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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 295
March 2019

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

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

***Pena-Garcia v. Director, OWCP*, ___ F.3d ___, 2019 WL 987887 (1st Cr. 2019).**

The First Circuit held that claimant has not established "successful prosecution" in his claim for benefits under the LHWCA, so as to warrant an award of attorney's fees under Section 28.

Claimant suffered a back injury while working for Employer. Employer agreed to pay for claimant's back surgery to be performed in Puerto Rico, but refused claimant's request to cover the cost of such surgery in New York. The ALJ determined that employer and carrier never refused to pay for the surgery and rejected claimant's claim that it was necessary to perform his surgery in New York. Claimant could have the surgery done in New York, but he would then be responsible for any additional expenses. The ALJ later held that claimant was not entitled to attorney's fees and costs. The ALJ rejected claimant's counsel's argument that claimant had successfully prosecuted his claim because he had obtained what he called his right to choose to have the surgery in New York. The Board affirmed.

The First Circuit agreed. The court initially noted that it reviews the Board's decisions on legal issues de novo. Further, the court determines whether the Board adhered to the "substantial evidence" standard when it reviewed the ALJ's factual findings. In reviewing for

[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 *__).

substantial evidence, the court assesses the record as a whole, and will affirm so long as the record contains such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

In this case, the court held that claimant was not entitled to fees under Section 28(a). It rejected claimant's argument that he had obtained a "successful prosecution" because employer and carrier raised a complete challenge to his request for treatment in New York. Subsection (a) is triggered only when the employer or insurance carrier denies liability and refuses to pay "any compensation." 33 U.S.C. § 928(a). Here, carrier was paying claimant some compensation in the form of medical benefits before this claim was initiated, calling into question whether subsection (a) applied at all. The court chose to bypass that question to address the surgery compensation issue. It concluded that employer's actions did not amount to a refusal to pay "any compensation," as there was no evidence that employer and carrier refused to cover the cost of the surgery in Puerto Rico.

Claimant was also not entitled to fees under Section 28(b). He mischaracterized the ALJ's decision both as confirming his "right to choose surgery/rehabilitation treatment in New York" and as an award of "additional compensation." Claimant was not awarded compensation greater than that tendered by his employer because there was no evidence that carrier refused to pay for surgery at the Puerto Rico cost, regardless of where claimant chose to have the surgery. Additionally, claimant's argument was precluded by *Barker v. U.S. Dep't of Labor*, 138 F.3d 431 (1st Cir. 1998), which held that confirming claimant's entitlement to LHWCA benefits, without securing additional benefits, did not entitle claimant to attorney's fees under subsection (b). The court did not reach the question whether medical benefits are subsumed within the phrase "additional compensation" under Section 28(b), because in this case claimant did not obtain a payment that would not otherwise have occurred.

[ATTORNEY'S FEES - Section 28(a) Successful Prosecution; Section 28(b) Additional compensation]

***Iopa v. Saltchuk-Young Brothers, Ltd.*, ___ F.3d ___, 2019 WL 1006653 (2019).**

The court affirmed the Board's decision upholding the ALJ's order striking, as untimely, a petition for payment of claimant's attorneys' fees under the LHWCA filed several months past the ALJ-ordered deadline.

The ALJ awarded benefits to claimant and directed that a fee petition had to be filed within 21 days of the award order. Over nine months after the petition was due, claimant's counsel filed a fee petition for work done before the OWCP. The ALJ notified counsel that he had filed the wrong petition, and counsel filed a corrected fee petition more than four months after the initial OWCP petition was filed. The ALJ granted employer's motion to strike the fee petition based on a finding of untimeliness without "excusable neglect." The Board affirmed.

