U.S. Department of Labor

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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 294
February 2019

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

There are no published decisions to report.

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. Feb. 6, 2019), the U.S. Court of Appeals for the Sixth Circuit addressed the question of how a miner's length of coal mine employment ("CME") may be calculated.

Most recently, on remand from the Benefits Review Board and on reconsideration, the ALJ awarded benefits pursuant to the fifteen-year rebuttable presumption of death due to pneumoconiosis, *see* 30 U.S.C. §921(c)(4), as he found that the claimant had established that the miner worked for 15.07 years in qualifying CME. The ALJ arrived at this figure by "counting quarters" for pre-1978 employment and utilizing Exhibit 610 of OWCP's Coal Mine Procedure Manual by crediting the miner with a year of CME if his income showed he worked for at least 125 days in that year. *Shepherd*, 915 F.3d at 396; *see Tackett v. Dir., OWCP,* 6 BLR 1-839, 1-841 n.2 (1984) (concluding that counting quarters of a year in which a miner earned at least $50.00 is a permissible method for calculating CME). The employer appealed, and the Board agreed with the employer that the ALJ had erred in crediting the miner with full quarters of CME when other evidence of record showed that the miner worked for less than a full quarter. After recalculating the miner's length of CME in light of information provided by the miner that he had not worked for the entirety of certain quarters credited by the ALJ, the Board arrived at 14.75 years of CME. Therefore, it concluded that the claimant was unable to invoke the fifteen-year presumption. Furthermore, because the claimant had not challenged the ALJ's earlier finding that, without the presumption, the claimant could not

establish entitlement, the Board reversed the award of benefits. The claimant then appealed to the Sixth Circuit.

At issue in the claimant's appeal was "whether the miner accumulated 15 years of creditable underground [CME] before his death." *Shepherd*, 915 F.3d at 400. The court began its analysis by noting that the regulations define a year as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days." 20 C.F.R. §725.101(a)(32). It then noted that Section 725.101(a)(32) "contains plain language offering alternative methods of determining the duration of a miner's [CME]":

> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act. If a miner worked fewer than 125 working days in a year, he or she has worked a fractional year based on the ratio of the actual number of days worked to 125. Proof that the miner worked more than 125 working days in a calendar year or partial periods totaling a year, does not establish more than one year.
> (ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained. The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and/ sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table must be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. § 725.101(a)(32)(i)–(iii); *Shepherd*, 915 F.3d at 400-401.

The court disagreed with the Director, OWCP, and the employer that the regulation requires, in every instance, "that the miner be employed by a coal mining company for a full calendar year *and* that the miner work for at least 125 days in the mines during that 365- or 366-day period." *Shepherd*, 915 F.3d at 401 (emphasis in original). Instead, the court concluded that such a reading of the regulation ignores its "clear language," as the provision in fact "sets out four alternate ways in which a claimant can establish requisite periods of coal mine employment." *Id*. These "alternate ways" are mirrored in the above-referenced prefatory language of Section 725.101(a)(32) and its three subparts. *Id.* at 401-402. The court also noted the following as support for its rejection of the reading of the regulation proposed by

the Director and the employer: (1) the remedial nature of the Black Lung Benefits Act; (2) the fact that "the plain language of the regulation unambiguously permits a one-year [CME] finding without a 365-day requirement"; (3) that the regulation's directive – that an adjudicator ascertain the beginning and ending dates of a miner's CME – should be read as "an effort to *make it easier* to" establish entitlement to benefits; and (4) that the provision "expressly provides" for a miner to be credited with a year of CME, if the Section 725.101(a)(32)(iii) calculation so establishes, even if he is unable to show that a mining company employed him for the entire calendar year. *Id.* at 402-403 (emphasis in original). The court further recognized that it recently held, in an unpublished order, the following, which it pointed out "is in accord with the express language of the relevant regulatory provision":

> [A] miner is entitled to credit for one year of coal mining employment if he worked "in or around a coal mine" for at least 125 "working days" during the year. *See* C.F.R. § 725.101(32). Under the regulations, [a miner] may be entitled to credit for 15 years of coal mining employment even though he worked for less than 15 actual years in an underground coal mine.

Id. at 403; *Barnett v. Tenn. Consol. Coal Co.*, No. 16-3983, slip op. at 5 (6th Cir. July 14, 2017) (order).

In sum, the court concluded that, with the promulgation of Section 725.101(a)(32), "a factfinder is required, if possible, to ascertain the beginning and ending dates of any such employment." *Shepherd*, 915 F.3d at 406. If this type of inquiry leads to a conclusion that a coal mining company did not employ a miner for a full calendar quarter, then the otherwise "applicable quarter method cannot be used." *Id.* The court also identified evidence provided by the claimant as to particular beginning and ending dates of the miner's CME (1) that neither the ALJ nor the Board had considered, and (2) that not only contradicted evidence relied upon by the Board in arriving at a length of CME of 14.75 years, but also would support a finding that the miner worked for more than fifteen years in CME. Therefore, the court remanded the matter to the ALJ "to consider and weigh, in the first instance, *all evidence* related to the beginning and ending dates of each of the miner's stints of [CME], including the evidence submitted by [the claimant] — evidence that the [ALJ and the Board] failed to discuss." *Id.* at 407 (emphasis in original). After evaluating all "relevant, creditable evidence," the ALJ should determine whether the miner worked for fifteen years in CME, giving "effect to all provisions and options set forth in 20 C.F.R. § 725.101(a)(32), *not just the regulation's prefatory language*." *Id.* (emphasis added).

[Length of coal mine employment]

B. Benefits Review Board

In *Tackett v. ICG Knott County, LLC*, BRB No. 18-0033 BLA (Feb. 26, 2019) (unpub.), the Board affirmed the ALJ's decision on remand awarding benefits based on a finding of complicated pneumoconiosis. In so doing, the Board addressed whether the employer should be excused from forfeiting its *Lucia*-related challenge. It concluded that the forfeiture exception the Sixth Circuit recognized in *Jones Brothers* did not apply:

> Nor does the exception recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) apply as, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address an Appointments Clause issue if properly raised. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (Congress vested the Board with the statutory power to decide substantive questions of law); *Duck v. Fluid Crane and Constr. Co.,* 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction").

Slip op. at 3, n.2. Because the employer did not raise its *Lucia*-related challenge when the case was initially before the Board, the Board denied the employer's motion to remand the case for a new hearing before a new ALJ.

[New: *Lucia v. SEC*]