



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 313
February 2021**

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Carrie Bland
Acting Associate Chief Judge for Black Lung

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

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

In a Black Lung case summarized below, *Joseph Forrester Trucking v. Director, OWCP*, 987 F.3d 581 (6th Cir. 2021), the Sixth Circuit held that an Appointments Clause challenge had to be raised before the ALJ to preserve the issue for review before the Board.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. Published decisions:

[Joseph Forrester Trucking v. Dir., OWCP](#), 987 F.3d 581 (6th Cir. 2021) decides three appeals by different Employers. In each of these cases, the BRB held that the Employers forfeited their Appointments Clause/*Lucia* challenge by failing to raise the issue before the ALJ.

In its decision, the Court stated that, in order to determine whether Employers forfeited their Appointment Clause challenges, the following formula must be employed: (1) Whether the black lung administrative scheme requires a party to exhaust issues before an ALJ; (2) If so, whether Employers properly exhausted their Appointments Clause challenges.

The Court found that the Black Lung Benefits Act does not contain any specific language requiring that issues be exhausted. However, it found that 20 CFR §725.419(b), 20 CFR §725.451, and 20 CFR §725.463 all require issue exhaustion at the ALJ level. In addition, it found that the Board's limited scope of review of ALJ decisions also indicates that issue exhaustion is required at the ALJ level. It further found that the exhaustion requirement is not contrary to the Act, does not conflict with other regulations, nor is it applied in an arbitrary or inconsistent manner.

The Court then found that Employers did not exhaust their Appointments Clause challenge before the ALJ. There was no dispute in the record that the first time the issue was raised was before the Board. Employers argued that the issue was preserved by a footnote included in the decision noting the ALJ's reappointment in response to *Lucia*. The Court said that the ALJ's recognition of the Department's response to *Lucia* did not equate to raising an affirmative *Lucia* challenge.

The Court further found that there was no basis to excuse Employers' failure to raise the issue before the ALJ. It rejected their arguments that raising the issue would have been futile. The Board stated that ALJs can entertain as-applied constitutional challenges and provide the requested relief without doing any violence to the Black Lung Benefits Act. It also rejected as speculative Employers' argument that raising the issue would risk ALJ bias. Finally, it found that the Employers' failure to raise the Appointments Clause challenge could not be excused by the intervening change in law doctrine since the issue existed prior to the *Lucia* decision.

[Forfeiture of the Appointment Clause Challenge; Issue Exhaustion]

2. Unpublished decisions: There were no unpublished appellate court decisions in February.

B. Benefits Review Board

1. Published decisions: There were no published Board decisions in February.

2. Unpublished decisions:

Reed v. Dickenson-Russell Coal Co., BRB No. 20-0104 BLA (Feb. 24, 2021)(unpub.): The ALJ found that Employer had not rebutted the presumption of timeliness in this claim. Employer appealed to the Board, which remanded to the ALJ

for further findings on the issue of timeliness. Specifically, it held that the ALJ erred in requiring the medical communications to the miner to address whether he was totally disabled from comparable work. On remand, the ALJ reviewed the doctor's statements to determine if they qualified as a medical determination of total disability due to pneumoconiosis and, if so, whether this was communicated to the miner. He found that the doctor's communications to the miner did not contain a clear diagnosis of total disability due to pneumoconiosis and awarded benefits.

Employer again appealed to the Board. The Board affirmed the ALJ's finding that the miner's deposition testimony that his doctor had told him that he was totally disabled due to pneumoconiosis was entitled to less weight than the medical records. The Board also found that the ALJ's weighing of the medical evidence on the issue was permissible. It further rejected Employer's argument that the ALJ required the miner to not be able to work and actually not working in order for the statute of limitations to apply since the ALJ permissibly found that the medical communications were insufficient to have advised the miner that he was totally disabled.

[Timeliness of claim]

Chapman v. Patrick Processing, BRB No. 20-0030 BLA (Feb. 26, 2021)(unpub.): The miner was examined in 2011 by Dr. Ammisetty for the Department-sponsored examination. As a result of that examination, Dr. Ammisetty diagnosed the miner with pneumoconiosis and total disability due to pneumoconiosis. The claim was later withdrawn. The miner testified at a deposition for his current claim that Dr. Ammisetty told him that he was totally disabled due to pneumoconiosis. Employer moved to dismiss the claim as untimely since the 3-year statute of limitations had run. At the hearing, the claimant said that Dr. Ammisetty did not tell him in person that he was totally disabled due to pneumoconiosis, but rather that he read it in his report. The ALJ found that Dr. Ammisetty's report did not diagnose total disability and that the miner's testimony addressing whether Dr. Ammisetty informed him of the total disability was inconsistent. As such, the ALJ found that Employer had not rebutted the presumption of timeliness. The Board affirmed this finding as supported by substantial evidence.

