



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 316
June - August 2021**

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Carrie Bland
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**

A. U.S. Circuit Courts of Appeals¹

In [*Decker Coal. Co. v. Pehringer*, 8 F.4th 1123 \(9th Cir. 2021\)](#), the Ninth Circuit addressed an Appointments Clause challenge to the Department of Labor ALJs' appointments in the context of a Black Lung claim.

B. Benefits Review Board

[*Jones v. Huntington Ingalls, Inc.*, BRBS \(2021\)](#).

The Board reversed on reconsideration its prior holding in [*Jones v. Huntington Ingalls, Inc. \(Ingalls Operations\)*, 51 BRBS 29 \(2017\)](#),² and held that an audiologist is a "physician" such that claimant is permitted his initial choice of audiologist pursuant to § 7(b) of the LHWCA as a matter of statutory construction.

In *Jones*, 51 BRBS 29, the Board had held that claimant does not have a statutory right to choose his treating audiologist under § 7(b), and that the "selection of an audiologist" concerns the character and sufficiency of a medical service within the district director's scope of medical supervision pursuant to 20 C.F.R. § 702.407. It therefore remanded the case to the district director's office to address "the details of Claimant's audiological care."

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 citation to a reporter is unavailable, refer to the Westlaw identifier (*id.* at *___).

² See [Recent Significant Decisions Digest – October-November 2017](#).

On reconsideration, agreeing with claimant, the OWCP Director, and the Workers' Injury Law and Advocacy Group (which filed an amicus brief), the Board reversed its prior holding and vacated its remand order. The Board concluded that Congress intended to equate audiologists with physicians for purposes of § 7(b), based on the language of the Act, its overall framework, and its legislative history.

Statutory and Regulatory Background

Section 7(a) provides that employers shall furnish medical, surgical, and other attendance or treatment for a covered injury. Since 1972, § 7(b) has provided that the employee shall have the right to choose an attending physician. An employee's initial choice of physician plays a vital role in developing a claim with lasting implications for the treatment of the work injury. The Act does not define the term "physician." Originally promulgated in 1938, one regulatory definition covered the term for both the Federal Employees' Compensation Act ("FECA") and the LHWCA. Last revised in 1977 to incorporate changes to the FECA definition, the relevant part of the current Longshore regulation states:

The term *physician* includes doctors of medicine (MD), surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. . . . Naturopaths, faith healers, and other practitioners of the healing arts which are not listed herein are not included within the term "physician" as used in this part.

20 C.F.R. § 702.404.

However, after the agency last amended § 702.404 in 1977, Congress amended the LHWCA in 1984, equating certified audiologists with physicians for the diagnosis and treatment of hearing loss. Specifically, amended § 8(c)(13)(C) accords audiograms presumptive evidentiary weight regarding the amount of hearing loss sustained if they are administered by a licensed or certified audiologist or a physician certified in otolaryngology. The legislative history of amended § 8(c)(13)(C) confirms the importance Congress placed on the medical expertise of audiologists. To the extent the regulatory history of § 702.404 as tied to the administration of FECA suggests otherwise, it cannot trump the congressional will expressed in § 8(c)(13)(C) of the LHWCA. Further, OWCP has long administered the Act by equating audiologists with otolaryngologists for the treatment of hearing loss. On this issue, the FECA and the LHWCA diverge. In practice, claimants have long been given their choice of audiologists to provide medical care for hearing loss, regardless of the fact that the agency did not formally amend § 702.404.

Interplay between § 7(b) and Amended § 8(c)(13)(C)

