

U.S. Department of Labor

Office of Administrative Law Judges
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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 312
January 2021

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Carrie Bland
Acting Associate Chief Judge for Black Lung

Yelena Zaslavskaya
Senior Counsel for Longshore

Francesca Ford
Senior Counsel for Black Lung

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

No published decisions were issued by the courts and the Benefits Review Board in January 2021.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. Unpublished decisions:

Manalapan Mining Co. v. Dir., OWCP, No. 20-3240, 2021 U.S. App. LEXIS 1609 (6th Cir. Jan. 21, 2021) (unpub.): The miner passed away while his claim was pending at the DD. His widow continued to pursue the claim on his behalf. She also filed a survivor's claim. Benefits were awarded in both claims and the Employer appealed to the OALJ.

The claim was assigned to Judge Morris, who issued a pre-hearing order in May 2017. In it, he ordered that, absent good cause, all discovery had to be completed 20 days prior to the hearing and that any evidence that was not identified and exchanged at least 20 calendar days before the hearing would be inadmissible. The order also stated that if the parties were unable to comply with this timeline, a continuance of the hearing could be requested. However, the order held that any motion made within 21 days of the hearing would be ruled on at the hearing.

The claimant filed her evidence 55 days prior to the hearing date. The Employer did not receive its evidence from Dr. Fino until 21 days prior to the hearing date. Instead, it moved the ALJ to allow it to take Dr. Fino's deposition after the hearing. The ALJ heard the motion at the hearing and, noting that Dr. Fino's report was in the record, denied the Employer's request. Thereafter, the Employer moved for reconsideration. The ALJ denied the motion for reconsideration citing the Employer's failure to explain why a fair hearing required Dr. Fino's deposition, or why it had not taken reasonable steps to obtain the deposition prior to the hearing. A decision awarding benefits was issued. The BRB subsequently affirmed the ALJ's refusal to allow the deposition post-hearing as well as the award of benefits.

On appeal to the Sixth Circuit Court of Appeals, the Employer argued that the ALJ abused his discretion and deprived it of due process because he would not hold the record open post-hearing. Specifically, it argued that the ALJ misstated and misapplied the regulation at 20 CFR §725.458 since it discusses post-hearing depositions without an "extraordinary circumstance" requirement. However, the Court pointed out that the regulation also states that the admission of such evidence is subject to the ALJ's discretion.

Further, the Court held that the ALJ did not apply abuse his discretion by not allowing a post-hearing deposition. The Employer had 8 months from when the claim was received at OALJ and 5 months from the date of the pre-hearing order to obtain the evidence from Dr. Fino. There was no indication that there was an issue with obtaining the records for the report or any intervening event that delayed receipt of his report. It also could have had Dr. Fino attend the hearing to give testimony there without a deposition. Moreover, it held that the Employer was not adversely affected by the adverse ruling since the report of Dr. Fino was already in the record.

[Admissibility of Post-Hearing Evidence]

Sextet Mining Corp. v. Martin, No. 20-3184, 2021 U.S. App. LEXIS 2524 (6th Cir. Jan. 28, 2021) (unpub.): The miner filed a claim for benefits in November 2012. Benefits were awarded in the Proposed Decision and Order. The employer requested an evidentiary hearing before an ALJ. The parties stipulated that the miner had 21 years of coal mine employment and a totally disabling respiratory impairment. As the 15 year presumption applied to the claim, the employer had the burden of proving that the miner either did not have pneumoconiosis (clinical or legal) or that his totally disabled respiratory impairment did not arise out of his coal mine employment.

The employer submitted the reports of Drs. William Houser and Peter Tuteur. Dr. Houser found that the miner had emphysema due to smoking and coal dust exposure. However, he found that it was primarily due to smoking. Dr. Tuteur found that the miner had COPD due to smoking. Although he acknowledged that it was impossible to determine whether COPD is due to smoking or coal dust exposure, he found that it was “highly unlikely” that the miner’s condition was due to coal dust exposure. In support of this opinion, he pointed to medical studies that showed that 20% of smokers who are not exposed to coal dust develop clinically significant COPD versus 1% of non-smoking coal miners.

