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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 318
January - March 2022

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

A. U.S. Circuit Courts of Appeals[1]

No published decisions to report.

B. U.S. District Courts

***Gindo v. Director, OWCP*, No. 4:19-CV-1745, 2022 WL 861415 (S.D. Tex. Feb. 28, 2022), vacating on other grounds and remanding sub nom. *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018).**

The district court adopted the Magistrate Judge's recommendation to grant claimant's appeal of the Board's decision because the ALJ rejected the parties' stipulation that claimant was temporarily totally disabled without prior notice. The recommendation did not address the ALJ/BRB's determination that claimant's PTSD should be classified as an occupational disease.

[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 *__).

C. Benefits Review Board

***Duvall v. Mi-Tech, Inc.*, ___ BRBS ___ (2022).**

Agreeing with the Director, OWCP, the Board held that decedent's work in a Croatian shipyard on a project overhauling a U.S. Navy ship, the USS *Mt. Whitney*, was covered under the Defense Base Act, because it was a "public work" within the meaning of § 1651(a)(4).

Decedent suffered a heart attack and died while working on the overhaul of the USS *Mt. Whitney*. His widow filed a claim for death benefits. The ALJ found that decedent's work was performed under a series of contracts commencing with the U.S. Government. The U.S. Navy's Military Sealift Command ("MSC") contracted with the shipyard for the overhaul of the USS *Mt. Whitney*. The shipyard then contracted with The McHenry Management Group ("TMMG"), insured by Chubb, which contracted with decedent's employer for his services. Employer secured workers' compensation coverage in South Carolina, but did not secure DBA coverage for this claim. It argued that the only parties which could be liable are TMMG and/or its carrier, Chubb.

Although the ALJ found decedent performed his work pursuant to a U.S. Government contract, he found none of the DBA coverage provisions, apply and thus the DBA did not cover decedent's death. *See* 42 U.S.C. § 1651(a)(1)-(6). Consequently, he denied the benefits.

"Public Work"

To be compensable under § 1651(a)(4), a claim must stem from a contract for a "public work" outside the continental United States. The ALJ found that § 1651(a)(4) did not apply because the USS *Mt. Whitney* overhaul "is not a project for the public use of the United States or its allies and thus said contract was not for the purposes of engaging in public work."

The Board reversed the ALJ's finding. Prior cases have held that "public work" constitutes government-related construction projects, work connected with national defense, or employment under a service contract supporting either activity. They have not addressed whether work on a Navy ship is a "public work." The USS *Mt. Whitney* is a Navy vessel and is part of the national defense, and federal courts and the Board have held that a project with a "military aspect" is by definition a "public work." Consequently, work repairing a Navy vessel satisfies the requirement that a "public work" is "any project, whether or not fixed, involving construction, alteration, removal *or repair* for the public use of the United States or its allies, including but not limited to projects or operations under service contracts and projects in connection with the national defense ...." 42 U.S.C. § 1651(b)(1) (emphasis added).

Contract Provisions

In concluding that claimant's death was not covered by the DBA, the ALJ additionally relied on his findings that employer did not carry DBA insurance and that TMMG's DBA policy specifically excluded this project. The ALJ concluded that "the industry did not believe DBA insurance was necessary under these facts." He also determined that the MSC contract with the shipyard did not specifically address or require the shipyard to carry DBA insurance. On appeal, employer argued in support of the ALJ's approach that §

1651(a)(4)'s coverage of injuries or deaths arising under public work contracts cannot be given effect unless the contract itself complies with that section's security clause, which states:

> [E]very such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) ... provide for securing to or on behalf of employees engaged in such public work under such contract the payment of compensation and other benefits under the provisions of this chapter[.]