The Ninth Circuit stated: "We now consider for the first time in our circuit whether striking an untimely petition for attorney's fees under the Longshore Act is proper only given

extreme circumstances, or whether excusable neglect is the proper standard by which to evaluate such petitions. We hold that the excusable neglect analysis is proper and affirm the BRB's decision to uphold the ALJ's dismissal order." *Id.* at *1. The court provided the following reasoning:

> [Claimant] asserts that Longshore Act fee petitions are subject to the relatively lenient standard adopted by the BRB in 1986: "The loss of an attorney's fee is a harsh result and should not be imposed on counsel as a penalty except in the most extreme circumstances." *Paynter v. Dir., OWCP*, 9 Black Lung Rep. (Juris) 1-190, at *1 (Ben. Rev. Bd. 1986). In 2015, however, the Rules of Practice and Procedure for Administrative Hearings Before the OALJ were revised to include, inter alia, the following provision: "When an act may or must be done within a specified time, the judge may, for good cause, extend the time . . . [o]n motion made after the time has expired if the party failed to act because of *excusable neglect*." 29 C.F.R. § 18.32(b)(2) (emphasis added). This rule applies to claims brought before an ALJ in the Department of Labor, including Longshore Act claims. *See id.* § 18.10(a). While *Paynter* may have previously served as the primary guide in determining whether to strike a fee petition, the 2015 revision of the Rules of Practice and Procedure for Hearings Before the OALJ requiring a showing of "excusable neglect" for untimely claims cannot be ignored. *See id.* § 18.32(b)(2).

Id. at *2.

The court further held that the ALJ properly applied the four-factor test articulated in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 378 (1993), in finding that there was no excusable neglect. It noted that "[a]pplying the *Pioneer* factors to the instant case is appropriate and consistent with post-*Pioneer* case law analyzing 'excusable neglect' in various regulatory contexts." *Id.* at *2. Under *Pioneer*, the relevant factors are: "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* (quoting 507 U.S. 380, 395 (1993)).

The ALJ's conclusion that claimant's counsel did not establish excusable neglect was supported by substantial evidence. First, the ALJ reasonably determined that Respondents demonstrated they would be prejudiced by the delayed filing, because their "memory of the details of the case" and ability "to recall each back and forth between the parties for the purpose of contesting the validity or amount of time claimed for a given line item" was affected by the substantial delay. *Id.* at *2. The second factor weighed strongly against a finding of excusable neglect, because the delay was substantial and counsel waited another month to correct his petition after being instructed to do so by the ALJ. Third, the ALJ's determination that "none of [the reasons for delay] are convincing or persuasive" or were beyond the control of counsel was supported by case law. Although claimant's counsel noted several challenges in managing his caseload, particularly following the departure of the associate who managed

this case, the Supreme Court has held that "we give little weight to the fact that counsel was experiencing upheaval in his law practice." *Id.* at *3 (quoting *Pioneer*, 507 U.S. at 398)(additional citations omitted). Finally, the ALJ found that the fourth factor, good faith, had no weight in this case. The court observed that if the ALJ had found that counsel acted in good faith, that factor does not require a finding of excusable neglect when weighed against the other three factors; excusable neglect determination is committed to the trial court's discretion.

[ATTORNEY'S FEES – Application Process (Time Requirements); PROCEDURE - Rule 18.32 (Computing and Extending Time; Excusable Neglect)]

B. Benefits Review Board

There are no published Board decisions to report.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Rockwood Casualty Ins. Co. v. Director, OWCP, et al.* [*Kourianos*], 917 F.3d 1198 (10th Cir. Mar. 5, 2019), the court addressed a claim filed by a miner, Tony Kourianos, who had worked for over 27 years in the coal mines. Below, the Benefits Review Board ("Board") affirmed a decision in which the administrative law judge had awarded benefits and found Hidden Splendor Resources, Inc. ("Hidden Splendor"), as insured by Rockwood Casualty Insurance Co. ("Rockwood"), to be responsible for the payment of benefits.

In the case, the district director sent Notices of Claim to both Hidden Splendor and West Ridge Resources, Inc. Although Hidden Splendor initially denied that it was the responsible operator, it later filed an amended response in which it admitted that it was indeed the responsible operator. In the subsequent Schedule for the Submission of Additional Evidence ("SSAE"), the district director preliminarily concluded that Hidden Splendor was the responsible operator; in its response to the SSAE, Hidden Splendor stated that it "'has accepted the designation of Responsible Operator but contests Claimant's entitlement for benefits.'" *Kourianos*, 917 F.3d at 1207, *quoting* Suppl. App. at 73. Later, the district director issued a Proposed Decision and Order finding Hidden Splendor to be the responsible operator and awarding benefits.

