U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 169
January – February 2004

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

Bar Suspension

LAWYER SUSPENDED FOR ACTIONS THAT INCLUDE MISCONDUCT BEFORE ALJ IN A LONGSHORE CASE

In Re: Joseph W. Thomas (Disciplinary Proceedings) (2003-B-2738)(February 25, 2004).

Attorney Joseph W. Thomas's three year suspension resulted after the Louisiana Supreme Court found that he incompetently handled civil cases, insulted an ALJ and disrupted another judge by shoving a lawyer against a wall. Thomas showed up more than an hour late for a hearing before Judge James Kerr, without apologizing and with what was described as a belligerent attitude. He lacked preparation to represent the family of a longshoreman killed on the job. Judge Kerr had determined that Thomas had never met with his clients before the hearing and failed to file a witness list. The Louisiana Supreme Court found that during the trial, Thomas demonstrated a complete lack of familiarity with the procedural rules of the administrative proceeding. Thomas objected to Judge Kerr questioning witnesses, calling the judge "biased" and the hearing "a joke." In its 19-page decision, the Louisiana Supreme Court found that Thomas' "insulting and abusive language toward Judge Kerr and his utter lack of preparation for this case is frankly shocking to this court."

[Topic 19.3.7 Procedure—Adjudicatory Powers—ALJ Disqualifying Attorney]

A. United States Supreme Court

Stewart v. Dutra Const. Co., ___ U.S. ___ (No. 03-814) (*Cert. granted* Feb. 23 2004).

The U.S. Supreme Court will consider whether a dredge is a "vessel" under the Jones Act. The dredge in question was used to dig a trench under Boston Harbor. The

First Circuit had held that it was not a vessel because it was not primarily used in navigation or commerce.

[Topic 1.4.3 Jurisdiction—"Vessel"]

New Orleans v. Ibos, ___ U.S. ___ (03-366)(Cert. denied January 12, 2004).

Here the U.S. Supreme Court declined to consider this *Cardillo* rule related case. The Fifth Circuit had previously held that the amounts that a widow received from LHWCA settlements with longshore employers who were not the last responsible employer were not relevant to the amount owed by the last responsible maritime employer and should not have reduced liability for the last responsible maritime employer. Thus, the Fifth Circuit's opinion stands.

[Topic 2.2.16 Occupational diseases and the Responsible Employer/Carrier]

B. Circuit Courts of Appeals

[ED. Note: The following case has been revised by the Fifth Circuit twice now. The outcome remains the same however.**]**

Moore v. ANGELA MV, ___ F.3d ___, (No. 02-30441)(5th Cir. January 21, 2004).

In this 905(b) action, the Fifth Circuit found that the non-pecuniary award (for loss of love and affection totaling $750,000) given to the surviving widow was excessive. (The couple, both approximately 50 years old, had been married for six months after having been together for seven years. They had no children.) It further held that the district court exceeded its authority in increasing the security posted in lieu of the vessel.

[Topic 5.2.1 Third Party Liability--Generally]

Newport News Shipbuilding & Dry Dock Co., (Unpublished)(No. 03-1989) (4th Cir. January 5, 2004).

The Fourth Circuit affirmed an award of de minimis in relation to an award of temporary partial disability benefits. The court noted that Section 8©, dealing with permanent partial disability was not applicable here, rather Section 8(e) was applicable and thus the ALJ was correct in considering the claimant's future earnings capacity in issuing the award.

[Topic 8.2.2 *De minimis Awards*; 8.6.1 Temporary Partial Disability—Generally]

C. United States District Courts

Mobley v. MONTCO, Inc., 2004 WL 307478 (E.D. La. February 17, 2004).

Here the federal district court judge held that the court had the power to force the plaintiff in a Jones Act case to sign a "Receipt and Release" even though the settlement agreement was not reduced to writing.

[ED. Note: The reader may want to keep in mind that the settlement of a related non-longshore action will not bar a later claim brought under the LHWCA, unless the settlement meets the requirements of Section 8(i). *Ryan v. Alaska Constructors*, 24 BRBS 65 (1990) (Claimant's claim under LHWCA was not barred by a previous settlement of a Jones Act claim entered into with his employer, involving the same injury); *see also Harms v. Stevedoring Servs. Of America*, 25 BRBS 375 (1992).**]**

[Topic 8.10.2 Section 8(i) Settlements—Persons Authorized]

Beasley v. U.S. Welding Service, Inc. (Unreported) (Civ. A. 02-2567)(E.D. La. January 20, 2004)

In this potential 905(b) case, the court found that it did not need to determine the worker's seaman status (Claimant sued under both the Jones Act and filed a 905(b) action) since he failed to carry his burden of proving that an incident occurred and that it caused his injury. The court found that the worker's version of the facts defied the laws of physics. It seems his injuries were more consistent with previous injuries.

