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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 269
September 2015 – February 2016

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

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

***Ramsay Scarlett & Co. v. Dir., OWCP*, 806 F.3d 327 (5th Cir. 2015).**

The Fifth Circuit upheld the BRB's decision affirming the ALJ's finding that claimant's asbestosis was caused by his exposure to asbestos while changing the brakes and clutches of several types of equipment during his covered employment with employer, and that employer is liable for associated medical expenses, including flu and pneumonia vaccines.

Claimant was employed by employer from 1969 to 1991. He primarily worked at the Port of Baton Rouge which is a covered LHWCA situs, though from 1972 to 1976, he worked at Sharp Station which is not a covered situs. From 1991 to 2013, he was employed by Westway, an employer also covered by the LHWCA. He was diagnosed with asbestosis in 2011.

The court initially stated that it reviews decisions by the BRB only to determine whether it adhered to the proper scope of review—whether the ALJ's findings were supported by substantial evidence and were consistent with the law. Substantial evidence is that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact finding. Importantly, the ALJ remains the sole fact finder and must make all credibility determinations.

In this case, the ALJ did not err in concluding that claimant met the low burden required to establish a *prima facie* case of a covered injury under § 20(a). Claimant establishes a *prima facie* case by showing that (1) a harm occurred and (2) the harm may have been caused or aggravated by a workplace condition. Contrary to employer's assertion, testimony provided by claimant and his expert, an industrial hygienist, constituted substantial evidence to justify a *prima facie* case. Employer challenged the credibility of claimant's testimony regarding his asbestos exposure on the grounds that his belief that he was exposed to asbestos arose only after he read a newspaper article on the

[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 Lexis identifier.

presence of asbestos in certain machinery, he only mentioned his exposure at Sharp Station at the time of his 2011 diagnosis, and he only wore a protective mask at Sharp Station. Employer also criticized claimant's expert's report for failing to cite historical literature or other data and solely relying on the testimony of other longshoremen. In rejecting these credibility attacks, the court stated that the ALJ, not the BRB, is entitled to assess the relevance and credibility of testimony, including expert testimony. Here, the ALJ found this evidence relevant and credible. The ALJ's statement that the expert relied on "scientific literature, his education and experience, and information generally relied upon [by] members of his profession" also demonstrated that the ALJ deemed his testimony reliable. Additionally, the court noted that the formal rules of evidence do not apply in administrative proceedings but rather the admissibility of evidence depends on whether it is such evidence as a reasonable mind might accept as probative; and that employer did not challenge the ALJ's decision for relying on a fact unsupported by the record, *see* 5 U.S.C. § 556.

Employer also challenged claimant's *prima facie* case on the ground that his asbestos exposure at the Port of Baton Rouge would have been *de minimis* compared to his exposure at other non-maritime settings, such as Sharp Station. The court rejected this challenge in light of its prior precedent which held that, regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious.

Further, substantial evidence supported the ALJ's conclusion that employer did not rebut the § 20(a) presumption of a valid LHWCA claim. Employer may rebut the presumption through facts—not mere speculation—that the harm was not work-related. This burden can be met by showing that working conditions did not cause the harm or that the employee was exposed to the same working conditions at a subsequent covered employer. Employer must provide "factual doubt" and "substantial evidence to the contrary." Here, employer only submitted evidence that, by 1976, the Occupational Health and Safety Administration had adopted regulations regarding asbestos, which would have greatly limited any exposure to asbestos. But, it did not present any evidence that these asbestos regulations or any additional safety measures were ever implemented at the Port of Baton Rouge. Nor did it present any evidence contradicting claimant's testimony and his expert's report that there was asbestos in the brakes and clutches. Thus, a reasonable mind could accept that employer did not provide factual doubt as to whether the working conditions of the Port of Baton Rouge caused claimant's asbestosis.

Employer also argued that it rebutted the presumption by proving that it was not the last covered maritime employer. It asserted that because claimant testified that he worked around cranes, trucks, and other equipment at Westway, he could have been exposed to asbestos at Westway. In rejecting this contention, the ALJ relied on claimant's deposition testimony that at Westway he was not exposed to asbestos and that he did not change brakes and clutches. Employer did not put forth any factual evidence that contradicted this testimony.

Finally, the ALJ did not err in requiring employer to reimburse claimant for annual flu and pneumonia vaccines and for the treatment of pneumonia and bronchitis. The LHWCA requires an employer to reimburse a claimant for all medical expenses that arise from a work-related injury and defines "injury" as a disease or infection that arises "naturally" out of the employment. 33 U.S.C. §§ 902, 907. This court has held that "[a] subsequent injury is compensable if it is the direct and natural result of a compensable primary injury, as long as the subsequent progression of the condition is not shown to have been worsened by an independent cause." *Id.* at 333, quoting *Miss. Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 1000 (5th Cir. 1981). The court applies a liberal causation standard when determining the coverage of initial and subsequent injuries. *Id.* at 333, citing *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051 (5th Cir. 1983). Here, employer asserted that claimant did not establish a causal link between asbestos exposure and other respiratory infections. The

court, however, deferred to the ALJ's credibility determination and reliance on Dr. Gomes's testimony that patients with asbestosis require yearly flu and pneumonia vaccines and have increased likelihood of pneumonia and bronchitis. Given the liberal causation standard, a reasonable mind could accept Dr. Gomes's testimony and "the common sense of the situation" as adequate to support the conclusion that these respiratory ailments are a natural result of asbestosis and that flu and pneumonia vaccines are necessary treatments for the disease. *Id.* at 334, quoting *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. Unit B 1981).

Notably, the court rejected employer's contention that, pursuant to *Amerada Hess Corp., et al. v. Director, Office of Worker's Comp. Programs*, 543 F.3d 755 (5th Cir. 2008), the causation standard for subsequent injuries is a higher burden than the ALJ applied. In *Amerada Hess*, the court remanded the case for the ALJ to determine whether there was substantial evidence to conclude that a heart condition was the "natural and unavoidable" result of a back injury. 543 F.3d. at 760-62. However, the court's decision rested on the fact that there was no expert testimony linking the two conditions. *Id.* at 762. Conversely, in his deposition, Dr. Gomes directly linked asbestosis to the relevant respiratory conditions.

[Topic 20 § 20(a) PRESUMPTION THAT CLAIM COMES WITHIN PROVISIONS OF THE LHWCA (Claimant's *Prima Facie C*ase; Employer's Burden of Rebuttal with Substantial Evidence; Secondary/Subsequent Injury); Topic 21 Review of Compensation Order; Topic 23 EVIDENCE]

***Shirrod v. Director, OWCP*, 809 F.3d 1082 (9th Cir. 2015).**

The Ninth Circuit vacated the BRB's decision affirming the ALJ's award of attorney's fees to claimant's attorney, and remanded for the determination of the reasonable hourly rate in light of this decision.

An attorney's hourly rate is to be calculated "according to the prevailing market rates in the relevant community" and should be "in line with [the rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Christensen v. Stevedoring Servs. of Am.*, 557 F.3d 1049, 1053 (9th Cir. 2009). Recognizing that the decision-maker has wide—but not unlimited—discretion when making attorney's-fee awards, this court left it to the BRB, ALJs, and District Directors to determine the "relevant community" and the corresponding prevailing market rates, as long as the decision-maker provides adequate justification. *Id.* at 1055.

In this case, the ALJ found that the evidence proffered by claimant's counsel, Charles Robinowitz, did not substantiate his requested hourly rate of $400/hour. The ALJ relied on the analysis developed by ALJs in two earlier cases involving the same counsel: *DiBartolomeo v. Fred Wahl Marine Constr.*, ALJ No. 2008-LHC-01249 (Dep't of Labor Oct. 26, 2009) (ALJ Gerald Etchingham),[2] and *Castillo v. Sundial Marine Tug & Barge Works, Inc.*, ALJ No. 2010-LHC-00341 (Dep't of Labor Apr. 22, 2011) (ALJ Jennifer Gee). In *DiBartolomeo*, Judge Etchingham rejected similar evidence and instead determined a proxy rate for Robinowitz's services in the Portland market based on the 2007 Survey of Law Firm Economics by Altman Weil Publications ("Altman Weil Survey"). He determined that Robinowitz's credentials and performance merited a rate in the 75th percentile. He then averaged the 75th-percentile hourly billing rates for lawyers practicing in areas he found relevant to Longshore Act litigation—employment law ($365), maritime law ($320), personal-injury law ($335), and workers'-compensation law ($200)—and Oregon lawyers with over 30 years of experience ($325). He increased the resulting proxy market rate of

[2] *DiBartolomeo* was affirmed by the BRB in an unpublished decision, *DiBartolomeo v. Fred Wahl Marine Constr.*, No. 10-0257, 2010 WL 3514186, at *6 (Ben. Rev. Bd. Aug. 30, 2010).

$309/hour to $316.42 to account for inflation. Judge Etchingham rejected the Oregon State Bar Survey, even though it includes more detail about billing rates in various Oregon markets, including Portland. He determined that the Altman Weil Survey was a better source of data because it is published every year and provides billing rates for lawyers practicing employment law and maritime law, whereas the Bar Survey is published every four to five years and does not include separate rates for those practice areas. The ALJ in the present case agreed with this analysis and adopted the $316.42 proxy market rate, which he increased to $320 to account for inflation and to $340 to acknowledge Robinowitz's recent accomplishments. The BRB affirmed this fee award.

The "relevant community:"

The court stated that identification of the "relevant community" is necessary in order to determine the prevailing market rate, and that the "relevant community" in Longshore Act cases should focus on the location where the litigation took place. The issue of which is the "relevant community" need not necessarily be decided anew in each decision awarding fees. The court must consider relevant indicia to determine where the litigation took place. Here, all factors point to Portland, Oregon as the location of the litigation: both claimant's counsel and employer's counsel maintain their offices there and that is where the hearing took place. Thus, the court held that Portland is the "relevant community" for determining the prevailing market rate for claimant's counsel in this case.

Employer contended that the ALJ had the discretion to treat the state of Oregon or the city of Portland as the "relevant community." The court stated that, even if this is so, the ALJ evidently adopted the "relevant community" determination from *DiBartolomeo* and *Castillo*. The court acknowledged that the "relevant community" may depend on the facts of specific cases, and declined to construct a bright-line rule. However, this determination must be adequately justified and supported by substantial evidence. With regard to the Seventh Circuit's suggestion that the "relevant community" could be national in scope, *Jeffboat, LLC v. Dir., OWCP*, 553 F.3d 487, 490 (7th Cir. 2009), the Ninth Circuit noted that the DOL decision-makers determine the "relevant community" in the first instance, but added that the Ninth Circuit has not adopted this position and that *Jeffboat* has not been widely followed with respect to this point.