Reading § 7(b) in conjunction with amended § 8(c)(13)(C) establishes Congress intended claimants to have their initial choice of treating audiologists. Because the statutory language is ambiguous, it is best understood by looking to the statutory scheme as a whole. Reading the term "physician" to include audiologists for purposes of § 7(b) best harmonizes the Act. It would be inconsistent for Congress to equate the two professions for diagnosing hearing loss in one section -- triggering statutes of limitations in two others -- but to permit a claimant to choose only an otolaryngologist to provide medical care in yet another. Moreover, reading them together fulfills the purposes of both sections as demonstrated by legislative history. Section 7(b)'s objective to allow greater patient choice applies to

otolaryngologists and audiologists with equal force. Audiologists are qualified by their education, training, and state licensure to perform the same diagnostic tests and provide the same corrective treatment for hearing loss, and are subject to the same need for confidentiality and trust. Conversely, reading the term "physician" to exclude audiologists in § 7(b) would lead to inconsistent, impractical, and costly results. A claimants would still be entitled to choose an otolaryngologist, who would likely refer the claimant to an audiologist for an audiogram and fitting of hearing aids, increasing the costs for employers.

OWCP's Interpretation of § 702.404

The agency's interpretation of § 702.404 is consistent with congressional intent after the amendment to § 8(c)(13)(C). Section 702.404 has not been revised since the 1984 Amendments to the LHWCA, and the FECA does not contain any corollaries to the status of audiologists afforded by the LHWCA. If the Longshore regulation, or OWCP's administration of it, did not account for these differences, the Department's interpretation would conflict with the statute and be unenforceable. But there is no such conflict and the Department is under no obligation to revise the regulation as the dissent suggests. It is also the best interpretation. The first and last sentences of § 702.404 provide illustrative lists, and are not exhaustive. It is more reasonable to classify audiologists with the examples of "physicians" listed in the first clause rather than to exclude them with the examples of "practitioners of the healing arts" in the last clause. Viewing the regulation in light of the statute and gathering meaning from the types of medical professions specifically included and excluded by its plain text, the Department's longstanding interpretation of § 702.404 is permissible.

In all other respects, the Board affirmed its prior decision.

Administrative Appeals Judge Boggs dissented. She reasoned that Congress did not define the term "physician," and the Department issued regulations to do so. Section 702.404 is unambiguous and does not conflict with the LHWCA -- audiologists are not "physicians" under the LHWCA. In reaching this conclusion, Judge Boggs relied on the absence of "audiologists" from the list of identified "physicians" in the regulatory definition, the regulatory history of § 702.404, and the limitation set forth in the last sentence of § 702.404. The also relied on the LHWCA's regulatory definition of "physician" historically conforming to the FECA's definition and case decisions holding that audiologists are not physicians under the FECA. In her view, the majority's interpretation is inconsistent with the regulation as written.

[Section 7 – Medical Benefits – Section 7(b), (c)—Choice of Physician and Physician Defined; Definition of Physician]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. Published decisions:

Decker Coal Co. v. Pehringer, 8 F.4th 1123 (9th Cir. Aug. 2021): Benefits were awarded to claimant by the ALJ. The employer filed a joint motion for reconsideration and motion to reopen, both of which were denied by the ALJ. The BRB affirmed the ALJ's denial of the motion, which the employer appealed to the Court of Appeals for the Ninth Circuit.

Before the court, the employer challenged the constitutionality of 5 USC § 7521 because it permits ALJ removal only for good cause as determined by the Merit Systems Protection Board. The employer, relying on *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), argued that this provided a second level of for cause removal protection and violated the principle of the separation of powers. Specifically, it argued that 5 USC § 7521 is unconstitutional because it prevents the President from removing an ALJ. The court stated that the constitutionality of 5 USC § 7521 as it applies to DOL ALJs has not been previously decided by the Supreme Court therefore it applied the general presumption of constitutionality per *United States v. Morrison*, 529 US 598, 607 (2000). It went on to find that the President has enough control over DOL ALJs to satisfy the Constitution for the reasons that follow.