[Topic 5.2.1Third Party Liability--Generally]

D. Benefits Review Board Decisions

Reed v. Bath Iron Works, ___ BRBS ___ (BRB No. 03-0345)(Feb. 10, 20004).

In a case of first impression, the Board held that the phrase "without an award," contained within Section 13(a) refers to payments without an award under the LHWCA. Therefore, where an employer makes any payments without an award under the LHWCA, the Section 13(a) limitations period is tolled until one year after the employer's last payment. Here an employer who had made payments pursuant to a state act, argued that the LHWCA claim was untimely since it came more than one year after the employee knew he had a work-related injury. However, the Board stated:

> It follows that employer's payment pursuant to the state compensation award constitutes a payment without an award under the Act, and that therefore the statute of limitations was tolled until one year after employer's last payment… . As employer's liability under the Longshore

> Act had not been determined at the time employer made its payments to claimant under the state award, those payments are considered advanced payments of compensation with regard to employer's potential liability under the Act. Therefore, they are payments without an award for purposes of Section 13(a). Section 14(j) of the Act, 33 U.S.C. 914(j), has been construed so that any payments by employer intended as compensation may be considered "voluntary" so as to permit employer a credit under the Act....Thus, whether paid purely voluntarily or as a result of an award under another compensation system, the status of payments made without a Longshore award is the same. Where no award under the Act has yet been entered, a payment by an employer intended as compensation for claimant's injury must be considered an advance, i.e. voluntary payment of compensation under the Act.

[Topics 13.1 Time for Filing of Claims--Generally; 13.1.1 Voluntary Payments]

Keys v. Ceres Gulf, Inc., (Unpublished)(BRB No. 03-0745) (Jan. 30, 2004).

While this matter was on appeal, the employer moved for a partial remand, noting that it had reached an 8(i) settlement but also requesting that it be allowed to pursue its appeal regarding Section 8(f). The Director asserted that employer's signed settlement with the claimant precluded the employer from obtaining Section 8(f) relief and required dismissal of the appeal. Agreeing with the director, the Board noted that there is no procedural mechanism for bifurcating an appeal.

The Board, denying the employer's motion for partial remand, remanded the full case for consideration of the settlement agreement. The Board stated:

> If the settlement is approved and establishes compensation due for any period for which the Special Fund could be liable if Section 8(f) relief were granted, then employer's continuation of its appeal is precluded by Section 8(i)(4). If, however, the approved settlement affects only employer's liability, i.e., the Fund cannot be liable for reimbursement to employer of any sums due under the settlement, then employer may seek reinstatement of its appeal. In this event, or in the event that the proposed settlement is not approved, employer may request reinstatement by filing notice with the Board...

[Topics 8.7.9.2 Special Fund Relief—Timeliness of Employer's Claim for Relief; 8.7.9.6 the Effect of Settlements and Stipulations; 8.10.1 Section 8(i) Settlements—Generally; 8.10.3 Structure of Settlement; 8.10.6 Withdrawal of Claim/Settlement Agreement; 8.10.9 Section 8(f) Relief]

Lacy v. Southern California Ship Services, ___ BRBS ___ (BRB No. 03-0381)((Feb. 23, 2004).

Here the Board upheld the ALJ's determination that there was substantial evidence to support a finding that the claimant was a longshoreman, rather than a seaman. The claimant's duties incorporated stereotypical tasks of both longshoremen and seamen. He worked as a rigger and deckhand for the employer and was in the process of loading cargo from one of employer's boats onto a ship anchored outside the breakwaters of the Los Angeles/Long Beach Harbor when a swinging pallet hit him and caused injury to his back. The employer's primary business is to provide water taxi and supply service to vessels at anchor in the harbor.