In its "statement of contested issues" to be addressed in its appeal of the district director's Proposed Decision and Order, Hidden Splendor noted that it did not dispute its designation as the responsible operator. However, following testimony that Mr. Kourianos had most recently worked for Hidden Splendor as a night watchman at "the loadout," a position

in which he did not mine or instruct miners and during which the mine was at times not in operation, Hidden Splendor moved to withdraw its stipulation that it was the responsible operator. The administrative law judge denied the motion, finding that Mr. Kourianos's work as a night watchman was "reasonably ascertainable" when the claim was before OWCP and that, therefore, the black lung regulations acted to prevent Hidden Splendor from withdrawing its stipulation. *See* 20 C.F.R. §725.463(b) ("An administrative law judge may consider a new issue only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director."). In a later Decision and Order, the administrative law judge awarded benefits based on invocation of the fifteen-year presumption, as (1) Mr. Kourianos worked in qualifying coal mine employment for at least fifteen years, (2) he established that he was totally disabled, and (3) Hidden Splendor failed to rebut the presumption. *See* 30 U.S.C. §921(c)(4).

Hidden Splendor appealed the case to the Board, which affirmed the award of benefits.

Before the Tenth Circuit, Rockwood first argued that the Board erred in affirming the administrative law judge's decision to bar Hidden Splendor from withdrawing its responsible operator stipulation. The court disagreed, noting that (1) a senior staff accountant at Hidden Splendor had reported to the district director that Mr. Kourianos had worked outside of the mine at a "loadout" in his last few months at the company, and (2) the company had failed to investigate Mr. Kourianos's employment or dispute the responsible operator question for over two years after the claim's filing date. It concluded that "[t]hese facts undercut any argument that responsible operator evidence was not 'reasonably ascertainable' while Mr. Kourianos's claim was pending before the district director." *Kourianos*, 917 F.3d at 1216, *citing* 20 C.F.R. §725.463(b). The court also pointed out numerous ways in which Hidden Splendor could have "reasonably ascertain[ed]" Mr. Kourianos's job duties but did not, and it remained unconvinced as to Hidden Splendor's proffered excuses for its failure to investigate. Therefore, the court concluded that the administrative law judge did not err when he denied Hidden Splendor's request to withdraw its stipulation to being the responsible operator.

Second, Rockwood contended that substantial evidence did not support the administrative law judge's finding that Mr. Kourianos is entitled to benefits. Again, the court disagreed, upholding the administrative law judge's weighing of the arterial blood gas study and medical opinion evidence and, therefore, his application of the fifteen-year rebuttal presumption. It also affirmed his finding that Hidden Splendor had failed to rebut the presumption.

In light of the above, the court denied Rockwood's petition for review.

[Stipulations: Stipulation of responsible operator status] [new]

In *Bizzack Construction v. Fannin*, No. 18-3734, 2019 U.S. App. LEXIS 6929 (6th Cir. Mar. 8, 2019), the U.S. Court of Appeals for the Sixth Circuit considered the employer's argument that the claimant did not work for it as a "miner." The employer argued that its business is road building and that the extraction of coal was only incidental to its road building

work. The claimant's job for the employer was drilling through rock so that areas could be excavated for road construction. When he and his colleagues hit a coal seam, drilling stopped, they removed the rocky overburden, and the claimant worked to clean the coal so that it could be loaded and sold. The claimant stated that he drilled into coal almost daily. According to the employer's executive vice president, the company's business was "highway jobs," but he stated that - during the time the claimant worked for the employer - it sold more than 690,000 tons of coal for more than $22,000,000. He also explained that when the company bid on projects, it would lower its offered price if the company anticipated encountering coal. The executive vice president further stated that coal was less than 1% of the material they removed. In light of the above, the Sixth Circuit concluded that the claimant's job satisfied both the "situs" test - as coal was extracted from the land where the claimant worked and the employer had a "considerable economic interest" in the coal - and the "function" test, as the claimant drilled until coal was discovered, he helped remove the overburden, and he cleaned the coal.

