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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 292
November - December 2018

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

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

***Cruz v. Nat'l Steel & Shipbuilding Co.*, ___ F.3d ___, 2018 WL 6627700 (9th Cir. Aug. 2018).**

The Ninth Circuit held that borrowing employers are immune from borrowed employees' tort suits under the LHWCA, and that an employee who collected workers' compensation benefits from her primary employer, a staffing agency, was precluded from recovering in a negligence suit against her borrowing employer because there was a "one recovery" policy under the LHWCA.

Sira Cruz suffered work-related injuries while working as a tank tester aboard a Navy ship undergoing repairs. She collected workers' compensation from her primary employer, Tradesmen, a staffing agency. Then, she brought a negligence action against general contractor, Nassco, seeking recovery for the same injuries. Nassco asserted that it was immune from suit pursuant to the "one recovery" policy at the heart of workers'

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

compensation law. The district court granted Nassco's motion for summary judgment on this issue.

The Ninth Circuit affirmed. Pursuant to § 5(a), when the LHWCA applies, its remedy is "exclusive and in place of all other liability of [the] employer to the employee." Thus, an employer is immune from any suit seeking further recovery for the same injury. Further, under the borrowed employee doctrine, when one person puts his employee at the disposal and under the control of another for the performance of a particular service, the employee is to be dealt with as that of the latter and not of the former.

The court initially determined that Cruz was a borrowed employee of Nassco, because her work was subject to its direction and control. In reaching this conclusion, the court noted that Cruz had been assigned to work for Nassco for two nearly uninterrupted years, and had worked for Nassco prior to that though a different staffing agency. She attended daily meetings at which Nassco employees gave her tasks to perform, wore Nassco's ID badge, and received training from a Nassco employee. Further, Nassco had the authority to terminate Cruz's temporary employment and approved her vacation time. Although she remained on the payroll of Tradesmen, payroll status is not dispositive in borrowed employee inquiries.

Next, the court held that Nassco, as a borrowing employer, was entitled to the same immunity as a conventional employer under the LHWCA. The court noted that, in so holding, it joined the Third, Fourth, Fifth, and Eleventh Circuits, stating:

> We now expressly hold that a borrowed employee is an "employee" and a borrowing employer is an "employer" for purposes of the LHWCA, and accordingly, a borrowed employee who has been fully compensated under the LHWCA by any party has no further remedy for the same injury against her borrowing employer.

Slip op. at *5. The court reasoned that, when Congress enacted the current definition of the term "employee" in 1984, it did not include borrowed employees among the eight categories of laborers categorically excluded from coverage in § 2(3). Rather, § 2(3)(D) excludes only a narrow subset of borrowed employees: those who perform work for the borrowing employer distinct from the type of work that employer's conventional employees perform. This language reflects a policy decision by Congress to exclude some borrowed employees—but not all. *See also* 33 U.S.C.S. § 905(a)(describing the conditions under which a subcontractor's employees will be deemed employees of the contractor). The court noted that its holding is also consistent with the broader body of workers' compensation law.

The court concluded that the LHWCA provides maritime employees one guaranteed recovery for covered injuries and the district court was correct to preclude claimant from pursuing a second recovery.

[Employer-employee relationship – Borrowed employee; Exclusive remedy]

Ed. Note: In cases arising under the Black Lung Benefits Act, the Sixth and Tenth Circuits addressed challenges to the constitutional validity of the ALJs' appointment in light of *Lucia v. SEC*, 585 U.S. __ , 138 S.Ct. 2044 (2018). *See Island Creek Coal Co. v. Wilkerson*, __ F.3d __ (6th Cir. 2018); *Turner Brothers, Inc. v. Dir., OWCP* [*Conley*], No. 17-9545, 2018 U.S. App. LEXIS 34771 (10th Cir. 2018)(unpub.). These decisions are summarized below.

