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 # 296
April 2019

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

Alexander Smith
Senior Counsel for Black Lung

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

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

Grimm v. Vortex Marine Construction, 921 F.3d 845 (9th Cir. 2019).

The Ninth Circuit held that an ALJ's order requiring payment of a worker's future medical expenses was not "final," and thus the district court lacked jurisdiction over the worker's complaint against employer to enforce the order under Section 21(d) of the LHWCA, where the order did not list an amount to be paid or a means of calculating what employer owed, or specify medical services for which employer would be liable.

The ALJ found that claimant sustained work-related injuries and ordered employer to "pay or reimburse the Claimant for all medical expenses arising from the Claimant's work-related injuries," and to "provide treatment going forward, including the diagnostic procedures and therapies his treating physicians judge appropriate." The Board affirmed. Thereafter, claimant brought action in the district court seeking enforcement of the ALJ's order under Section 21(d). Claimant alleged that employer refused to pay for required medical treatment forcing him to rely on Medicare. He also asserted a claim for double damages under the Medicare Secondary Payer Act ("MSP") for the amounts paid by Medicare for his treatment. The district court found that the ALJ's order was not final and dismissed the complaint.

[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 *__).

The Ninth Circuit affirmed. The court reasoned that the ALJ can issue a "compensation order," either "rejecting the claim or making the award." 33 U.S.C. § 919(e); 20 C.F.R. § 702.348. If an employer "fails to comply with a compensation order ... that has become final," the beneficiary may bring an enforcement action in the district court. *Id.* § 921(d). The district court's jurisdiction extends only to the enforcement of compensation orders, not the merits of the litigation. The Ninth Circuit joined the Fifth and Second Circuits in holding that to be "final" for purposes of § 21(d), an order must "at a minimum specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties." *Id.* at 847 (*quoting Severin v. Exxon Corp*., 910 F.2d 286, 289 (5th Cir. 1990)*; see also Stetzer v. Logistec of Conn., Inc.*, 547 F.3d 459, 463–64 (2d Cir. 2008)).[2] It reasoned that:

> The Longshore Act does not specify when a "compensation order" becomes "final" under § 921(d). But the Act defines "compensation" as "the money allowance payable to an employee," 33 U.S.C. § 902(12), suggesting that a final order must either specify the "money allowance" or provide a ready method for determining it. And, the governing regulations define "medical care" as that which is "recognized as appropriate by the medical profession for the care and treatment of the injury." 20 C.F.R. § 702.401(a). The district court's enforcement power does not extend to determining whether specific medical care is appropriate, or even whether the fees charged by a treating physician are reasonable. *See* 20 C.F.R. § 702.413 (requiring the agency to determine the reasonableness of disputed fees). It thus stands to reason, as *Severin* holds, that a district court's limited jurisdiction over a compensation order extends only to orders whose monetary sweep cannot be disputed.

Id. at 847-848.

In this case, the district court lacked jurisdiction over the enforcement claim. The ALJ's order did not list an amount to be paid or a means of calculating what employer owed, nor did the order specify any specific medical service for which employer would be liable. A decision is not final where the extent of damage remains undetermined. The relief that claimant sought would require the district court to insert itself into the merits of the litigation. The court would be called on to resolve disputes about whether the services claimant received were for work-related injuries, and perhaps over the charges incurred for those services. Resolution of that dispute turns on extra-record facts which are potentially subject to genuine dispute between the parties, which must be addressed in the first instance to the agency. Moreover, the complaint in this case requested modification of the ALJ's order (e.g., by requesting issuance of LS-1 forms authorizing payment for medical services), which is outside the district court's jurisdiction.

The court observed that the central purpose of the Act – to provide compensation to claimants as soon as possible – might be furthered if district courts were empowered to resolve disputes over whether a specific service should be paid for by the employer. However,

[2] Other Circuits have reached identical conclusions in suits arising under the Black Lung Benefits Act.

Congress did not do so and, instead, limited the jurisdiction of the district court to enforcing "compensation orders."

