U.S. Department of Labor

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

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

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 253 June 2013

Stephen L. Purcell
Chief Judge

Paul C. Johnson, Jr.
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

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

[there are no decisions to report for this month]

B. U.S. District Courts

S.D. Texas v. ACE American Insurance Co., 2013 WL 3157527 (S.D.Tex. 2013).[2]

The district court affirmed the ALJ/BRB decision awarding benefits to claimant under the Defense Base Act. Claimant sustained a back injury while working for employer, L-3 Communications/Vertex Aerospace ("L-3"), in Kuwait in 2005. He underwent back surgery and eventually returned to work in the US for a non-covered employer, Duit Construction, without any loss of wage-earning capacity. Claimant periodically experienced back "catches," the term he used to describe episodes of pain in his back, which could occur while doing everyday activities. In 2007, while working for Duit, claimant experienced a back "catch" episode when he rolled over as he was working under a vehicle. He was placed on light duty and later terminated, due in part to his back problems. The ALJ applied the § 20(a) presumption that claimant's current back condition was causally related to the initial 2005 injury. He then found that employer failed to rebut the presumption or, alternatively, claimant established that his present back condition was causally related to his 2005 injury.

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Westlaw identifier.

[2] Only the Westlaw citation is currently available.

The court observed that the Fifth Circuit has articulated somewhat different standards as to what is a supervening cause that would allow the first employer to escape liability for disability compensation when the subsequent injury occurs either outside employment or during employment for a non-covered employer. *Id.* at *3. Initially, *Voris v. Texas Employers Insurance Ass'n,* 190 F.2d 929 (5th Cir.1951), held that a supervening cause was an influence originating entirely outside of employment that overpowered and nullified the initial injury. Subsequently, in *Mississippi Coast Marine v. Bosarge,* 637 F.2d 994 (5th Cir.), *modified on other grounds and reh'g denied,* 657 F.2d 665 (5th Cir.1981), another panel held—without discussing *Voris*—that a simple "worsening" could give rise to a supervening cause. This court subsequently held that, because only an *en banc* court can overrule a previous panel's holding in this Circuit, the *Voris* standard could not have evolved into the second standard stated in *Borsarge.*

In this case, the court initially applied the more stringent *Voris* standard. Under this standard, if the second injury exacerbated or aggravated the work injury but did not overpower and nullify it, the first employer is liable. While employer relied on the testimony of Dr. Craven, he did not testify that the 2005 injury was irrelevant to the disability effect of the second injury. The case law is clear that a second injury that exacerbates or aggravates an earlier injury need not be a supervening cause of disability resulting from the second injury. The court observed that the 2005 injury resulted in back surgery. Further, prior to the 2007 injury, claimant was experiencing back "catches" triggered by innocuous activities due to the 2005 injury, for which he sought medical treatment. Thus, substantial evidence supported the ALJ's finding that rolling over under the vehicle in 2007 did not overpower and nullify the 2005 work-related back injury.

Next, the court applied the less demanding "worsening" standard under *Borsarge*. The court observed that *Shell Offshore, Inc. v. Director, OWCP,* 122 F.3d 312, 316 (5th Cir.1997), held that an aggravation or exacerbation of an existing injury does not qualify as the type of "worsening" that would give rise to a supervening cause. Here, claimant sought medical aid after the first injury and before the second. Further, he was injured while rolling over, a normal act that did not require either heavy exertion or lifting. Thus, the record supported the ALJ's decision that, at most, the 2007 injury exacerbated or aggravated the 2005 injury; it did not "worsen" claimant's condition. The 2007 injury was therefore not a supervening or intervening cause of the disability under either *Voris* or *Shell Offshore.* Accordingly, agreeing with claimant and the OWCP Director, the court upheld the ALJ/BRB's conclusion that L-3 was liable for benefits.

[Topic 20.5.1 Causal Relationship of Injury to Employment]

C. Benefits Review Board

There have been no published Board decisions under the LHWCA in June 2013.

II. Black Lung Benefits Act

In *Consolidation Coal Co. v. Director, OWCP [Bailey]*, ___ F.3d ___, Case No. 11-3637 (7th Cir. June 27, 2013), the circuit court upheld an award of benefits based on application of the 15-year presumption in a subsequent miner's claim filed after enactment of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 § 1556 (2010), where the miner's two pre-PPACA claims were denied. The court stated:

> A subsequent claim inquiry must show that 'one of the applicable conditions of entitlement' as set out in 20 C.F.R. § 725.309(d). Section 725.202(d) lists the elements of a claim, including that the claimant has pneumoconiosis as set out in § 717.202, and that this pneumoconiosis contributes to the claimant's total disability, as set out in § 718.204. These sections set out the elements of entitlement and incorporate regulatory definitions of those elements.
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> There is nothing in any of these sections that precludes the use of the 15-year presumption to show a change in condition. Indeed, these sections specifically mention that the elements of pneumoconiosis and disability causation, respectively, can be established by the 15-year presumption.

