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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 273
July - August 2016

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

OWCP's Proposed Rule on the LHWCA's Maximum and Minimum Compensation Rates:

On August 26, 2016, the OWCP published for public comment a proposed rule that would implement the Act's Section 6 maximum and minimum compensation provisions. The proposed rule also addresses the Act's Section 10(f) annual adjustment provision. Click HERE to review the Maximum and Minimum Compensation Rates proposed rule on the Federal Register's website. The comment period ends on October 25, 2016.

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

***Fenske v. Serv. Emples. Int'l, Inc.*, ___ F.3d __, 2016 U.S. App. LEXIS 15791 (9th Cir. 2016).**

The Ninth Circuit affirmed the Board's holding that claimant could not receive concurrent compensation for a "scheduled" injury (hearing loss) and total disability caused by his back injury.

On October 9, 2005, claimant suffered a back injury while working for employer in Iraq. The ALJ awarded claimant temporary total disability (TTD) benefits followed by permanent total disability (PTD) for this injury. Claimant also presented an audiogram from June 4, 2009 showing hearing loss. The ALJ held that concurrent payments for the hearing loss were unavailable, and the BRB affirmed.

[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 refer to the Lexis identifier.

The Ninth Circuit stated that it generally disallows concurrent awards involving total disability because the Act "invokes wage-compensation principles rather than tort principles." *Id.* at *6 (*quoting Rupert v. Todd Shipyards Corp.*, 239 F.2d 273, 274-77 (9th Cir. 1956) (per curiam)). While tort principles seek to compensate a plaintiff for every injury wrongfully suffered, wage-compensation principles repay workers for lost earning capacity, not the injury itself. Once a worker has lost all earning capacity through total disability, an additional award would constitute "double dipping." *Id.* (*quoting Stevedoring Servs. of Am. v. Price*, 382 F.3d 878, 885 (9th Cir. 2004) (as amended).[2] These principles apply to scheduled losses.

Claimant asserted that he should, nevertheless, be paid a concurrent award based on *Price*, which allows concurrent awards for certain time-delayed injuries. In *Price*, claimant suffered an unscheduled PPD under § 8(c)(21) and was awarded two-thirds of his lost earning potential. Years later, he suffered a second injury causing PTD. The court held that, under those circumstances, concurrent payments were warranted because the later total disability award was based on a wage that had already been decreased by the earlier partial disability. In the present case, claimant sought to extend *Price*'s holding beyond PPDs under § 8(c)(21) to scheduled losses. The court stated that it did not need to address this issue because "a prerequisite for applying the *Price* theory is that the partial disability preceded the total disability." *Id.* at *8. Because claimant's hearing loss did not precede his back injury, *Price* does not apply.

While claimant was exposed to excessive noise throughout his employment in Iraq, the only evidence of his hearing loss was an audiogram obtained years after his employment ended. The Supreme Court has held that hearing loss is not a latent disease involving a delayed onset of disability, but rather occurs simultaneously with the exposure to excessive noise. *Id.* at *8 (*citing Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153 (1993)). As a result, when a post-retirement audiogram shows hearing loss, "the date of last exposure—the date upon which the injury is complete—is the relevant time of injury for calculating a retiree's benefits for occupational hearing loss." *Id.* at *9 (*quoting Bath Iron Works*, 506 U.S. at 165). Under this rule, claimant's date of last exposure was the same day he suffered his back injury and was forced to leave Iraq.

Claimant argued that the court should formulate an alternate rule based on the Supreme Court's statement in *Bath Iron Works* that a hearing loss injury "occurs simultaneously with the exposure to excessive noise." The Ninth Circuit disagreed and held that in a case where the only evidence of hearing loss is a post-retirement audiogram, the *Bath Iron Works* rule applies when determining the timing of disabilities under *Price*. Claimant's argument is inconsistent with the bright-line date-of-last-exposure rule adopted by the Supreme Court. As an injury that progresses with exposure over time, determining the date and extent of hearing loss before the date of last exposure would delay proceedings and require more speculation than fact. Additionally, this court has previously rejected attempts to set the date of hearing loss disability earlier than the date of last exposure when the proof of earlier hearing loss was anything less than a reliable audiogram. Claimant's last day of exposure to excessive noise was the same day as his back injury and *Price* does not apply.