Applicability of the proxy market rate to the Portland market:

The court vacated the award of a $340 hourly rate for claimant's counsel, holding the ALJ erred in applying a rate that has "no direct nexus" to the relevant community of Portland, Oregon. The proxy market rate adopted by the ALJ, based on five constituent rates from the Altman Weil Survey, bore no direct nexus to Portland because one rate encompassed the entire state of Oregon, while the others appeared to be national in scope. The ALJ relied entirely on data not tailored to the "relevant community" of Portland, even though reliable information about attorney billing rates in Portland was readily available. The court added that if the relevant community had been identified differently, or if reliable data on the attorney's fees in the "relevant community" did not exist, using the Altman Weil data could be permissible. However, in this case, the Oregon State Bar Survey provided information specific to Portland.

The court further rejected the reasons provided by Judge Etchingham in *DiBartolomeo* for favoring the Altman Weil Survey over the Oregon State Bar Survey. First, although he reasoned that the Altman Weil Survey is preferable because it is published every year, he did not calculate proxy market rates for each year using the survey data for that year. Rather, for years after 2007, he merely adjusted the proxy market rate calculated from the 2007 Altman Weil Survey using inflation data. These same inflation

adjustments could be applied to the figures in the Bar Survey. Second, Judge Etchingham stated that he relied on the Altman Weil Survey because it includes billing rates for attorneys practicing employment law and maritime law, which the Bar Survey lacks. However, he did not explain why he disregarded the data for the practice areas—personal-injury law and workers'-compensation law—that the surveys have in common and for which the Bar Survey contains data specific to the Portland market. Nor did he explain why the Altman Weil's billing rate for Oregon attorneys with over 30 years of experience was superior to the Bar Survey's billing rate for Portland attorneys with such experience.

Use of billing rates for workers'-compensation practice:

The court further held it was error for the ALJ to include, and for the Board to affirm, rates for attorneys practicing state workers' compensation law in a proxy market rate calculation, because such rates are artificially low and do not necessarily represent market rates that are usable in a lodestar calculation. This conclusion is compelled by the BRB's decisions in *Christensen*,[3] which constitute binding precedent and provide good reasons to doubt that the rate for workers'-compensation practice is a market rate for Longshore Act claimants' work. In *Christensen*, the court vacated the BRB's decision awarding fees for work Robinowitz performed before it because the fee award was not based on market rates. On remand, the BRB initially calculated a proxy market rate by reference to an average of the rates for workers' compensation, plaintiff personal injury civil litigation, and plaintiff general civil litigation cases. *Christensen*, 43 BRBS at 146-47. However, on reconsideration, the BRB excluded the workers'-compensation rate because it found it to be artificially low and thus not reflective of market rates: Fees paid to claimants' attorneys are typically capped by state law and often paid out of the compensation award, whereas insurers and employers are able to negotiate discounts with attorneys who defend against workers'-compensation claims because they supply a steady stream of work. *Christensen*, 44 BRBS 39, 40 (2010). The court added that it is not in a position to evaluate whether the billing rate for workers'-compensation practice in fact suffers from such flaws; to the extent that it does not, it may be used in Longshore fee awards. However, the BRB decision in *Christensen* is precedential, and the BRB has neither repudiated nor distinguish it here.

The court rejected the two reasons provided by the ALJ in this case for departing from the BRB's approach in *Christensen.* First, the ALJ reasoned that the BRB decisions regarding attorney's fees for appellate work before the BRB—such as *Christensen*—are "less instructive" than BRB decisions reviewing fee awards for trial-level work before ALJs. The court stated that if reported rates for workers'-compensation practice do not reflect *market* rates, they cannot be used in a lodestar calculation, no matter how similar the skills involved are. Second, the ALJ suggested that the reported rates are market rates because workers'-compensation attorneys "freely choose to represent injured workers in cases very similar to [Longshore Act cases], and they do so knowing of the cap." But this reasoning contradicts the BRB's decision in *Christensen* that these rates are not representative of market rates in part because the total fee is capped by statute. The court stated that it shares the BRB's skepticism that billing rates reported under such a regime reflect rates that are sufficient to induce a capable attorney to undertake the representation, because the fee cap may reduce *reported* hourly rates below *expected* hourly rates.

The case was remanded for recalculation of a reasonable hourly rate.

[Topic 28.6.1 ATTORNEY'S FEES – Hourly Rate]

[3] *Christensen v. Stevedoring Services of America*, 43 BRBS 145 (2009), *modified in part on recon.*, 44 BRBS 39, *recon. denied*, 44 BRBS 75 (2010), *aff'd mem. sub nom. Stevedoring Services of America, Inc. v. Director, OWCP*, 445 F.App'x 912 (9th Cir. 2011).

B. U.S. District Courts

[**Note:** The following decision is included for informational purposes only]

***Burnette v. Sierra Nev. Corp.*, 2015 U.S. Dist. LEXIS 124984 (D. Ariz. Sept. 17, 2015).**

Relevant to this review, the district court grated a summary judgment in favor of New Frontier Innovations, LLC ("NFI") as to the wrongful death and negligence claims brought by plaintiff, on the grounds that such state law tort claims are preempted by the exclusive remedy provision in the Defense Base Act ("DBA").

Claimant's son was working as a sensor operator on board a plane that was conducting an airborne counter-narcotics surveillance mission when the plane crashed near the border of Panama and Columbia killing him and three other crew members. The surveillance mission was conducted in conjunction with a service contract between Sierra Nevada Corporation ("SNC") and a division of the United States Air Force. SNC, in turn, subcontracted with NFI to provide the personnel—such as pilots and sensor operators—for the missions. Rejecting plaintiff's contrary argument, the court concluded that the contracts at issue were related to "public work" for purposes of establishing coverage under Section (a)(4) of the DBA. 42 U.S.C. § 1651(a)(4). "Public work" under this section constitutes government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity. 42 U.S.C. §1651(b)(1). The court found that the prime contract, and the subcontract by extension, had a clear nexus to national defense. The court observed that efforts to disrupt and dismantle transnational organized crime networks and reduce availability of illicit drugs and inhibit terrorist funding have been recognized as part of the larger effort to improve national security.

C. Benefits Review Board

***Edwards v. Marine Repair Servs.*, __ BRBS __ (2015).**

The Board vacated the ALJ's summary decision finding that claimant's LHWCA claim is barred under § 33(g).

Section 33(g)(1) provides a bar to claimant's receipt of compensation where the person entitled to compensation enters into a third-party settlement for an amount less than his compensation entitlement without obtaining employer's (and carrier's) prior written consent. Under § 33(g)(2), if no written approval is obtained as required in (g)(1), or if the employee fails to notify employer of any settlement obtained from or judgment against a third-party, then all rights to compensation and medical benefits under the Act shall be terminated.

In his LHWCA claim, claimant alleged that he sustained injuries on 6/10/2010 in the course of his work for employer, when his vehicle was struck by a truck. Employer disputed the claim on multiple grounds. Claimant also filed a tort suit in federal court against the truck owners, which was settled for an undisclosed amount. With respect to claimant's claim under the LHWCA, the ALJ granted employer's motion for summary decision, finding that claimant's right to compensation is barred under § 33(g), as he had entered into a third-party settlement without obtaining employer's prior written approval in accordance with § 33(g)(1) or notifying employer of the settlement in accordance with § 33(g)(2).

Initially, the Board rejected claimant's argument that he is not a "person entitled to compensation" ("PETC") for purposes of § 33(g) because employer disputed his entitlement to benefits. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), the Supreme Court stated that the normal meaning of "entitlement" includes a right or benefit for which a person qualifies, and does not depend upon whether the rights have been acknowledged or adjudicated. Here, employer conceded that claimant was its employee and that an injury occurred on 6/10/2010. While the defenses asserted by employer may otherwise bar claimant's entitlement to compensation, such cannot preclude him from being a "PETC."

The Board also rejected claimant's contention that employer is judicially estopped from asserting that claimant is a PETC for purposes of § 33(g) defense because it denied his claim for benefits. The doctrine of judicial estoppel does not apply in this case, as employer's defenses to the claim are not inconsistent, regardless of their merit. Employer is entitled to raise any defenses to a claim, and it may argue them in the alternative.

However, the Board agreed with claimant that a genuine issue of material fact exists as to the applicability of § 33. Contrary to the ALJ's determination, claimant complied with the § 33(g)(2) notice provision. Although he did not notify employer at the time of the settlement, his notification several months later was timely under § 33(g)(2) as it predated any payment of benefits by employer and any issuance of an award. Since claimant complied with § 33(g)(2) by providing notice to employer, but not § 33(g)(1)'s requirement of prior written consent, the issue is which subsection applies. Subsection 33(g)(1) applies only when the third-party settlement is less than the claimant's compensation entitlement under the Act. Because the settlement is confidential, it is unknown whether the proceeds are less than claimant's compensation entitlement under the Act and which subsection applies. On remand, if employer's other defenses fail, the § 33(g) issue would need to be decided. As the proponent of the § 33(g) defense, employer bears the burden of establishing that claimant entered into a third-party settlement for less than his compensation entitlement. The Board noted that *in camera* proceedings may be useful to resolve the impasse over the confidentiality of the third-party settlement. 29 C.F.R. §§18.51, 18.56, 18.85 (2015).

Claimant also argued that the time for complying with § 33(g) should be tolled by analogy to § 30(f) tolling provision. The BRB noted that this argument was not raised before the ALJ and that, in any event, there is no § 33(g) tolling provision in the Act.

The case was remanded to the ALJ for further proceedings.

[Topic 33 COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE -- § SECTION 33(g); Subsection (g)(1) - Prior Written Approval; Subsection 33(g)(2) - Notice Provision; Topic 85 Doctrines of Preclusion – Judicial Esoppel]

***Pisaturo v. Logistec, Inc.*, __ BRBS __ (2015).**

The Board held that where the work-related injury to claimant's left eye resulted in diplopia, or double vision, his claim for scheduled permanent partial disability ("PPD") benefits was properly found to be compensable under § 8(c)(5), in conjunction with § 8(c)(19).[4]

[4] § 8(c)(5) provides for an award of 160 weeks of compensation for loss of an eye. Further, § 8(c)(19) provides that where a claimant has a partial loss or loss of use, he is entitled to benefits for a number of weeks proportionate to the impairment rating provided by a medical expert.

