Employer's renewed, post-hearing objections in her Decision and Order awarding benefits.

On appeal, Employer argued that the ALJ abused her discretion in denying its motion because the regulations do not require such post-bronchodilator testing. Employer also posited that simply because the regulations do not require such testing does not mean that they could not be performed if a physician were to conclude that they would be useful in reaching a diagnosis. A majority of the Board concluded that it was unable to discern whether the ALJ abused her discretion in denying Employer's motion; therefore, it vacated her denial and remanded the case to her to further consider Employer's request and to more fully explain her findings:

> In her November 1, 2013 order and her December 29, 2015 decision, the [ALJ's] only stated basis for denying employer's motion is that post-bronchodilator testing is not required by the regulations. However, as employer asserts, the [ALJ] failed to address its argument that the fact that post-bronchodilator testing is not required by the regulations does not, itself, mean that they may not be performed, or its contention that its due process rights were violated because claimant's refusal to submit to post-bronchodilator pulmonary function testing denied employer evidence that was relevant to its defense of the claim.

Slip op. at 6.

Second, the Board addressed Employer's contention that the ALJ erred in finding that Claimant worked for at least fifteen years in qualifying CME. In crediting Claimant with 15.6 years of CME for the years 1972 to 1987, the ALJ divided Claimant's yearly income as reported in his Social Security Administration ("SSA") records by the 125-day figure contained in Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine Procedure Manual.[6] The Board concluded that the ALJ did not properly apply the two-part test, as contemplated by Section 725.101(a)(32), for finding these 15.6 years of CME established:

> Proof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish that the miner worked for one calendar year. Here, the [ALJ] did not conduct the threshold inquiry of whether claimant established a calendar year of [CME] prior to determining if claimant worked at least 125 days during that year. Further, the regulations provide that, if the beginning and ending dates of the miner's employment cannot be ascertained, the [ALJ] may, in her discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average "daily" earnings for that year as reported by the BLS at Exhibit 610. In the

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[6] In so doing, the ALJ referenced the formula contained in 20 C.F.R. §725.101(a)(32)(iii) (stating that, if the beginning and ending dates of a miner's CME are unclear, "then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS)"). The ALJ also credited Claimant with an additional year of CME based on a combination of his SSA income records, for the years of 1952, 1954, 1969, and 1988, and his testimony.

> instant case, the [ALJ] used the incorrect table at Exhibit 610, the table listing the coal mine industry's average yearly earnings for miners for 125 days of income, and not the "daily" earnings table, to calculate claimant's [CME]. As a result, the [ALJ] improperly credited claimant with 365 days of employment if his income exceeded the industry average for just 125 days of coal mine work.

Slip op. at 7-8 (footnote and internal citation omitted). In light of the above, the Board vacated the ALJ's finding that Claimant had established these 15.6 years of CME, and further concluded that she did not adequately explain how she credited Claimant with an additional year of CME based on work performed in the years 1952, 1954, 1969, and 1988. The Board therefore remanded the matter to the ALJ to reconsider these findings, while emphasizing that use of the formula at Section 725.101(a)(32)(iii) is discretionary, if she finds that the evidence is insufficient to establish the beginning and ending dates of Claimant's CME.

Third, the Board addressed Employer's argument that the ALJ erred in her consideration of the evidence at total disability. Initially, the Board rejected Employer's challenges to the ALJ's weighing of the pulmonary function study evidence, and therefore affirmed her finding that this evidence established a total respiratory disability. Next, the Board considered the ALJ's weighing of the medical opinion evidence, consisting of the opinions of Drs. Baker, Rosenberg, and Vuskovich, at total disability. In light of the "disparate scrutiny" she applied to the opinions of Drs. Vuskovich and Baker, *see* slip op. at 12, the Board vacated her finding that total disability was established based on the medical opinion evidence and her total disability finding overall.[7]

In a concurring and dissenting opinion, Judge Hall noted her disagreement with "the majority's decision to vacate the [ALJ's] denial of employer's motion to compel claimant to undergo post-bronchodilator pulmonary function testing." Judge Hall wrote that she "would hold that, on the facts presented in this case, employer has not met its burden to show that the [ALJ] abused her discretion in denying employer's motion to require claimant to undergo post-bronchodilator pulmonary function testing." In support, Judge Hall noted the following: (1) the post-bronchodilator portion of the pulmonary function test is not required under the regulations, (2) the Department has acknowledged that the use of a bronchodilator does not sufficiently assess the extent of a miner's disability, (3) the Sixth Circuit "has recognized the limited value of a miner's response to bronchodilators as a method for excluding coal mine dust exposure as a cause of his impairment," and (4) Claimant had attended all Employer-related appointments.