Slip op. at pp. 7-8. The court held:

> As the 15-year presumption is now built into the definitions of the elements, the 15-year presumption can be used to show a change in condition.

Slip op. at p. 8.

In addressing whether the miner's years of employment on the surface "were substantially similar to conditions in an underground mine," the court held they were. Based on testimony of the miner about the dusty conditions under which he worked, the court held the Administrative Law Judge's finding that the miner engaged in "substantially similar" employment was "in line with case law concerning outdoor but excessively dusty coal environments." After concluding Employer did not present evidence sufficient to rebut the presumption, the award of benefits in the post-PPACA subsequent claim was affirmed.

[**15-year presumption may be used to demonstrate threshold findings in a subsequent claim under 20 C.F.R. § 725.309**]

In *U.S. Steel Mining Co. v. Director, OWCP [Starks]*, ___ F.3d ___, Case No. 11-14468 (11th Cir. June 27, 2013), the court affirmed application of the automatic entitlement provisions of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1556 (2010) (PPACA) to the post-PPACA petition for modification of a pre-PPACA survivor's claim filed after January 1, 2005, which had been denied. Because the miner was finally awarded benefits on his lifetime claim, and the survivor's claim remained pending on modification on March 23, 2010, the survivor's claim was awarded on modification pursuant to the PPACA.

[**application of the automatic entitlement provisions of the PPACA to a pre-PPACA survivor's claim that was pending on modification at the time of passage of the PPACA**]

In *Westmoreland Coal Co. v. Director, OWCP [Cochran]*, ___ F.3d ___, Case No. 11-1839 (4th Cir. June 4, 2013)(Chief Judge Traxler, dissenting), the majority of a three-member panel upheld the Administrative Law Judge's award of benefits. Notably, although the miner did not suffer from clinical pneumoconiosis, it was determined the miner demonstrated total disability due to legal pneumoconiosis through the medical opinion of Dr. Rasmussen. Westmoreland argued Dr. Rasmussen's opinion was insufficient to support a finding of legal pneumoconiosis. As noted by the court:

> Westmoreland compares Dr. Rasmussen's testimony here to his testimony in another black lung case, *United States Steel Mining Co., Inc. v. Director, Office of Workers' Compensation Programs*, 187 F.3d 384 (4th Cir. 1999) ("Jarrell"), ...
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> In *Jarrell*, the ALJ had awarded survivor benefits to a claimant 'relying solely' on Dr. Rasmussen's testimony that '[i]t is possible that [the coal miner's] death could have occurred as a consequence of his pneumonia superimposed upon his chronic lung disease, including his occupational pneumoconiosis and occupationally related emphysema' and '[i]t can be stated that [the coal miner's] occupational pneumoconiosis was a contributing factor to his death.'

Slip op. at 8.

Whereas the *Jarrell* court reversed the award of benefits on grounds that "the mere possibility of causation was insufficient to support finding a nexus between a claimant's pneumoconiosis and his death," the *Cochran* court concluded the tenor of Dr. Rasmussen's report differed, and it was sufficient to support an award:

> Here, by contrast, Dr. Rasmussen did not testify that coal mine dust or cigarette smoke could be the cause of Cochran's respiratory impairment. Nor did he testify that he did not know or could not tell whether coal mine dust contributed to Cohran's respiratory impairment. Rather, Dr. Rasmussen testified that both coal mine dust and cigarette smoke were causes, affirmatively asserting 'Mr. Cochran's coal mine dust exposure must be considered a significant contributing factor to . . . what should be described as overlap syndrome . . . and that he does have at least legal pneumoconiosis, *i.e.* COPD/emphysema caused in significant part by coal mine dust exposure.'

Slip op. at 9.