Further, the district court correctly rejected claimant's MSP claim as premature. The MSP authorizes Medicare to make conditional payment for services if a primary plan (such as the Longshore Act) has not made or cannot reasonably be expected to make payment promptly. Medicare can then seek reimbursement. Further, the MSP's private right of action allows a beneficiary to recover double the amount of Medicare payments. However, the term "primary plan" presupposes an existing obligation to pay for covered items or services. Absent a final compensation order requiring that specific services either be paid for or reimbursed, a plaintiff cannot state a claim for recovery under the MSP.

In a concurring opinion, Circuit Judge Watford agreed that the district court lacks jurisdiction to hear the Longshore Act claim. However, while the court formulated the jurisdictional issue as one of finality, Judge Watford opined that there is a more basic deficiency. In his view, the portion of the ALJ's order directing employer to pay or reimburse claimant in the future "for all medical expenses arising from [his] work-related injuries" is not a "compensation order" for purposes of § 21(d):

> The Act defines "compensation" as "the money allowance payable to an employee or to his dependents as provided for in this chapter." 33 U.S.C. § 902(12). That definition does not include an employer's obligation to furnish future medical care. To obtain an enforceable compensation order, Grimm must first receive the medical care he requires and then seek an additional order directing Vortex to pay for the medical bills he has incurred. The Longshore Act does not permit a district court to issue an injunction under § 921(d) prospectively ordering an employer to pay for future medical benefits, no matter how specific the administrative order may be.

Id. at 849-850 (citations omitted).

[Section 21(d) – COMPLIANCE; Section 2(12) – DEFINITIONS – "COMPENSATION;" Section 7 – MEDICAL BENEFITS]

B. Benefits Review Board

***Church v. Huntington Ingalls, Inc.*, ___ BRBS ___ (2019).**

The Board held that claimant who sustained an injury in a parking lot, within the boundaries of the employer's shipyard but separated from the production areas by a fence and a security gate, met the situs requirement under Section 3(a) of the LHWCA.

The ALJ granted employer's motion for summary decision, reasoning that the parking lot does not meet the functional requirement of 3(a) situs, relying on *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013) (mixed-use facility's underground tunnel does not satisfy functional component and is not covered). It was undisputed that no ship-related work occurs on the parking lot. The Board reversed.

The Board stated that a site not specifically enumerated in § 3(a), such as a "shipyard," can be covered only if it qualifies as an "other adjoining area." The Fifth Circuit, in whose jurisdiction this case arose, has held that an adjoining area must be "a discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters;" it must satisfy a two-part test: it must border on, or be contiguous with, navigable waters (geographic component, not disputed in this case), and it must be customarily used for maritime activities (functional component). Slip op. at 4 (citations omitted). The court has declined to define areas by fence lines because they are subject to manipulation, and so did the Board in *Spain v. Expeditors & Prod. Service Co., Inc.*, 52 BRBS 73 (2018)(living quarters are covered as within the boundaries of a marine terminal, an enumerated site). Instead, the test is whether the injury occurred within a contiguous shipbuilding area adjoining navigable water. It is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured, and an injury on a part not used for maritime purposes does not preclude coverage.

After discussing decisions from the Fifth and Fourth Circuits as well as its own prior decisions, the Board concluded that "[a] shipyard adjacent to navigable waters with an overall function to build ships is an 'adjoining area.'" Slip op. at 5. "As the entire shipyard is covered, we reject the assertion that the parking lot lacks a functional nexus to navigable waters merely because it is separated from shipbuilding operations by a fence. Rather, the parking lot is a covered situs by virtue of its location within the boundaries of employer's shipyard, a covered adjoining area, and it is unnecessary to address its function separately." *Id.* at 5-6. The Board distinguished cases involving injuries on employers' properties separate from their shipyards. Further, because a shipyard is not a mixed-use facility, the ALJ's reliance on *BPU Mgmt.* was misplaced.