B. Benefits Review Board

***Motton v. Huntington Ingalls Industries, Inc.*, __ BRBS __ (2018).**

The Board affirmed the ALJ's finding that claimant, a drawing clerk, was excluded from coverage under the Act, pursuant to the clerical worker exclusion of § 2(3)(A) of the LHWCA.

Initially, the Board denied claimant's motion to vacate the ALJ's decision and to remand the case to a properly appointed ALJ, pursuant to *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044 (2018). Agreeing with the OWCP Director, the Board held that this issue was not timely raised. Claimant did not raise any issue in her initial brief to the Board concerning the ALJ's appointment under the Appointments Clause of the U.S. Constitution and thus forfeited this argument. *See* 20 C.F.R. § 802.211. The Board reasoned that "[t]he Appointments Clause issue is 'non-jurisdictional,' and is subject to the doctrines of waiver and forfeiture." Slip op. at 2, n.1 (*citing Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"))(additional citations omitted).

The Board further affirmed the ALJ's finding that claimant did not satisfy the status requirement under § 2(3). Section 2(3)(A) excludes from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work [if such persons are covered by State workers' compensation laws]."[2] The ALJ did not err by not addressing whether claimant's duties are integral to the shipbuilding process. "Claimant is not entitled to coverage under the Act if her job duties are within the clerical worker exclusion of Section 2(3)(A), even if they are integral to shipbuilding." Slip op. at 3 (citation omitted).

The Board affirmed the ALJ's finding that claimant performed "exclusively clerical" work, subject to the § 2(3)(A) exclusion. The ALJ found that claimant's duties as drawing clerk are performed exclusively in an office setting and that any forays outside of claimant's office were incidental to her clerical work. The ALJ properly distinguished *Wheeler v.*

[2] The ALJ stated that claimant is subject to coverage under state workers' compensation laws.

Newport News Shipbuilding & Dry Dock Co., 39 BRBS 49 (2005), which held that senior engineering analyst's duties "required the exercise of judgment and expertise" that goes beyond typical clerical work. The ALJ determined that claimant's job duties do not require such expertise; rather, her job is to verify administrative data and retrieve requested documents from cabinets and drawers, then check out these documents, and check them back in. The ALJ properly rejected claimant's contention she exercises independent judgment beyond that typically required of clerical work.

Accordingly, the Board affirmed the denial of coverage under the Act.

[Exclusions from Coverage - Section 2(3)(A) Clerical Workers; PROCEDURE – *Lucia v. SEC*]

***Spain v. Expeditors & Production Service Co., Inc.*, ___ BRBS ___ (2018).**

The Board affirmed the ALJ's findings that claimant met the situs requirement under § 3(a) of the LHWCA and that he also established coverage under the Outer Continental Shelf Lands Act ("OCSLA").

Claimant worked for employer as a shipping and receiving dispatcher at Anadarko Petroleum's facilities located at Port Fourchon, Louisiana, near the mouth of Bayou Lafourche. Anadarko operates two facilities at the Port, C-Port-1 and C-Port-2, which service oil and gas rigs on the Outer Continental Shelf ("OCS"). Claimant worked at C-Port-1. His duties included supervising vessel loading and unloading. Personnel were required to live in quarters located at both C-Port-1 and C-Port-2. The living quarters at C-Port-2 were about 1.5 miles from claimant's work station at C-Port-1, and 500-600 feet from the bayou. Claimant was injured when he slipped and fell in a wet hallway of a trailer that he was living in at C-Port-2. He applied for benefits under the LHWCA and the OCSLA. The ALJ found coverage under both statutes and employer appealed.