42 U.S.C. § 1651(a)(4).

Rejecting this reasoning, the Board held that coverage under § 1651(a)(4) cannot be defeated by the absence of a security/insurance provision in the relevant legal agreements. In *Delgado v. Air Serv. Int'l, Inc.*, 47 BRBS 39 (2013), the Board reached this conclusion with respect to identical language in § 1651(a)(5). Additionally, the only way to waive DBA coverage is by affirmative action of Secretary of Labor. 42 U.S.C. § 1651(e). As the security/insurance language in subsection (a)(5) is the same as that in subsection (a)(4), *Delgado* is controlling. Work defined as covered by the statute does not become uncovered work simply because a contract fortuitously omits the appropriate insurance provision. An employer does not have the authority to waive or avoid DBA coverage.

The Board noted that, to the extent the ALJ concluded DBA insurance is unnecessary for the project because it was not mentioned in employer's contract, this was error. First, the Board has held that employer does not have the authority to waive DBA coverage by omitting it from the contract. Second, § 4(a) of the LHWCA states if the contractor provides compensation insurance, the subcontractor's failure to do so is irrelevant. In this case, although employer did not secure DBA insurance, claimant and employer asserted that TMMG did. Employer also asserted the only entities which possibly could be liable for DBA compensation are TMMG and Chubb. The Board stated that, since the determination of which party may ultimately be responsible for any awarded benefits is not relevant to the coverage issue, it took no position on the matter.

The ALJ's decision was reversed and the case remanded for the ALJ to address any remaining unresolved issues.

[STATUTORY EXTENSIONS of the LONGSHORE ACT - The Defense Base Act Coverage - § 1651(a)(4)]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. Published decisions:

Samons v. National Mines Corp. 25 F.4th 455 (6th Cir. 2022): The miner filed a claim for benefits in 2003 but passed away before it was decided. His widow proceeded with his claim and filed her own survivor's claim as well. Benefits were awarded on the miner and survivor's claims by the District Director. The employer requested a hearing before the Office of Administrative Law Judges. In his first decision, the ALJ found that the miner did not have a totally disabling respiratory impairment based on the pulmonary function testing and medical opinion evidence. The claimant appealed the decision to the Benefits Review Board. The Board noted that the ALJ's weighing of the pulmonary function testing was not contested and affirmed that portion of the decision. However, it remanded the ALJ's weighing of the medical opinion evidence with instructions to identify the miner's usual coal mine work and the exertional requirements of that work.

In the second opinion, the ALJ found that the miner's various positions required moderate to heavy labor and found him totally disabled based on the medical opinion evidence of the miner's treating physician. The employer appealed the award of benefits to the Board, who vacated the ALJ's finding that the medical opinion evidence established total disability. The Board also directed the ALJ to identify the miner's usual coal mine work and consider whether the physicians understood the exertional requirements of that work when opining on his disability.

In the third opinion, the ALJ found that he was unable to make a finding regarding the miner's usual coal mine work or the exertion it required based on the evidence in the record and that the claimant had therefore failed to establish burden of proof. The claimant again appealed, and the Board remanded. It stated that the ALJ could not refuse to make a determination just because the record contained conflicting evidence. It further stated if there was insufficient evidence in the record for the ALJ to determine the exertional level of the miner's job, then he should take judicial notice of the *Dictionary of Occupational Titles*.

In the ALJ's fourth opinion, the judge found that the miner's usual coal mine work as fell within the heavy work category in the *Dictionary of Occupational Titles*. He denied benefits based on the medical opinion evidence by physicians who also categorized the miner's work as heavy. The ALJ did not address the claimant's argument that the pulmonary function testing established total disability. The claimant appealed to the Board, who affirmed the ALJ's decision. In so doing, it rejected the claimant's argument that the ALJ erred in not addressing her arguments regarding the pulmonary function testing as it had previously affirmed his conclusions and that the affirmance constituted the law of the case. It also affirmed the ALJ's determination that the claimant had not established total disability via medical opinion evidence.