The Board previously held that where an injury to an eye results in visual deficits other than a loss of visual acuity, an award properly rests under §§ 8(c)(5), (19). In this case, the Board held that where the injury to claimant's left eye impaired only the ability of that eye to work in tandem with the other eye, it is appropriate to compensate the impairment to his visual system as the injury to the left eye.

As this case involves an eye injury, the ALJ is not bound by the AMA *Guides* or by any particular standard in assessing the extent of claimant's disability. The Board upheld the ALJ's reliance on the opinion of employer's medical expert over that of claimant's treating physician regarding the extent of impairment on the ground that the treating physician failed to sufficiently explain the basis for his impairment rating. Any error by the ALJ in rejecting claimant's treating physician's opinion on the basis that it is unclear whether his impairment rating was made pursuant to the AMA *Guides* is harmless, as the ALJ provided a valid alternate reason for rejecting the doctor's rating.

However, agreeing with the OWCP Director, the Board held that the ALJ impermissibly substituted his own judgment for that of employer's medical expert by devising a "conversion factor" to adjust the doctor's impairment rating in order to reconcile an incongruity found by the ALJ to exist between the AMA *Guides*, on which the doctor's impairment rating was based, and the Act. *See generally Pietrunti v. Director, OWCP*, 119 F.3d 1035, 1042, 31 BRBS 84, 89(CRT) (2d Cir. 1997). The ALJ found that the Act and the AMA *Guides* are incongruent in that § 8(c)(5) provides compensation for loss of use of one eye whereas the AMA *Guides* are premised on impairment to the overall visual system.[5] It was not necessary to devise an impairment rating for claimant's left eye alone, as, on the facts of this case, the impairment to claimant's visual system resulting from the left eye injury may be compensated under § 8(c)(5); thus, there is no incongruity between the Act and the AMA *Guides*. Moreover, the ALJ's conversion factor is not based on any record evidence. It is based on an assumption that an impairment rating for partial diplopia bears a direct relationship to a rating of loss of an eye, which is without medical or scientific support in the record. On the unique facts presented by this case, where the only effect of the injury to claimant's left eye was on his overall visual system, and where the sole credited impairment rating is based on the impairment to claimant's visual system, as opposed to the one injured eye, claimant has not met his burden of producing credible medical evidence that the loss of use of his left eye is greater than the 7.5 percent impairment assessed by the credited physician.

The Board therefore modified the ALJ's scheduled award to reflect the impairment rating assessed by the credited doctor.

[Topic 8.3 PERMANENT PARTIAL DISABILITY – SCHEDULED AWARDS; Topic 8.3.13 § 8(c)(5) (Loss of Use of Eye); Topic 8.3.23 § 8(c)(19) Partial Loss of Use; Topic 23 EVIDENCE (ALJ Can Accept or Reject Medical Testimony; ALJ May Accept or Reject AMA Guides Unless Required]

***Boudreaux v. Owensby & Kritikos, Inc.*, __ BRBS __ (2015).**

The Board affirmed the ALJ's conclusion that claimant's claim, seeking benefits for an injury sustained in a car accident while traveling from his home to a designated pick-up

[5] To address this incongruity, the ALJ devised a conversion factor based on there being a 5:1 ratio between disability ratings for one eye under the Act and ratings for impairment to the visual system under the AMA *Guides*. Applying this ratio, the ALJ determined that the 7.5 percent impairment of the visual system found by employer's ophthalmologist pursuant to the *AMA Guides* equates to a 37.5 percent impairment of the left eye under § 8(c)(5)

area on a dock for further transport to a rig on the OCS, falls under the coverage of the Outer Continental Shelf Lands Act ("OCSLA").[6] The Board affirmed the ALJ's finding that claimant established the requisite "substantial nexus" between his injuries and the extraction of natural resources on the OCS, in accordance with *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. __, 132 S.Ct. 680, 45 BRBS 87(CRT) (2012).

On appeal, employer asserted that the "substantial nexus" test does not mean a "substantial nexus" between the injured worker's general job duties and the employer's operations on the OCS, but rather that the injury was actually "caused by" those operations. Employer further argued that claimant is not covered under the OCSLA because he was not within the course and scope of his employment at the time of his injury.

The Board discussed, at length, the substantial nexus standard applied by the Ninth Circuit in *Valladolid*, and adopted by the Supreme Court in that case.[7] The Ninth Circuit clarified that to meet this standard, "the claimant must show that the work performed directly furthers [OCS] operations and is in the regular course of such operations." *Valladolid v. Pacific Operations Offshore, L.L.P.*, 604 F.3d 1126, 1139, 44 BRBS 35, 43(CRT) (9th Cir. 2010). However, it added: "An injury sustained during employment on the [OCS] itself would, by definition, meet this standard. However an accountant's workplace injury would not be covered even if related to [OCS], while a roustabout's injury in a helicopter en route to the [OCS] likely would be." *Id.* Further, the Supreme Court stated that "[a]lthough we expect that employees injured while performing tasks on the OCS will regularly satisfy the test, whether an employee injured while performing an off-OCS task qualifies -- like Valladolid, who died while tasked with onshore scrap metal consolidation -- is a question that will depend on the individual circumstances of each case." *Valladolid*, 132 S.Ct. at 691, 45 BRBS at 92(CRT). Contrary to employer's contention, this holding clearly anticipates that an employee injured while performing an off-OCS task for employer, may be covered. Further, the Supreme Court left adjudicators considerable discretion to give meaning to the substantial nexus standard.

Agreeing with the OWCP Director, the Board affirmed, as supported by substantial evidence, the ALJ's finding that the evidence established a significant causal link between claimant's injuries and employer's on-OCS extractive operations. The ALJ rationally relied on the following facts: 1) claimant's duties on the OCS examining off-shore facility storage tanks for defects was in the "regular course of" and "directly furthered" operations on the OCS; 2) claimant's injuries occurred while he was in route, along with his work equipment, to the OCS facility to perform his job duties; and 3) claimant was compensated by the mile and for his travel time to the job site on the OCS on the date of his injury (collecting cases on the "trip-payment exception" to the general rule that traveling to and from work is not within the course of employment). In sum, "[b]ecause the injury occurred in the course of claimant's employment and claimant was traveling with his work equipment to meet a crew boat to be transported to his offshore duty station, where he performed work relating to extractive operations on the OCS, the ALJ rationally found claimant covered under the 'substantial nexus' test." Slip op. at 10.

The Board rejected employer's contention that the ALJ relied on the discredited "but for" test. It also rejected employer's contention that the ALJ erroneously referred to cases where the employees were killed in helicopter crashes over the OCS on their way to

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[6] The BRB stated that the employer's appeal is of a non-final order, in that the ALJ addressed only the coverage issue and neither awarded nor denied benefits. The BRB further noted that piecemeal litigation of this sort is discouraged.

[7] The parties to *Valladolid* settled the claim on remand and thus the coverage issue was not adjudicated further.

rigs. Employer suggested that injuries sustained while in transit to an offshore site on a helicopter or vessel are covered because those modes of travel are inherently more risky than travel by car. The Board concluded that there is nothing in the substantial nexus test which requires the fact-finder to use a risk-based assessment of the circumstances surrounding an injury, and that it would add unnecessary and unwarranted complexity to the test, and could negate the Act's no-fault scheme.

[Topic 60.3.2 OCSLA – Coverage]

***Tounkara v. Glacier Fish Co.*, __ BRBS __ (2016).**

The Board affirmed the ALJ's finding that the vessel on which claimant was injured was not "in navigation" at the time of the injury, and, thus, claimant was not a member of the vessel's crew and was not excluded from coverage under § 2(3)(G) of the LHWCA.

Section 2(3)(G) excludes from coverage "a master or member of a crew of any vessel." The LHWCA and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is synonymous with a "member of a crew of any vessel" under the LHWCA. An employee is a seaman/member of a crew if: 1) his employment contributes to the function of the vessel or the accomplishment of its mission; and 2) he has a connection to a vessel in navigation that is substantial in both its duration and nature. Whether a vessel is "in navigation" is a factual determination for the ALJ, and the BBR may not reweigh the evidence.

The vessel in this case sustained fire damage while at sea. It sailed under its own power to Alaska, but then was towed to Seattle for repairs. Substantial evidence supported the ALJ's finding that the repairs were "extensive" and beyond those that would take place in order to prepare the vessel for its next journey. In addition to repairing the fire damage, major renovations were undertaken to relocate the wheelhouse and to change the dimensions and buoyancy of the hull. The repairs took more than one year and the vessel underwent sea trials when the repairs were complete. The vessel was not capable of use in maritime commerce while undergoing these "extensive repairs." The Board rejected the contention that the vessel remained "in navigation" because the purpose of the vessel was the same before and after the repairs; the vessel need not be undergoing a conversion in order to be removed from navigation.

[Topic 1.4 LHWCA V. JONES ACT – Vessel "In Navigation;" Topic 1.11.1 EXCLUSIONS TO COVERAGE – § 2(3)(G) "a master or member of a crew of any vessel"]

***Ritzheimer v. Triple Canopy, Inc.*, __ BRBS __ (2016).**

Agreeing with the OWCP Director, the Board held that the ALJ correctly applied the "zone of special danger" doctrine to find that claimant sustained a compensable injury under the Defense Base Act. Claimant, who was employed in Israel as a force protection officer, sustained injuries when he slipped and fell in the bathroom of employer-provided apartment, after taking a shower following a work shift.

The Board discussed at length the doctrine of the "zone of special danger," separately collecting cases that found this doctrine applicable and those that did not. In cases arising under the DBA, an employee may be within the course of employment, even if the injury did not occur within the space and time boundaries of work, so long as the "obligations or conditions of employment" create a "zone of special danger" out of which the injury arose. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951). Thus, an injury is covered where it results from "one of the risks of the employment, an incident of

the service, foreseeable, if not foreseen." *Id*. at 507 (additional citations omitted). In *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965), the Supreme Court stated that *O'Leary* "drew the line only at cases where an employee had become 'so thoroughly disconnected from the service of his employer that it would be entirely unreasonable to say that injuries suffered by him arose out of and in the course of his employment.'"