Situs Under the Longshore Act

Section 3(a) of the Act covers injuries occurring:

> upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a). The enumerated sites are all land-based structures or areas which adjoin navigable waters and are typically used in maritime activities. If a site is not "enumerated," it can qualify as an "other adjoining area" if it satisfies: (1) a geographic component and (2) a functional component. The Fifth Circuit, within whose jurisdiction this case arose, has stated that "'[i]f a general area is customarily—not necessarily exclusively

or predominantly—used for loading and unloading of vessels, all parts within it are a maritime situs,' and it is necessary to look at both a particular part of a facility's 'proximity and its interconnectedness to the loading and unloading location, along with its function' to determine if it is fair to designate a particular part of a facility as part of the situs." Slip op. at 6 (*quoting Coastal Prod. Services, Inc. v. Hudson*, 555 F.3d 426, 435, 42 BRBS 68, 71(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009)).

In this case, the ALJ found that C-Port-2 is a "marine terminal" because it is the end of a transportation line from which products are moved in and out of the facility by vessels and has structures associated with the movement of cargo from vessel to shore and shore to vessel. Employer did not contest this finding (which the Board noted was supported by substantial evidence). Rather, it contended that the living quarters where the injury occurred are not part of the marine terminal area and are not used for the maritime purposes.

The Board affirmed the ALJ's finding that claimant's injury occurred on a covered situs. Substantial evidence supported the ALJ's conclusion that the living quarters, where the injury occurred, are located within the boundaries of C-Port-2, a marine terminal. The Board reasoned that:

> The proximity, interconnectedness to the loading and unloading location, and the function of the living quarters justify the [ALJ]'s determination that they are part of the maritime situs. Personnel working at C-Port-2, including shipping and receiving dispatchers such as claimant, are required to sleep and eat in the living quarters due to their work schedules of 12 hours per day with a 24-hour on-call status. While the living quarters are separated from C-Port-2 by a security fence and there is secured access to the loading operations at C-Port-2, the living quarters are designated for use only by people working at the port and are on the same side of the public road as the loading operations, which adjoin navigable waters. Employer's operations supervisor … testified that there is a fence along the exterior of all of C-Port-2 that encloses the loading operations, the living quarters, and the internal security fences. Pictorial evidence indicates that the living quarters are not separated from the bayou or the loading operations by any other large structures.

Id. (citations to record and footnote omitted).

Coverage Under the OCSLA

Coverage under the OCSLA is separate from coverage under the LHWCA. The OCSLA covers injuries occurring as a result of operations to explore for, develop, remove, or transport natural resources from the subsoil or seabed of the OCS. The OCSLA covers an injury regardless of where it occurs as long as it has a "substantial nexus" to operations on

the OCS. *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 45 BRBS 87(CRT) (2012). A claimant is required to "establish a significant causal link between the injury that he suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS." *Id.,* 565 U.S. at 222, 45 BRBS at 93(CRT).

In this case, the ALJ found that claimant's work loading and unloading vessels was an integral part of the work performed on the OCS such that Anadarko would be substantially hampered in performing oil and gas extraction without the vessels loaded with the requisite cargo. Therefore, he concluded that claimant established a substantial nexus between his injury and the extraction of natural resources from the OCS.

The Board affirmed the ALJ's holding that claimant is covered by the OCSLA. The Board rejected employer's contention that, as in *Baker v. Gulf Island Marine Fabricators*, LLC, 49 BRBS 45 (2015), *aff'd sub nom. Baker v. Director, OWCP*, 834 F.3d 542, 50 BRBS 65(CRT) (5th Cir. 2016), claimant's work was "geographically, temporally, and functionally distant from" extractive operations on the OCS because he worked on land, did not directly perform extractive work, and was never required to travel to the OCS. The Board stated that an ALJ has broad discretion in applying the substantial nexus test of *Valladolid* to the facts of each case. In contrast to *Baker*, the ALJ found that claimant's work had an immediate and direct effect on offshore work. Although claimant was not required to travel to the OCS and performed his duties on land, substantial evidence supported the ALJ's finding that claimant's work was directly related to the extraction of resources from the OCS. Claimant supervised the loading and unloading of vessels that transported equipment and personnel to the offshore rigs. In addition, employer's supervisors testified that these duties were an integral part of the extractive process. Thus, the work claimant performed directly furthered OCS operations and was in the regular course of such operations.