On appeal to the Sixth Circuit Court of Appeals, the claimant argued that the Board erred in refusing to address her arguments regarding the pulmonary function testing and that the ALJ erred in finding that total disability was not established by the medical opinion evidence. First, the court held that the Board correctly applied the law of the case doctrine when it declined to consider the claimant's pulmonary function testing arguments. The court found that the claimant did not challenge the ALJ's rejection of the pulmonary function testing in its first appeal. The Board's conclusion that the claimant forfeited a challenge based on the pulmonary function testing became law of the case for the proceedings.

Although the Board did not apply law of the case to the merits issues related to the tests, it had properly applied it to its finding that the claimant did not challenge and therefore forfeited any challenge to the ALJ's determination regarding the tests. Furthermore, the court declined to excuse the forfeiture although the claimant argued that the agency failed to properly inform her how to raise arguments in proceedings since 20 CFR § 802.211 states that the parties must raise their specific arguments before the Board. The court then rejected the claimant's argument that the ALJ's opinion was not based on substantial evidence. Finally, it rejected the claimant's argument that the "jumbled" administrative record produced by the Department of Labor prevented an effective judicial review of her claim. The court stated that although the Department produced "a mess of an administrative record" without continuous pagination, in no apparent order, and with duplicative or missing documents, it was still able to review the claim.

[Law of the case doctrine; forfeiture of challenge; disorganized administrative record]

2. Unpublished decisions:

Jackson v. Black Butte Coal Company, No. 20-9652, 2022 U.S. App. LEXIS 2186, (10th Cir. Jan. 25, 2022) (unpub.): The claimant was a coal miner for 11 years after which he worked for 21 years as an underground trona miner. After retiring from this job, he filed a claim for benefits which was granted by the District Director. The employer requested a hearing before an ALJ, who denied benefits. In so doing, he rejected the reports of three physicians relating the claimant's COPD to coal dust exposure but credited the report of Dr. Gregory Fino. The Board affirmed the ALJ's decision, and the claimant appealed to the Tenth Circuit Court of Appeals.

On appeal, the court held that the ALJ did not provide a reasonable explanation for discounting the report of Dr. Brigette Gottschall as equivocal because she stated that it was "likely" that his coal dust exposure was a substantially contributing factor to his COPD and that it was "likely" that the claimant's smoking history and coal dust exposure are both causally related. The court stated that it was internally inconsistent for the ALJ to then find Dr. Fino's report credible when it could have been seen as equivocal since he stated that the claimant's employment as a trona miner "could account for" his COPD. The court went on to find that the ALJ did not err in relying on Dr. Fino's understanding of the miner's exposure history, but that he could revisit the issue of Dr. Fino's assumption that the claimant's pressurized oxygen level was the same during his work in the trona and coal mines.

[Weighing evidence; disease causation; trona mining]

Beech Fork Processing, Inc. v. Spencer, No. 21-3331, 2022 U.S. App. LEXIS 2643 (6th Cir. Jan. 27, 2022) (unpub.): The ALJ found that the miner had established the existence of complicated pneumoconiosis and awarded benefits. The employer appealed to the Benefits Review Board, who affirmed the award of benefits. Before the Sixth Circuit Court of Appeals, the employer argued that the evidence did not support a finding of complicated pneumoconiosis and that an equivalency determination should have been applied.

The court noted that the parties agreed that the chest x-ray evidence was positive for pneumoconiosis but disagreed on the degree of the disease. It then rejected the employer's argument that the ALJ's reliance on the medical opinion of Dr. Sikder was misplaced because Dr. Sikder failed to consider the CT scan evidence. The court pointed out that this was not the case since Dr. Sikder directly reviewed and interpreted the CT scans in her treatment records. For the same reason, it likewise rejected the employer's similar argument that the ALJ erred in relying upon the report of Dr. Shah since he relied upon Dr. Sikder's notes. The

court then noted that, under 30 U.S.C. §921(c)(3) and 20 C.F.R. §718.304, a miner can establish complicated pneumoconiosis with x-ray evidence of "large opacities," "massive lesions" on biopsy or autopsy, or an equivalent diagnostic result reached by other means. Further, it noted that, per 30 U.S.C. §921(c)(3), "an equivalent diagnostic result is any condition which could reasonably be expected to yield *either* large opacities on a chest x-ray *or* massive lesions in a biopsy or autopsy." As such, it found that the ALJ's reliance on the reports of Drs. Sikder and Shah diagnosing progressive massive fibrosis on CT scan was permissible.

