U.S. Department of Labor

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

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

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 288
April - May 2018

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Alexander Smith
Attorney Advisor

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

On April 19, 2018, the Federal Register published a final rule containing regulations implementing the Longshore Act's provisions on the maximum and minimum compensation rates: 83 Fed. Reg. 17287-17293 (Apr. 19, 2018). The rule also implements the Longshore Act's annual compensation-adjustment mechanism for permanent total disability compensation and death benefits. The rule went into effect on May 21, 2018.

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

There are no decisions to report.

B. Benefits Review Board

***Wilson v. The Boeing Company*, __ BRBS __ (2018).**

The Board vacated the ALJ's order granting employer's motion for summary decision because claimant's notice of injury and claim were untimely.

Claimant worked intermittently for employer between 1983 and 1989. Claimant asserted that before he was sent by employer to Saudi Arabia, he received an anthrax vaccine and was told to take bromide pills. Claimant then worked for the Department of Veterans Affairs ("VA") as a civilian employee until his retirement in 1998 due to post-traumatic stress

[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 citations to a reporter are unavailable, refer to the Lexis or Westlaw identifier (*id.* at *__).

disorder.[2] In 1993, claimant testified that he started suffering leg spasms, stiff muscles, and leg pain. In March 2012, he was diagnosed with fibromyalgia, restless leg syndrome, and scattered muscle disease. Claimant testified that he started researching his medical problems and believed that the bromide pills and anthrax shots caused his medical conditions, referred to as Gulf War Syndrome. He filed a claim with the VA in 2012 for Gulf War Syndrome, which the VA rejected because it was not service-related. Claimant filed the instant claim against employer on March 30, 2016.

The ALJ found that claimant's condition is an occupational disease. The ALJ concluded that claimant became aware of the cause of his occupational disease on August 2, 2012. Accordingly, the ALJ found that claimant should have notified employer of his injury by August 2, 2013. 33 U.S.C. § 912(a). The ALJ concluded that none of the exceptions in Section 12(d) applies. The ALJ also concluded the claim should have been filed by August 2, 2014. 33 U.S.C. § 913(b)(2). Because claimant did not give notice and file his claim until March 30, 2016, the ALJ concluded that the notice and claim were untimely. Therefore, she granted employer's motion for summary decision and dismissed the claim.

The Board vacated the ALJ's summary decision, as she did not fully apply the law as to when the statutes of limitations begin to run. The Board stated that "[w]here, as here, claimant voluntarily retired prior to the date of manifestation of his injury, the filing period begins to run from the date claimant became permanently physically impaired due to his work injury and was aware of the relationship between the injury, the permanent physical impairment and his employment. 20 C.F.R. §§702.212(b), 702.222(c)." Slip op. at 4 (additional citations and footnote omitted). The ALJ did not make a finding as to when claimant became permanently physically impaired by his alleged work-related condition. Without this finding, employer is not entitled to a decision in its favor as a matter of law. The case was remanded for the ALJ to make this determination and to assess the timeliness of claimant's notice of injury and claim with respect to this date. If the evidence offered by employer in support of its motion for summary decision does not address this issue or if claimant's responsive evidence raises a genuine issue of material fact, the ALJ must hold a hearing on claimant's claim.

Assuming, *arguendo*, that claimant's notice of injury was untimely fied, the Board next addressed the ALJ's finding that none of the Section 12 exceptions applies in this case.[3] The Board stated that "[u]nder Section 12(d), untimely notice will not bar the claim if: (1) the employer had actual knowledge of the injury or death; and (2) employer was not prejudiced by claimant's late notice. *See* 33 U.S.C. §912(d); 20 C.F.R. §702.216. Pursuant to the Section 20(b) presumption, employer must establish it had no knowledge of the injury and was prejudiced by the late notice." Slip op. at 5 (citations and footnote omitted). The Board affirmed the ALJ's finding that employer established that it did not have knowledge under Section 12(d)(1). However, the Board vacated the ALJ's finding that employer was prejudiced under Section 12(d)(2) because she did not cite any specific evidence supporting the conclusion as required by the Administrative Procedure Act, 5 U.S.C. § 557(c)(3)(A). Employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim by reason of claimant's failure to provide timely notice under Section 12. Here, employer argued that it has been significantly prejudiced in investigating and defending this claim because, aside from an itemization of claimant's paychecks, it has no record of claimant's employment or the vaccinations. The Board rejected this argument, stating that "a mere conclusory allegation of prejudice or of an

[22] Because claimant retired for reasons unrelated to the conditions that are at issue in this claim, he is considered to be a voluntary retiree for purposes of the Act.