The ALJ found that neither of these opinions were entitled to any weight since Dr. Houser did not explain why coal dust exposure did not contribute to the miner’s emphysema and since Dr. Tuteur’s opinion was based on general statistics rather on the miner’s individual picture. The BRB affirmed.

On appeal to the Sixth Circuit, the employer argued that the ALJ erred in determining the miner’s smoking history and in rejecting the reports of Drs. Houser and Tuteur. The Court found that any error in the ALJ’s determination of the miner’s smoking history was harmless since, under the 15-year presumption, the employer had the burden to rule out the existence of pneumoconiosis. Regardless of the miner’s smoking history, the employer did not carry its burden of ruling out coal dust exposure as a cause of the miner’s impairment i.e. legal pneumoconiosis. Dr. Houser stated only that smoking was the predominate cause of the miner’s impairment and did not eliminate that coal dust exposure as a cause. Dr. Tuteur’s causation findings were based on statistical probabilities rather than the miner’s actual clinical picture and were also inconsistent with the preamble. As such, the Court found no reversible error in the ALJ’s decision.

[Weighing Evidence]

B. Benefits Review Board

1. Unpublished Decisions:

[*Bryant v. Mill Branch Coal Corp.*](#), BRB No. 20-0054 BLA (January 12, 2021)(unpub.): The miner submitted two x-ray reports rebutting the x-ray from the DOL exam in addition to the two x-ray reports he submitted as his affirmative evidence. The employer argued before the ALJ that either the miner’s second rebuttal report was inadmissible or that it was also entitled to submit a second rebuttal report. The ALJ admitted both of the reports from the miner and the employer into the record in excess of the evidentiary limitations. The Board found that neither party could submit a second rebuttal of the x-ray. Although the miner indicated that his report was in rebuttal to evidence from the employer, it was not a re-reading of any of the x-rays submitted by employer. Moreover, he and the employer had already met their affirmative evidentiary limitations. Since neither party argued that the reports should be entered for good cause, the Board found that the ALJ’s evidentiary ruling was improper.

[Evidentiary Limitations]

[*Miles v. 17 West Mining, Inc.*](#), BRB No. 20-0007 BLA (Jan. 12, 2021)(unpub): The Board remanded the ALJ’s denial of benefits. The employer asked for leave to file a brief on remand. The ALJ issued an order declining briefing because the miner was not represented by counsel. Benefits were subsequently awarded.

On appeal, in addition to its argument that the ALJ erred in awarding benefits, the employer argued that the ALJ erred in not allowing it to submit a brief on remand. It argued that its rights to an adequate defense had been violated. The Board held that the employer

does not have an absolute right to submit a brief. It pointed out that the ALJ has the discretion to decide whether or not to accept briefs under 20 C.F.R. §725.455(d). Further, the Board found that the employer did not argue that the regulations violated its due process rights nor did it indicate how it was prejudiced by the ALJ's ruling. As such, the Board found that there was no abuse of discretion or violation of due process rights.

[Briefing on Remand; Due Process]

[*Melton v. Trinity Coal Corp.*](#), BRB No. 19-0515 BLA (Jan. 12, 2021)(unpub.): The ALJ found that the miner had 37 years of coal mine employment. However, he found that the miner did not establish the existence of a totally disabling respiratory impairment and denied benefits.

On appeal, the Board affirmed the ALJ's findings that the miner did not establish total disability with the pulmonary function testing, arterial blood gas values, or the report of Dr. Broudy. However, it held that the ALJ erred in finding that the treatment records did not establish total disability. The ALJ found that these records were not indicative of total disability as they did not discuss whether the miner had a totally disabling respiratory impairment. The Board stated that the opinions of the treating physicians that include medical assessments of exertional limitations e.g. arterial blood gas studies, must be considered even when they do not include specific language of total disability.

[Medical Opinion Evidence; Treatment Records; Total Disability]