While the claimant was called a "deckhand" he performed duties both on land and aboard vessels. Claimant worked 35 per cent of his work time on vessels and 65 percent on land. The land time included time preparing cargo and vessels to be launched as well as disposal and clean up after docking. When the claimant was assigned to a vessel, he and another deckhand would prepare the cargo nets and pallets for loading, including getting them from the storage area, using forklifts to load them onto the nets, and using a crane to load them onto the vessels. The claimant would handle the dock lines upon leaving and returning to the dock, and he would ride in the vessel to deliver the supplies or passengers to the ship. His main duty in transport was to be sure the supplies were secure, and he typically would have time to drink coffee during the ride. Once the vessel arrived at the ship, he would assist in loading the supplies onto the ship, or help transfer passengers to/from the ship.

The Board noted that the ALJ had correctly found that while the claimant met the first prong of the *Chandris* test (contributing to the function of the vessel and the accomplishment of its mission) he could not meet the second prong (a substantial connection to a vessel or fleet of vessels). While recognizing that the claimant's 35 percent of time spent on boats exceeded the 30 percent rule of thumb set forth by the Fifth Circuit, the ALJ had stated that time alone does not satisfy the inquiry. Rather, the ALJ found that the connection must also be substantial in nature, and he found that the claimant's on-board work was not "primarily sea-based" work. The ALJ determined that the claimant's "vessel-related" duties were "secondary and minor compared to his regular occupation as a loader and unloader" and that these longshore duties were "neither primarily sea-based nor inherently vessel related."

While upholding the ALJ, the Board however pointed out that a claimant's duties should not be segregated into steering/maintenance duties and loading/unloading duties. The Board stated that it needed only to address whether the ALJ rationally relied upon the Ninth Circuit's language to ascertain whether the claimant's connection to the employer's fleet was substantial. In assessing whether the claimant's duties were "sea-based" or "vessel-related," the ALJ determined that the bulk of the claimant's job required him to perform land-based loading, unloading, storing and disposing of items transported by the employer's vessels. The Board stated, "As this work is performed on

land, the [ALJ] rationally concluded it was not "sea-based. Moreover, the [ALJ] found that claimant did not sleep on the vessels, was more often assigned to land jobs because of his skills, and did not get paid per vessel trip but was a regular hourly employee. Thus, in ascertaining whether claimant's connection to employer's fleet was substantial in nature, it was rational for the {ALJ] to rely on Ninth circuit language and to conclude that the connection was not substantial in nature."

[Topics 1.4 LHWCA v. Jones Act—Generally; 1.4.2 Master/member of the Crew (seaman)]

Richardson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0355)(February 17, 2004).

There are two significant issues in this matter, both involving Section 33. First, at issue is whether Section 33(g) can bar a claim for COPD disability when a claimant suffers from both a non-asbestos related COPD condition, plus an asbestos related condition and the claimant accepted third party settlements in relation to his asbestos related lung disease. Second, at issue is the classification of a claimant who is only undergoing medical monitoring (as opposed to receiving benefits/compensation) when it comes to whether that person is a "person entitled to compensation." While this case was ultimately remanded, it is nevertheless significant for its illustration of the Board's views.

The claimant originally alleged that he contacted an asbestos-related lung disease as a result of exposure to asbestos dust and fibers, and chronic obstructive pulmonary disease (COPD) from exposure to welding smoke and paint fumes, during the course of his approximately 30 years of work for the employer. The claimant had filed a claim for asbestosis in 1995 and for COPD in 1999, which were eventually consolidated. At the OALJ hearing, the claimant averred that he did not presently have asbestosis and thus he sought to amend his asbestos claim to seek only an award for medical monitoring under Section 7 of the LHWCA. While his longshore claims were pending, the claimant became involved in third party litigation and entered into two third party settlements. The employer argued that Section 33(g) should apply and bar the claimant's recovery since he had entered into the settlements without the employer's prior written approval.

The board first addressed the issue of whether a claimant recovering only medical monitoring for an asbestos-related condition is a "person entitled to compensation." In resolving this issue, the Board found that the ALJ rationally looked to the evidence in existence as of the date of the settlements in order to determine if the claimant satisfied the prerequisites to the right to recover. The evidence at that point in time supported the ALJ's finding that as of the date the claimant stopped working, the claimant was aware of the relationship between his work-related asbestosis and his inability to work. At that point in time, there was medical evidence noting the existence of a condition "consistent with asbestos."

