



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 303  
February 2020**

*Stephen R. Henley*  
Chief Judge

*Paul R. Almanza*  
Associate Chief Judge for Longshore

*William S. Colwell*  
Associate Chief Judge for Black Lung

*Yelena Zaslavskaya*  
Senior Counsel for Longshore

*Francesca Ford*  
Senior Counsel for Black Lung

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

**A. U.S. Circuit Courts of Appeals<sup>1</sup>**

**[Sea-Land Services, Inc. v. Director, OWCP, 949 F.3d 921 \(5th Cir. 2020\).](#)**

The Fifth Circuit affirmed the ALJ/BRB's finding that claimant did not aggravate his prior neck and back injuries, sustained when working for Sea-Land, while working for Universal Maritime Service Company ("UMS") fourteen years later.

Claimant injured his neck and back while working for Sea-Land in 1997. Claimant and Sea-Land eventually reached a settlement, resolving his entitlement to disability compensation but not medical benefits. In 2010, claimant's treating physician, Dr. Eidman, approved his return to work without restrictions, and claimant began working for UMS. In 2011, he filed a claim under the LHWCA, alleging that he injured his shoulder, neck, and back in a work-related incident. Sea-Land and UMS contested responsibility for treating claimant's neck and back injuries. The ALJ found that Sea-Land was liable, and the Board affirmed.

The Fifth Circuit stated that, if claimant sustains a work-place aggravation of a preexisting condition, the employer at the time of the aggravation is liable for the entire resulting disability. Aggravation occurs where an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone. But if the disability results only from the natural progression of injuries sustained while working for a former employer, then there is no aggravation, and the previous employer remains responsible. Here, at issue was whether claimant's injuries were aggravated in the 2011 incident or were the natural progression of his 1997 injuries.

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<sup>1</sup> 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 \*\_\_\_).

The court reasoned that LHWCA claims are evaluated using a three-step framework. First, the claimant must establish a *prima facie* case by showing that (1) he suffered harm and (2) conditions of the workplace, or an accident at the workplace, could have caused, aggravated, or accelerated the harm. Establishing a *prima facie* case raises a presumption under § 20(a) of the LHWCA that the claimant's injury is work-related and that the claimant is entitled to compensation. The employer can rebut that presumption by presenting substantial evidence that its workplace did not cause or aggravate the injury. If the employer succeeds, the claimant must demonstrate by a preponderance of the evidence that the employer's workplace caused or aggravated his injury.

Here, the ALJ applied that three-step framework. The ALJ found that Dr. Eidman's opinion that claimant sustained an aggravation in 2011 raised the § 20(a) presumption. The ALJ then found that UMS successfully rebutted that presumption with reports from three physicians, Drs. Vanderweide, Kagan, and Brown, who independently reviewed claimant's medical records and concluded that his symptoms reflected the natural progression of his 1997 injury. Next, the ALJ determined that claimant's injuries were more likely than not a natural progression of his pre-existing condition. The ALJ favored the reports of the independent physicians over Dr. Eidman's, reasoning that claimant's medical records better supported their conclusions. The ALJ assigned little weight to claimant's testimony, as he contradicted his own medical records and had a motive to ascribe his injury to UMS due to his prior settlement with Sea-Land.

The court observed that it reviews Board's decisions to determine whether it has adhered to its proper scope of review, *i.e.*, whether the ALJ's findings of fact are supported by substantial evidence and are consistent with law. Substantial evidence is that relevant evidence—more than a scintilla but less than a preponderance—that would cause a reasonable person to accept the fact finding. As a factfinder, the ALJ is exclusively entitled to assess both the weight of the evidence and the credibility of witnesses.

The court rejected Sea-Land's contention that the opinions of the three independent physicians failed to rebut the presumption. Sea-Land argued that the opinion of claimant's treating physician was entitled to greater weight. It asserted that the three independent doctors based their evaluations on incomplete medical records (which UMS disputed), only one of them examined claimant, their credentials were not in the record, and their reports were flawed. UMS urged the court to affirm the ALJ's finding, pointing to Dr. Brown's opinion that the 2011 injury may have caused a temporary exacerbation of symptoms, but claimant's baseline pain and issues were related to his 1997 injury; Dr. Kagan's opinion that while aggravations are immediate, claimant had a delayed reaction; and Dr. Vanderweide's opinion that while there was a possibility of an exacerbation or flare-up of symptoms, there was insufficient evidence to suggest that the underlying pre-existing musculoskeletal condition was advanced in severity beyond its natural course. The court acknowledged that Sea-Land's criticisms had some force. It stated, however, that "the 'substantial evidence' showing needed to rebut the § 20(a) presumption is a 'minimal requirement' less demanding than a preponderance of the evidence," and these doctors' opinions met that low burden. *Id.* at 926 (citations omitted).