[Complicated pneumoconiosis; CT scan evidence]

Consolidation Coal Co. v. Shipley, No. 19-1738, 2022 U.S. App. LEXIS 3598 (4th Cir. Feb. 9, 2022)(unpub.):

Miner, who had a 40-year history of coal mine employment, was awarded benefits by the district director. Employer requested a hearing before the Office of Administrative Law Judges. The ALJ denied benefits. The claim was remanded by the BRB which found that the ALJ failed to apply the correct standard i.e., Employer must prove that no part of Miner's respiratory or pulmonary total disability was due to his employment. On remand, the ALJ denied benefits based on expert testimony from Employer's experts who related Miner's impairment to smoking rather than coal dust exposure. The BRB again vacated the denial and remanded the claim back to the ALJ with instructions to determine whether the experts' opinions conflicted with the preamble to the 2000 amendments to the black lung regulations. On remand for the second time, the ALJ found that Employer failed to rebut the presumption that Miner's employment contributed to his impairment and awarded benefits. The BRB affirmed. Employer appealed.

On appeal, Employer argued that BRB exceeded its authority by requiring the ALJ to assess the medical evidence against the preamble. The court rejected this argument on appeal. It stated that the preamble is non-binding guidance but is consistent with the Act and the regulations and explains the scientific and medical basis for the regulations. It stated that determining whether an expert's opinion is consistent with the preamble is one way of determining whether his or her opinion is credible. The court also agreed with the BRB's affirmance of the award of benefits since "reasonable minds could accept the tension" between the preamble and Employer's experts.

[Preamble to regulations]

B. Benefits Review Board

1. Published decisions:

Bonner v. Apex Coal Corporation, 25 BLR 1-277 (2022): Claimant appealed the denial of benefits by the ALJ. The ALJ found that only 2 of Miner's 17 years of surface mining employment was in conditions that were substantially similar to the conditions in an underground coal mine. Without applying the 15-year presumption, she found that Miner had clinical pneumoconiosis. However, she found that he did not have legal pneumoconiosis and that his death was not due to pneumoconiosis.

On appeal, the Board found that the ALJ erred in finding that Miner had only established 2 years of qualifying coal mine employment because she rejected the testimony of Claimant, his widow, who testified at the hearing about how dirty Miner and his clothes were after work as it was "self-serving." In so doing, the ALJ quoted 20 C.F.R. §718.305(b)(4),

which states that a finding of total disability in a deceased miner cannot be based on testimony from a person who is eligible to receive benefits. The Board stated that neither the Act nor the regulations prohibit the use of widow's testimony for the purposes of establishing the dust condition as of a miner's employment and that the prohibition against relying upon it in 20 C.F.R. §718.305(b)(4) applied only in the context of determining total disability.

Further, the Board found that the ALJ erred in finding that Claimant's testimony regarding Miner's work conditions unreliable since she did not describe his work environment and she did not have any personal knowledge of his daily working conditions. The Board found that work history form Claimant submitted included a description of Miner's exposure history in the work environment. It also stated that caselaw supports the use of a survivor's testimony regarding a miner's appearance and amount of dust on his clothes after work to determine the amount of dust exposure at his work. See Zurich American Insurance Group v. Duncan, 889 F.3d 293, 304 (6th Cir. 2018). As such, the Board vacated the ALJ's finding that Claimant only established 2 years of qualifying coal mine employment as well as her finding that the 15-year presumption did not apply and remanded the claim for further reconsideration.

[Proof of qualifying coal mine employment]

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