First, the court found that DOL ALJs perform a purely adjudicatory function in deciding black lung claims, and, therefore, their powers are not central to the functioning of the Executive Branch. The court noted further that Justice Kavanaugh's dissent in the *Free Enterprise* decision, specifically stated that the findings would not affect the status of administrative law judges. *Id* at 699 n. 4. Second, the court said that Congress did not encroach upon the President's power since it did not require the DOL to hire ALJs to decide claims. Rather, 30 USC § 932a requires only that "qualified individuals" should be appointed. Congress did not require the DOL to use ALJs, but rather left the decision of whether to use them up to the DOL. Since the President appoints the department head of the DOL, and since the department head chose to use ALJs, the President accepted the dual for-cause removal of ALJs. Third, the President has additional control over the DOL ALJ's through the Benefits Review Board. The BRB reviews the decisions of the ALJ to ensure that they conform to the law. BRB members are appointed by the Secretary of Labor and removed at his or her discretion. The President has the power to ask the Secretary to remove a BRB member at any time. In addition, the President has the power to have the BRB remand a case back to the ALJ even without consent of the parties. Lastly, the court held that the language allowing removal of ALJ's for "good cause" in § 7521 indicates a reduced level of impingement on the President's powers. Therefore, the court found that the dual-level tenure protection of DOL ALJs as found in § 7521 is constitutional. The court went on to note that even if it had found that § 7521 was unconstitutional, they would only sever one level of protection which would not invalidate the ALJ's decision since there was no indication that he took any unlawful action. See *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

The court further found that there was no abuse of discretion by the ALJ's denial of the employer's motion for reconsideration which included its request for modification proceedings. Since 20 CFR §725.310(b) clearly prohibits the initiation of modification at the ALJ or BRB level, the ALJ's refusal to allow modification was not an abuse of discretion. Moreover, the ALJ acted within his discretion when he denied the motion for reconsideration since the employer had ample time including two extensions of time to submit evidence. Notably, the employer did not file any evidence or a post-hearing brief. Finally, the court

found that the ALJ's finding of entitlement was based on substantial evidence as the claimant successfully invoked the 15-year presumption, which the employer failed to rebut.

[ALJ removal protection; constitutionality of 5 USC § 7521]

2. Unpublished decisions:

[*Island Creek Coal Company v. Wallace Uzzle*](#), No. 20-3870 (6th Cir. June 2021) (unpub.): The employer in this claim appealed the ALJ's findings that the miner's claim was timely filed and that his total disability was due to pneumoconiosis. The miner retired from coal mining after 26 years of underground coal dust exposure. After retiring, he filed a Kentucky Workers' Compensation claim for pneumoconiosis in 2002. It was denied because the miner did not prove that he had pneumoconiosis. He did not file a federal black lung claim until 2011. His claim was initially awarded by the district director. The employer requested a hearing before an ALJ. The ALJ found that the claim was timely filed, and that the miner was totally disabled due to pneumoconiosis. The employer appealed to the Benefits Review Board, who remanded the claim for further consideration of the timeliness issue. On remand, the ALJ again found that the claim had been timely filed. The Board affirmed the award on remand.

On appeal to the Sixth Circuit Court of Appeals, the employer again argued that the claim was not timely filed per 30 USC §932(f). Specifically, the employer argued that the miner's claim was not filed within 3 years of "a medical determination of total disability due to pneumoconiosis." Per 20 CFR §725.308(a), this determination must be communicated to the miner. The employer relied upon the miner's hearing testimony where he stated that he had been diagnosed by Dr. Houser with total disability due to pneumoconiosis as early as 2000 or 2001. The ALJ found that this testimony was inconsistent and unreliable given the contradictory evidence in the record. In addition, there was no evidence in the record that Dr. Houser had examined the miner prior to 2012. Further, the only medical records in the record from the time frame referenced in the miner's testimony did not diagnose pneumoconiosis. The court therefore found that the ALJ's finding that the claim was timely was supported by substantial evidence.

The court went on to find that the ALJ's determination that the employer did not successfully rebut the 15-year presumption regarding the cause of the miner's total disability was adequately explained and supported by the evidence. The employer argued that the miner's impairment was due to asthma rather than COPD caused by exposure to coal mine dust. Although the employer filed medical reports from physicians who related the impairment to non-coal dust related causes, the ALJ found the physicians that related the impairment to COPD caused by coal dust exposure to be the most credible. The court held that the ALJ's decision was supported by substantial evidence.