The Board noted that "[t]he question of whether the obligations or conditions of an individual's employment created a zone of special danger out of which the injury arose involves a factual determination that turns on the particular circumstances of the DBA employment, and the [ALJ]'s findings regarding the doctrine are subject to review based on the substantial evidence standard." Slip op. at 6 (citations omitted). The BRB also quoted the First Circuit's statement in *Battelle Mem'l Inst. v. DiCecca*, 792 F.3d 214, 220, 49 BRBS 57, 60(CRT) (1st Cir. 2015), *aff'g* 48 BRBS 19 (2014), that the determination of whether an injury falls within foreseeable risks associated with the employment abroad "is necessarily specific to context and thus turns on the totality of circumstances." *Id.*

In this case, the Board concluded that:

> "Consistent with the *O'Leary* line of cases, the [ALJ] specifically considered whether 'the obligations or conditions of employment created the zone of special danger out of which the injury arose' and whether claimant's injury resulted from 'one of the risks of the employment, an incident of the service, foreseeable, if not foreseen.' . . . . He found that the conditions and obligations of claimant's employment created a zone of special danger, on the basis of substantial evidence of record, which included evidence that claimant was continuously on-call, that he was required to live in the furnished apartment provided by employer, that he worked in a hot, sandy environment wearing 100 pounds of gear, that he showered after work because he was sweaty and dirty, and that the terms of his employment contract required that he maintain good hygiene and a professional appearance. Having found that these employment conditions and obligations made bathing a necessity, the [ALJ] rationally determined that slipping while getting out of the shower was a foreseeable risk of claimant's employment."

Slip op. at 11 (citations omitted).

Based on these findings, the ALJ rationally rejected employer's assertion that, in light of claimant's testimony that he would shower daily regardless of any work responsibilities, his injury should be found to have arisen from an activity entirely personal in nature which is unconnected to an employment obligation. Citing *R.F. [Fear] v. CSA, Ltd*, 43 BRBS 139 (2009), employer asserted that claimant's showering was purely personal in nature and was thoroughly disconnected from his employment. The BRB distinguished *Fear* on the basis that claimant Fear's use of a cosmetic chemical peel had nothing to do with his professional appearance on the job or with any other obligation or condition of his employment in Kuwait, whereas substantial evidence in this case supports the ALJ's finding that the obligations and conditions of claimant's employment made it necessary for him to engage in the showering activity that resulted in his injuries.

The Board also rejected employer's argument that there was nothing unique or different about the bathroom in claimant's apartment in Israel that caused his injury while exiting the shower, and therefore his employment did not create a zone of special danger out of which his injury occurred. Contrary to employer's argument, the bathroom in which claimant was injured need not have presented unique risks for the doctrine to apply. Slip op. at 10, citing *Jetnil v. Chugach Mgt. Services*, 49 BRBS 55, 59 & n.7 (2015), *appeal pending*, No. 15-72873 (9th Cir.); *DiCecca*, *supra*.

Thus, the Board found that the ALJ's conclusion that claimant's injury is compensable under the DBA pursuant to the zone of special danger doctrine is rational, supported by substantial evidence and in accordance with law.

[Topic 60.2.7 DEFENSE BASE ACT – Course and Scope of Employment, "Zone of Special Danger]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Eighty Four Mining Co. v. Director, OWCP*, F.3d , 2016 WL 495675 (3rd Cir. Feb. 9, 2016), the court addressed "whether a state workers' compensation board's denial of pneumoconiosis benefits due to the repudiation of the claimant's black lung diagnosis resets the BLBA three-year statute of limitations period." A majority of the court concluded that such a denial does reset the statute of limitations period, and the court therefore denied Employer's petition for review.

Dr. Cohen examined Claimant in 2006 and opined that Claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. It was this opinion that Claimant relied upon in his state workers' compensation claim for occupational pneumoconiosis. However, this claim was denied, and Claimant did not file an appeal with the Pennsylvania Workers' Compensation Appeal Board.

In January 2011, Claimant filed a federal black lung claim, in which he relied upon more recent evidence. The ALJ awarded benefits, thereby concluding that the claim was timely filed pursuant to *Helen Mining Co. v. Director, OWCP*, 650 F.3d 248 (3rd Cir. 2011) (holding that the denial of an initial federal black lung claim renders a prior diagnosis as a "misdiagnosis," thereby resetting the statute of limitations period) [hereinafter *Obush*]. Specifically, the ALJ concluded that the denial of Claimant's state claim rendered Dr. Cohen's diagnosis as a "misdiagnosis" for purposes of the BLBA's statute of limitations. Although the Board affirmed the award, it did so on the basis that Employer's timeliness argument was precluded because of judicial estoppel.

On appeal, the majority phrased the question before the court as being "how to apply the central holding in *Obush* that a misdiagnosis does not constitute a 'medical determination' sufficient to trigger the statute of limitations — that is, we must determine whether there has been a misdiagnosis that resets that statute of limitations." The majority noted that *Obush*'s holding – that a misdiagnosis does not begin the running of the limitations period – relied upon three main principles: (1) the black lung program should be liberally construed in light of the statute's remedial nature "to ensure widespread benefits to miners and their dependents," (2) pneumoconiosis is a latent and progressive disease that may first become detectable after a miner's exposure to coal mine dust ceases, and (3) because subsequent claims are permitted, an interpretation of the statute of limitations that "effectively precludes" the consideration of such claims is "untenable."

The majority concluded that "[t]he rejection of Dr. Cohen's diagnosis is indistinguishable from the denial of the initial black lung benefits claim in *Obush.*" Accordingly, the majority concluded:

> [T]he rejection of a claim in which the adjudicator repudiates a medical determination of pneumoconiosis means that a subsequent claim filed within three years of receipt of a new medical determination establishing the existence of pneumoconiosis will not be barred as untimely, regardless of whether the first claim was filed under a state workers' compensation law or under the BLBA.

The majority further noted that the decision "rests primarily on the liberal interpretation to be accorded the BLBA" and that "it is immaterial that [Claimant's] first claim was filed under a state workers' compensation law." In a footnote, the majority rejected the Board's reliance on the theory of judicial estoppel in concluding that the claim was timely filed. The

majority concluded that the theory was inapplicable, as Employer did not advance "irreconcilably inconsistent positions." Instead, Employer could reasonably argue that Dr. Cohen's diagnosis was both incorrect and sufficient to trigger the running of the limitations period.

In light of the above, the court denied Employer's petition for review and affirmed the Board's Decision and Order.

In dissent, Judge Nygaard disagreed with the majority's conclusion that the denial of a state workers' compensation claim renders a prior medical determination as a "misdiagnosis" for purposes of the statute of limitations under the BLBA. Judge Nygaard concluded that, because the denial of the state workers' compensation claim "does not have any conclusive effect upon subsequent federal claims, and it is not tantamount to a ruling (for purposes of a federal claim) that the underlying diagnosis is a misdiagnosis, the state ALJ's decision does not reset the statute of limitations clock under the [BLBA] for purposes of a subsequent federal black lung claim." Therefore, because Dr. Cohen's medical determination was communicated to Claimant in 2006, and as claimant did not file his federal black lung claim until 2011, Judge Nygaard would conclude that Claimant "is now time barred from raising any other claim."

[Applicability of 20 C.F.R. §718.308, statute of limitations for filing a miner's claim: Medical opinions from prior claim deemed premature or misdiagnosis, Third Circuit]

In *Eastern Associated Coal Corp. v. Director, OWCP [Toler]*, 805 F.3d 502, B.L.R. (4th Cir. 2015), which involved a subsequent claim filed in 2008,[8] the ALJ awarded benefits pursuant to the 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4). *See* 20 C.F.R. §718.305; *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015). The Benefits Review Board eventually affirmed the award. On appeal before the Fourth Circuit, Employer contended that, by applying the 15-year presumption to the miner's subsequent claim, the ALJ violated the Black Lung Benefits Act (BLBA), its implementing regulations, and the "principles of finality and separation of powers." *Toler*, 805 F.3d at 504.

Before the ALJ, the parties stipulated that the miner was totally disabled due to a pulmonary impairment; therefore, as the miner had worked for twenty-seven years in coal mine employment (CME), sixteen of which were underground, the ALJ applied the 15-year presumption to the miner's subsequent claim. After examining the opinions of Employer's two doctors, the ALJ found that Employer failed to disprove the existence of pneumoconiosis or demonstrate that the miner's impairment did not arise out of, or in connection with, his CME. Accordingly, the ALJ awarded benefits. Employer appealed the award, and the Board remanded the matter to the ALJ to provide Employer with an opportunity to submit new evidence addressing the 15-year presumption.

On remand, the ALJ again awarded benefits by applying the 15-year presumption to the miner's subsequent claim and finding that Employer failed to rebut the presumption. Employer appealed the ALJ's decision to the Board, which affirmed the award. The appeal to the Fourth Circuit then followed.

Employer raised two main arguments on appeal before the Fourth Circuit. First, Employer argued that the ALJ erred in using the 15-year presumption to establish a change in an applicable condition of entitlement. The court disagreed, concluding instead that "the

[8] The miner's only prior claim was denied based upon a failure to establish the existence of pneumoconiosis, despite an ALJ finding the miner had established a totally disabling pulmonary or respiratory impairment. The Board affirmed the ALJ's denial of benefits, and the Fourth Circuit thereafter denied the miner's petition for review.

Act and the regulations show plainly that a coal miner *armed with new evidence* may invoke the [15]-year presumption to establish a change in an applicable condition of entitlement." *Id.* at 511 (emphasis added). The court noted that the preamble to the 2001 regulations reinforced this conclusion, as the Department there stated that "'the miner continues to bear the burden of establishing all of the statutory elements of entitlement, except to the extent that he is aided by [the] statutory presumptions' in effect at the time the Secretary promulgated the 2000 Final Rule." *Id.* at 512 (quoting 65 Fed. Reg. 79,920, 79,972 (Dec. 20, 2000)). Finally, the court concluded that, even if it harbored doubts as to this conclusion, it "would defer to the Director's reasonable and consistent interpretation of the applicable regulations." *Id*.

The court went on to reject Employer's arguments against such application of the 15-year presumption in a subsequent claim. The court disagreed that application of the presumption amounted to a "double presumption," and instead noted that its use simply assists a miner in establishing the applicable conditions of entitlement in a subsequent claim. The court also disagreed with Employer's argument that use of the 15-year presumption to establish a change in an applicable condition of entitlement is inconsistent with the Secretary of Labor's concession in *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), that "the most common forms of pneumoconiosis are not latent." *Id.* at 23-25. In addition, the court rejected Employer's contention that the miner's first claim and subsequent claim are the same "with a new label," as the court had held that such "claims are not the same" in *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362 (4th Cir. 1996) (en banc). *Toler*, 805 F.3d at 513. The court also concluded that *Lisa Lee Mines* foreclosed any suggestion that the miner must "prove that the etiology of his condition has changed by comparing the evidence pertaining to [his] second claim with the evidence underlying the denial of his first claim." *Id.* (citing *Lisa Lee Mines*, 86 F.3d at 1361). Finally, the court rejected, as factually incorrect, Employer's assertion that the miner had not submitted new evidence postdating the denial of his first claim pursuant to 20 C.F.R. §725.309(c)(4) and *Consol. Coal Co. v. Williams*, 453 F.3d 609 (4th Cir. 2006). Therefore, the court concluded that the ALJ violated neither the BLBA nor the applicable regulations in applying the 15-year presumption to the miner's subsequent claim.