The claimant withdrew his claim for disability benefits for asbestosis, ostensibly on the ground that the later medical evidence could not support a finding of either asbestosis or disability due to asbestosis. Nonetheless, the Board noted that the ALJ addressed the medical evidence as a whole and concluded that the claimant had asbestosis, asbestos-related pleural plaques, and both a restrictive and an obstructive lung impairment due to simultaneous work exposure to asbestos, smoke, dust, and welding fumes, and which combined with the claimant's pre-existing asthma to render him totally disabled. Further more, the Board noted that the ALJ concluded that the claimant's disability due to his lung condition was the same disability for which he settled his third party claims and therefore fond the disability claim under the LHWCA barred, because of the third party settlements.

The Board explained that it could not affirm this finding. The Board remanded with instructions to make findings consistent with *Chavez v. Director, OWCP*, 961 F.2d 1409, 25 BRBS 134 (CRT) (9th Cir. 1992) (Claimant developed asbestosis and hypertension. Ninth Circuit: An employee who is totally disabled based on either injury alone could recover from the employer under either injury. Therefore to allow an employer set-off for third party proceeds received under one injury would result in a windfall for the employer because the employee could have sought recovery under the other injury for which no third party proceeds are awardable. Such an interpretation in effect would reward the employer for causing two work-related disabilities instead of one.); *on remand*, *Charvez v. Todd Shipyards Corp*., 27 BRBS 80 (1993) (McGranery, J., dissenting), *aff'd on recon. En banc*, 28 BRBS 185 (1994) (Brown and McGranery, J.J. dissenting), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 139 F. 3d 1309, 32 BRBS 67 (CRT) (9th Cir. 1998).

The Board further instructed the ALJ to then determine the applicability of Section 33(g) based on these findings. "Only if asbestosis is claimant's only work-related disability can Section 33(g) be invoked to bar claimant's claim." The Board further noted that, "Although claimant withdrew his claim for disability benefits due to asbestosis, employer nevertheless may attempt to establish, in support of its claim, that Section 33(g) applies, that claimant's disability is due to asbestosis alone."

The Board went on to state, "If after reviewing the medical evidence in light of *Chavez*, the [ALJ] again finds that claimant is disabled by both asbestosis and COPD, Section 33(g) cannot bar the claim because, under the aggravation rule, COPD is considered to be the disabling, compensable condition and therefore not the same disability for which claimant settled his third party claims." Thus, the Board vacated the ALJ's finding that Section 33(g) bars the claimant's COPD and remanded the case for consideration of the entire record to discern the cause of the claimant's disability.

The Board also found that, under the circumstances, the claimant's claim for medical monitoring for any asbestos-related condition cannot be barred by Section 33(g)

because, ultimately, the claimant is not entitled to disability compensation for asbestosis; a person entitled only to medical benefits is not a "person entitled to compensation for purposes of Section 33(g).

[Topics 33.6.1 Compensation For Injuries Where Third Persons Are Liable--"Person Entitled to Compensation" Pursuant to Section 33(f); 33.7 Insuring Employer's Rights-Written Approval of Settlement]

Rodriguez v. Columbia Grain, Inc., (Unpublished)(BRB No. 03-0376)(February 23, 2004).

Here the Board vacated an ALJ's Order to compel Appearance at Medical Examination. When the employer replaced a scheduled panel's psychiatrist with a neuropsychologist the claimant refused to attend, arguing that his claim was only for a purely physical injury. When the ALJ issued an Order to Compel,, the claimant appealed. While finding that an ALJ has broad discretion, the Board noted that Section 18.14(a) of the OALJ Rules of Practice mandates that matters sought to be discovered be relevant to the subject matter involved in the proceeding. "The [ALJ's] summary conclusion in his Order does not sufficiently explain how the psychological component of the examination is relevant to these proceedings. Moreover, claimant specifically raised this question below, asserting that since his claim for benefits under the Act is based upon a physical injury alone, an employer-sponsored psychological examination is not relevant to his claim of a work-related back injury. The [ALJ] did not discuss claimant's arguments in this regard or explain how the psychological evaluation of claimant is relevant to his claim. As the [ALJ] did not address claimant's assertions, which go directly to the relevancy of employer's discovery request, the case must be remanded."

[Topics 7.7 Unreasonable Refusal To Submit To Treatment; 19.3.6.2 Discovery]

E. Other Jurisdictions

Koch v. R.E. Staite Engineering, Inc., (Unpublished), 2004 Cal. App. Unpub. LEXIS 898 (D041657)(Court of Appeal of California, fourth Appellate District, Division One) (January 29, 2004).