[2] While the court never held that the double dipping prohibition applies to TTD, it did not reach this issue here, as claimant relied entirely on *Price*.

Claimant further argued that if full concurrent payments are not available, he should at least be provided a decreased award capped at two-thirds of his wage under *ITO Corp. of Baltimore v. Green*, 185 F.3d 239 (4th Cir. 1999)(holding that the total of multiple awards should have a ceiling of two-thirds of a worker's AWW—the amount awarded to a worker with total disability). This relief would benefit claimant because his total disability award was capped by § 6(b) at 200 times the NAWW, an amount that was less than two-thirds of his AWW for multiple years. The court noted its holding in *Price* that § 6(b) cap does not limit the total amount paid for multiple awards. Here, the court denied the requested relief, as claimant's argument provides no additional rationale for allowing concurrent payments.

[Topic 8.4 Concurrent Awards; Topic 8.13 Hearing Loss]
***Baker v. Director, OWCP*, __ F.3d __, 2016 U.S. App. LEXIS 15297 (5th Cir. 2016).**

The Fifth Circuit affirmed the ALJ/BRB's determination[3] that claimant did not satisfy the coverage requirements under the LHWCA or the Outer Continental Shelf Lands Act (OCSLA).

Claimant, a marine carpenter, was hired by employer to fabricate topside living quarters to be incorporated onto the tension leg offshore oil platform named Big Foot. He was allegedly injured while performing this work and sought benefits under the LHWCA and, alternatively, under the OCSLA.

The court initially stated that where the facts are not in dispute—as in this case—whether LHWCA coverage exists is a question of statutory interpretation and thus is reviewed *de novo* as a pure question of law.

The court held that claimant did not satisfy the § 2(3) status requirement under the LHWCA because his work did not involve "shipbuilding." Addressing the 1 U.S.C. § 3 definition of "vessel," and the Supreme Court's decisions in *Stewart v. Dutra Constr. Co.*, Inc., 543 U.S. 481 (2005), and *Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735 (2013), the court affirmed the ALJ/BRB's finding that Big Foot is not a "vessel" under the Act. The court concluded that

> "… Big Foot is *not* a vessel. Like the floating home in *Lozman*, Big Foot has no means of self-propulsion, has no steering mechanism or rudder, and has an unraked bow. Big Foot can only be moved by being towed through the water, and when towed to its permanent location, Big Foot will not carry 'items being transported from place to place (*e.g.*, cargo),' but only 'mere appurtenances.' [*Lozman*, 133 S. Ct.] at 745. While required to carry a captain and crew when towed, the crew will only be present to ensure Big Foot's transport to its permanent location on the OCS. And unlike the *Super Scoop*, Big Foot will not be used to transport equipment and workers over water in the course of its regular use. *Dutra*, 543 U.S. at 495. In fact, Big Foot is only intended to travel over water once in the next twenty years—the voyage to its operational location on the OCS. Given these undisputed facts, 'a reasonable

[3] See *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), summarized in *RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST* # 268 (Feb. 2015 – Aug. 2015).

observer, looking to [Big Foot's] physical characteristics and activities, would [not] consider it designed to a practical degree for carrying people or things over water.' *Lozman*, 133 S. Ct. at 741.'"

Id. at *9-10 (emphasis in original). This holding comports with this court's precedent, including decisions addressing the definition of "vessel" under the Jones Act. As Big Foot is not a "vessel," the ALJ properly found that claimant was not involved in shipbuilding and is not covered under § 2(3) of the LHWCA.