Second, the court turned to Employer's argument that, by applying the 15-year presumption to the miner's subsequent claim, the ALJ improperly reopened an Article III court's final judgment: the Fourth Circuit's 1998 denial of the miner's petition for review in his first claim. The court concluded that the award in the miner's subsequent claim "did not 'retroactively . . . reopen' anything, much less a final judgment of an Article III court." *Toler*, 805 F.3d at 515. The court noted that, in fact, *Lisa Lee Mines* required that the ALJ "accept the correctness of the administrative denial of [the miner's] 1993 claim – and, by necessary extension, our 1998 denial of [his] petition for review." *Id.* (emphasis in original). Accordingly, the court rejected Employer's contention that the ALJ inappropriately exercised "the judicial Power" in granting the miner's subsequent claim." *Id.*

In light of the above, the court denied Employer's petition for review.

[Subsequent Claims Under 20 C.F.R. §725.309: Application of the 15-year presumption; used to demonstrate element of entitlement]

In *Blue Mountain Energy v. Director, OWCP* [*Gunderson*], 805 F.3d 1254, B.L.R. (10th Cir. Nov. 2015), the ALJ, on second remand, awarded benefits by finding Claimant established that he was totally disabled due to legal pneumoconiosis. Of note, the ALJ found that "the brevity of Dr. Shockey's report [finding legal pneumoconiosis] causes it to be less probative in light of the comprehensiveness of the other medical opinions of record." *Gunderson v. Blue Mountain Energy*, OALJ Case No. 2004-BLA-05323, slip op. at 14-15 (Mar. 18, 2013) (unpub.). Furthermore, the ALJ found "Dr. Repsher's opinion that

Claimant's COPD is not related to coal dust exposure based predominately, if not totally, on articles Dr. Repsher cites for the proposition that coal dust exposure is significantly less likely to cause COPD than cigarette smoking . . . ." *Id.* at 15. Therefore, the ALJ accorded Dr. Repsher's opinion "less weight because it does not focus on Claimant's specific symptoms and conditions, but on statistics." *Id*. The ALJ also noted that Dr. Repsher failed to "address whether coal dust exposure and smoking could have been additive causes of Claimant's lung disease, an etiology clearly adopted in the Preamble to the Regulations." *Id.* In sum, the ALJ found the opinions of Drs. Cohen and Parker to be most probative because both doctors "more thoroughly evaluated Claimant's specific condition when determining that Claimant's obstructive lung disease was caused by coal mine dust exposure." *Id.* The ALJ also pointed out that Dr. Parker had, for example, "specifically linked Claimant's symptoms to the documented effects of coal mine dust exposure and cited to literature that has been approved by the Department in the Preamble." *Id.*

Employer moved for reconsideration, which the ALJ denied, except in respect to the onset date for the payment of benefits, which he modified accordingly.

Employer then appealed. The Board concluded that the ALJ had "permissibly relied on the preamble to the revised 2001 regulations as a statement of medical principles accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of [CME]." *Gunderson v. Blue Mountain Energy*, BRB No. 13-0412 BLA, slip op. at 6 (May 16, 2014) (unpub.). The Board further noted that "the preamble does not constitute evidence outside the record with respect to which the [ALJ] must give notice and an opportunity to respond." *Id.* Of note, the Board concluded that the ALJ "reasonably credited Dr. Parker's diagnosis of legal pneumoconiosis because Dr. Parker linked claimant's impairment to the documented effects of coal mine dust exposure, based on studies that were cited with approval in the preamble to the revised 2001 regulations." *Id.* at 7. Furthermore, the Board stated that the ALJ "rationally discounted Dr. Repsher's opinion," as the ALJ found the opinion at legal pneumoconiosis insufficiently explained, "considering that the Department of Labor accepted medical literature stating that smoking and coal mine dust exposure are additive in causing COPD." *Id.* Accordingly, the Board affirmed the award of benefits.

Employer petitioned the Tenth Circuit for review. Before the court, Employer argued that the ALJ violated the Administrative Procedure Act (APA). Specifically, Employer first contended that the ALJ violated the APA by "relying on the preamble, thereby giving the preamble the 'force and effect of law.'" *Gunderson*, 805 F.3d at 1259. At the outset, the court noted "the very limited extent to which the ALJ referenced the preamble," as the ALJ included the preamble as only one of the tools he used to evaluate the credibility of two medical reports, and referenced the preamble on only two occasions. *Id*. The court also noted that, while such use of the preamble is a matter of first impression in the Tenth Circuit, numerous other courts have affirmed reliance on the preamble, including the Ninth, Sixth, Fourth, Third, and Seventh Circuits. The court disagreed with Employer that the ALJ's citation to the preamble "undeniably changed the outcome" of the case, and further noted that the ALJ did not solely rely on the preamble in crediting the medical reports. *Id.* at 1260. The court concluded that that was "no indication in the ALJ's final opinion that he was effecting some sort of change in the law or relying on a broadly-applicable rule premised on the preamble." *Id.* at 1261. Instead, the ALJ simply "used the preamble's summary of medical and scientific literature as one of his tools in determining whether the experts' medical analyses of [Claimant's] condition were credible." *Id.* The court failed to see how the ALJ's use of the preamble transformed "a summary of 'the prevailing view of the medical community' into binding law." *Id*.

The court also rejected Employer's argument predicated upon *Christensen v. Harris County*, 529 U.S. 576 (2000), and the fact that the preamble was not subject to notice and

comment. The court distinguished *Christensen* on two grounds: (1) in contrast to the opinion letter in *Christensen*, which offered a legal interpretation of a statute, the preamble "provides a scientific justification for amending a regulation," and (2) the question before the court in *Christenson* was one of *Chevron* deference, while in the present case the issue was whether "the ALJ was entitled to use the preamble as one of his tools in evaluating the scientific credibility of experts." *Id*.

In light of the above, and in rejecting Employer's first argument on appeal, the court concluded that the preamble "seems like a reasonable and useful tool for ALJs to use in evaluating the credibility of the science underlying expert reports that address the cause of pneumoconiosis." *Id*. Accordingly, the court held "that an ALJ may—but need not—rely on the preamble to 20 C.F.R. §718.201 for this purpose." *Id*. at 1262. The court noted that "parties remain free to offer other scientific materials for the ALJ to consider for the same purpose, including but not limited to, materials challenging the continued validity of the science described in the preamble." *Id*.

Second, the court addressed Employer's argument that the preamble constitutes evidence not contained in the record and, therefore, the ALJ was required to reopen the record to provide Employer with an opportunity to respond to findings in the preamble. The court rejected this argument, concluding that the ALJ did not abuse his discretion in refusing to do so and noting that Employer "was well aware of the preamble's scientific findings . . . and had ample opportunity prior to the close of this record to submit evidence or expert opinions to persuade the ALJ that the preamble's findings were no longer valid or were not relevant to the facts of this case." *Id*. Furthermore, Employer's requests to reopen the record largely "did not point to anything in the preamble that [Employer] considered no longer scientifically valid." *Id*.

For the above reasons, the Tenth Circuit denied Employer's petition for review.

[General Principles of Weighing Medical Evidence: The preamble to the amended regulations]

In *Coastal Coal-WV, LLC v. Director* [*Miller*], Fed. Appx. , 2015 WL 5780674 (4th Cir. Oct. 5, 2015) (unpub.), the court addressed Employer's request for rehearing of the court's earlier decision dismissing Employer's petition for review as untimely. Contrary to its earlier opinion, the court concluded that, because Employer timely filed a motion for reconsideration of the Board's Decision and Order affirming the ALJ's award, Employer's petition for review was properly before the court.

Concerning the merits of Employer's appeal, the court agreed with Employer that the ALJ erred in failing to consider the comments its doctors provided on their x-ray interpretations concerning the existence of complicated pneumoconiosis. The court concluded "that the ALJ erred by failing to consider the physicians' comments, as those comments have direct bearing on whether the mass appearing on the x-ray is in fact the manifestation of a chronic dust disease or is the result of some other disease process." Because the ALJ primarily relied on the interpretations of these physicians in finding that the irrebuttable presumption of complicated pneumoconiosis was applicable, without also considering the attendant comments and how those comments might affect the credibility of the doctors' readings, the court concluded "that substantial evidence does not support the award of benefits."

In light of the above, the court vacated the award of benefits and remanded the matter to the ALJ "for reconsideration of the x-ray evidence of complicated pneumoconiosis." The court noted that, "[i]f the ALJ again finds that the x-ray evidence establishes the existence of complicated pneumoconiosis, he should then weigh all of the

evidence to determine whether Employer provided affirmative evidence showing that the opacity does not exist or was caused by another disease process."

[Use of the official ILO form, generally: no bias, alternative versus additional diagnosis]

In *West Virginia CWP Fund v. Mullins*, ___ Fed. Appx. ___, 2015 WL _____ (4th Cir. Sept. 10, 2015) (unpub.), the ALJ, in a decision on remand from the Benefits Review Board, awarded benefits based on a finding that Claimant established total disability due to legal pneumoconiosis.[9] The Board subsequently affirmed the award.[10] On appeal, however, the Fourth Circuit concluded that the ALJ's decision awarding benefits was not supported by substantial evidence. Therefore, the court granted Employer's petition for review and reversed the award.

Specifically, the court concluded "that substantial evidence does not support the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion," which the ALJ relied upon in finding that Claimant had legal pneumoconiosis and was totally disabled due to the disease. In support of its conclusion, the court noted the following:

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[9] In its Decision and Order remanding the matter to the ALJ, the Board affirmed the ALJ's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, because Claimant conceded that he did not work for at least 15 years in qualifying coal mine employment (CME), the 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), was inapplicable.