In this 905(b) related matter, the injured worker was a commercial diver and marine construction worker employed injured in an underwater industrial accident while he was repairing the decaying wall of a quay at a San Diego Navy base near a self-propelled barge owned by his employer. This is the de novo appeal of a summary judgment issued in favor of the employer which had found that the undisputed material facts showed that the accident occurred during marine construction activity due to co-workers' acts and not in the employer's capacity as vessel owner.

The court noted that Section 905(b) of the LHWCA authorizes certain covered employees to bring an action against the vessel as a third party if their employment-related injury was caused by the negligence of the vessel. It found that the employer here was a "dual-capacity" employer and that liability in vessel negligence under Section 905(b) will only lie where the dual-capacity defendant breached its duties of care while acting in its capacity as vessel owner. Thus, the analysis must determine whether the negligent actions of a dual-capacity defendant's employees were undertaken in pursuance of the defendant's role as vessel owner or as employer. The court found here that the conclusion was correct that the actions had been taken by co-workers in pursuance of the employer's role as an employer. Thus the summary judgment decision was upheld.

[Topic 5.2.1 Third Party Liability]

II. Black Lung Benefits Act

A. United States Supreme Court

In *Doe v. Secretary of Labor*, ___ S.Ct. ___, Case No. 02-1377 (Feb. 24, 2004), the Supreme Court held that Buck Doe's claim for minimum damages of $1,000 under the Privacy Act at 5 U.S.C. § 552a(g)(4) failed because the statute requires that a plaintiff suffer "actual damages" to recover under the Act. Buck Doe, however, presented no corroborating evidence for his claim of emotional distress.

The case arose from the use of social security numbers on multi-captioned notices of hearings by the Department's Office of Administrative Law Judges (OALJ). The notices were utilized to advise parties and their counsel of hearing dates and times. The Department agreed to discontinue their use. A dispute remained, however, regarding whether the claimants were each automatically entitled to $1,000 in damages.

The Court held that "'entitlement to recovery' necessary to qualify for the $1,000 minimum is not shown merely by an intentional or willful violation of the Act producing some adverse effect"; rather, "[t]he statute guarantees $1,000 only to plaintiffs who have suffered some actual damages."

[Privacy Act—demonstrating "actual damages" required for recovery]

B. Circuit Courts of Appeals

In *Midland Coal Co. v. Director, OWCP [Shores]*, ___ F.3d ___, Case No. 02-2734 (7th Cir. Feb. 18, 2004), the ALJ's award of benefits in a multiple claim was affirmed.

Pneumoconiosis is latent and progressive. Employer unsuccessfully challenged the ALJ's finding that pneumoconiosis can be progressive and latent under the amended regulations at 20 C.F.R. § 718.201(c), which states that pneumoconiosis may be "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." The court noted that the issue of "[w]hether pneumoconiosis . . . is a disease that can be latent and progressive is a scientific question," but the "Department of Labor's regulation reflects the agency's conclusion on that point" and the agency's regulation is entitled to deference.

The Seventh Circuit cited to *National Mining Association v. Department of Labor*, 292 F.3d 849, 863 (D.C. Cir. 2002), wherein the D.C. Circuit Court of Appeals noted that "latent and progressive pneumoconiosis is rare, occurring in a small percentage of cases by all accounts." Employer used this holding by the D.C. Circuit to argue that "a claimant bringing a subsequent application must prove that she suffers from the particular kinds of pneumoconiosis that have been found in the medical literature to be progressive and/or latent." The Seventh Circuit disagreed and held that the amended regulation is designed to "prevent operators from claiming that pneumoconiosis is *never* latent and progressive." As a result, the court declined to require that Claimant present medical evidence that the miner's pneumoconiosis was "one of the particular kinds of pneumoconiosis that are likely to manifest latent and progressive forms."

Establishing "material change in conditions." The court upheld the ALJ's determination that the miner established a "material change in conditions" since the denial of his prior claim and stated the following:

> It follows that a finding that Shores is now totally disabled by pneumoconiosis is sufficient to find a material change in Shores's condition, whether that finding reflects a change from no disease at all to a totally disabling condition, or it rests on a change from a mild form of the disease to a totally disabling condition.

Weighing medical opinions. In considering the medical opinions, the ALJ properly discredited a physician's report because the physician "referenced parts of the medical literature that deny that coal dust exposure can ever cause pneumoconiosis," he stressed the absence of chest x-ray evidence, and the physician erroneously relied on "the absence of pulmonary problems at the time of (the miner's) retirement from coal mining," which was contrary to the premise that pneumoconiosis is progressive.