Claimant also did not satisfy the coverage requirements of the OCSLA. The OCSLA extends coverage of the LHWCA to "injur[ies] occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the outer Continental Shelf." 43 U.S.C. § 1333(b). Pursuant to *Pacific Operators Offshore, LLP v. Valladolid*, 132 S.Ct. 680 (2012), claimant's on-shore work at employer's shipyard facility was not the "result of" OCS operations because it did not have a substantial nexus to OCS operations. In rejecting the "but for" test, the Supreme Court was clear in *Valladolid* that the OCSLA was not meant to "cover land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS." *Id.* at *13 (*quoting Valladolid*, 132 S.Ct. at 690). In this case,

> "[w]hile not an office employee, Baker's job of constructing living and dining quarters is too attenuated from Big Foot's future purpose of extracting natural resources from the OCS for the OCSLA to cover his injury. Baker's employment was located solely on land, whereas, for example, the deceased in *Valladolid* spent ninety-eight percent of his time on an offshore drilling platform (even though he was injured while on land). Baker's particular job, to the contrary, did not require him to travel to the OCS *at all*, making his work geographically distant from the OCS. And although Gulf Island manufactured the living quarters for Big Foot, the company had no role in moving Big Foot to, installing Big Foot on, or operating Big Foot once placed on the OCS. Based on the specific facts of Baker's employment, we conclude that his injury does not satisfy the substantial nexus test and is not covered under the LHWCA as extended by the OCSLA."

Id. at *13-14 (citation omitted; emphasis in original).

[Topic 2.3 DEFINITIONS – § 2(3) EMPLOYEE; Topic 60.3 OCSLA – Coverage]

B. Benefits Review Board

***Anderson v. Yusen Terminals, Inc.*, __ BRBS __ (2016).**

The Board affirmed the ALJ's denial of employer's request for § 8(f) relief, holding that employer waived any entitlement to § 8(f) relief when it failed to litigate the issue in the initial proceeding before OALJ in which claimant was found to be permanently disabled.

When this claim initially came for consideration by an ALJ in 2011-2012, the ALJ entered an award of permanent disability benefits based on the private parties' stipulations, and employer formally withdrew the § 8(f) issue from consideration. Several years later, employer again raised its entitlement to § 8(f) relief in conjunction with a § 8(j) claim. A

second ALJ considered the issue of employer's entitlement to § 8(f) relief, but found that employer did not meet the requirements for such relief.

The Board initially rejected employer's argument that the OWCP Director could not argue for the first time on appeal that employer waived its right to claim § 8(f) relief. The Director was permitted to raise this issue for the first time on appeal as the Director's argument raised a legal issue and as the liability of the Special Fund was at issue.

Agreeing with the OWCP Director, the Board held that, pursuant to *Serio v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 106 (1998), and *Egger v. Willamette Iron & Steel Co.*, 9 BRBS 897 (1979), the ALJ should not have considered employer's § 8(f) request because employer waived its right to claim such relief when it withdrew the § 8(f) issue from consideration in the initial proceeding in which claimant was found to be permanently disabled. A § 8(f) claim must be "litigated" in the same proceeding wherein permanent disability is at issue, absent a showing of special circumstances. Although (unlike in *Serio* and *Egger*) no formal hearing was held regarding the permanent disability issue, there were, in fact, two proceedings before the OALJ. Further, there was no evidence here indicating any special circumstances that outweigh the proscription against bifurcation of issues.

[Topic 8.7.9 SECTION 8(f) SPECIAL FUND RELIEF - Procedural Issues; Topic 21.2 Board Appellate Procedure]

***Suarez v. Service Employees Int'l, Inc.*, __ BRBS __ (2016).**

The Board affirmed the ALJ's decision awarding medical benefits for claimant's gastrointestinal injury and denying disability compensation based on failure to file a timely claim under § 13(a).

While working for employer in Iraq, claimant suffered incapacitating gastric episodes in 2007, 2009, and 2010, which had been variably diagnosed. He was terminated in 2010 for breach of safety standards. On April 17, 2011, he filled out an LS-203 claim form seeking temporary total disability (TTD) benefits for a work-related "bacteria stomach infection" he suffered on December 29, 2009. In 2013, he was diagnosed with post-infectious irritable bowel syndrome (IBS).

The ALJ found that claimant suffered a work-related GI injury. As the parties stipulated that the date of injury was December 29, 2009, the day before claimant requested medical leave due to his condition, and as employer filed its first report of injury on January 14, 2010, the ALJ found that the tolling ended and the one-year time for filing a claim began to run on that date, pursuant to 33 U.S.C. §§913(a), 930(a), (f). The ALJ found that claimant filed his claim for compensation on May 27, 2011, and that such claim was untimely under § 13(a). The ALJ awarded claimant medical benefits.