[10] According to the Board:

> Dr. Gaziano based his diagnosis of legal pneumoconiosis on claimant's [CME] and smoking histories, a medical history, a physical examination, and the results of a pulmonary function study. Director's Exhibit 12. The [ALJ] found that Gaziano's opinion, that claimant's COPD was due in part to his coal mine dust exposure, was well-reasoned, noting that it was 'supported by the results of his own objective testing, and accounts for [c]laimant's coal dust exposure, without ignoring his significant smoking history.' Decision and Order on Remand at 10. We conclude that substantial evidence in the record supports the [ALJ's] determination that Dr. Gaziano's diagnosis of legal pneumoconiosis was reasoned.

Mullins v. Pen Coal Corp., BRB No. 14-0035 BLA, slip op. at 4-5 (July 28, 2014) (unpub.). The Board also affirmed the ALJ's decision to accord less weight to the opinions of Employer's physicians, Drs. Repsher and Dahhan, at legal pneumoconiosis. Finally, at disability causation, the Board held:

> The [ALJ] rationally discounted the disability causation opinions of Drs. Repsher and Dahhan because the physicians did not diagnose legal pneumoconiosis. [citations omitted]. Moreover, as the [ALJ] rationally relied on the well-reasoned and well-documented opinion of Dr. Gaziano to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Gaziano's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. [citation omitted]. Consequently, we affirm the [ALJ's] finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Slip op. at 6-7.

> Dr. Gaziano's diagnosis of legal pneumoconiosis was based entirely on [Claimant's] history of coal dust exposure. Dr. Gaziano offered no objective medical evidence to support the conclusion that [Claimant's] [COPD] arose out of his [CME] or was aggravated by coal dust exposure, and Dr. Gaziano confirmed at deposition that [Claimant's] symptoms were not specific to any respiratory disease. Dr. Gaziano also admitted that it was possible that [Claimant's] COPD could have been caused entirely by cigarette smoking, without any aggravation by coal dust. Thus, Dr. Gaziano essentially presented only the possibility that [Claimant's] COPD was caused by coal dust exposure, which we have deemed insufficient to support an award of benefits.

The court further noted that "Dr. Gaziano's reliance on an overestimate of the length of [Claimant's] coal mining career by five years" was problematic, as (1) the ALJ failed to explain how this discrepancy did not make a difference in this case, and (2) "[t]his discrepancy [did] not bolster the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion, especially when the sole basis for Dr. Gaziano's diagnosis of legal pneumoconiosis was [Claimant's] exposure to coal dust."

The court concluded that Dr. Gaziano's opinion "is simply insufficient to satisfy [Claimant's] burden of demonstrating his entitlement to benefits." Finding no remaining evidence supporting entitlement, the court reversed the award of benefits.

[Medical reports: Undocumented and unreasoned opinion, little or no probative weight]

B. Benefits Review Board

In *Chewning v. T & T Management Co., Inc.*, BRB No. 15-0133 BLA (Feb. 5, 2016) (unpub.), which involved a miner's claim arising out of the Fourth Circuit, the ALJ found that Claimant invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis, as he worked for thirty-six years in qualifying coal mine employment (CME) and established the existence of a total respiratory disability. The ALJ also found that Employer did not rebut the presumption, and therefore awarded benefits.

According to the Board, on rebuttal:

> The [ALJ] found that the evidence failed to show that claimant had clinical pneumoconiosis, Decision and Order at 10-12, but that through 'the operation of [a] legal presumption,' namely Section 411(c)(4), claimant had legal pneumoconiosis. Decision and Order at 16. Therefore, the [ALJ] found that the single issue to be determined in this case was whether employer rebutted the presumption of disability causation. Decision and Order at 17.

At disability causation on rebuttal, the ALJ considered the opinions of Dr. Bellotte, who opined that Claimant has neither clinical nor legal pneumoconiosis and is not totally disabled due to coal dust exposure, and Dr. Jaworski, who attributed Claimant's disability to his CME and smoking. The ALJ found Dr. Bellotte's opinion to be unpersuasive because, although he "opined 'that [c]laimant's asthma accounted[ed] for many of respiratory symptoms,' he 'disassociate[d] asthma from coal mine dust [exposure] contrary to the [p]reamble to the [r]egulations.'" The ALJ also rejected Dr. Jaworski's opinion as unpersuasive because he did not explain the basis for his opinion.

At the outset, the Board concluded that the ALJ failed to apply the correct standard in finding that Employer did not rebut the Section 411(c)(4) presumption. In light of the ALJ's discussion of pneumoconiosis in terms indicating that the burden of proof remained

with Claimant and that Claimant established the existence of "legal pneumoconiosis 'through operation of a [a] legal presumption," the Board concluded that the ALJ did not properly consider, at prong one of rebuttal, whether Employer met its burden of disproving the existence of pneumoconiosis pursuant to Section 718.305(d)(1)(i)(A), (B). In addition, at prong two of rebuttal, the ALJ found that the medical evidence did not "establish that '[c]laimant's legal pneumoconiosis [was] a 'substantially contributing cause' of his total pulmonary or respiratory disability.'" The Board noted that, according to Section 718.305(d)(ii), the correct standard is whether Employer establishes that no part of Claimant's respiratory or pulmonary disability was caused by pneumoconiosis. Accordingly, the Board vacated the ALJ's rebuttal finding and remanded the matter for a determination as to whether Employer established rebuttal of the Section 411(c)(4) at either prong.

Finally, the Board addressed Employer's allegation that the ALJ erred in his treatment of Dr. Bellotte's opinion on the issue of disability causation. The Board concluded that the ALJ, in considering Dr. Bellotte's opinion, did not "address the fact that Dr. Bellotte stated that claimant's respiratory disability was due to his hiatal hernia and [gastroesophageal reflux]," and he failed to recognize that Dr. Bellotte opined "that claimant's asthma was not due to [CME] and that claimant had neither clinical nor legal pneumoconiosis . . . ." Accordingly, on remand, the Board directed the ALJ to "consider the causes of claimant's disabling respiratory impairment" and "whether Dr. Bellotte's opinion is reasoned."

In light of the above, the Board vacated the ALJ's decision and remanded the matter for further consideration.

[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]

In *Short v. Keystone Coal Mining Corp.*, BRB No. 15-0196 BLA (Feb. 24, 2016) (unpub.), which involved a survivor's claim arising out of the Third Circuit, the ALJ found the Section 411(c)(4) presumption to be inapplicable, as the miner worked for fewer than fifteen years in qualifying CME. However, the ALJ found that Claimant established that the miner died due to legal pneumoconiosis, and therefore awarded benefits.

On appeal, Employer argued that the ALJ erred in finding that Claimant established the existence of legal pneumoconiosis and death due to legal pneumoconiosis. In determining whether Claimant established existence of legal pneumoconiosis, the ALJ considered the opinions of Drs. Houser, Sood, Oesterling, Rosenberg, and Tomashefski. Drs. Houser and Sood opined that the miner had COPD/emphysema due to coal mine dust exposure and smoking, and therefore diagnosed legal pneumoconiosis. Drs. Oesterling, Rosenberg, and Tomashefski also diagnosed COPD/emphysema, but opined that the disease was due to smoking and not coal mine dust exposure. In considering these opinions, the ALJ found the opinions of Drs. Houser and Sood to be "well-documented and reasoned." In contrast, he gave less weight to the opinions of Drs. Oesterling, Rosenberg, and Tomashefski because he found their opinions to be inconsistent with the science underlying the preamble to the 2001 regulatory amendments. Therefore, the ALJ found that the medical opinion evidence established the existence of legal pneumoconiosis.

After rejecting Employer's contention that the ALJ improperly accorded less weight to Dr. Rosenberg's opinion, the Board noted its agreement with Employer that the ALJ erred in discrediting the opinions of Drs. Oesterling and Tomashefski. Specifically, although the ALJ discredited their opinions "because he found that [they] were inconsistent with the DOL's recognition that the medical literature supports the theory that 'dust induced emphysema and smoke-induced emphysema occur through similar mechanisms," he did not reference any support for his finding that these physicians "actually based their opinions on the principle that dust-induced emphysema and smoke-induced emphysema occur through

different mechanisms."[11] Therefore, the Board concluded that the ALJ's finding was not in conformance with the Administrative Procedure Act.

The Board also agreed with Employer that the ALJ "did not adequately address whether the opinions of Drs. Houser and Sood were sufficiently documented and reasoned."

In light of the above, the Board vacated the ALJ's findings regarding the existence of legal pneumoconiosis and death causation, and therefore remanded the matter for further consideration.

[The preamble to the amended regulations: Benefits Review Board; Decision of the Administrative Law Judge: Compliance with APA's requirements]

In *Sanders v. T C Bell Mining, Inc.*, BRB No. 15-0151 BLA (Jan. 13, 2016) (unpub.), which involved an unrepresented Claimant's appeal of an ALJ's denial of benefits in a miner's claim, the ALJ credited Claimant with 8.06 years of underground coal mine employment (CME). Therefore, despite finding that Claimant suffered from a totally disabling respiratory impairment, the ALJ found that Claimant was unable to invoke the 15-year rebuttable presumption of total disability due to pneumoconiosis. Furthermore, the ALJ found that Claimant was unable to establish the existence of pneumoconiosis. Accordingly, the ALJ denied benefits.

On appeal, Claimant generally challenged the denial of benefits. The Benefits Review Board initially addressed the ALJ's finding that Claimant worked for 8.06 years in qualifying CME and therefore was unable to invoke the 15-year rebuttable presumption. After affirming the ALJ's finding that Claimant's aboveground CME was not creditable, the Board turned to the ALJ's consideration of Claimant's underground CME.

According to the ALJ, Claimant could not "recount the specific beginning and ending timeframes of his employment with various companies, and often could only recall a general year date of employment." *Slip op.* at 4-5. Furthermore, the ALJ found the evidence was "unclear as to when claimant's employment started and ended with each company," and that there were "many periods in which claimant worked for less than one year with a specific employer." *Id.* at 5. The ALJ therefore accorded great weight to Claimant's SSA earnings statement and W-2 forms. In utilizing these income records to calculate the length of Claimant's CME, the ALJ used the following method, as summarized by the Board:

> The [ALJ] noted that, "where the evidence is 'insufficient to establish the beginning and ending dates of the miner's [CME], or the miner's employment lasted less than a calendar year,' it is permissible to use the formula provided by [20 C.F.R.] §725.101(a)(32)(iii)." Decision and Order at 9; *see* 20 C.F.R. §725.101(a)(32)(iii). The [ALJ] listed claimant's employers from 1979 through 1995, totaled claimant's yearly income, and then divided the yearly income by the coal mine industry's yearly average for 125 days set forth in Exhibit 610 to the *Office of Workers' Compensation Programs Coal Mine*

[11] According to the Board, Dr. Oesterling eliminated coal mine dust exposure as a cause of the miner's COPD/emphysema in light of "evidence of very minimal anthracotic pigmentation within [the miner's] lung tissue," while Dr. Oesterling observed "no correlation of the lesions of centrilobular emphysema in [the miner's] lung tissue with coal macules or with significant coal dust deposition."