[3] The Board noted that the Section 12 issues are moot if the claim was not timely filed pursuant to Section 13(b)(2), as there are no exceptions to that provision.

inability to investigate the claim when it was fresh is insufficient." Slip op. at 6 (collecting cases). The Board instructed the ALJ to address on remand whether employer was prejudiced by claimant's failure to provide timely written notice such that the claim is barred by Section 12(a).

[Section 12 - Notice of Injury or Death; Section 13 - Timely Claim; Summary Decision]

***Mugerwa v. Aegis Defense Services*, __ BRBS __ (2018).**

The Board held that the ALJ has the authority to issue an order compelling a claimant to sign medical releases as a part of the discovery process, but vacated the ALJ's orders compelling claimant to sign medical releases based on the facts of this case.

Claimant, a Ugandan citizen and resident, alleges that he suffered an epigastric hernia as a result of working for employer in Afghanistan. Employer denies the compensability of this condition. Because the ALJ has no subpoena power in Uganda,[4] employer asked claimant to sign medical releases ("Tangiers Release" and "AIG Release"); when claimant refused, employer filed with the ALJ a motion to compel claimant to sign them. Claimant objected to the motion and sought a protective order. The ALJ granted employer's motion to compel,[5] but limited the scope of the releases to those records created no more than three years before the alleged injury. The Board accepted claimant's interlocutory appeal of the ALJ's order.

Initially, the Board rejected claimant's contention that medical releases exceed the permitted methods of discovery. It reasoned that 20 C.F.R. § 702.338 provides that "[t]he [ALJ] shall inquire fully into the matters at issue and shall receive into evidence the testimony of witnesses and any documents which are relevant and material to such matters." *See also* 33 U.S.C. § 927(a). "In making an investigation[,] the [ALJ] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, . . . but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties." 33 U.S.C. § 923(a); 20 C.F.R. § 702.339; *see also* 33 U.S.C. § 919(d). The Board concluded that "[b]ecause the Act and its regulations are more expansive than the more general OALJ rules, the parties are not limited to the discovery tools specifically listed in the OALJ Rules." Slip op. at 4-5 (additional citations and footnotes omitted).

ALJs have broad discretion in authorizing parties to obtain relevant evidence. 20 C.F.R. §§ 702.338-702.339; 29 C.F.R. § 18.12. While claimant asserted that he had provided all relevant information to employer, the ALJ correctly stated that claimant's compliance with the discovery employer has propounded does not limit employer's right to see additional evidence – at least until such time as claimant objects and the ALJ finds that further discovery is unwarranted. 20 C.F.R. §§ 702.338-702.339; 29 C.F.R. § 18.51(b)(4)(i) - (iii). Therefore, medical release forms are a permitted method for discovery.

Next, the Board rejected claimant's contention that the ALJ lacks the authority to compel him to sign medical release forms. The Board observed that courts are split over

---

[4] The Board noted that although a party generally is able to use subpoenas to obtain documents in the possession of a third party, such as a doctor, the ALJs lack the authority to compel a subpoena in a foreign country. 29 C.F.R. § 18.56(b)(2), (3).

[5] The ALJ reasoned that claimant waived his privileges because he placed his physical health at issue by filing a claim. The ALJ further stated that if claimant objects to the release of particular medical records, he must produce materials for *in camera* review by the ALJ and provide affidavits and declarations to establish why the information is to be protected.

whether a judge has the authority to compel a party to sign medical release forms under the Federal Rules of Civil Procedure ("FRCP"). After surveying the relevant cases, the Board concluded that

> "[w]eighing the competing interests identified in these cases, we hold that [ALJs] have the authority to compel claimants to sign narrowly-tailored medical releases when it is reasonable under the circumstances to do so. 33 U.S.C. §§923, 927; 20 C.F.R. §§702.338-702.339; 29 C.F.R. §18.56(b)(2), (3). Such a rule balances the need to disclose relevant information against the privacy concerns implicated by the release of potentially sensitive medical documents. *See Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002) (adopting the Director's view that an [ALJ] must determine the reasonableness of a request to compel medical releases under the circumstances of the case)."

Slip op. at 6-7. The Board noted that the lack of subpoena power over foreign citizens does not automatically justify compelling a claimant to sign medical releases, but is a factor for the ALJ to consider in determining the reasonableness of a request. Employer "presumably weighed the advantages of contracting with Ugandan nationals against the inherent complexities of litigating against a foreign national. Its failure to account for the materialization of a clearly foreseeable risk does not, *per se*, entitle it to a remedy that we believe should be sparingly granted." Slip op. at 7 n.10.

