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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 203 October 2008

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I. Longshore

A. U.S. Circuit Courts of Appeals

***Amerada Hess Corp. v. Dir., OWCP*, __ F.3d __, 2008 WL 4399007 (5th Cir. 2008).**

Claimant filed a claim for benefits under the LHWCA based on a back injury sustained at work, and Employer paid benefits for this injury. At the hearing before an ALJ, Claimant asserted that the steroid injections used to treat his back injury caused him to gain weight, which in turn caused him to develop a heart condition. The Fifth Circuit vacated the ALJ's award of medical benefits for the heart condition, holding that the ALJ erred in applying the §20(a) presumption of causation to the alleged heart condition.

The Fifth Circuit held that "[b]ecause the statutory presumption applies only to the claim, and because the claim in this case does not reference a work-related heart injury, the ALJ and the [Benefits Review Board ("Board")] erred in applying it to Dover's alleged heart condition" (citing *U.S. Indus./Fed. Sheet Metal, Inc. v. Dir., OWCP*, 455 U.S. 608, 613 (1982)("the presumption by its terms cannot apply to a claim that has never been made")).[1] Instead, in order to receive benefits under the Act for a subsequent or "secondary" injury, a claimant must present substantial evidence that the secondary condition "naturally or unavoidably" resulted

[1] This holding is the basis of Circuit Judge Reavley's concurring opinion.

from the first covered injury, as required by the Act. *See* 33 U.S.C. §902(2). The statute does not support a presumption that any medical condition that an injured claimant suffers after a work-related injury is caused by the work-related injury. Not all "secondary" injuries are covered under the LHWCA simply because the claimant demonstrates a subsequent harm that could have stemmed from the covered injury.

Accordingly, the Court remanded the case to the ALJ for a determination of whether Claimant's heart condition "naturally or unavoidably" resulted from the treatment of his work-related back injury. The Court left it to the ALJ to consider whether such a fining requires expert testimony, but noted that it "would benefit from, if not require, support of medical experts." It further noted evidence contradicting Claimant's and his wife's testimony, credited by the ALJ, regarding the cause of his heart condition.

The Court noted that this holding is consistent with its own precedent and with the case law of other Circuits and the Board, which holds that a subsequent injury or aggravation outside work is compensable if it is the natural or unavoidable result of the original work injury, and not due to an intervening cause (citations omitted). To the extent that the Court's earlier holding in *Crescent Towing & Salvage Co. v. Collins*, 228 F. App'x 447 (5th Cir. 2007)(Unpublished) could be interpreted as approving application of the §20(a) presumption to a subsequent injury, it must be rejected.

The Court further vacated the ALJ's finding of total and permanent disability and remanded for reconsideration of this issue, as it could not say conclusively that this determination was not affected by the ALJ's finding of a compensable heart condition. Finally, the Court denied review of the judge's attorneys' fee award, as Employer waived any objections by not appealing the award to the Board.

[Topic 20.6 Section 20(a) does not apply; Topic 2.2.3 Subsequent injury]

***Stetzer v. Logistec of Connecticut, Inc.*, __ F.3d __, 2008 WL 4707535 (2nd Cir. 2008).**

Claimant filed a request for enforcement of a prior benefits award under § 14(f) of the LHWCA. Noting that ALJs lack the authority to "enforce" decisions, *see* § 18(a), the ALJ nonetheless found that the prior award did not constitute an enforceable final order, and instead modified the award pursuant to § 22. The Board affirmed the ALJ's findings, but remanded the

issue of attorney fees based on the ALJ's failure to take into account the counsel's limited success in light of the amount previously paid to Claimant.

The Second Circuit affirmed. The Court adopted the Fifth Circuit's test in holding that an ALJ's order is not final and enforceable under § 14(f) if it does not "specify the amount of compensation due or provide a means of calculating the correct amount without resort to extra-record facts which are potentially subject to genuine dispute between the parties." *Severin v. Exxon Corp.*, 910 F.2d 286, 289 (5th Cir. 1990); *see also Ledet v. Phillips Petroleum Co.*, 163 F.3d 901, 905 (5th Cir. 1998), *Lazarus v. Chevron USA, Inc.*, 958 F.2d 1297, 1303 (5th Cir. 1992). Here, the ALJ properly determined that the original award was not final and enforceable under § 14(f) because a significant amount of compensation -- i.e., compensation based on payments made to a "comparable employee" utilized in computing Claimant's benefits -- was in dispute and could not be resolved without additional proceedings. Under these circumstances, the ALJ properly modified the original award pursuant to § 22 in response to Claimant's request for enforcement of that award. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256, 92 S.Ct. 405, 30 L.Ed.2d 424 (1971); *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276-77 (2nd Cir. 2003).

