

Post-retirement Disability Claims under the Longshore Act

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Section 2(10) of the Longshore Act defines “disability” as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment,” except in cases involving awards to retirees with occupational diseases compensated under Section 8(c)(23), in which case it means “permanent impairment.” 33 U.S.C. § 902(10). While the statute addresses post-retirement disability in occupational disease cases, it does not expressly address this issue with respect to traumatic injuries. This commentary surveys the relevant case law and some of the thorny issues it raises.

Post-Retirement Disability in Occupational Disease Cases

In the 1980s, the Board confronted the issue of post-retirement disability in occupational disease cases, which often involve long latency periods. Prior to the 1984 Amendments, the Board had held that claimants who suffered from occupational diseases which did not become manifest until after their voluntary retirement and withdrawal from the work force did not have a disability under the Act as they had no loss of earning capacity.¹ The 1984 Amendments overruled these decisions, amending Section 2(10) and adding Sections 8(c)(23), 10(d)(2), 10(i), and 9(e)(2) to expressly allow awards to retired employees with an occupational disease which does not immediately result in death or disability (as well as their survivors). Thus, the Act was broadened to encompass voluntary retirees who later become aware of the existence of an occupational disease.² The employers in such cases are potentially liable for both retirement benefits and workers’ compensation benefits.

Under the Act as amended in 1984, if a claimant voluntarily retires from his employment, and then is impaired by an occupational disease, his recovery of disability compensation is limited to an award for permanent partial disability based on the extent of his impairment as measured by the American Medical Association’s *Guides to the Evaluation of Permanent*

¹ *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 16 BR3S 347 (1984); *Aduddell v. Owens-Corning Fiberglass*, 16 BRBS 131 (1984); *Redick v. Bethlehem Steel Corp.*, 16 BRBS 155 (1984).

² *MacDonald v. Bethlehem Steel Corp.*, 18 BRBS 181 (1986).

Impairment. 33 U.S.C. §§ 902(10), 908(c)(23). If a claimant's retirement is involuntary, *i.e.*, due in part to the work injury, the post-retirement provisions of Sections 2(10), 8(c)(23), and 10(d)(2) do not apply, and the claimant is entitled to an award based on his loss of wage-earning capacity ("WEC").³ The regulations governing claims involving occupational diseases that do not immediately result in death or disability provide that "[f]or purposes of this subpart, retirement shall mean that the claimant, or decedent in cases involving survivor's benefits, has voluntarily withdrawn from the workforce and that there is no realistic expectation that such person will return to the workforce." 20 C.F.R. § 702.601.

Post-Retirement Disability in Traumatic Injury Cases: Board Decisions

More recently, the Board addressed the issue of post-retirement disability in traumatic injury cases. Under the Board's approach, if a worker is disabled because of a traumatic injury and the worker retires, then he or she can continue to receive disability compensation for loss of WEC. *Harmon v. Sea-Land Service Inc.*, 31 BRBS 45 (1997). If a worker is able to perform his or her usual work or suitable alternate employment ("SAE") without a loss of earnings and the worker retires, then the worker is not entitled to disability benefits based on a loss of WEC (such as total disability compensation) if his or her condition worsens after retirement.⁴ *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989);⁵ *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001);⁶ *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *rev'd*, 879

³ *MacDonald*, 18 BRBS 181; *see also R.H. [Harvey] v. Baton Rouge Marine Contractors, Inc.*, 43 BRBS 63 (2009)(claimant's retirement was "involuntary" as it was due, at least in part, to his pulmonary condition, despite applying for "regular" retirement; in such cases, claimant's average weekly wage is based on earnings prior to the date of retirement), *aff'd sub nom. Louisiana Ins. Guar. Ass'n v. Dir., OWCP*, 614 F.3d 179, 44 BRBS 53(CRT) (5th Cir. 2010).

⁴ By contrast, the BRB has held that claimants with scheduled injuries are entitled to an award of scheduled permanent partial disability notwithstanding voluntary retirement, because a loss of WEC is presumed for a scheduled award. *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124 (1989); *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001) (as claimant was compensated for the degree of physical impairment under the schedule, including the increased impairment arising after his retirement, he is on equal footing with voluntary retirees with occupational diseases; like such retirees, he is not entitled to total disability benefits).