Turning to the Administrative Law Judge's assessment of opinions by Employer's medical experts, Drs. Zaldivar and Hippensteel, Westmoreland argued the Administrative Law Judge improperly utilized, and incorrectly characterized, the preamble to accord less weight to their opinions:

> Westmoreland argues that the ALJ misinterpreted the Preamble to mean that smoke-induced and coal mine dust-induced respiratory impairments always are indistinguishable. According to Westmoreland, Dr. Zaldivar and Dr. Hippensteel relied on advancements in science and medicine since the implementation of the Preamble that purportedly facilitate the differentiation of coal mine dust-induced and smoke-induced emphysema, which the ALJ supposedly ignored because of how he interpreted the Preamble. In so arguing, Westmoreland overstates the ALJ's reliance on the Preamble.
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> Instead, the ALJ did not state that he would not consider Dr. Zaldivar's and Dr. Hippensteel's opinions, nor did he suggest that he was obligated to accept the scientific studies in the Preamble over any other evidence. Rather, the ALJ explained that he chose to give Dr. Rasmussen's opinion more weight in part because it aligned with the scientific findings in the Preamble. And neither Dr. Zaldivar nor Dr. Hippensteel testified as to the scientific innovations that archaized or invalidated the science underlying the Preamble. In fact, only Dr. Zaldivar cited literature that post-dates the Preamble—none of which appears to even discuss the effects of coal mine dust exposure on the lungs.

Slip op. at 12. The court also noted the Administrative Law Judge provided additional rationale for according less weight to the opinions of Drs. Zaldivar and Hippensteel, such as their focus on whether the miner suffered from

clinical pneumoconiosis without sufficiently addressing the presence or absence of *legal* pneumoconiosis.

[**use of the preamble in weighing medical opinions**]

In *Peabody Coal Co. v. Director, OWCP [Brigance]*, ___ F.3d ___, Case No. 12-3568 (6th Cir. June 10, 2013), *rev'g. Brigance v. Peabody Coal Co.*, 23 B.L.R. 1-170 (2006) (en banc), the Sixth Circuit held a miner's claim was time-barred where he "admitted that he waited seven years after a medical determination of total disability due to pneumoconiosis was communicated to him" in a state black lung claim before he filed his claim for federal black lung benefits. Citing to its decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 F. App'x. 140, 144 (6th Cir. 2002) (per curiam), the court noted the three-year statute of limitations commences to run "upon (1) a medical determination of (2) total disability (3) due to pneumoconiosis (4) which has been communicated to the miner." The *Brigance* court addressed the meaning of "medical determination" and stated:

> Although statutorily undefined, 'medical determination' is not without meaning. 'Medical determination' as used in § 932(f) plainly does not include undiagnosed or self-diagnosed cases of pneumoconiosis, even if the claimant actually has the disease. (citation omitted). The language also requires a diagnosis from a medical professional trained in internal and pulmonary medicine—*i.e.* a physician with expertise in diagnosing pneumoconiosis.
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> . . .
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> In addition, because of the progressive nature of the disease, we have held that a misdiagnosis does not constitute a 'medical determination' within the meaning of the statute. *Dukes*, 48 F. App'x. at 146 ('[I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes').

Slip op. at 5. The court added:

> Construing the text of the statute as written, we hold that when a diagnosis of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine is communicated to the miner, a 'medical determination' sufficient to trigger the running of the limitations period has been made. No more is required. Additional findings regarding whether the

> medical determination is well-reasoned or well-documented are not necessary.
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> To hold otherwise would improperly conflate the statute of limitations with the merits of the claim. Statutes of limitation are intended to stave off stale claims, not weak claims.
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> . . .
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> Whether the diagnosis is well-reasoned or otherwise accurate (whether the miner is *in fact* totally disabled due to pneumoconiosis) is irrelevant for purposes of the statute of limitations. The accuracy of the diagnosis is appropriately considered on the merits when determining a miner's entitlement to benefits.

Slip op. at 6.

Turning to the issue of whether a medical determination from the miner's state claim may be used to time-bar his federal claim, the court responded that it could. The court cited, with approval, its decision in *Dukes* wherein it was determined a medical determination of total disability due to pneumoconiosis underlying a denied claim was deemed a "misdiagnosis" and, therefore, would not time-bar the filing of a subsequent claim. However, the *Brigance* court observed:

> The misdiagnosis rule applies only 'if a miner's claim is ultimately rejected on the basis that he does not have the disease.' (citation omitted). Here, the record does not reveal the reason for the termination of (state) benefits. And, unlike in *Dukes*, Brigance's prior claim was *not* rejected; the state tribunal awarded him benefits for eight years.

Slip op. at 8.

[**miner's claim untimely under 20 C.F.R. § 725.308 based on medical opinion communicated to him in a state black lung claim**]