[Timeliness of claim filing]

B. Benefits Review Board

1. Published decisions: There were no published Board decisions during June-August.

2. Unpublished decisions:

[*Holland v. Flatwoods Coal Company*](#), BRB No. 20-0174 BLA (June 2021) (unpub.): The employer appealed the ALJ's finding that it was the responsible operator. It argued that

the employer named in the miner's first claim was the responsible operator since it stipulated on that issue. The Board stated that before a stipulation from a previous claim could be binding, it had to be fairly entered into by the parties. The Board agreed with the ALJ and the Director that this did not appear to be the case here since the prior employer's stipulation was later retracted.

The employer further argued that it was not the responsible operator as it employed the miner for less than a calendar year. The employer argued that the ALJ erred by applying the method set forth in *Shepherd v. Incoal*, 915 F.3d 392 (6th Cir. 2019) rather than calculating the duration of employment from the beginning and end dates of his work for the employer. Citing *Shepherd*, the Board pointed out that even if the actual dates of employment are available and indicate less than a year of employment, an ALJ can still apply the *Shepherd* analysis. Further, if the miner worked for at least 125 days, he will be credited with a year of employment regardless of whether of the actual duration of employment.

[Prior RO stipulation; application of Shepherd analysis when employment records are available]

[*Hurley v. Fools Gold Energy Corp.*](#), BRB No. 20-0271 BLA (June 2021) (unpub.): The claimant worked for the employer as an underground coalminer from 2001-2003. He subsequently worked for another employer, Cavalier Mining (Cavalier), in 2005-2006. The employer was designated as the responsible operator by the District Director. Before the ALJ, the employer argued that it was not the responsible operator due to the claimant's subsequent employment with Cavalier. The claimant's earnings reflected on the Social Security Administration records indicated that he had over 125 days of employment with Cavalier using the method of calculation in 20 CFR §725.101(a)(32)(iii), but the ALJ rejected the argument.

On appeal to the Board, the employer argued that the ALJ erred in determining the length of the claimant's subsequent employment. The Board agreed. It found that she did not adequately explain the basis of her finding that the claimant did not have a year of employment with Cavalier. It noted the conflicting evidence in the record regarding the length of the claimant's subsequent employment including the Social Security Administration's records that indicated 189 days of employment under 20 CFR §725.101(a)(32)(iii); the paystub evidence from July 2005-April 2006; the claimant's employment history form from a state claim; as well as the claimant's inconsistent testimony of 1 to 3 or 4 years of employment.

The Board also vacated the ALJ's finding that the employer failed to establish that Cavalier was capable of paying benefits. It is the Director's burden to establish whether an employer is financially capable of paying an award. There was no evidence in the record to indicate that the Director had done so. In addition, there was no 20 CFR §725.495(d) statement from the District Director explaining why Cavalier was not designated as the responsible operator.

On remand, the Board also instructed the ALJ to determine the state where the claimant was last exposed to coal dust in order to determine whether to apply the law of the 4th Circuit versus the law of the 6th Circuit. The distinction is relevant in this case in order to determine the duration of the claimant's employment since the 4th Circuit has not adopted *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019). The Board affirmed the award of benefits since the ALJ's findings were supported by substantial evidence.

[Responsible operator designation]

[*Parish v. Jewell Smokeless Coal Corp.*](#), BRB No. 20-0241 BLA (June 2021) (unpub.): The miner appealed the ALJ's finding that he did not establish 15 years of qualifying coal mine employment and the resulting denial of benefits. The ALJ found that the miner worked for 36 years in surface-related employment as a supply clerk for an underground coal mine. The warehouse where he worked was not located at an active mine site, but he did deliver parts to underground mines. She found that this job was not substantially similar to work in an underground mine.

On appeal, the Board held that the ALJ erred in requiring the miner to establish that he worked in conditions substantially similar to an underground coal mine. Instead, the Board stated that the type of mine that the miner worked at, regardless of where he actually performed his duties, is determinative of whether a claimant has to show that his or her work is comparable to that of an underground miner. In other words, "a miner who worked aboveground at an underground mine site need not otherwise establish that the conditions he worked in were substantially similar to those in an underground mine." *Island Creek Ky. Mining v. Ramage*, 737 F.3d at 1058-1059 (6th Cir. 2013). Further, the Board found that the miner's work included spending 2-3 hours per day at active underground mine sites. It pointed out that a miner is not required to spend his or her entire day engaged in coal mine employment in order to be credited with a full day of mining work per 20 CFR §725.101(a)(32). Finally, the Board went on to state that even if the miner was not employed at an underground coal mine, he had established substantial similarity to underground coal mine employment through his testimony that he was regularly exposed to coal dust delivering to active underground mining sites and from the coal dust from coal truck while in the warehouse.