⁵ In *Burson*, the BRB affirmed the ALJ's denial of benefits for temporary total disability claimed after voluntary retirement (the ALJ had relied on *Redick*, 16 BRBS 155, overruled by the 1984 Amendments). The ALJ rationally found that claimant had voluntarily left the workforce where there was no evidence to support his testimony that he intended to open a landscaping business after leaving his longshore employment. Thus, he had no loss of WEC when he underwent surgery after retirement. He could, however, receive a scheduled award for his toe injury.

⁶ In *Hoffman*, claimant suffered a knee injury, returned to light-duty work with his employer, and accepted an early retirement three years later. His condition subsequently worsened, and his physician increased his permanent impairment rating and later performed surgeries. The ALJ found that claimant accepted the early retirement as he thought that it was "a good deal," rejecting claimant's testimony that his knee pain was a factor in his retirement decision. The BRB affirmed the denial of permanent total disability benefits. Because claimant's retirement was voluntary, and not due to his injury, employer was not required to show the continued availability of SAE.

F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018), *reh'g and reh'g en banc denied* (2018); *Christie v. Georgia-Pacific Co.*, 51 BRBS 7 (2017), *appeal pending*, No. 17-70853 (9th Cir.). The Board reasoned that such workers cannot establish a loss of earning capacity “because of injury” for purposes of Section 2(10) because they have no earning capacity after retirement.⁷ *Id.* Under this line of cases, disability is only compensable if it existed at the time of retirement. If it did, the worker is entitled to compensation with no inquiry into his or her motivations for retiring. *Harmon*, 31 BRBS 45. If not, the retirement is effectively deemed voluntary and it precludes any future “disability” based on a loss of WEC. *Christie*, 51 BRBS 7.

In *Moody*, the Board explained its long-standing position that voluntary retirement precludes any future “disability” based on a loss of WEC. Claimant sustained a shoulder injury after giving employer notice of his upcoming retirement, and he underwent shoulder surgery shortly after he retired. The Board reversed the ALJ’s award of temporary total disability for a two-month period when claimant was not cleared to work after his surgery. It stated that:

“Section 2(10) of the Act provides that: ‘Disability’ means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]’ 33 U.S.C. §902(10) (emphasis added). Thus, ... the disability inquiry encompasses both physical and economic considerations. Claimant bears the burden of establishing that his loss of [WEC] is due to his work injury. For example, where a claimant is performing suitable alternate work post-injury, and his inability to continue to do so is not due to the work injury, the employer is not liable for total disability benefits. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993).⁸ Similarly, when a claimant leaves or is discharged from his usual work

Claimant’s loss of WEC was not caused by his injury but was due to his retirement. He was, however, entitled to increased benefits under the schedule.

⁷ While Board decisions appear to equate retirement with a permanent withdrawal from the workforce, several decisions (e.g., *Burson* and *Hoffman*) nevertheless address whether claimant worked or sought work post-retirement. In *Hoffman*, the BRB reject claimant’s contention that the ALJ should have consider whether he intended to retire from the “general workforce,” stating that “[c]ontrary to claimant’s contention, the [ALJ] did not apply [20 C.F.R. § 702.601(c)], as neither it nor the related provisions for compensating retirees with occupational diseases are applicable to claimant who has sustained a traumatic injury.” 35 BRBS at 149-150. Yet, it also noted that claimant had not worked since his injury and only testified that he inquired of a friend about potential employment. In cases that did not involve retirement, the BRB has held that a claimant’s withdrawal from the labor market following an injury does not affect entitlement if loss of WEC is established. *Hoopes v. Todd Shipyards Corp.*, 16 BRBS 160 (1984) (employer’s assertion that claimant had no economic disability because she elected to stay home to take care of her child erroneously presumes that the Act only compensates loss of present actual earnings; rather, claimants are compensated for a diminished ability to earn wages); *Schenker v. Washington Post Co.*, 7 BRBS 34 (1977) (strike). See generally *Drake v. Gen. Dynamics Corp.*, 11 BRBS 288 (1979) (loss of WEC did not “magically disappear” as a result of a subsequent motorcycle accident).

for reasons unrelated to his work-related injury, he does not have a ‘disability’ within the meaning of the Act because his loss of earning capacity is not ‘because of injury.’

.... Accordingly, in a traumatic injury claim for post-retirement disability compensation, the only relevant inquiry is whether claimant’s work injury precluded his return to his usual work at the time of his retirement such that the loss of earning capacity was ‘because of injury.’”