The ALJ's award of benefits was affirmed.

[Section 3(a)—Situs - Enumerated Sites; The Outer Continental Shelf Lands Act]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

On December 21st, the U.S. Court of Appeals for the Seventh Circuit issued a to-be-published decision in a black lung case. *See* Consolidation Coal Co. v. Dir., OWCP [Ross], F.3d , 2018 U.S. App. LEXIS 36164 (7th Cir. Dec. 21, 2018). The matter concerned a claim filed in 2012 by a former miner with an approximate 30-year coal mine employment history. Initially, the administrative law judge ("ALJ") denied benefits based on a finding that the claimant did not establish that he suffers from a totally disabling respiratory or pulmonary impairment. However, the Benefits Review Board ("BRB") vacated the decision and remanded the matter to the ALJ for further consideration. On remand, the ALJ found that the claimant established total disability based on the arterial blood gas study and medical opinion evidence; therefore, he found that the claimant invoked the 15-year rebuttable presumption of total disability due to pneumoconiosis arising out of coal mine employment at 30 U.S.C. §921(c)(4) (2012). Finding that the employer failed to rebut the presumption, the ALJ awarded benefits. The BRB affirmed, and the employer's appeal followed.

The Seventh Circuit first addressed the employer's challenge that the BRB erred in not granting its motion to strike the Director's response brief filed during the employer's first appeal to the BRB. The basis for this motion was the employer's contention that the brief addressed issues beyond those permitted by 20 C.F.R. §802.212(b). The employer also argued that, by considering the Director's response brief, the BRB violated the Administrative Procedures Act ("APA") and due process. In disagreeing with the employer, the court concluded that the Director's brief constituted a proper response under the regulations; moreover, it was not persuaded that the BRB violated the APA and due process in denying the employer's motion to strike. The court deemed the APA violation argument to be waived and concluded that the Director's brief allowably "expounded" upon the points the claimant raised in his petition for review; furthermore, the employer had the opportunity to present its case twice to both the ALJ and the BRB.

Second, the court considered the employer's argument that the BRB's first decision must be vacated because it simply adopted the Director's arguments and findings in that decision and directed the ALJ to do likewise on remand. In rejecting this argument, the court held that the BRB "acted within its scope of review and appropriately vacated and remanded the ALJ's decision as not supported by substantial evidence in the record" and "simply instructed the ALJ on remand to 'further consider[]' the evidence." *Ross*, 2018 U.S. App. LEXIS 36164, at *38.

Third, the court dispatched with the employer's contention that the ALJ's findings as to total disability on remand were not supported by substantial evidence and were contrary to law. The court held "that the ALJ's decision to accord more weight to Drs. Tazbaz's and Tuteur's opinions — because he considered those opinions better-reasoned than Dr. Selby's and found them supported by the medical evidence —was rational, supported by substantial evidence, and in accordance with applicable law." *Id*. at *43. It therefore affirmed the ALJ's findings that the claimant established total disability and therefore invoked the 15-year rebuttable presumption.

Finally, the court upheld the ALJ's finding that the employer had failed to rebut the presumption. In so doing, it considered and rejected the employer's contentions that (1) the ALJ erred in failing to consider whether the employer could disprove the existence of clinical pneumoconiosis, (2) invocation of the 15-year presumption creates a rebuttable presumption only as to the existence of clinical pneumoconiosis, and (3) the ALJ erred in his application of the rebuttal standards.

In light of the above, the court upheld the BRB's decision affirming the ALJ's award of benefits.