[Substantially similar employment]

[*Gaylor v. Consolidation Coal Co.*](#), BRB No. 20-0425 BLA (July 2021) (unpub.): This is a subsequent claim for benefits where the ALJ found that Claimant established a change in condition and awarded benefits in a decision and order on June 22, 2020. The employer filed a motion for reconsideration on July 15, 2020. The ALJ, citing 29 CFR §18.93, denied the motion for reconsideration as it was filed more than 10 days after the service of the decision. The Board found that the ALJ applied the wrong regulation. 29 CFR §18.93 applies to situations only where the governing regulation does not apply. Since 20 CFR § 725.479(b) states that a motion for reconsideration in a federal black lung claim should be filed within 30 days of an ALJ's decision, the Board found that 29 CFR §18.93 did not apply. Instead, the employer had 30 days to file the motion. As the motion in this claim was filed within 30 days of the ALJ's decision, it was timely.

[Motion for Reconsideration]

[*Branham v. Estep Coal Co.*](#), BRB No. 20-0257 BLA (July 2021) (unpub.): The claimant established 12.52 years of underground coal mine employment before the ALJ. The ALJ found that the claimant was entitled to benefits without the benefit of the presumption based upon the report of Dr. Green. The employer appealed the award to the Benefits Review Board, arguing that the ALJ erred by relying on Dr. Green's medical opinion evidence since it was based upon pulmonary function testing that indicated the incorrect height for the miner. All three of the pulmonary function tests in the record indicated differing measurements for the height of the miner. The ALJ used the miner's hearing testimony as well as his medical records to determine his height. The employer argued that

the ALJ erred because she did not average the heights listed on the pulmonary function testing.

The Board rejected the employer's argument. It stated that the ALJ was not required to average the heights listed on the pulmonary function studies. Rather, she had the discretion to use any reasonable method to resolve the conflicting reported heights. As such, her reliance upon the medical opinion evidence of Dr. Green was permissible.

[Height Discrepancies]

Lester v. Consolidation Coal Co., BRB No. 20-0182 BLA (Aug. 2021) (unpub.): The ALJ found that the miner had complicated pneumoconiosis at the time of his death and awarded survivor's benefits per 30 USC §921(c)(3) and 20 CFR §718.304. The employer appealed, arguing that the ALJ erred in finding that the miner had complicated pneumoconiosis.

Before the Board, the employer argued that the ALJ erred by weighing the x-ray interpretation of Dr. Smith as a B-reader and Board-certified radiologist because his curriculum vitae was not included in the record. The Board found that the ALJ permissibly relied upon Dr. Smith's indication on the ILO form that he was a B-reader, which she found was supported by his inclusion on the NIOSH Comprehensive B-Reader List at the time of her decision. The Board also affirmed her determination, as unchallenged, that Dr. Smith was a Board-certified radiologist.

The employer further argued that the ALJ erred in not considering the x-ray evidence from the miner's living claims. The Board rejected this argument since 20 CFR §725.309(c)(2) requires evidence from prior claims be included with subsequent claims only when the claims are filed by the same person. In addition, when, as here, there is evidence from a living miner's claim, it should not automatically be included in the survivor's claim since the two types of claims have different standards of proof and processing procedures under the Act. Instead, the parties have to designate the medical evidence from a prior living miner's claim in accordance with the evidentiary limitations in 20 CFR §725.414. Since the x-ray evidence was not designated as evidence by the parties in the survivor's claim, the ALJ did not err in finding that they should not be considered.

[Physician's qualifications; admissibility of X-ray evidence from living miner's claim]