(*BLBA*) *Procedure Manual*, to credit claimant with 8.06 years in underground [CME].

Slip op. at 5 (footnote indicating that Exhibit 610 also contains a daily earnings average by year omitted).

After reviewing Section 725.101(a)(32), the Board noted, without elaboration, that the ALJ "used the average *annual* earnings by year for miners who spent an actual 125 days at a mine site, rather than the *daily* average earnings by year, to credit claimant with 365 days of employment if his income exceeded the industry standard for just 125 days of work." *Id.* (emphasis in original), citing *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-3 (1996) (en banc) (McGranery, J., concurring and dissenting). The Board used the following explanatory parenthetical for the *Croucher* decision: "a mere showing of 125 working days does not establish one year of [CME]." *Id.* Despite the above, the Board affirmed the ALJ's finding that Claimant was unable to invoke the 15-year presumption "because the evidence of record is insufficient to establish the requisite fifteen years of qualifying [CME] . . . ." *Id.* at 5-6.

Moving to the merits of the case, the Board affirmed, as supported by substantial evidence, the ALJ's finding that Claimant failed to establish the existence of pneumoconiosis. Accordingly, it affirmed the ALJ's denial of benefits.

[Definition of Coal Miner and Length of CME, Bureau of Labor Statistics table – Exhibit 610 (new)]

In *Murdock v. Mountain Laurel Resources Co.*, BRB No. 15-0169 BLA (Jan. 20, 2016) (unpub.),[12] a case involving a survivor's claim, the ALJ awarded benefits pursuant to the automatic entitlement provision at Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).

On appeal, Employer alleged that the ALJ had inappropriately relied upon Section 932(*l*) in awarding survivor's benefits. In support, Employer noted that the underlying miner's claim remained pending before the OALJ; therefore, in light of Employer's request for a formal hearing before the OALJ, the District Director's award is not effective. The Board disagreed, noting that "Section 932(*l*) requires only that a miner be '*determined to be eligible to receive benefits* . . . at the time of his . . . death.'" *Slip op.* at 3, quoting 30 U.S.C. §932(*l*) (emphasis in Board decision). Furthermore, its decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), clarified that an award in an underlying miner's claim "need not be final or effective" in order to support an award pursuant to Section 932(*l*) in a related survivor's claim. *Slip op.* at 3. Therefore, the Board concluded that, "contrary to employer's contention, the miner in this case was 'determined to be eligible to receive benefits' for the purpose of determining eligibility for derivative benefits under Section 932(*l*)." *Id.* at 5.

As Employer raised no other contentions of error, the Board affirmed the award pursuant to Section 932(*l*).

[Applicability of automatic entitlement, threshold criteria]

[12] It is noted that, later in the month, the Board issued a decision that is substantially similar to *Murdock*. *See Robinson v. Lady H Coal Co.*, BRB No. 15-02212 BLA (Jan. 27, 2016) (unpub.).

In *Richardson v. J. Smith Coal, Inc.*, BRB No. 15-0051 BLA (Dec. 14, 2015) (unpub.), which involved a miner's subsequent claim, the ALJ found that Claimant, despite establishing the existence of legal pneumoconiosis and a totally disabling respiratory impairment, had failed to prove that he was totally disabled due to legal pneumoconiosis.[13] Accordingly, the ALJ denied benefits.

Claimant appealed, arguing that the ALJ erred in finding that he had not established disability causation. Employer responded in support of the denial. The Director filed a limited response, in which he argued that the Board should reverse the denial of benefits. In support, the Director posited that, "because the [ALJ] found that claimant's chronic obstructive pulmonary disease constitutes legal pneumoconiosis, and as this pulmonary disease is the sole cause of claimant's total disability, claimant has established that his pneumoconiosis is a substantially contributing cause of the disability." *Richardson*, slip op. at 2.

In addressing the arguments on appeal, the Board initially noted that the ALJ articulated the proper disability causation standard: "claimant must prove that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment." *Id.* at 4 (citing 20 C.F.R. §718.204(c); *Arch on the Green, Inc. v. Groves*, 761 F.3d 594, 25 BLR 2-615 (6th Cir. 2014)). However, the Board concluded that the ALJ applied an incorrect standard when determining whether the relevant medical opinions - namely, those of Drs. Chavda, Baker, and Houser – carried Claimant's burden to establish disability causation. The Board noted the following:

> Instead of focusing on the contribution which *pneumoconiosis* makes to claimant's total respiratory disability at Section 718.204(c)(1), the [ALJ] revisited the question of the extent to which claimant's respiratory impairment is attributable to *coal dust exposure*, which is the relevant inquiry in establishing the existence of legal pneumoconiosis pursuant to Section 718.201(a)(2).

Id. at 5-7 (emphasis included in original) (internal references omitted). According to the Board, after the ALJ found that Claimant had established the existence of legal pneumoconiosis, he should have determined "whether that condition is a substantially contributing cause of claimant's disability." *Id.* at 7.

Finally, the Board rejected the Director's contention that the denial of benefits should be reversed. If Claimant's COPD – which the ALJ found to be legal pneumoconiosis – was Claimant's only respiratory or pulmonary impairment that could have caused his total disability, the Board agreed with the Director that reversal would be appropriate. However, the Board noted that "a review of the record reveals evidence of alternate pulmonary diseases or conditions that could potentially cause or contribute to claimant's disability." *Id.* at 7. Therefore, the Board concluded that a remand was warranted in order for the ALJ "to consider all of the relevant evidence of record and determine whether claimant has established disability causation." *Id.*

Accordingly, the Board affirmed in part, and vacated in part, the ALJ's decision and remanded the matter for further consideration.

[Etiology of total disability]

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[13] The ALJ credited Claimant with thirteen years and seven months of qualifying coal mine employment (CME). The Board affirmed this finding on appeal. Accordingly, Claimant was unable to avail himself of the rebuttable 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4). The Board also affirmed the ALJ's finding of legal pneumoconiosis.

In *Stacy v. Diamond May Coal Co.*, BRB No. 15-0084 BLA (Dec. 22, 2015), which involved Claimant's request to modify a denial of benefits in a survivor's claim, the ALJ credited the miner with twenty years of surface CME in conditions substantially similar to those of an underground mine. The ALJ also found that Claimant established the miner suffered from a totally disabling respiratory or pulmonary impairment. Therefore, the ALJ found that Claimant invoked the 15-year rebuttable presumption at Section 411(c)(4). Upon finding that Employer did not rebut the presumption, the ALJ awarded benefits.

Employer appealed to the Board. Initially, the Board rejected Employer's argument that the ALJ's award of benefits based on modification in this case represented an improper modification based on a change in law. The Board noted that it "has held that modification is available to permit re-examination of entitlement in circumstances similar to those in the [present] case," and that it "has applied [the holding in *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49, 1-53 (2012),] to cases such as this involving Section 411(c)(4)." *Stacy*, slip op. at 5. The Board also rejected Employer's allegation that Claimant filed her modification request based on an improper motive: to avail herself of the 15-year presumption. Noting at the outset that Claimant had actually filed her modification request before the PPACA was enacted, the Board also stated that, "by filing a request for modification, claimant was exercising her right to pursue a claim for benefits under the Act." *Id.* Therefore, the Board concluded that "there was nothing improper about her motive in seeking modification of her denied claim." *Id.*

The Board next addressed Employer's argument that the ALJ erred in relying on the preamble to the 2001 regulations to discredit the opinions of its experts, Drs. Oesterling and Rosenberg, on rebuttal.[14] In rejecting Employer's argument, the Board concluded as follows:

> Contrary to employer's contention, when the [ALJ] discredited the opinions of Drs. Oesterling and Rosenberg on the existence of legal pneumoconiosis, he explicitly indicated that their conclusions conflicted with the following evidence from scientific studies found credible by the DOL in the preamble to the revised regulations, and cited to their location in the Federal Register: coal dust exposure and cigarette smoking cause damage to the lungs by similar mechanisms; a finding of complicated pneumoconiosis is not required before a miner's disabling obstructive lung disease can be found to be attributable to coal dust exposure; and coal dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis, even in the absence of smoking.

Id. at 6-7. Finally, the Board rejected Employer's contention that the ALJ improperly considered the science referenced in the preamble when he evaluated the credibility of its doctors' opinions. *Id.* at 7.

In light of the above, the Board affirmed the ALJ's award of benefits on modification.

[Mistake (or change) of law, not a basis for modification; General Principles of Weighing Medical Evidence: The preamble to the amended regulations]

[14] On appeal, Employer did not challenge the ALJ's finding that Claimant invoked the 15-year rebuttable presumption of total disability due to pneumoconiosis.

In *Cree v. Central Cambria Drilling Co.*, BRB No. 15-0129 BLA (Nov. 2, 2015) (unpub.), which involved a survivor's claim[15] arising out of the Third Circuit, the ALJ found that Claimant was automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), without holding a hearing.

Employer appealed and challenged Claimant's entitlement to survivor's benefits. In response, the Director requested that the Board vacate the award and remand the case to the ALJ to hold a hearing.

The Board began by summarizing the relevant regulations, noting that a hearing need not be held "if a party moves for summary judgment and the [ALJ] determines that there is no genuine issue as to any material fact and the moving party is entitled to the relief requested as a matter of law." *Cree*, slip op. at 3 (citing 20 C.F.R. §725.452(c)). Furthermore, if an ALJ "believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the [ALJ] shall notify the parties by written order and allow at least thirty days for the parties to respond." 20 C.F.R. §725.452(d). However, if any party files a timely request in response to the order, the ALJ "shall hold the oral hearing." *Id.* Finally, "[w]hile the parties may waive the right to a hearing before an [ALJ], such waiver must be in writing and filed with the Chief [ALJ] or the [ALJ] assigned to hear the case." *Cree*, slip op. at 3 (citing 20 C.F.R. §725.461(a)).

The Board concluded that, "[b]ecause the parties did not agree to a decision on the record, and no party filed a motion for summary judgment, the [ALJ] was obligated to hold a hearing before issuing his decision." *Id.* at 3-4. Therefore, the Board vacated the award of benefits and remanded the matter to the ALJ "for a hearing consistent with the aforementioned regulatory requirements." *Id.* at 4.