The Board also rejected claimant's contention that the ALJ should have stricken the requests to sign the releases because the requests were unsigned, as required under 29 C.F.R. § 18.50(d). Although employer's requests were initially sent via email and had no handwritten signature, the emails each contained a pre-set signature block which included employer's counsel's name, address, phone number, fax number, and email address, as required by the regulation. The motion to compel was signed by hand and included copies of the releases. Therefore, the requests complied with the regulation.

Additionally, the Board rejected claimant's assertion that his agreement to submit to a medical examination with a physician of employer's choosing negates the need for the medical releases. Employer is entitled to use a variety of discovery methods to obtain relevant medical records. *See* 20 C.F.R. §§ 702.338-702.339; 29 C.F.R. §§ 18.60-18.65.

Lastly, the Board addressed claimant's contention that compelling him to sign the medical releases was unreasonable in this case. Noting the absence of controlling precedent under the Act, the Board again looked to other courts for guidance. Federal district courts have broad discretion in addressing motions to compel, and their decisions will not be disturbed unless there was an abuse of discretion. The Board stated that

> "[t]he party who initially objects to the propounded discovery bears the burden of showing why the discovery should be denied. *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 314 F.R.D. 87 (S.D.N.Y. 2016). Specifically, 'the resisting party' must show via evidence that, despite liberal construction of the discovery rules, the requested discovery is not relevant or is overbroad, burdensome, or oppressive. *Id.* at 88; *Swackhammer v. Sprint Corp., PCS*, 225 F.R.D. 658, 661 (D. Kan. 2004) (unless a request is overbroad on its face, party resisting discovery must show overbreadth, including any objection to the temporal scope of the request). If the objection is proven, the burden shifts to the requesting party to show that the information is relevant and necessary. *Mason Tenders District Council of Greater New York v. Phase Constr. Services, Inc.*, 318 F.R.D. 28 (S.D.N.Y. 2016); *Henderson v. Holiday C.V.S., L.L.C.*, 269 F.R.D. 682, 686 (S.D. Fla. 2010)."

Slip op. at 8.

Here, the Board agreed with claimant's contention that the medical releases are grossly overbroad on their faces and appear to be designed to harass or intimidate as much as to obtain relevant information. The releases are egregious as they grant employer permission to obtain unlimited medical and other sensitive information (including hotel and travel records) from unlimited sources for no identifiable or legitimate reason. By their straightforward terms, these forms would authorize an expansive release of plainly irrelevant medical and personal records, even with the temporal limitation placed by the ALJ. The resulting invasion of privacy far outweighs any reasonable purpose such broad releases could serve in defending this claim. Accordingly, the Board vacated the ALJ's orders granting employer's motion to compel and remanded this case for further consideration. The Board instructed that

> "[o]n remand, employer must first establish a reasonable inference of the existence of additional relevant records in light of claimant's assertion that he has produced all relevant records. *See, e.g., Mason Tenders*, 318 F.R.D. at 42 (in the face of a denial of the existence of or control over documents, the requesting party must produce specific evidence challenging the assertion). If the [ALJ] finds that claimant has acted in good faith by producing his relevant medical records and employer has not shown the likely existence, relevance, and necessity of the additional requested medical information, the medical release forms are unnecessary, and the [ALJ] should deny employer's motion to compel. If, however, the [ALJ] finds that claimant has acted in good faith but employer has shown the relevance and necessity of medical information held by a medical provider, or if employer establishes claimant has not acted in good faith, then the medical releases may be warranted. If they are needed, the [ALJ] must greatly narrow their scope or must order the parties to work together to generate mutually-agreeable medical release forms. *Sherlock v. Fontainebleau*, 229 F.Supp.3d 1277 (S.D. Fla. 2017). If claimant refuses to sign the narrowed medical release forms, then the [ALJ] may grant employer's motion to compel."