[Section 3(a) SITUS – "Over Land"]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Oak Grove Res., LLC v. Dir., OWCP*, F.3d , (11th Cir. Apr. 11, 2019), the U.S. Court of Appeals for the Eleventh Circuit addressed appeals in two cases in which surviving spouses were automatically awarded benefits pursuant to 30 U.S.C. §932(*l*). That provision states that "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits . . . at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." *See Ferguson v. Oak Grove Res., LLC*, 25 BLR 1-231 (2017); *Terry v. U.S. Steel Corp.*, BRB Nos. 17-0105 BLA & 17-0107 BLA (Oct. 30, 2017). These cases presented two questions. The first, which the court referred to as being "important-but-relatively-uninteresting," was whether the award in the miner's claim in *Terry* was supported by substantial evidence. Slip op. at 2. The court quickly dispensed with this question, holding "that the ALJ's determination that [the miner in *Terry*] was eligible for benefits under the Act was consistent with the law and supported by substantial evidence." *Id.* at 12.

The second question concerned whether, considering the timing of the awards in the underlying miner's claims associated with the *Ferguson* and *Terry* cases, the survivors in those cases were eligible to automatically receive benefits pursuant to Section 932(*l*). The court framed the issue in the following way:

> The key phrase [in Section 932(*l*)] for our purposes—the hinge on which the dispute here turns—is "a miner who was determined to be eligible to receive benefits . . . at the time of his or her death." There are two ways to understand that bit of text. Either "at the time of his or her death" modifies the word "eligible"—such that a miner need only have been eligible at the time he died, not formally determined to be eligible—or it modifies the word "determined"—such that an eligibility determination must have been made before the miner died. It matters here, of course, because Lee Ferguson and Luther Terry were formally determined to be eligible for benefits only after their deaths. They were eligible at the times that they died, but only posthumously determined so.

Id. at 13. The court agreed with the Board, the claimants, and the Director in settling on the former reading. In support, the court agreed that "the phrase 'at the time of his or her death' is most naturally read as modifying the word 'eligible' rather than the word 'determined,'" especially considering the "rule of the last antecedent." *Id.* at 15. Moreover, the court could "think of *no* common-sense reason why Congress would have wanted to differentiate between two otherwise-identical survivors solely by virtue of the fact that the ALJ in charge of one miner's case got around to determining eligibility before he died while the ALJ handling the other's case didn't." *Id.* at 16 (emphasis in original). The court also rejected the employer's argument that to read the statute in the way advocated for by the claimants would be to render as mere surplusage the phrase "at the time of his or her death." In so doing, the court noted that "linking 'at the time of his or her death' to eligibility . . . doesn't render the phrase wholly meaningless," and furthermore that there are examples, like the present case, "in which a court may validly 'prefer ordinary meaning to an unusual meaning that will avoid

surplusage.'" *Id.*, *quoting* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

Accordingly, the court held "that careful attention to § 932(*l*)'s text requires a decision in favor of [the claimants]: Because their husbands were eligible for benefits under the Act at the times of their respective deaths—and despite the fact that the men were only thereafter formally determined to be eligible—[the claimants] are due survivor benefits under § 932(*l*)'s automatic-entitlement provision." Slip op. at 18. The court therefore affirmed the Board's decisions in both cases.

[Applicability of automatic entitlement: Threshold criteria]

On April 24, 2019, the U.S. Court of Appeals for the Fourth Circuit issued an unpublished decision in a black lung case. *See* *Brickstreet Mutual Ins. Co. v. Director, OWCP*, No. 18-1190, 2019 LEXIS 12138 (4th Cir. Apr. 24, 2019). At issue in the case was whether the ALJ permissibly determined that the named insurance carrier was responsible for the payment of benefits. Specifically, the named carrier challenged evidentiary rulings made by the ALJ that the carrier contended prevented it from establishing that an earlier-in-time insurance carrier actually should be held responsible for the payment of benefits. It further objected to the ALJ's benefits onset date calculation, a determination that was related to her finding that the named carrier was properly responsible for the payment of benefits. On appeal, the Fourth Circuit rejected each of the named carrier's assignments of error and affirmed the award of benefits.

[Responsible Operator designation: Evidence related to responsible operator excluded absent "extraordinary circumstances"]

B. Benefits Review Board

No decisions to report.