Injury

On appeal, employer contended that the ALJ erred in considering claimant's stomach ailments as one condition for which he filed a claim. It asserted that claimant's claim was

for a 2009 *H. pylori* infection and that the § 20(a) presumption does not apply to the IBS – a secondary condition that was not claimed. Employer further argued that the IBS is not compensable, as it is not the natural and unavoidable result of the 2009 infection. The Board held that, as the parties stipulated to claimant's "gastrointestinal" injury and employer did not contend before the ALJ that the § 20(a) presumption is not applicable, the ALJ properly applied § 20(a) to claimant's GI condition in its entirety.

The Board agreed with employer that the ALJ erred in finding it did not rebut the § 20(a) presumption linking claimant's GI condition to his employment in Iraq. In particular, the ALJ found that the opinion Dr. Raijman did not rise to the level of substantial evidence necessary for rebuttal because his opinion that claimant's home well water could have been the cause of the original infection was speculative. The Board reasoned that, as Dr. Raijman was unequivocal in his opinion that claimant's GI condition is not related to his employment in Iraq, the § 20(a) presumption was rebutted. However, any error is harmless, as the ALJ addressed the record as a whole and rationally credited Dr. McHorse's opinion that claimant's GI condition is work-related. As a claim for medical benefits is never time-barred, the BRB affirmed the award of medical benefits.

Timeliness of Claim

Traumatic Injury or Occupational Disease?

The Board affirmed the ALJ's finding that claimant's GI condition is a traumatic injury, subject to the provisions of § 13(a)(one-year statute of limitations), and not an occupational disease, subject to the provisions of § 13(b)(2)(two-year statute of limitations). The Board reasoned that "occupational disease" has been defined as a disease caused by the hazardous conditions of employment, which are peculiar to the employee's employment as opposed to other employment generally. Typically, the onset of an occupational disease is gradual, not sudden. 33 U.S.C. § 913(b)(2) (time for filing claim when disease *does not immediately result* in disability or death); *but see* 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law, §52.04[3] (2015)(as both types of injuries may be work-related, gradual onset is no longer necessary to distinguish "disease" from "accident"). In this case, although claimant has a "disease" that was caused or aggravated by his work, the ALJ rationally concluded that claimant's GI condition is not an "occupational disease" because his gastric episodes rendered him immediately disabled. Additionally, a GI condition is not "peculiar" to being a truck driver in Iraq.

Was Claim Timely Filed?

The Board affirmed the ALJ's determination that claimant's 2011 claim for disability compensation was untimely. Under § 13(a), the time for filing a claim for compensation does not "begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment." A claimant is not "aware" until he knows the likely impairment to his wage-earning capacity (WEC) due to his work injury. *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). A doctor's opinion relating the condition to the employment is not necessarily controlling.

Here, claimant asserted that the ALJ incorrectly determined his date of awareness to be December 29, 2009, because he recovered, continued to work, and did not have "*Stancil* awareness" until he was diagnosed with IBS in 2010. The Board disagreed. It reasoned that claimant was aware he suffered incapacitating gastric episodes in 2007, 2009, and 2010. That his GI injury was not identified as IBS until 2010 did not make it an "unknown" injury as in *Stancil* or prevent him from knowing its "full character." Importantly, in May 2011, claimant filed a claim for benefits for the period he missed work in 2010. Therefore, he need not have been "aware" of any particular diagnosis of a permanent condition (like IBS) or know the likelihood of any permanent effect on his WEC before filing his claim. Claimant's awareness of a temporary loss of his ability to work due to a work-related injury, in a claim for a specific period of temporary disability benefits, is sufficient to commence the running of the statute of limitations. Thus, based on claimant's testimony concerning his awareness of the work-relatedness of his symptoms and Dr. Berry's precluding him from work beginning December 28, 2009, the December 29, 2009 date of awareness is supported by substantial evidence. Further, as claimant's claim, wherein he sought benefits for only the initial period of disability in January 2010, was untimely filed, he cannot amend it to request benefits for other/later periods of disability.