Slip op. at 9-10 (additional citations and footnote omitted). The Board noted that, in *Sherlock*, the court required the parties to propose jointly-drafted HIPAA-compliant orders that would authorize a heath care provider to release only specific information, for a specific purpose, and for a limited time. Here, it may be necessary for employer to propound additional interrogatories or written deposition questions to identify the proper providers. The information addressed by any such jointly-proposed release forms should be limited to claimant's relevant medical records at issue in this specific claim and should not include extraneous information unrelated to claimant's medical condition, such as hotel or travel records, or medical records related to other people, such as claimant's dependents. Moreover, to prevent "unfettered" *ex parte* communications, the releases should regulate those communications. Slip op. at 10 n.13 (*citing Caldwell v. Chauvin*, 464 S.W.3d 139, 148 (Ky. 2015) (holding that HIPAA does not prohibit *ex parte* communications with treating physicians but does regulate the information that can be disclosed in such conversations)).

[Practice and Procedure; Powers of Administrative Law Judges]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

On April 27, 2018, the U.S. Court of Appeals for the D.C. Circuit issued its decision in *Arch Coal, Inc. v. Acosta*, __ F.3d __, 2018 WL 1972890 (Apr. 27, 2018) (pub.). This case concerned Arch Coal's challenge to Bulletin 16-01, which contained Department of Labor guidance sent to OWCP's Division of Coal Mine Workers' Compensation ("DCMWC") staff. This Bulletin provided guidance to DCMWC staff when "adjudicating claims in which the miner's last coal-mine employment of at least one year was with one of the 50 subsidiary companies that have been affected by the Patriot Coal Corporation bankruptcy." Bulletin 16-01 at 1. Specific to Arch Coal, the Bulletin instructed DCMWC staff to send notices of claim to that company in particular circumstances, even though Arch Coal had since sold the BLBA liabilities of certain subsidiaries to Magnum Coal Co., which in turn was later acquired by Patriot Coal. As part of this federal court litigation, Arch Coal sought to enjoin the Department's administrative proceedings.

In March of 2017, the U.S. District Court for the District of Columbia granted the Department's motion to dismiss for lack of subject matter jurisdiction. The District Court concluded "that Arch Coal's challenges to [Bulletin 16-01] are within the scope of [the review structure laid out by the BLBA] because they are ultimately about whether Arch Coal is liable for certain miners' compensation claims—which is the core issue that the agency adjudicates (i.e., who is the responsible operator?) through orders under this review structure." Arch Coal, Inc. v. Hugler, 242 F. Supp. 3d 13, 19 (D.D.C. 2017).

Arch Coal appealed this decision to the Court of Appeals. In its decision, the Court of Appeals first addressed the question of federal court jurisdiction. It initially noted that the BLBA, by its terms, made clear Congress's intent to limit operators to contesting "their liability for benefits payments exclusively through the statutory review scheme." Slip op. at 8. The Court of Appeals also concluded that, "[i]n all relevant respects, the BLBA resembles other statutory schemes held to preclude district court jurisdiction." *Id*. at 9. For example, operators may challenge proposed decisions and orders before an ALJ and seek further review before the Benefits Review Board. "Only after the Board has issued a final order may an adversely affected party obtain judicial review, and that review is available only in a U.S. court of appeals." *Id*. at 10. Moreover, the Court of Appeals stressed that in only two limited circumstances not relevant to the present claim does the BLBA expressly authorize district court jurisdiction. *See* 33 U.S.C. §§ 921(d), 934(b)(4)(A). Accordingly, "operators seeking to contest their liability for black lung benefits claims must exhaust the administrative remedies provided in the statute before seeking review in a U.S. court of appeals." Slip op. at 10.

The Court of Appeals further held that the claims raised by Arch Coal are of the very type that Congress intended to fall within this review scheme. It therefore rejected Arch Coal's contention that *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (per curiam), dictated that the company's claims could be heard in federal court because Bulletin 16-01 represented a substantive rule impermissibly issued retroactively and without notice-and-comment. The Court of Appeals noted that it had pointed out in *Nat'l Mining* "that in a case of the sort that Arch seeks to pursue here, 'there [is] no reason to believe that [the operator's] legal position, if correct, could not be fully remedied through review in the Court of Appeals.'" *Id.* at 12, quoting *Nat'l Mining*, 292 F.3d at 858. A formal regulation, not a bulletin, was challenged in *Nat'l Mining*, and the court underscored that Bulletin 16-01 neither imposes liability upon Arch Coal nor adjudicates any claim on the merits. The Court of Appeals thus characterized the federal lawsuit as "an attempt by Arch to jump the gun and make an end run around the BLBA's statutory scheme." *Id.* at 14. It also called attention to the concession by Arch Coal's attorney at oral argument that the

operator will have the opportunity to raise objections to the Bulletin and any other Department actions during the administrative process; in fact, the Court of Appeals pointed out that the company had in fact already done so in at least one case. The Court of Appeals also determined that any argument regarding the lack of meaningful judicial review because of inadequate discovery was premature; it further detailed numerous statutory and regulatory discovery safeguards, as well as the possibility of appellate review. *Id*. at 14-15.