Substantial evidence supported the ALJ's finding that the disputed payments made to the "comparable employee" were not wages and therefore should not have been included in calculating Claimant's benefits. The payments were not associated with hours worked, were paid in addition to hourly wages, and there was testimony indicating that such payments may have been related to the "comparable employee's" position on the board of directors of a company that leased property to employer.

In *dicta*, the Court noted that, although the Second Circuit "has not addressed the issue of whether attorney's fees may be discounted by the amount of compensation benefits previously paid by an employer, other Courts of Appeals have upheld the BRB's requirement that prior payments should not be included as part of the 'amount of benefits awarded,' 20 C.F.R. § 702.132." *See Ingalls Shipbuilding, Inc. v. Dir., OWCP*, 991 F.2d 163, 166 (5th Cir. 1993); *Dir., OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991); *Gen. Dynamics Corp. v. Horrigan*, 848 F.2d 321, 324-25 (1st Cir. 1988).

[Topic 14.4 Compensation paid under award; Topic 22.1 Modification, generally; Topic 28.1.2 Attorney's fees - Successful prosecution]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

[no cases to report]

B. Benefits Review Board

The Board vacated a denial of benefits in *D.S. v. Westmoreland Coal Co.*, BRB No. 07-1000 BLA (Sept. 30, 2008) (unpub.), a case arising in the Third Circuit. Citing to *Clites v. J&L Steel Corp.,* 663 F.2d 14 (3rd Cir. 1981), the Board held that the administrative law judge must determine whether findings on biopsy of lymph nodes ranging in size from one to two centimeters "would appear on x-ray as opacities greater than one centimeter in diameter," thus demonstrating the presence of complicated pneumoconiosis under the regulations.

Further, in weighing the evidence, the administrative law judge must also consider statements by Drs. Naeye and Hippensteel that, because there were no lesions greater then two centimeters in diameter on biopsy, there was no evidence of complicated pneumoconiosis. The Board noted, to the contrary, the following:

> The Department of Labor has declined to adopt the view that a 2 centimeter lesion on autopsy or biopsy is a prerequisite for a diagnosis of complicated pneumoconiosis, noting that there is no consensus among physicians that this criterion is valid. 65 Fed. Reg. 79,936; *Gollie v. Elkay Mining Corp.*, 22 B.L.R. 1-306, 1-311 (2003).

Finally, the Board held that, if complicated pneumoconiosis is present, the judge "must determine whether the evidence establishes that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c)."

[**complicated pneumoconiosis and its etiology**]

In *J.L.S. v. Eastern Associated Coal Co.*, BRB No. 08-0146 BLA (Oct. 24, 2008) (unpub.), the Board held that it had jurisdiction to consider Claimant's appeal, which was filed within 30 days of the administrative law judge's denial of his *second* motion for reconsideration. In so holding, the Board rejected Employer's argument that the second motion for reconsideration did not toll the time for filing an appeal with the Board.

Citing to *Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 11 B.L.R. 2-150 (7th Cir. 1988) and *Tucker v. Thames Valley Steel*, 41 B.R.B.S. 62 (2007), the Board held that, for "internal administrative appeals within an agency," the 30 day time period for Claimant to file an appeal did not commence to run until the judge finally disposed of the claim which, in this case, was upon denial of Claimant's second motion for reconsideration.

On the merits of the claim, the judge properly concluded that the evidence of record did not demonstrate the presence of a totally disabling respiratory impairment. Notably, the judge accorded little probative value to Dr. Rasmussen's finding of total disability on grounds that the physician failed to adequately explain his finding in light of the non-qualifying blood gas testing underlying his report. On the other hand, the Board upheld the judge's conclusion that Dr. Zaldivar's finding of no total disability was reasoned and documented in that it "integrates all aspects of the medical and work requirement evidence," including the non-qualifying ventilatory and blood gas testing of record.

[**time for filing appeal to the Board; reasoned and documented opinion on issue of total disability**]