[Methods of demonstrating total disability: Pulmonary function (ventilatory) studies; Bureau of Labor Statistics table: Exhibit 610]

In *Jackson v. Drummond Co., Inc.*, BRB No. 16-0250 BLA (Feb. 27, 2017) (unpub.), a case involving a miner's subsequent claim,[8] the Board addressed questions surrounding those values that must be obtained during an arterial blood gas test in order for the test to be deemed qualifying. In one of the blood gas studies at issue, the PCO2 value was exactly 50, while the PO2 value was 55.1. According to the table at 20 C.F.R. Part 718, Appendix

[7] In the interest of judicial economy, the Board also addressed and affirmed the ALJ's findings on rebuttal pursuant to Section 718.305(d)(1). Accordingly, the Board acknowledged that, if the ALJ again finds that Claimant invoked the fifteen-year presumption, then she would be entitled to reinstate Claimant's award of benefits.

[8] In Claimant's previous claim, the District Director found that Claimant failed to establish a totally disabling respiratory or pulmonary impairment.

C(1), a PO2 value "equal to or less than" 60 will be deemed qualifying for a PCO2 value ranging from 40-49. Any PO2 value will be deemed qualifying for a PCO2 value "Above 50." The Board rejected Employer's argument that the results of this test were not qualifying because the table simply fails to contemplate a PCO2 value of exactly 50:

> Employer is technically correct that, as written, the tables in Appendix C do not account for a PCO2 value of exactly 50. Employer's position, however, would effectively preclude any study that produced such a value from ever being qualifying regardless of the PO2 value produced, or from being considered at all, even as studies with PCO2 values below and above 50 could be qualifying. It defies logic to think that the Department of Labor (DOL) would write the tables to account for any PCO2 value from "25 or below" to "Above 50," but deliberately exclude a value of exactly 50. Employer offers no reason why the tables should be read that way, and we will not interpret the regulations to produce such an absurd result.

Slip op. at 6 (internal citation omitted). Furthermore, the Board noted that "there is evidence that when DOL introduced the current blood gas tables in Appendix C, it intended for any blood gas studies that produce PCO2 values of *50 or above* — not "Above 50" — to be automatically qualifying." *Id.* at 6-7, *citing* 45 Fed. Reg. 13,678, 13,711 (Feb. 29, 1980) ("The Department has thus decided to adopt a value of 50 mmHg pCO2 in order to establish disability independent of the pO2.") (emphasis in original). Therefore, the Board held "that a valid arterial blood gas study with a PCO2 value of 50 and any PO2 value is qualifying based on the tables at 20 C.F.R. Part 718, Appendix C" and affirmed the ALJ's finding that the test was qualifying.

The Board next addressed Claimant's contention that the ALJ erred in finding a different arterial blood gas study non-qualifying. In this study, at rest, Claimant's PCO2 value was 49.1, while his PO2 value was 67.7. At exercise, his PC02 value was 50.3, while his PO2 value was 67.6. The ALJ found that both tests were non-qualifying because a PO2 value cannot surpass 60mmHg when the corresponding PACO2 value is over 40. Agreeing with Claimant, the Board held that the results from the resting and exercising studies were qualifying:

> A claimant's PCO2 and PO2 values must be "equal to or less than" the values on the table used to evaluate the claimant's values. Therefore, the resting blood gas study . . . is qualifying. Contrary to employer's contention, the study cannot be analyzed using the line on the table for PCO2 values from 40 to 49, because claimant's measured PCO2 value of 49.1 is not "equal to or less than" 49. Thus, the study must be analyzed using the next line, for PCO2 values "Above 50" — which, as we held in considering [the earlier] blood gas study, effectively means "50 and above." As the table indicates, any PO2 value would be qualifying, including the 67.7 produced here.

Slip op. at 8 (internal citations omitted). Accordingly, the Board concluded that the ALJ erred in finding this blood gas study to be non-qualifying.

In light of the above error and other errors committed by the ALJ in her consideration of the blood gas study evidence, the Board vacated her finding that the new blood gas study evidence failed to support a finding of total disability. The Board also vacated her finding that the medical opinion evidence failed to support a finding of total disability. On remand, the Board directed the ALJ to, at the outset, reconsider the new blood gas and medical opinion evidence, determine whether each supports a finding of total disability, and "then consider all of the evidence of total disability, including the new

pulmonary function study evidence, and determine if the weight of the evidence establishes that claimant is totally disabled."

[Introduction to the Medical Evidence: The blood gas studies]