[Claims processing; Establishing total disability: for claims filed after January 19, 2001]

In *Turner Brothers, Inc. v. Dir., OWCP* [*Conley*], No. 17-9545, 2018 U.S. App. LEXIS 34771 (10th Cir. Dec. 11, 2018), the U.S. Court of Appeals for the Tenth Circuit addressed an appeal of an award of benefits made pursuant to the 15-year rebuttable presumption. Of note, in a motion filed with the Tenth Circuit following the completion of briefing, Turner Brothers relied on the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), to (1) challenge the ALJ's authority to hear and decide the case, and (2) request a new hearing before a new ALJ.

The court first addressed this motion to remand. In agreeing with the Director, OWCP, it concluded that Turner Brothers' failure to raise the issue of the constitutionality of the ALJ's appointment before the agency was "fatal." In support, the court noted that the petitioner in *Lucia* had timely challenged the constitutional validity of the ALJ's appointment in that case, while in the instant case Turner Brothers failed to raise the issue before filing the motion to remand.

Moreover, the court concluded that the Sixth Circuit's decision in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018), did not support Turner Brothers' motion. While the employer in *Jones Brothers* identified the issue to the Federal Mine Safety and Health Review Commission but did not further pursue it, in the instant case "Turner Brothers did not mention this issue in its filings with the ALJ or the Board, and did not raise the issue until after it filed its brief with this court." *Conley*, slip op. at 3. The court also noted that the type of challenge raised in the motion to remand is "nonjurisdictional and may be waived or forfeited." *Id.* In support of this conclusion, the court cited to, among other decisions, the Sixth Circuit's decisions in *Jones Bros.* and *Island Creek Coal Co. v. Wilkerson*, F.3d , 2018 U.S. App. LEXIS 33856 (6th Cir. Dec. 3, 2018).

The court also refrained from addressing Turner Brothers' argument that neither the ALJ nor the BRB was able to address such a constitutional issue "because Turner Brothers does not make any constitutional challenges to the governing statutes or regulations, or to the Board's award of benefits." *Id.* at 4.

In light of the above, the court held "that Turner Brothers' 'failure to raise this argument with the Board constitutes failure to exhaust administrative remedies and deprives the Court of Appeals of jurisdiction to hear the matter.'" *Id.*, *quoting McConnell v.*

Dir., OWCP, 993 F.2d 1454, 1460 n.8 (10th Cir. 1993) (internal quotation marks omitted). It therefore denied the company's motion to remand.

Turning to the merits of the case, the court affirmed, as supported by substantial evidence, the ALJ's award of benefits pursuant to the 15-year rebuttable presumption.

Accordingly, the court denied Turner Brothers' motion to remand and petition for review.

[New: *Lucia* v. SEC]

In a published decision, the U.S. Court of Appeals for the Sixth Circuit also addressed an employer's appeal in a black lung case. *See Island Creek Coal Co. v. Wilkerson*, F.3d , 2018 U.S. App. LEXIS 33856 (6th Cir. Dec. 3, 2018). Below, the ALJ had awarded benefits, and the BRB affirmed.

The court first addressed whether the employer had timely raised the issue of the ALJ's appointment. Of note, in its reply brief filed with the court, the employer raised for the first time the issue of whether the ALJ's appointment complied with the Appointments Clause of the U.S. Constitution. The court held that the company "forfeited its Appointments Clause challenge," noting that it failed to raise the challenge in its opening brief filed with the court. Slip op. at 2. According to the court, "[t]he obligation to identify the issues on appeal in the opening brief applies to arguments premised on the loftiest charter of government as well as the most down to earth ordinance." *Id.* at 3. The court also concluded that none of the bases for excusing a forfeiture applied in the case and that it need not decide whether the employer preserved its Appointments Clause challenge before the ALJ.

Next, the court turned to the merits of the case and affirmed the ALJ's decision as supported by substantial evidence.

In accordance with the above, the court denied the employer's petition for review.