<u>Total disability</u>. Finally, the Seventh Circuit upheld application of the amended regulatory provisions relating to total disability at 20 C.F.R. § 718.204 (2001). Employer argued that Seventh Circuit precedent in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 1394 (7th Cir. 1994) precluded the miner's entitlement to benefits because he was already totally disabled due to a variety of non-pulmonary, non-respiratory impairments, including his age, heart attacks, severe coronary artery disease, degenerative joint disease, and peptic ulcer disease. The Seventh Circuit agreed that *Vigna* and other precedent of the court prior to issuance of the amended regulations may have provided support for Employer's argument. However, the court then cited, with approval, to the amended regulations and affirmed the ALJ's finding that the miner's total disability arose, at least in part, from his coal workers' pneumoconiosis.

[latent and progressive; "material change"; weighing medical opinions; total disability]

In *Lombardy v. Director, OWCP*, 355 F.3d 211 (3rd Cir. 2004), the ALJ properly found that a surviving divorced spouse's reliance on social security benefits, deriving from the miner's employment, did not qualify her as a "dependent" of the miner for purposes of receiving black lung benefits. The court cited to *Taylor v. Director, OWCP*, 15 B.L.R. 1-4, 1-7 (1991) as well as *Director, OWCP v. Ball*, 826 F.2d 603 (7th Cir. 1987), *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987), and *Director, OWCP v. Logan*, 868 F.2d 285, 286 (8th Cir. 1989) to hold that SSA benefits are not part of the miner's property and do not constitute a "contribution" to the survivor for purposes of establishing dependency under the Black Lung Benefits Act.

[receipt of social security benefits not support finding of "dependency"]

By unpublished decision in *McNally Pittsburgh Manufacturing Co. v. Director, OWCP*, Case No. 03-9508 (10th Cir. Feb. 10, 2004), the court clarified its "material change" standard in *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1511 (10th cir. 1996) to state that "in order for an administrative law judge to determine whether a claimant establishes this necessary change in his or her physical conditions, the administrative law judge should determine whether evidence obtained after the prior denial demonstrates a material worsening of those elements found against the claimant." In the case before it, the miner filed a petition for modification of the district director's denial of his original claim. The claim was denied on modification and, after more than one year, the miner filed a second claim. The court determined that, when assessing whether a "material change in conditions" is established, the administrative law judge must use the date of denial of the original claim, not the date of denial on modification.

[subsequent claims; establishing "material change"]

C. Benefits Review Board

In *White v. New White Coal Co.*, 22 B.L.R. 1-___, BRB No. 03-0367 BLA (Jan. 22, 2004), the ALJ properly denied benefits in a multiple claim arising under the amended regulations at 20 C.F.R. §§ 725.309 and 725.414 (2001). In the original claim, the district director determined that the miner had not established any element of entitlement. The ALJ reviewed the newly submitted evidence, which was subject to the evidentiary limitations at 20 C.F.R. § 725.414 (2001), and determined that the miner did not establish the presence of pneumoconiosis, or that he was totally disabled since the denial of his original claim.[1]

The ALJ found that the newly submitted chest x-ray evidence, consisting of five readings of three studies, was preponderantly negative. The Board stated that the ALJ properly considered physicians' qualifications and the fact that four of five interpretations were negative. Moreover, the ALJ properly found that the miner had not established total disability based on the medical opinions of record. Contrary to Claimant's argument on appeal, the Board held that the ALJ was not required to consider Claimant's age, education, and work experience as "[t]hese issues are not relevant to the issue of the existence of a respiratory impairment . . .." The Board further determined that a physician's opinion that the miner should work in a dust-free environment does not constitute a finding of total disability.

[multiple claim under the amended regulations]

By unpublished decision in *Mitchell v. Daniels Co.*, BRB Nos. 01-0364 BLA and 03-0134 BLA (Feb. 12, 2004), the Board held that the "law of the case" doctrine does not apply to a modification proceeding; rather, all judicially determined facts, including length of coal mine employment and designation of the proper responsible operator, must be reviewed *de novo* on modification. This is so even where the findings were previously affirmed by the Board on appeal.

["law of the case" doctrine inapplicable on modification]

---

[1] With regard to the elements of causation, the Board stated the following:

> Although the administrative law judge did not render findings on the two other 'requirements for entitlement,' . . . claimant has not raised any further allegations of error. We, therefore, affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable elements of entitlement has changed since the date of the denial of the prior claim . . ..

Slip op. at 7.