[Topic 20.2 PRESUMPTIONS – § 20(a) CLAIM COMES WITHIN PROVISIONS OF THE ACT; Topic 19 PROCEDURE (Stipulations); Topic 21.2 Board Appellate Procedure; Topic 13.3 TIME FOR FILING OF CLAIMS – AWARENESS STANDARD]

***Maglione v. APM Terminals*, BRBR (2016).**

The Board held that the ALJ erred in granting employer's motion for summary decision for reasons "independent of the motion," without first giving the parties notice and the opportunity to respond to this particular position, as required by 29 C.F.R. § 18.72(f).

Claimant filed a claim for hearing loss against employer, with the last date of exposure on March 9, 2001, and employer voluntarily paid benefits. Thereafter, a dispute arose over additional benefits based on a disagreement over claimant's impairment rating and average weekly wage (AWW). Claimant previously filed a claim for total disability benefits against multiple employers for orthopedic injuries sustained in work accidents on 1998 and 2000, and this claim was resolved in 2005 through an approved § 8(i) settlement agreement.

Prior to the scheduling of a hearing, employer filed a motion for summary decision with the ALJ based on its position that it had voluntarily paid claimant full compensation for his hearing loss. Claimant responded that there are genuine issues of material fact on the issues AWW and extent of hearing impairment. Despite the parties' respective positions, the ALJ granted employer's motion for summary decision on the independent finding that claimant suffered no loss of WEC from his hearing loss, because he had no WEC or AWW by virtue of his prior orthopedic injuries as of March 9, 2013.

The Board vacated the ALJ's order. Section 18.72(f) provides that the ALJ may issue a "Decision independent of the motion," but only after giving notice and an opportunity to respond. The ALJ erroneously granted employer's motion for reasons "independent of the motion," without first giving the parties notice and the opportunity to respond to this

particular position. Neither party asserted that claimant had no AWW. On remand, the ALJ may rule on employer's motion for summary decision on the grounds specifically raised by employer and opposed by claimant. Alternatively, the ALJ may issue a "decision independent of the motion" provided he gives the parties "notice and a reasonable time to respond" to the grounds identified by the ALJ.

The Board also provided guidance on the substantive issues raised by employer's motion. It stated that the ALJ's denial of benefits was based, in part, on a finding that claimant was already totally disabled as of March 9, 2001. The Board observed that a claimant may not concurrently receive a scheduled PPD award for one injury and a total disability award for another injury, as claimant cannot receive compensation greater than that for total disability. In a case in which the claimant sustains two injuries, one of which is totally disabling and the other which would result in a scheduled award, the claimant can receive scheduled benefits only where he is able to show that the PPD injury occurred prior to the onset of total disability. The claimant may only recover scheduled benefits accruing between the onset of partial disability and the onset of total disability. The Board further noted its holding in *Hoey v. Owens-Corning Fiberglas Corp.,* 23 BRBS 71 (1989), that a claimant was precluded from receiving disability benefits for work-related stomach cancer pursuant to § 8(c)(23), because he had settled pursuant to § 8(i) his claim for work-related asbestosis and the settlement agreement stated that the he was PTD. In this case, claimant can raise on remand his contention that the settlement agreement was not for PTD benefits.

[Topic 19.4.2 PROCEDURE - Summary Decision; Topic 8.4 Concurrent Awards]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

[There are no published Circuit Court decisions to report, though the Sixth Circuit issued an unpublished black lung decision in *Quarto Mining Co. v. Director, OWCP* [*Stupak*], ___ Fed. Appx. ___, 2016 WL 4254383 (6th Cir. Aug. 12, 2016). The decision is available via Google Scholar here.]

B. Benefits Review Board

In *Spatafore v. Consolidation Coal Co.*, BLR , BRB No. 15-0265 BLA (Aug. 12, 2016), a case arising out of the Fourth Circuit, the Benefits Review Board ("Board") addressed Employer's appeal of an ALJ's award of benefits. Below, the ALJ found that Claimant had established the existence of a totally disabling respiratory or pulmonary impairment and at least 15 years of qualifying coal mine employment ("CME"). Accordingly, the ALJ found that Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The ALJ further found that Employer was unable to rebut the presumption and awarded benefits.