[Review by the Administrative Law Judge: Entitlement to a hearing]

In *Ross v. Consolidation Coal Co./Consol Energy, Inc.*, BRB No. 15-0007 BLA (Oct. 20, 2015) (unpub.), which involved a miner's claim arising out of the Seventh Circuit, the ALJ found that Claimant failed to establish the existence of (1) a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), or (2) complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the ALJ denied benefits

Claimant appealed the denial. Before the Benefits Review Board, Claimant argued that the ALJ erred in his weighing of the evidence at total disability. Employer responded in support of the denial. The Director also responded, contending the ALJ "conflated the issues of total disability and disability causation, and erred in weighing the medical opinion evidence." Therefore, the Director requested that the Board vacate the ALJ's denial of benefits and remand the matter for further consideration.

Below, the ALJ initially determined that the pulmonary function study (PFS) evidence did not support a finding of total disability, while the arterial blood gas study (ABG) evidence did support such a finding. After noting that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record, the ALJ addressed the medical opinions of Drs. Tazbaz, Tuteur, and Selby. Dr. Tazbaz opined that Claimant suffers from "a moderately severe obstructive impairment" and hypoxemia, based on Claimant's PFS and exercise ABG results. In light of these impairments, Dr. Tazbaz opined that Claimant "cannot do his activities in [his] last year of employment." Dr. Tuteur opined that Claimant's PFS results showed that he suffers from "a minimal abnormality and some air trapping." However, Dr. Tuteur did not believe that these results were "clinical[ly]

[15] At the time of the Board's decision, the underlying miner's claim was still pending before OALJ.

meaningful" or were associated with disability or reduced lung function. Dr. Tuteur opined that, while Claimant's worsening DA-aO2 gradient and oxygen tension based on the ABG testing was a "substantial finding" and demonstrated an intracardiac shunt "consistent with complications of coronary artery disease, mycardial infarctions, surgical treatment and their sequelae," Claimant does not have a pulmonary problem. Instead, Dr. Tuteur opined that Claimant is totally disabled as a result of advanced coronary artery disease. Finally, Dr. Selby agreed with Dr. Tuteur in opining "that [C]laimant is not totally disabled from a respiratory standpoint," and instead attributed Claimant's drop in PO2 to a cardiac problem.

In weighing the medical opinion evidence, the ALJ concluded that only Dr. Tazbaz believed that Claimant is totally disabled from a pulmonary perspective, while Drs. Tuteur and Selby believed that Claimant does not suffer from a pulmonary impairment that prevents him from performing his usually coal mine employment (CME). The ALJ gave less weight to Dr. Tazbaz's opinion, as he found that the physician did not "consider [C]laimant's severe cardiac issues as a potential cause of impairment and that the opinion was based solely on the doctor's own test results." The ALJ further found the opinion not well-documented.

In contrast, the ALJ gave "great weight" to the opinions of Drs. Tuteur and Selby. The ALJ was persuaded by Dr. Tuteur's opinion, as supported by that of Dr. Selby, that "[C]laimant's hypoxemia and blood gas results are 'most likely due to a right to left intracardiac shunt . . . consistent with complications of the coronary artery disease, myocardial infarctions, surgical treatment and their sequelae.'" Dr. Tuteur opined that "'[C]laimant's blood is bypassing/shunting the lungs' due to a cardiac defect." The ALJ found the opinions of Drs. Tuteur and Selby to be well-reasoned and well-documented. Accordingly, he concluded that the medical opinion evidence failed to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In weighing all of the relevant evidence together at 20 C.F.R. §718.204(b)(2), the ALJ found that, despite the qualifying ABG evidence, Claimant failed to establish that he has a totally disabling respiratory or pulmonary impairment.

The Board agreed with the Director that the ALJ improperly combined his analysis of the issues of total disability and disability causation. In support, the Board noted that the cause of Claimant's totally disabling hypoxemia, which was manifested by his qualifying ABGs post-exercise, is properly considered either at disability causation or at the second prong of rebuttal pursuant to Section 718.305(d)(1)(ii). In addition, the Board concluded that the ALJ mischaracterized Dr. Tazbaz's opinion and erred in finding his opinion to be "not sufficiently documented" because of his reliance on his own results from Claimant's physical examination. Finally, the Board concluded that the ALJ did not sufficiently explain how the reports from Drs. Selby and Tuteur were better supported by the medical evidence of record.

In light of the above, the Board vacated the ALJ's finding that the medical opinion evidence was insufficient to establish total disability and, therefore, his finding that the evidence as whole did not establish total disability. Accordingly, the Board remanded the matter for further consideration.

[Establishing total disability]

In *Mays v. Bell County Coal Corp.*, BRB No. 15-0023 BLA (Oct. 29, 2015) (unpub.), which involved a subsequent claim arising out of the Sixth Circuit, the ALJ found that Claimant established a change in an applicable condition of entitlement by proving the existence of both clinical and legal pneumoconiosis. The ALJ further found Claimant established that he is totally disabled due to pneumoconiosis arising out of his CME. The

ALJ therefore awarded benefits. Employer moved for reconsideration, which an ALJ newly assigned to the case denied.

On appeal before the Board, Employer contended that the ALJ erred in finding it to be the responsible operator (RO). Furthermore, Employer argued the ALJ erred in finding that Claimant established the existence of clinical and legal pneumoconiosis, and thereby a change in condition, and in finding that Claimant is totally disabled due to pneumoconiosis.

The Board initially addressed Employer's contention that it was not the operator that last employed Claimant for at least one year because Claimant was self-employed as a coal truck driver for at least a year following his work with Employer. The Board noted that the District Director designated Employer "as the [RO] because claimant's only employment after leaving [Employer] was as an uninsured, self-employed coal truck driver." Furthermore, the District Director noted that a self-employed coal truck driver is not required to obtain insurance, Claimant did not obtain such insurance, and Claimant "cannot be required to pay his own benefits should he be found eligible to receive benefits." The Board noted that the ALJ found no evidence that Claimant "would be capable of paying benefits." The Board concluded that the District Director "investigated whether [C]laimant was covered by black lung insurance," and that, as a coal transportation employer, Claimant was under no obligation to purchase insurance or qualify as a self-insurer. The Board concluded that Employer failed to establish, pursuant to Section 725.495(c), that Claimant was able to assume liability to pay his own benefits. Therefore, the Board affirmed the ALJ's finding that Employer was the RO.

Turning to the merits of the case, the Board affirmed the ALJ's findings that Claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis. Accordingly, the Board affirmed the ALJ's award of benefits.

[Requirements for responsible operator designation: ability to pay]

In *Johnson v. MOR Coal Inc., c/o Hughes Group, Inc.*, BRB No. 15-0014 BLA (Sept. 16, 2015) (unpub.), which involved a survivor's claim arising out of the Sixth Circuit, the ALJ awarded derivative benefits pursuant to amended Section 932(*l*), 30 U.S.C. §932(*l*).

Employer appealed the award. Before the Board, Employer argued that (1) it should be dismissed as the responsible operator (RO) because it did not receive proper notice and service of the claim, (2) it is not the RO liable for the payment of benefits, and (3) the ALJ erred in applying Section 932(*l*) to the present claim. Claimant and the Director responded in support of the award, though the Director requested that the case be remanded to the ALJ for consideration of Employer's argument that it is not the properly designated RO.

At the outset, the Board addressed Employer's assertion that it should be dismissed as the RO "because it did not receive proper notice and service of this claim . . . ." The crux of Employer's argument was that, because the District Director failed to issue a Notice of Claim, Employer's due process rights were violated and liability should be transferred to the Black Lung Disability Trust Fund. The Board agreed with Employer that the District Director failed to issue a formal Notice of Claim. However, it concluded that, because "the Proposed Decision and Order constituted actual notice of the claim, and afforded employer a fair opportunity to defend against it, employer was not deprived of due process by the district director's declination to issue a formal Notice of Claim."

Employer additionally argued that, even if its due process rights were not violated, the District Director violated 20 C.F.R. §§725.407[16] and 725.418(d)[17] by failing to notify Employer of the claim prior to issuing the Proposed Decision and Order. The Board rejected this argument as well:

> The version of the regulation at 20 C.F.R. §725.418 in effect when the district director acted contains an exception that specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order 'at any time during the adjudication' if the district director determined that its issuance would 'expedite the adjudication of the claim.' 20 C.F.R. §725.418(a)(2); *see Sextet Mining Corp. v. Whitfield*, 604 Fed. Appx. 442, (6th Cir. Mar. 12, 2015); Director's Brief at 2 n.2 [footnote omitted]. Moreover, . . . the Department of Labor recently promulgated regulations implementing amended Section 932(*l*). Those regulations make clear that a district director who determines that the claimant is a survivor entitled to benefits under Section 932(*l*) may issue a proposed decision and order at any time during adjudication of the claim, and may designate the responsible operator in the proposed decision and order, without first notifying the responsible operator of its potential liability. 20 C.F.R. §725.418(a)(3). Thus, contrary to employer's contention, the district director's issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim, was appropriate and consistent with both the former and current regulations.

However, the Board agreed that the ALJ, "[i]n declining to address employer's arguments regarding its responsible operator status," deprived Employer of the opportunity to challenge its designation as the RO. Therefore, while the Board rejected Employer's argument that it must be dismissed from the present action, the Board nonetheless concluded that it must "vacate the [ALJ's] determination that employer is responsible for the payment of survivor's benefits, and remand this case for further consideration of any arguments, and evidence, employer submits with respect to its [RO] status."

Finally, the Board rejected Employer's arguments concerning the ALJ's application of Section 932(*l*) to the present claim. Therefore, the Board affirmed the ALJ's finding that Claimant is automatically entitled to survivor's benefits pursuant to that provision. However, because it vacated the ALJ's determination that Employer is liable for the payment of Claimant's survivor benefits, the Board remanded the matter "for further consideration of employer's arguments regarding its [RO] status."

[Due process rights of the employer violated; Trust Fund held liable for payment of benefits: Delay in notice of claim] [Standards of entitlement: The survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was determined eligible to receive benefits at the time of his or her death]

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[16] According to Section 725.407, "upon receipt of the miner's employment history, and the identification of the potentially liable responsible operators, the district director 'shall notify each such operator of the existence of the claim.'" 725.407(a), (b). In addition, "[t]he district director may not notify . . . operators of their potential liability after a case has been referred to the Office of Administrative Law Judges." 20 C.F.R. §725.407(d).

[17] According to the regulation at Section 725.418(d) in effect at the time in question, "[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to [Section] 725.407 . . . ." 20 C.F.R. §725.418(d).