Moody, 50 BRBS at 10 (additional citations omitted). Contrary to the ALJ’s statement, “the issue concerning the reason for claimant’s retirement is central to this case” because its resolution determines whether his disability is “because of injury.” *Id.* Substantial evidence supported the ALJ’s finding that claimant’s retirement was voluntary,⁹ and claimant did not contend that his shoulder injury precluded his continued work for employer at the time of his retirement. As claimant continued working in a suitable position until he voluntarily retired, he did not sustain any loss of WEC “because of” his work injuries. His retirement “had already resulted in his complete loss of earning capacity at the time of his shoulder surgery.” *Id.* at 11.

In *Moody*, the Board distinguished *Harmon*, 31 BRBS 45. In *Harmon*, it held that claimant who suffered a work-related traumatic injury and was physically unable to perform his usual work at the time he took longevity retirement remained “disabled” following his retirement.¹⁰ In these circumstances, the claimant need not establish that his retirement was due to his work injury (involuntarily).¹¹ Rather, the sole relevant inquiry in a traumatic injury case is whether the work injury precluded claimant’s return to his usual work, and thus, whether claimant satisfied his burden of establishing a *prima facie* case of total disability. Because the

⁸ In *Brooks*, the Fourth Circuit affirmed the BRB’s holding that where claimant ceases working in SAE because of the claimant’s conduct (falsifying a job application), the employer need not re-establish the availability of SAE in order to preclude total disability; while claimant’s violation might not have come to light but for his work-related injury, his inability to perform the post-injury job was due to his own misfeasance and not because of his work-related disability. See also *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996); *Jaros v. Nat’l Steel & Shipbuilding Co.*, 21 BRBS 26 (1988); cf. *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999) (employer has a renewed burden to establish the availability of SAE when there has been economic layoff at its facility). See also BRB Longshore Deskbook (“Effect of Discharge or Layoff”).

⁹ The ALJ found that claimant retired due to his displeasure at being assigned to work the second shift, and he rejected as not credible claimant’s contention that his work duties aggravated his prior 2001 back injury and caused his retirement.

¹⁰ Employer’s assertion that it should not have to pay compensation “on top of” retirement benefits was “not compelling, as any given employer may already possess this double liability in post-retirement occupational disease cases.” *Id.* at 48-49. These two entitlements are “not equivalent.” *Id.* at 49.

¹¹ The Board stated that “this is not an occupational disease case, and the issues of claimant’s retirement type and its affect (sic) on his disability status should not have arisen.” *Id.* at 48.

claimant's work injury precluded his return to his usual work prior to his retirement, it was immaterial that he retired due to eligibility. The ALJ improperly considered claimant's longevity retirement as evidence of no loss of WEC after the date of retirement. Accordingly, the Board reversed the ALJ's denial of benefits after the date of retirement, and it awarded permanent total and partial disability benefits in accordance with the ALJ's alternate findings.

Most recently, in *Christie*, 51 BRBS 7, the Board narrowly construed the concept of injury-related (involuntary) retirement by tying it to claimant's inability to perform usual work or SAE without a loss of earnings at the time of retirement. After sustaining a back injury, claimant performed light duty work for employer until accepting early retirement in 2010. The ALJ found that although claimant was physically capable of performing his work when he took early retirement,¹² his retirement was "involuntary" as it was motivated, at least in part, by his work-related back injury. The ALJ found that claimant took early retirement based in part on a well-founded fear that his injury would preclude him from working until full retirement age. Based on this finding, the ALJ awarded PTD compensation beginning in 2012 when additional work restrictions were imposed. The Board reversed the award, citing *Moody*. It reiterated that "an employee is not entitled to receive a total disability award after he retires for reasons unrelated to the work injury because there is no loss of [WEC] due to the injury. In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, the only relevant inquiry is whether claimant's work injury precluded him from performing his usual work or [SAE] at the time of his retirement such that the loss of earning capacity was 'because of injury.'" *Id.* at 8-9. In that case, the ALJ's finding that claimant's retirement was motivated in part by the fear of losing his job due to the injury was "not legally significant in view of the [ALJ]'s finding that claimant was capable of performing his work for employer with no loss of WEC at the time he retired." *Id.* at 9. As claimant had no earning capacity two years later when increased work restrictions were imposed, he was not disabled within the meaning of Section 2(10). *Christie* is presently pending before the Ninth Circuit Court of Appeals (9th Cir. No. 17-70853).¹³

The Fourth Circuit Reverses the Board in *Moody*

In a recent decision, the Fourth Circuit reversed the Board's holding that a voluntary retiree with a traumatic work-related injury is not entitled to total disability benefits. *Moody*, 879 F.3d 96, 51 BRBS 45(CRT). The court reasoned that the Board's construction -- that an employee's retirement necessarily makes him incapable of earning any wages -- misconstrues the plain meaning of "incapacity" and the real-world significance of retirement. The court stated

¹² Claimant testified that he could have kept working and planned to do so until he learned about a change in employer's pension plan.

