



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 245**  
**August 2012**

*Stephen L. Purcell*  
Chief Judge

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

*Yelena Zaslavskaya*  
Senior Attorney

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Associate Chief Judge for Black Lung

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Senior Attorney

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

**A. U.S. Circuit Courts of Appeals<sup>1</sup>**

**Ed. Note:** The Fourth Circuit's decision in *Westmoreland Coal Co. v. Sharpe*, \_\_\_ F.3d \_\_\_, 2012 WL 3553629, Case No. 10-2327 (4<sup>th</sup> Cir. 2012) (*Sharpe II*) (C.J. Agee, dissenting), summarized in the Black Lung portion of this Digest, is relevant to the adjudication of Longshore claims to the extent that it interprets Section 22 of the LHWCA.

***Ramos v. Director, OWCP*, No. 11-15884, 2012 WL 3237816 (11<sup>th</sup> Cir. 2012)(unpub.)**

The Eleventh Circuit affirmed the Board's holding in *Ramos v. Container Maintenance of Florida*, 45 BRBS 61 (2011), that, contrary to the ALJ's finding, employer's facility located on Alta Drive about three miles from the deep water port on Blount Island did not meet the situs requirement of the LHWCA, as it lacked geographic nexus with navigable water. The court concluded that substantial evidence did not support the ALJ's finding that the Alta Drive facility satisfies this geographic nexus requirement. The court quoted the Board's determination that the Alta Drive facility "is not adjacent to or in the vicinity of navigable water; its location was chosen based on general business factors; the Blount Island facility is three miles away; properties closer to Blount Island were rejected as unsuitable for employer's

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<sup>1</sup> Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

purposes; and the businesses surrounding the [facility] are not maritime.” The court noted that the Board also concluded that the ALJ erred by applying the presumption of coverage under the LHWCA in this case. The court did not reach claimant’s argument that the BRB should have applied this presumption when considering the functional nexus between the Alta Drive facility and maritime activities. Like the BRB, the court found it unnecessary to consider the facility's functional nexus; and claimant made no argument that application of the presumption would alter the BRB's analysis of the geographic nexus requirement.

#### **[Topic 1.6.2 JURISDICTION/COVERAGE - SITUS - "Over land"]**

##### **B. Benefits Review Board**

There have been no published Board decisions under the LHWCA in August 2012.

## II. Black Lung Benefits Act

### A. U.S. Circuit Court of Appeals

In *Westmoreland Coal Co. v. Sharpe*, \_\_\_ F.3d \_\_\_, Case No. 10-2327 (4<sup>th</sup> Cir. Aug. 20, 2012) (*Sharpe II*) (C.J. Agee, dissenting), the Fourth Circuit upheld the Benefits Review Board's (BRB's) denial of Employer's petition for modification on grounds that its consideration would "not render justice under the Act."

#### *Sharpe I* set the stage

In *Sharpe v. Director, OWCP*, 495 F.3d 125 (4<sup>th</sup> Cir. 2007) (*Sharpe I*), the court remanded Mr. Sharpe's black lung claim and directed that, prior to consideration of Employer's petition for modification on the merits, the Administrative Law Judge must make a threshold determination regarding its propriety. To that end, the *Sharpe I* court noted:

. . . a proper exercise of discretion should lead the adjudicators to assess, in addition to the need for accuracy, the diligence and motive of Westmoreland in seeking modification . . ., the possible futility of . . . modification, and other factors that may bear on whether [modification] will 'render justice under the act.'

*Sharpe I*, 495 F.3d at 134. And, the court set forth a specific series of questions for the Administrative Law Judge to consider on remand:

Why did Westmoreland wait to seek modification under § 725.310(a) until June 2000, two months after Mr. Sharpe's death, and nearly seven years after the BRB had affirmed his living miner's award (a decision that Westmoreland never appealed)?

Should Westmoreland's motive in seeking modification be deemed suspect?

Was the Modification Request part and parcel of Westmoreland's defense in Mrs. Sharpe's claim for survivor's benefits, which had been filed less than two months earlier?

Is the Modification Request futile or moot, in that no overpayments made to Mr. Sharpe could be recovered?

Is the Modification Request akin to a request for an advisory opinion, in that a favorable resolution thereof will have no impact on the living miner's claim?