Employer appealed to the Board, alleging that the ALJ erred in finding 15 years of qualifying CME and that the miner was totally disabled; therefore, Employer contested the ALJ's finding that Claimant properly invoked the 15-year rebuttable presumption. Even if the presumption was properly invoked, Employer alleged that the ALJ erred in finding that it failed to rebut the presumption.

The Board first addressed Employer's argument that the ALJ erred in finding Claimant worked for at least 15 years in qualifying CME. Below, the ALJ credited Claimant with 17.8 years of CME, 7 years of which were as an underground miner for Employer and 10.8 years of which were as a West Virginia state mine safety trainer. Both the Director, OWCP, and Employer alleged that Claimant should not be considered a "miner"[4] for this later CME and, therefore, the ALJ erred in crediting Claimant for this time as part of his length of CME calculation. As the Board noted, the definition of a "miner" encompasses a situs requirement ("that the claimant worked in or around a coal mine or coal preparation facility") and a function requirement ("that the claimant worked in the extraction or preparation of coal"). The Board stated that the parties did not dispute that Claimant's work as a state mine safety trainer satisfied the situs requirement; instead, the issue was "whether that work also satisfies the function requirement."

In addressing this issue, the Board noted the various descriptions of Claimant's work as a state mine safety trainer contained in the record. In response to Employer's interrogatories, Claimant described his job duties as follows: "Trained mine rescue teams

[4] A miner is defined as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a).

and did safety training for miners underground[.]" A completed Department of Labor ("Department") employment history form described Claimant as "a safety instructor[,] which required him to train mine rescue teams." Claimant indicated that he trained these teams "to build stoppages, shovel[,] and do various mining duties while using the breathing apparatus . . . ." He also led escape studies "to try out the effects of the self[-]rescuer." These trainings were conducted inside and outside the mine, and Claimant indicated he was exposed to "significant amounts" of coal dust and smoke. At the hearing, Claimant testified that during trainings "[w]e'd go underground and work problems" and conduct drills. He and the team he was training would "go up on a section [underground] and talk safety to the guys, watch them mine coal," and "tell them where to stand, where not to stand." Although Claimant stated that he worked 3 days a week underground, for about 5 to 6 hours a day, he did not do work that was related to the production of coal.

The Board concluded that, while "claimant performed important work as a mine safety trainer, claimant's job duties were not integral or necessary to the extraction or preparation of coal." Therefore, the Board further "conclude[d] that claimant was not working as a miner, as defined by the [Black Lung Benefits] Act [("Act")] and its implementing regulations, when he worked for the State of West Virginia as a mine safety trainer." In light of this holding and the Sixth Circuit's holding in *Navistar, Inc. v. Forester*, 767 F.3d 638, 25 BLR 2-659 (6th Cir. 2014), that a federal miner inspector is not considered to be a miner, the Board stated the following: "logic compels us to conclude that, as a general rule, government employees, whether federal or state workers, are not miners for purposes of the Act and the regulations." The Board reiterated that, "with the exception of coal mine construction and transportation workers, the Act and its function requirement limit the definition of 'miner' to those individuals who perform work integral or necessary to the extraction or preparation of coal."[5]

In support of its distinguishing between employees of private entities and government agencies, the Board referenced the Sixth Circuit's decision in *Forester* and 20 C.F.R. §725.491, which clarifies that "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. §725.491(f); *see Forester*, 767 F.3d at 646, 25 BLR at 2-672 (noting that, when Congress moved enforcement of federal mine safety regulations to the Department, it "intended to separate inspection duties from any nexus to production"). Although the Board emphasized that the instant decision "does not preclude private employees who perform safety-related tasks for operators from being considered miners under the Act," the Board found "it difficult to envision how government employees' work related to regulation could be integral or necessary to coal production."