[Function of the miner: Construction workers; Situs of the work performed]

B. Benefits Review Board

In an unpublished decision, the Board addressed both a miner's and a survivor's claim. *See* *Helton v. ANR Coal Co.*, BRB Nos. 18-0176 BLA & 18-0195 BLA (Mar. 12, 2019) (unpub.). The Board affirmed the administrative law judge's denial of benefits in the miner's claim and, therefore, affirmed the judge's finding that the survivor was not automatically entitled to benefits. Further, the Board stated that "a review of the record in the survivor's claim reveals no evidence, or findings by the district director, addressing whether the miner had pneumoconiosis arising out of coal mine employment or whether his death was due to pneumoconiosis." Slip op. at 9. Therefore, the Board held that the administrative law judge correctly determined that the "survivor's claim *must* be remanded to the district director for claimant to be provided with an opportunity to pursue her claim." *Id.* (emphasis added).

[Introduction to survivors' claims: Generally]

Finally, in a published decision, the Board considered an appeal of a decision in which the administrative law judge denied a miner's claim for benefits. *See* *Hawkinberry v. The Monongalia County Coal Co.*, BLR , BRB No. 18-0228 BLA (Mar. 26, 2019). Below, although the administrative law judge found that the claimant had invoked the rebuttable presumption that he was totally disabled due to black lung, she further found that the employer rebutted the presumption. On appeal, the Board affirmed the administrative law judge's credibility findings regarding the opinions of Drs. Saludes, Ranavaya, and Scattaregia regarding the existence of legal pneumoconiosis, though the Board did not affirm her weighing of the evidence at rebuttal of the Section 411(c)(4) presumption. Instead, the Board applied the judge's credibility findings to the rebuttal standards and reversed the denial of benefits.

Below, the administrative law judge accorded little weight to the opinion of Dr. Saludes. She found that Dr. Saludes did not specifically diagnose legal pneumoconiosis and

determined that, even if his opinion constituted a diagnosis of legal pneumoconiosis, it was equivocal at best and inadequately explained. The administrative law judge accorded less weight to the opinions of Drs. Ranavaya and Scattaregia vis-à-vis the issue of legal pneumoconiosis because (1) they did not address whether the claimant's years of coal mine dust exposure could have contributed to or aggravated his chronic lung disease or impairment, and (2) they failed to address the possible additive effects of the claimant's coal mine dust exposure and smoking history on his COPD/emphysema. In addition, she found that Dr. Scattaregia's opinion, that smoking "most likely" caused the claimant's respiratory impairment, was equivocal and inadequately reasoned. On appeal, the Board affirmed these credibility findings.

However, after considering these three opinions and giving them "reduced weight," the administrative law judge relied on the opinions of Drs. Ranavaya and Scattaregia, finding them sufficient to (1) disprove the existence of legal pneumoconiosis, and thereby (2) establish that legal pneumoconiosis played no role in the claimant's total disability.

On appeal, the claimant alleged that, in view of the administrative law judge's credibility findings, she erred in finding the opinions of Drs. Ranavaya and Scattaregia sufficient to meet the employer's burden on rebuttal. The Board agreed, stating that once the claimant invokes the Section 411(c)(4) presumption, it is presumed that he has legal pneumoconiosis. Therefore, "irrespective of the weight accorded to claimant's physicians, to establish claimant's impairment is not legal pneumoconiosis, employer must demonstrate it is more likely than not the impairment is not 'significantly related to, or substantially aggravated by, dust exposure in coal mine employment.'" Slip op. at 6, *quoting* 20 C.F.R. §718.201(a)(2). Further, the Board concluded that the administrative law judge applied an erroneous standard in determining whether the employer satisfied its burden on rebuttal.

Rather than remand the case, the Board applied the administrative law judge's credibility findings to the correct rebuttal standards. It concluded that the employer could not establish that the claimant does not have legal pneumoconiosis - "which requires sufficiently addressing the role coal mine dust played in claimant's chronic lung disease or impairment" - or that legal pneumoconiosis played no part in the claimant's disability. Slip op. at 6-7. Therefore, the Board held that the employer did not rebut of the Section 411(c)(4) presumption, reversed the administrative law judge's denial of benefits, and remanded the case for entry of an award of benefits.

[Rebuttal: Rebuttal in the miner's claim, case law examples]