The Employer also argued that the ALJ erred in not compelling the miner to undergo arterial blood gas testing. The claimant underwent a DOL examination which included arterial blood gas testing. Thereafter, he refused to undergo arterial blood gas testing with the Employer's expert. The ALJ found that additional testing would be contraindicated based on the medical opinions of Drs. Johnson, Patnik, and Dahhan, all of whom said that additional arterial blood gas testing could cause serious complications due to the miner's health. The BRB found no abuse of discretion in the ALJ's denial of the employer's motion to compel. It further found that the ALJ did not abuse his discretion in finding that Dr. Green's ABG testing was valid.

[Timeliness of claim; Compelling Medical Testing]

Newsome v. Director, OWCP, BRB No. 0138 BLA (Feb. 25, 2021)(unpub.): The claimant filed a claim for benefits on October 31, 2018. On March 11, 2019, the District Director awarded benefits to be paid by the Trust Fund without issuing a Schedule for the Submission of Additional Evidence (SSAE). The District Director set the commencement date for the payment of benefits as November 2018. The claimant's attorney cited 20 CFR §725.303(b), which states that claims "submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefit rights would result, in which case a claim shall be considered filed as of the date of its postmark." In that case, the postmark date would prevail. The claimant's attorney

asked that the commencement date be revised to October 2018 since the postmark date was October 31, 2018. The District Director agreed with the claimant's attorney and the order was revised to include the corrected commencement date.

The claimant's attorney filed a fee petition for work performed before the District Director. The District Director issued a supplemental award of attorney's fees in which she noted that since she awarded benefits without a SSAE being issued, the Trust Fund was not liable for payment of the attorney's fees. The claimant's attorney requested reconsideration of the attorney fee award arguing that the Trust Fund was liable for the payment of the fees. The District Director denied the request as there was no adversarial relationship between the Trust Fund and the claimant as required by 20 CFR §725.367(a).

On appeal, the claimant's attorney argued that, under *Duncan v. Director, OWCP*, 24 BLR 1-154 (2010), the Trust Fund can be held responsible for attorney fees in cases where the District Director does not contest the claim. Further, he argued that the District Director's original erroneous entitlement date was a denial of benefits for the month of October. As such, he argued that there was an adversarial relationship. The Director denied the existence of an adversarial relationship between the Trust Fund and the claimant. The Board determined that since the District Director agreed without any opposition to change the date of entitlement, there was no adversarial relationship. It further held that *Duncan* did not apply since there was no adversarial relationship.

[Liability for Payment of Attorney's Fees]

Moore v. Consolidation Coal Company, BRB No. 20-0098 BLA (Feb. 17, 2021)(unpub.): The ALJ found that the claimant had established complicated pneumoconiosis and was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis.

On appeal to the Board, the Employer argued that the ALJ erred in finding complicated pneumoconiosis based upon the autopsy report of Dr. Cinco. In his report, Dr. Cinco noted "conglomerate anthracosilicotic nodules" that were 1.7 cm in diameter. He did not specifically state that the lesion was complicated pneumoconiosis or progressive massive fibrosis. The Employer argued that since Dr. Cinco did not identify the 1.7 cm lesion as pneumoconiosis, the ALJ could not rely upon it. The Board rejected this argument stating that the statute does not require a physician to use the precise words "complicated pneumoconiosis." The Board pointed out that the regulations include "anthrosilicosis" in the definition of pneumoconiosis. Additionally, in the Fourth Circuit, case law indicates that the focus should be on the description given by the physician rather than use of a legal term of art.

The Employer also argued that the ALJ's equivalency determination, *i.e.* her finding that the 1.7 cm autopsy would show up on x-ray, was not supported by the evidence. However, the Board rejected this argument as well since Dr. Caffrey specifically stated that it would appear as a large opacity on an x-ray.

[Complicated Pneumoconiosis; Equivalency Determination]

The Board also reviewed the ALJ's determination of complicated pneumoconiosis in *Werzbicke v. Consol Energy, Inc.*, BRB No. 20-0117 BLA (Feb. 24, 2021). In this case, there was no x-ray evidence in the record. The evidence included only the miner's medical records and autopsy slides. Drs. Perper and Swedarsky reviewed the autopsy slides and diagnosed a chain of conglomerate nodules measuring

at least 1.1 cm in length, but not diameter. However, they disagreed as to whether this finding constituted complicated pneumoconiosis. Dr. Rosenberg reviewed the medical records and conceded that if there was a conglomerate mass of pneumoconiosis, it would meet the pathological criteria for complicated pneumoconiosis. The ALJ found that the claimant had met her burden of establishing complicated pneumoconiosis. In so doing, he rejected Dr. Swedarsky's rationale that a lesion has to exceed 1 cm in all dimensions to classify as complicated pneumoconiosis.

The Employer argued that the ALJ erred in not adopting Dr. Swedarsky's opinion. The Board noted that Dr. Swedarsky admitted on cross-examination that the chain could be classified as an opacity exceeding 1.1 cm. Therefore, the Board held that the ALJ permissibly rejected his opinion that the chain could not be considered complicated pneumoconiosis.

[Complicated Pneumoconiosis; Equivalency Determination; Autopsy]