*Id.* at 133.

### The Administrative Law Judge's Findings on Remand

On remand, the Administrative Law Judge found that Employer's modification petition of the award in the miner's claim was proper. He held a hearing, admitted the miner's "Last Will and Testament", and concluded that no monies in the miner's estate could be recovered if Westmoreland prevailed in overturning the award on modification.

Nevertheless, the Administrative Law Judge concluded that filing of the petition was not futile "because reconsideration of the 1993 finding that Mr. Sharpe suffered from complicated pneumoconiosis 'might be the only way in which Westmoreland could protect itself from an automatic award of benefits in [Mrs. Sharpe's] survivor's claim.'" Here, the Administrative Law Judge explained that Mrs. Sharpe may be entitled to application of "offensive nonmutual collateral estoppel" in her survivor's claim to bar re-litigation of the existence of complicated coal workers' pneumoconiosis established in the miner's claim. In essence, he concluded, Mrs. Sharpe would be automatically entitled to benefits in her claim based on the finding of complicated coal workers' pneumoconiosis in the miner's claim.

At this point, the Administrative Law Judge held that "an employer's objective to thwart a survivor's claim (or a potential survivor's claim) is sufficient basis for finding that modification of a miner's claim is not a futile act, regardless of whether the employer could recoup the payment of benefits it made to the miner." He further concluded that only Westmoreland was prejudiced by its lack of diligence and he concluded:

. . . where a party's action is not prohibited by law it should not be precluded simply because the party is motivated by self-interest.

In the end, the Administrative Law Judge found Employer's modification petition was proper and he reversed his earlier award of benefits in the miner's claim.

### The court's reaction in *Sharpe II*

On appeal for the second time, the court emphasized that "an ALJ possesses broad – but not unlimited – discretion in ruling on modification requests." Citing to *O'Keefe v. Aerojet-Gen. Shipyards, Inc.*, 404 U.S. 254

(1971), the court agreed that “[t]he plain import” of 20 C.F.R. § 725.310 is to allow for correction of mistakes based on new evidence, cumulative evidence, or further reflection on evidence initially submitted. On the other hand, the court stressed that “due consideration must yet be given to whether modification would render justice under the Black Lung Benefits Act”, which is remedial in nature and has the purpose of providing benefits to qualified miners and their survivors. As a result, the court stated that “[t]he basic criterion is whether reopening will ‘render justice under the act.’”

In considering the propriety of Westmoreland’s modification petition, the court found that it was undisputed that the consideration of the petition was “futile” in the sense that no monies could be recovered from the miner’s estate even if Westmoreland was successful. Beyond this, the court found the motive behind the petition was “patently improper.” It noted that where “a modification request is aimed at thwarting a good faith claim or defense”, consideration of the request does not “render justice under the act.” Here, the court stated:

. . . allowing employers to regularly use modification to evade application of the collateral estoppel doctrine and the irrebuttable presumption of death due to pneumoconiosis would effectively eradicate those entrenched legal principles.

Notably, however, the court determined that it would “leave open the question of whether such an improper motive can ever be outweighed by a strong interest in accuracy underlying the modification statute.”

With regard to whether Mrs. Sharpe could invoke the doctrine of “offensive nonmutual collateral estoppel” in her survivor’s claim to bar re-litigation of the existence of complicated coal workers’ pneumoconiosis, the court held that she could. The court stated that mere filing of a modification petition by Employer in the miner’s claim did not “alter the finality” of the decision awarding benefits; rather, it “pertain[ed]” to a decision that had become final.

**[ threshold determination under § 725.310; use of offensive nonmutual collateral estoppel to bar relitigation of complicated pneumoconiosis ]**

In *Cumberland River Coal Co. v. Director, OWCP [Banks]*, \_\_\_ F.3d \_\_\_, Case No. 11-3500 (6<sup>th</sup> Cir. Aug. 8, 2012), the circuit court affirmed the Administrative Law Judge’s award of benefits based on a finding that the miner was totally disabled due to legal coal workers’ pneumoconiosis. Noting a 38 pack year cigarette smoking history and a 17 year coal mine employment history, the Administrative Law Judge weighed conflicting

medical opinions to conclude that smoking and coal dust exposure contributed to development of the miner's disabling emphysema and chronic bronchitis.