[New: *Lucia* v. SEC]

In *Robert Coal Co. & Old Republic Ins. Co. v. Dir., OWCP,* Fed. Appx. , 2018 WL 6016554 (6th Cir. Nov. 16, 2018), a panel of the U.S. Court of Appeals for the Sixth Circuit considered an appeal of a federal black lung benefits award. Below, the administrative law judge ("ALJ") found that, while the claimant had failed to establish the existence of clinical pneumoconiosis, he did establish the presence of totally disabling legal pneumoconiosis. The court affirmed the ALJ's determination that the claimant had established that he is totally disabled to legal pneumoconiosis, in the form of COPD.

B. Benefits Review Board

In *Stair v. Clinchfield Coal Co.*, BRB No. 17-0677 BLA (Nov. 26, 2018) (unpub.), the Benefits Review Board ("Board") addressed an employer's appeal of a decision awarding benefits on modification of a claim filed in July of 2005. The claim was initially denied, and a

district director thereafter denied three claimant-filed modification requests. The ALJ eventually awarded benefits on the claimant's fourth modification request, which was filed in September of 2012. This award was based on the claimant's invocation of the 15-year rebuttable presumption at 30 U.S.C. §921(c)(4) (2012).

On appeal before the Board, the employer contended that the ALJ erred in (1) admitting x-ray readings submitted by the claimant that exceeded the evidentiary limitations, and (2) finding that it did not rebut the 15-year presumption.

Addressing the employer's first contention of error, the Board noted that the regulations allow each party to submit two affirmative x-ray readings as part of a newly filed claim, as well as one additional affirmative x-ray reading for each modification request. *See* 20 C.F.R. §§725.414(a)(2)(i), 725.310(b). The Board also noted that it had previously held, in a published decision, that Sections 725.414 and 725.310(b) "work together such that, in a modification request, each party may submit the evidence allowed by 20 C.F.R. §725.310(b) and 'its full complement of medical evidence allowed by 20 C.F.R. §725.414, i.e., additional evidence to the extent the evidence already submitted in the claim proceedings is less than the full complement allowed.'" *Stair*, slip op. at 3, *quoting Rose v. Buffalo Mining Co*., 23 BLR 1-221, 1-227-28 (2007).

In his original claim and his first two modification requests, the claimant did not designate any affirmative x-ray readings. In his third modification request, although he designated three x-ray readings as his affirmative evidence, the district director admitted only of one these readings: a reading of an October 11, 2007 x-ray. In his fourth modification request, he sought to admit four new affirmative readings of x-rays dated July 21, 2011; November 11, 2012; February 2, 2016; and February 6, 2016. The ALJ admitted all four of these readings – as well as the employer's rebuttal readings – over the employer's objection.

At issue in the instant case was whether the claimant could backfill the unused affirmative x-ray slots from his original claim and the first two modification requests. The Board concluded that its holding in *Rose* "applies with equal force to subsequent modification proceedings." *Stair*, slip op. at 4. Therefore, "[i]nsofar as claimant permissibly reopened his claim by filing a subsequent request for modification, he was entitled to submit, at a minimum, one affirmative x-ray reading under 20 C.F.R. §725.310 and two additional affirmative x-rays that were still available to submit under 20 C.F.R. §725.414." *Id.* at 5, *citing Rose*, 23 BLR at 1-226-27. The ALJ thus "properly admitted at least three of claimant's new x-ray readings to account for two unused evidentiary slots from the initial claim proceeding and one additional reading permitted in this fourth modification request." *Id.* However, the Board refrained from addressing "whether a litigant may also submit additional evidence to account for unused evidentiary slots from a prior modification request under 20 C.F.R. §725.310" because it concluded that any error in the ALJ having admitted the fourth affirmative x-ray reading was harmless.[3] *Id.*

[3] The Board concluded that, in light of the manner in which the ALJ weighed the x-ray evidence, the employer had failed to explain how the "exclusion of any or all of the four new x-rays would satisfy its burden to disprove that claimant has pneumoconiosis." *Id.* at 6.