Second, the Court of Appeals rejected Arch Coal's argument that Bulletin 16-01's guidance amounts to a final agency action not otherwise subject to review during the administrative process. In so doing, the Court of Appeals agreed with the Department, which contended that Arch Coal is able to raise its claims throughout the administrative process, these claims will be considered when raised, and Arch Coal has failed to challenge a final agency action in accordance with 5 U.S.C. § 704.

In light of the above, the Court of Appeals affirmed the District Court's dismissal of Arch Coal's complaint.

[Department of Labor jurisdiction]

In *Zurich American Insurance Group v. Duncan*, __ F.3d __, 2018 WL 2050669 (6th Cir. May 3, 2018) (pub.), the Sixth Circuit addressed an appeal involving a miner's claim and a survivor's claim for benefits. The miner, a non-smoker, had worked solely at above-ground coal mines for nearly 25 years and had severe respiratory problems. Below, the ALJ had awarded benefits based on the claimant's invocation of the 15-year rebuttable presumption and Zurich American's inability to rebut the presumption. The BRB thereafter affirmed the award.

The Sixth Circuit first addressed Zurich American's contention, based on the miner's surviving spouse's testimony at the hearing and the medical records, that the miner did not file his black lung claim within the three-year statute of limitations. *See* 30 U.S.C. § 932(f)(1); 20 C.F.R. § 725.308(a). The surviving spouse "was unsure" when the miner had learned from his physicians that he was totally disabled due to black lung and, while she guessed at several years in which the miner may have received such a diagnosis, eventually stated that she simply did not know the date. Slip op. at 7. The ALJ determined that her testimony on this issue was, at best, equivocal and that the medical records also did not assist Zurich American in rebutting the presumption that the miner's claim was timely filed. The court concluded that the ALJ's finding that Zurich American failed to rebut this presumption was supported by substantial evidence.

Second, the court considered Zurich American's argument that the ALJ had erred in finding that the miner had worked for at least 15 years in qualifying coal mine employment. Initially, the court rejected Zurich American's challenge to the validity of 20 C.F.R. §718.305(b)(2), which states that "[t]he conditions in a coal mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." The court held that Section 718.305(b)(2) is a valid regulation, thereby (1) according the Department's interpretation of the statute's "substantially similar" standard *Chevron* deference, and (2) joining the Tenth Circuit in so holding. *See Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1219–23 (10th Cir. 2018); slip op. at 9-12. Furthermore, the court affirmed the ALJ's finding that the miner was regularly exposed to coal mine dust exposure for at least 15 years during his surface coal mine employment. *Id*. at 12-13.

Third, the court rejected Zurich American's allegation that the ALJ had erred in finding that it did not rebut the presumption of total disability due to legal pneumoconiosis. The court determined that the ALJ had permissibly weighed the evidence on rebuttal.

Finally, the court affirmed, as unchallenged on appeal, the claimant's automatic entitlement to survivor's benefits.

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

Judge Kethledge, concurring in the result, noted his disagreement with the majority's reliance on the Department's interpretation of the phrase "substantially similar" contained in 30 U.S.C. §921(c)(4). While he contended that the phrase "substantially similar" is not ambiguous, he further stated that the Department's interpretation of the phrase "is no different than mine" and is in fact "both thoughtful and well-reasoned." Slip op. at 18-19. Judge Kethledge emphasized that, while his disagreement with majority matters little in the present case, "[f]or purposes of our constitutional separation of powers, . . . it matters a great deal whether we exercise our Article III power to 'say what the law is,' . . . or instead hand over that power to an executive agency." *Id*., quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995). According to Judge Kethledge, the meaning of the "substantially similar" phrase "is easy enough to discern here"; therefore he concurred only in the judgment. Slip op. at 19.

[Fifteen-year presumption at 20 C.F.R. § 718.305: "Substantially similar" conditions at a surface mine, deference to the Administrative Law Judge]

In an unpublished decision, *Consol of Kentucky, Inc., v. Eskut*, __ Fed. Appx. __, 2018 WL 2329737 (6th Cir. May 23, 2018), the Sixth Circuit denied the employer's petition for review. The employer in *Eskut* had challenged the ALJ's finding that it had not rebutted the 15-year presumption.

A. Benefits Review Board

There are no decisions to report.