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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 277
December 2016

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Chief Judge

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Associate Chief Judge for Longshore

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

[no published decisions to report]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Aberry Coal, Inc., v. Fleming*, 843 F.3d 219 (6th Cir. Dec. 1, 2016), the Sixth Circuit addressed whether the ALJ's calculation of Mr. Fleming's ("Claimant") length of coal mine employment ("CME") was supported by substantial evidence. The court, in an opinion written by Judge Levy, concluded that it was not, reversed the ALJ's length of CME finding, and remanded the matter for further proceedings.

Most recently, on remand from the Benefits Review Board, the ALJ issued a Decision and Order awarding Claimant benefits. In his decision, the ALJ found Claimant worked for more than 15 years in qualifying CME, based on his review of Claimant's testimony and employment records, and again awarded benefits pursuant to the 15-year presumption of total disability due to pneumoconiosis. The Board affirmed his decision, and Employer appealed to the Sixth Circuit.

On appeal, after listing Claimant's work history, which spanned from 1970 to 1991, the court summarized the ALJ's CME findings as follows:

> The ALJ determined that Fleming should receive no credit for [CME] in 1972, because Fleming showed no earnings from [CME] that year. Fleming also showed no employment between 1981 and 1984, or in 1986. Fleming's work in 1987 was also not [CME]. Accordingly, he showed no coal-mine related employment during six of the twenty-two years between the beginning of 1970 and end of 1991.
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> Despite earning only $72 in 1970, the ALJ credited Fleming with a full year of [CME] at Peem Coal Co. based on Fleming's testimony that he knew he "was there close to a year." For 1971, the ALJ credited Fleming with a year of employment at High Point Coal Co., despite earning only $57.50 that year, again based on Fleming's testimony that he "worked there almost a year." The ALJ credited Fleming with a second year of employment in 1971 at Archer & Club Coal Co., despite Fleming's having earned only $200 that year, based on Fleming's testimony that he "worked there for about a year, maybe longer." The ALJ next credited Fleming with a year of employment in 1971 and 1972 at the POM Corp. (erroneously called T.O.M. Corp.) based on Fleming's testimony. The ALJ then credited Fleming with a year of work at various employers in 1973 and with a year of work in 1974 for his work for the Scotia Employees Association. We assume that the ALJ meant Scotia Coal Co., where Fleming worked in 1974, and not Scotia Employees Association, where Fleming worked in 1975. In all, despite having found that Fleming had no [CME] in 1972, the ALJ credited him with five years of work in the five-year period between 1970 and 1974.
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> The ALJ credited Fleming with three years of employment at Scotia Employees Associates from 1975 to 1977, despite his not working at Scotia Employees Associates in 1976. Again, we will assume the ALJ meant to refer to Scotia Coal Co., where Fleming worked in 1976. The ALJ credited Fleming with two and one-half years of employment between 1978 and 1980, and with three years of employment in 1985, 1988, and 1989 for his work at Everidge & Nease Coal Co. Inc. and Wampler Bros. Coal Co. Inc. Finally, the ALJ credited Fleming with an additional year of work in 1989 for his work at Aberry, along with another two years of work in 1990 and 1991. This gave Fleming an additional eleven and one-half years of [CME], for a total of

sixteen and one-half years. The ALJ determined that Fleming qualified for the fifteen-year service presumption under the BLBA, and awarded benefits.

Aberry, 843 F.3d at 222-23 (internal citations omitted). The court concluded that the ALJ twice erroneously credited Claimant with two years of CME in one calendar year: (1) once in 1971, when he credited Claimant with full years of CME at High Point Coal Co. and Archer & Club Coal Co. and a partial third overlapping year at POM Corp., and (2) once in 1989, when he credited Claimant with a full year of CME at Wampler Bros. Coal Co., Inc., and a full year of CME at Aberry. In doing so, the court concluded that "the ALJ created two additional years of work that cannot exist." *Id*. at 224. Furthermore, the court concluded that the ALJ improperly credited Claimant with at least 4 additional months of CME in 1970 and 1991. *See id.*

In light of the above, the court determined that "[a] reasonable calculation based on the substantial evidence presented would allow the ALJ to conclude that [Claimant] had no more than fourteen years and two months (sixteen years and six months minus the two years and four months outlined above) of [CME]." *Id*. Therefore, the court concluded that, on remand, the ALJ must address the claim without affording Claimant the benefit of the 15-year rebuttable presumption.

In a concurrence, Judge Batchelder wrote separately concerning the court's analysis to explain his "understanding of the ALJ's errors in calculating [Claimant's] years of [CME]." *Id.* at 225. In so doing, he noted that "[t]he ALJ's opinion is so inexact that it makes impossible any attempt to understand for which years he credited [Claimant] with one year of [CME]." *Id*. Noting his agreement with various aspects of the Board's Judge Judith S. Boggs, who dissented from the Board's affirmance of the ALJ's decision on remand, Judge Batchelder wrote that he would reverse the Board's order for the reasons she gave and remand the matter for further proceedings.

Of note, the court issued an amended opinion in this case on January 24, 2017. *See Aberry Coal, Inc., v. Fleming*, ___ F.3d ___, 2017 WL 344995 (6th Cir. Jan. 24, 2017). The court's conclusion remained the same, as it concluded that the evidence "did not and could not have established that Fleming had over sixteen years of coal-mine employment, or even the fifteen necessary for the presumption of total disability." Therefore, the court reaffirmed its decision to reverse the award of benefits and remand the matter for further proceedings. However, the court's analysis in the amended opinion was substantially similar to analysis Judge Batchelder provided in his concurrence in the judgment in the original decision. The amended opinion, though again written by Judge Levy, contained no concurrence.

[Fifteen-year presumption at 20 C.F.R. § 718.305: Method of calculating length of coal mine employment; Length of coal mine employment: For claims filed after January 19, 2001]

B. Benefits Review Board

There are no notable black lung decisions to report.