On the merits, the Board affirmed the ALJ's finding that the employer failed to rebut the 15-year presumption and, therefore, affirmed the award of benefits on modification.

[Parties allowed to "back-fill" slots]

In *Fox v. Consolidation Coal Co.*, BRB No. 17-0673 BLA (Nov. 30, 2018) (unpub.), the Board considered an appeal of an award of benefits, issued pursuant to the 15-year rebuttable presumption, in a miner's claim. Before the Board, the employer contested its designation as the responsible operator, the ALJ's finding that the claimant suffered from a totally disabling respiratory impairment, and the ALJ's exclusion of CT scans and x-rays located in the claimant's treatment records.

The Board first addressed the employer's challenge to its designation as the responsible operator. The basis for this challenge was the employer's contention that the claimant was employed by a later operator, one he owned, for at least a year. In rejecting the employer's argument, the Board concluded that the ALJ rationally found that this later employer did not meet the definition of an operator or potentially liable operator under the regulations because the "claimant also testified that he was not exposed to coal mine dust while working there." *Fox*, slip op. at 4; *see* 20 C.F.R. §§725.491(a)(2)(i), 725.494. The Board thus affirmed the ALJ's finding that the employer was properly designated as the responsible operator.

Next, the Board considered the employer's contention that the ALJ erred in finding that the claimant was totally disabled based on the qualifying arterial blood gas study evidence, which she found outweighed the non-qualifying pulmonary function studies, contrary medical opinions, and treatment records. The Board concluded that the ALJ permissibly weighed the evidence as to total disability and therefore affirmed her finding that the claimant was totally disabled. Because it also affirmed her finding of thirty years of qualifying coal mine employment, it further upheld her determination that the claimant had invoked the rebuttable presumption at 30 U.S.C. §921(c)(4) (2012).

Finally, on rebuttal the Board addressed the employer's argument that the ALJ erred in excluding particular CT scans and x-rays that were contained in the claimant's treatment records. These records were relevant, as the ALJ had discredited the opinion of one of the employer's doctors because that doctor, in opining that the claimant did not suffer from clinical pneumoconiosis, had relied upon these records; the ALJ gave his opinion less weight for relying on evidence not contained in the record. In its decision, the Board elaborated on how the records at issue came to be excluded:

> At the hearing, the administrative law judge admitted Claimant's Exhibit 2, consisting of over 200 pages of treatment records from Beckley Medical Center, pending receipt of a cover sheet explaining the relevance of the evidence and directing her attention to specific portions of the records. She advised the parties that the treatment records would be excluded if she did not receive the summary by December 5, 2016. By Order dated August 15, 2017 the administrative law judge excluded Claimant's Exhibit 2 from the record because claimant did not submit an explanatory statement identifying relevant portions of the treatment records.

Fox, slip op. at 8-9 (internal citations and footnote omitted).[4] The Board noted that the employer knew "that the treatment records would be excluded if claimant's counsel did not submit the requested explanatory statement, and it received the Order excluding the records"; however, the employer failed to object to these evidentiary rulings. *Id.* at 9. According to the Board, the "[e]mployer failed to raise the issue before the administrative law judge and cannot raise it for the first time on appeal." *Id.* Therefore, the Board affirmed the ALJ's exclusion of Claimant's Exhibit 2 and went on to affirm her finding that the employer failed to rebut the 15-year presumption.

In light of the above, the Board upheld the ALJ's award of benefits.

[Authority of the Administrative Law Judge; Untimely: Evidence excluded]

[4] In a prehearing order, the ALJ had directed that any party seeking to submit records that exceed 20 pages in length "attach a cover sheet explaining the relevance of the records to the issue(s) before me for adjudication, and directing my attention to specific entries, or portions of the records, the submitting party avers to be of particular importance." July 14, 2016 Pre-Hearing Order at 6 (emphasis in original).