[5] The Board recognized its departure, with this holding, from its holding in a prior published case that a federal mine inspector is a miner for purposes of the Act. *See Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-43-44 (1981). The Board indicated that it was compelled to depart from the reasoning in *Moore* in light of government employees' regulatory function and decisions from the Fourth and Sixth Circuits. *See Forester*, 767 F.3d at 645-47, 25 BLR at 2-670-73 (holding that a federal mine inspector does not satisfy the Act's definition of a miner for failure to meet the function requirement); *McGraw v. OWCP*, 908 F.2d 967 (Table), 1990 WL 101412 at *1 (4th Cir. July 10, 1990) (concluding that "[f]ederal mine inspectors do not meet [the] definition [of a miner] for the purposes of establishing eligibility for black lung benefits").

Pursuant to the above, the Board held "that individuals who work at coal mines on behalf of federal or state agencies not charged with the function of extracting, preparing, or transporting coal, or performing coal mine construction, do not perform work integral or necessary to the extraction or preparation of coal, and therefore do not work as 'miners' under the Act." The Board noted that it follows that such work "is not 'coal mine employment,' 'coal mine work,' or 'employment in a mine or mines' under the Act and regulations." This conclusion then, impacts not just who is a miner, but also, *inter alia*, the calculation of length of CME for purposes of the rebuttal presumption.

In light of the above, the Board vacated the award of benefits and the following findings by the ALJ, all of which derived from his crediting Claimant's time as a mine safety trainer as qualifying CME: (1) that Claimant worked for 17.8 years in qualifying CME, (2) that Claimant invoked the 15-year rebuttable presumption, and (3) that Employer failed to rebut the presumption. Because the Board also concluded that the ALJ erred in considering the evidence at total disability, as he relied only upon the PFS evidence and did not consider the ABG or medical opinion evidence, it vacated the ALJ's total disability finding as well. Finally, it directed the ALJ to reassess the medical opinions at disability causation, should he on remand again find pneumoconiosis and total disability established.

Accordingly, the Board remanded the matter for further consideration.

[Coal miner defined under 20 C.F.R. Parts 718 and 727: The three-prong test; Function of the miner]

In *Dameron v. Big Bear Mining Co.*, BRB No. 15-0389 BLA (Aug. 16, 2016) (unpub.), the Board addressed Employer's appeal of an ALJ's order awarding Claimant's counsel $2,659.84 in reimbursements for costs associated with a successfully prosecuted federal black lung claim.

Pertaining to this claim, the District Director issued a Proposed Decision and Order awarding benefits on April 24, 2009. Following Employer's request for a hearing, the ALJ issued a Decision and Order awarding benefits on August 17, 2010. As part of this Decision and Order, the ALJ ordered Claimant's counsel to file a petition for attorney's fees and costs within 30 days of the Decision and Order's issuance. On August 30, 2010, Claimant's counsel filed a petition seeking $7,497.50 in fees, but not costs, incurred while litigating the case before the Office of Administrative Law Judges ("OALJ"). On November 8, 2010, counsel filed a petition for $2,669.84 in costs incurred relating to proceedings before the OALJ; however, counsel incorrectly filed this petition with the District Director, not the ALJ.[6] The ALJ fully awarded counsel's request for attorney's fees in a December 21, 2010 fee award.

Employer filed an appeal of the December 21, 2010 fee award with the Board on January 5, 2011. Claimant's counsel did not file a cross-appeal addressing the ALJ's failure to consider the petition seeking reimbursement for costs. On April 14, 2011, pursuant to

[6] According to the Board, there is no indication that the District Director ever addressed this petition for costs.

Employer's motion to withdraw its appeal of the fee award, the Board dismissed the appeal, which became final 60 days thereafter. *See* 20 C.F.R. §802.406.

In the meantime, Employer continued to contest the underlying award of black lung benefits. Employer appealed the ALJ's August 17, 2010 Decision and Order, and the Board affirmed the award in an August 25, 2011 Decision and Order. Employer thereafter appealed the Board's decision to the Fourth Circuit, though that court later granted Employer's motion to dismiss the appeal on October 3, 2013. No further action was taken on the underlying claim for benefits.