#### Threshold determination under § 725.309

Notably, the miner's first two claims were denied for failure to demonstrate the presence of pneumoconiosis. Indeed, a prior Administrative Law Judge found that the miner's respiratory disease was due solely to his history of smoking, not coal dust exposure. In the miner's third claim, the Administrative Law Judge concluded that legal pneumoconiosis was established. As a result, he determined the threshold requirement at § 725.309 that the miner must establish an element of entitlement previously adjudicated against him was satisfied.

Employer challenged the Administrative Law Judge's determination in this regard. Citing to *Sharondale Corp. v. Ross*, 42 F.3d 993 (6<sup>th</sup> Cir. 1994), the employer asserted that newly submitted evidence must differ "qualitatively" from old evidence. The court adopted the Director's position on appeal and departed from its holding in *Ross* to state:

. . . the ALJ need not compare the old and new evidence to determine a change in condition; rather, he will consider only the new evidence to determine whether the element of entitlement previously found lacking is now present.

*Slip op.* at 10. Although the court emphasized that medical opinions considered for purposes of the threshold determination must post-date denial of the miner's last claim, the fact-finder does not need to make a determination that the new evidence differs "qualitatively" from the old evidence to satisfy the threshold requirements at § 725.309.

#### Probative and non-probative components of a medical opinion

The Administrative Law Judge found that clinical pneumoconiosis was not established by x-ray evidence under § 718.202(a)(1) and, as a result, he accorded less weight to components of the opinions prepared by Drs. Forehand and Rasmussen wherein they diagnosed clinical pneumoconiosis based on x-ray data underlying their reports. The court affirmed this determination as well as the Administrative Law Judge's holding that the diagnoses of legal pneumoconiosis by Drs. Forehand and Rasmussen were entitled to "full probative weight":

[Employer] asserts that ALJ Merck's explanation for crediting the diagnosis of legal pneumoconiosis while simultaneously discrediting the diagnoses of clinical pneumoconiosis 'is not

supported by the record.’ This argument is unavailing because the definition of legal pneumoconiosis is significantly broader than that of clinical pneumoconiosis. (citation omitted). Dr. Forehand diagnoses both pneumoconiosis and chronic bronchitis. Dr. Rasmussen found that Banks suffered from respiratory impairments that he attributed, in part, to coal dust exposure. The ALJ adequately explained his reliance on the diagnosis, finding that each doctor ‘based his diagnosis on objective medical evidence, considered [Banks’] employment history and his smoking history, and explained the basis for his opinion.’ Rather than showing that he erred in finding these reports to be well-reasoned and well-documented, ALJ Merck’s rejection of the diagnosis of clinical pneumoconiosis demonstrates his careful examination of the record.

*Slip op.* at 11.

#### Miscellaneous weighing techniques affirmed by the court

The court held that the Administrative Law Judge properly accorded less weight to the opinions of Drs. Jarboe and Dahhan for the following reasons:

- Dr. Jarboe maintained that the miner did not suffer from coal dust induced emphysema because there was not enough coal dust retention shown on the chest x-rays. Here, the Administrative Law Judge properly concluded that the regulations provide legal pneumoconiosis may exist even in the absence of clinical pneumoconiosis (*i.e.* negative x-rays and CT scans).
- Dr. Jarboe cited to lack of restriction on the miner’s testing. The court agreed with the Administrative Law Judge that, under the regulations, legal pneumoconiosis may constitute an obstructive impairment, without any restrictive component.
- Dr. Jarboe cited the length of time that Claimant had stopped working in the mines as a factor against diagnosing coal dust induced lung disease. The court agreed with the Administrative Law Judge that this constituted an “impermissible factor” to consider because the regulations provide that coal dust induced lung disease “may first become detectable only after the cessation of coal mine dust exposure under § 718.201(c).
- Dr. Dahhan cited to the miner’s treatment with bronchodilator agents, which was suggestive that the miner suffered from a reversible condition, as support for his finding of no legal pneumoconiosis. However, the court agreed with the Administrative Law Judge that bronchodilator treatments

constitute an insufficient basis to conclude legal pneumoconiosis is not present.

**[ threshold determination under § 725.309; weighing medical opinion evidence; probative and non-probative components of a medical opinion ]**