¹³ An oral argument is scheduled for June 5, 2018 (<https://www.ca9.uscourts.gov/calendar/>).

that “incapacity” means “inability,” “incompetence,” and “incapability.” *Id.* at 99 (quoting Oxford English Dictionary (1933)). “Retirement, quite simply, is not inherently debilitating.” *Id.* By focusing on the voluntary nature of retirement, the Board “confuse[s] being unwilling with being unable.” *Id.* In this case, claimant had the ability of being a truck driver after his retirement, except for the two-month period during his recovery from shoulder surgery.

Additionally, the court determined that the Board’s approach erroneously equates loss of earning capacity with loss of actual earnings. Claimant’s injury did not cause him to lose any income, but it did deprive him of the ability to work. Case law defines “economic harm” as lost capacity to earn wages, not actual economic loss. The Supreme Court has held that “[c]apacity, and thus disability, is not necessarily reflected in actual wages earned after injury, and when it is not, the factfinder under the Act must make a determination of disability that is reasonable and in the interest of justice, and one that takes account of the disability’s future effects.” *Id.* at 99 (quoting *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 127-128 (1997)).¹⁴ On the facts of this case, claimant’s actual wage loss does not fully capture the loss of capacity caused by the injury. The ALJ followed *Rambo*’s instruction in deciding that the interests of justice and public policy weigh in favor of granting benefits. To decide otherwise would not only deprive claimant of his rightful benefits but would also confer a windfall on employer: claimant would have received disability benefits had he undergone surgery immediately rather than discharging his duties in good faith, and employer would have had to pay another worker.

The court concluded that “[t]he fact that [claimant] did not actually work or seek job opportunities after retirement does not change the analysis” because “[t]hat fact goes to actual economic loss but not incapacity.” *Id.* “Because the LHWCA compensates workers for their inability to earn wages due to injury, workers are entitled to disability benefits when an injury is sufficient to preclude the possibility of working.” *Id.* at 100. Here, claimant could have changed his mind and chosen to work after retiring,¹⁵ and this choice was taken away from him by his shoulder injury for at least two months.

In sum, the court concluded that voluntary retirement is not a form of total incapacity and that “retirement status, standing alone, is irrelevant to earning capacity and the determination of ‘disability’ under 33 U.S.C. § 902(10).” *Id.* at 100.

Conclusion

¹⁴ The court noted *Rambo*’s holding that an employee may still be eligible to receive disability benefits under the LHWCA even if his post-injury wages are higher than his pre-injury wages, upon a determination that the employee’s earning capacity is likely to fall below pre-injury levels in the future.

¹⁵ The court noted that the Act contains a “mandate to account for the future effects of disability” when fashioning disability awards. *Id.* (quoting *Rambo*, 521 U.S. at 132).

In cases involving traumatic injuries, the Board will no longer follow the approach it adopted in *Moody* and *Christie* in the Fourth Circuit. The *Christie* decision is pending appeal in the Ninth Circuit.¹⁶ It remains to be seen what the Board will do outside of the Fourth Circuit.

¹⁶ On appeal, claimant is urging the Ninth Circuit to interpret the statute in the same manner as the Fourth Circuit did in *Moody*. In the alternative, claimant argues that if the court were to find that retirement unrelated to an injury is a relevant consideration, the question should then be whether the retirement was motivated even in part by the injury. Further, even under the BRB's approach, claimant asserts that he is entitled to post-retirement benefits because he was disabled at the time of his retirement. See *Petitioner's Opening Brief*, 2017 WL 4465253 (Oct. 2, 2017), and *Petitioner's Reply Brief*, 2018 WL 607615 (Jan. 22, 2018), *Christie v. Georgia-Pacific Co.*, No. 17-70853 (9th Cir.).