On May 4, 2015, Claimant's counsel submitted the petition for costs, originally incorrectly submitted to the District Director, to the ALJ. Counsel indicated that the petition "was erroneously sent to the District Director instead of" the ALJ. Despite Employer's opposition to the petition as being untimely filed, the ALJ allowed the filing, struck one of the claimed expenses, and directed Employer to reimburse Claimant's counsel for $2,659.84 in costs. Employer appealed the award for costs to the Board.

On appeal, the Board agreed with Employer that the ALJ "lacked jurisdiction to allow claimant's counsel to file his request for costs, or to consider counsel's request, and therefore erred in awarding costs." According to the Board:

> Jurisdiction over counsel's fee petition was transferred from the administrative law judge to the Board in January of 2011, when employer filed its appeal of the administrative law judge's order awarding claimant's counsel $7,497.50 in fees. At that point, the administrative law judge no longer had authority to issue orders or take any other action with respect to the fee petition.

Slip op. at 4. The Board further noted that, because it then dismissed Employer's appeal of the fee award and did not remand the matter to the ALJ for further consideration, the ALJ never regained jurisdiction. In addition, the dismissal of the petition became final 60 days thereafter, "bringing litigation over the fee petition to a close." As the ALJ never regained jurisdiction over the petition, "he had no authority to reopen the litigation by granting claimant's counsel's request to 'amend' his fee petition."

In light of the above, the Board deemed as void, and therefore reversed, the ALJ's order awarding Claimant's counsel $2,659.84 in costs.

[Fee Petitions: Limiting time to file fee petition]

In *Fitzpatrick v. Old Ben Coal Co.*, BRB No. 0444 BLA (Aug. 31, 2016) (unpub.), a case arising within the Seventh Circuit, the Board addressed Employer's appeal of an award of benefits in a miner's subsequent claim. Before a hearing was held in the case, the ALJ denied Employer's request to subpoena Department employees in order to obtain their testimony regarding "the continuing validity of the scientific premises set forth in the preamble to the 2001 regulations." The ALJ also denied Employer's Motion for Reconsideration and Request for Continuance. In doing so, the ALJ found that the request "would only serve to confuse issues and unnecessarily delay the hearing by raising legal

challenges already well-settled by case law." Furthermore, the ALJ noted that, "if [e]mployer believes that the preamble language is misapplied to my decision in the current claim before me, [e]mployer may argue that point on appeal."

In a Decision and Order following her orders related to Employer's subpoena request, the ALJ awarded benefits pursuant to the rebuttable 15-year presumption.

On appeal, Employer initially argued that the ALJ failed to provide a proper basis for denying its subpoena request. The Director disagreed, contending that the ALJ's rejection of Employer's subpoena request was within her discretion. The Board, agreeing with the Director, held "that employer has failed to show that the administrative law judge abused her discretion in denying employer's subpoena request." In support of this conclusion, the Board noted that "the burden falls on the party challenging the regulation's validity to establish that the scientific consensus upon which it is based has changed, such that the regulation no longer reflects the prevailing scientific view." The Board concluded that the ALJ "determined correctly that employer could satisfy this burden by offering its own evidence demonstrating that the scientific conclusions accepted by the [Department] in the preamble are no longer accepted as correct."

Although recognizing that "there is a dearth of case law finding that an employer proffered evidence sufficient to invalidate the science that the [Department] relied on in promulgating the revised definition of legal pneumoconiosis," the Board pointed out that this fact "does not establish that it is impossible for an employer to develop such evidence." The Board noted that, in *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014), the Sixth Circuit recognized that an ALJ would have to address an employer's challenge to the science underlying the preamble, but "only after [the employer] submitted 'the type and quality of medical evidence that would invalidate' the DOL's position in that scientific dispute." The Board concluded in the instant case that the ALJ "reasonably determined that employer could have developed and submitted its own scientific evidence challenging the premises underlying the [Department's] definition of legal pneumoconiosis without questioning [Department] personnel on this issue." Therefore, the Board affirmed the ALJ's decision to deny Employer's subpoena request.

On the merits, the Board affirmed the ALJ's finding that Claimant established entitlement to benefits pursuant to the 15-year rebuttable presumption.

[Subpoenas]