The court also rejected Sea-Land's contention that the ALJ improperly weighed the evidence as a whole. Sea-Land may have convinced another factfinder. But to prevail on appeal, it had to demonstrate that no reasonable mind could have arrived at the ALJ's conclusion. Sea-Land failed to clear that high hurdle. The court stated that "[i]t is true . . . that the opinion of a treating physician may be entitled to considerable weight in determining disability. Nevertheless, an ALJ may give less weight to a treating physician's opinion when there is good cause shown to the contrary." *Id.* at 926-927. In this case, the ALJ was within his power to discount Dr. Eidman's testimony based on findings that it was internally inconsistent and also contradicted claimant's testimony. Moreover, it is not this

court's role to reevaluate each piece of evidence. Although another factfinder might have reached a different conclusion, the ALJ thoroughly explained his reasons. Where confronted with factual disputes, neither the court nor the Board may substitute their judgment for that of the ALJ. Here, the ALJ's decision was supported by substantial evidence and consistent with the law.

**[RESPONSIBLE EMPLOYER - Multiple Traumatic Injuries; Section 20(a)  
PRESUMPTION - Rebutting the Presumption, Evaluating the Evidence; Section 21  
APPELLATE PROCEDURE - Review by U.S. Courts of Appeals - Standard of Review,  
Applicable Law, Deference]**

**B. Benefits Review Board**

No decisions to report.

## **II. Black Lung Benefits Act**

### **A. U.S. Circuit Courts of Appeals**

The Sixth Circuit Court of Appeals issued one unpublished black lung decision in February.

In [\*Kentucky Prince Mining Company v. Director, OWCP \[Salyers\]\*](#), 2020 WL 615067 (6<sup>th</sup> Circuit, February 10, 2020), the ALJ awarded benefits per the 15 year presumption found in 20 CFR §718.305. In so doing, she found that Employer failed to rebut the presumption that the coal miner's total disability was due to pneumoconiosis. The BRB affirmed the award of benefits. Employer argued that the ALJ improperly discredited the opinion of its expert on the issue of disability causation. The expert, however, had testified that the miner did not have legal pneumoconiosis because the decreased FEV1/FVC ratio shown on pulmonary function testing indicated that his impairment was due to smoking rather than coal dust exposure. The Court held that this analysis is contrary to the Black Lung Benefits Act's (BLBA) regulations. The preamble specifically states that a decreased FEV1/FVC ratio is a symptom of pneumoconiosis. Therefore, it held that the ALJ properly discredited the expert's opinion and affirmed the award of benefits.

### **B. Benefits Review Board**

There were no published BRB black lung decisions in February. Here are some brief summaries of some of the decisions:

#### ***Lucia*-related Decisions**

In [\*Faine v. Buck Branch Rebuild and Manufacturing\*](#), BRB No. 19-0072 BLA, (February 2, 2020) (unpub) The Board found that reassignment to a new ALJ is not necessary when the only action by the ALJ prior to appointment was the issuance of a Notice of Hearing.

The BRB found that Employer's failure to raise an Appointments Clause challenge before the ALJ results in a forfeit of that issue on appeal per [\*Cook v. Fray Resources, Inc.\*](#), BRB No. 19-0115 BLA (February 19, 2020) (unpub.); [\*Mullins v. M & M Coal Company\*](#), BRB 19-0042 BLA (February 21, 2020) (unpub.); [\*Scott v. Westmoreland Coal Company\*](#), BRB No. 19-0065 BLA (February 25, 2020) (unpub.); [\*Hartsock v. Apache Coal Company\*](#), BRB No. 19-0091 BLA (February 28, 2020) (unpub).

In [\*Tackett v. White County Coal\*](#), BRB No. 19-0176 BLA, (February 27, 2020) (unpub.), Employer attempted to raise an Appointments Clause challenge for the first time on remand to the ALJ. The case was reassigned to a new ALJ due to the prior ALJ's retirement. The ALJ on remand found that Employer did not timely raise the issue. The BRB agreed. The BRB also added that since the ALJ on remand had only issued a reassignment order, a second remand for a new hearing was not required.

In [\*Sturgill v. Jent & Franks Coal Company\*](#), BRB No. 19-0379 BLA (February 27, 2020) (unpub.), Employer argued that the ALJ did not have authority to decide the claim. It made three arguments in support of its position. First, the Employer alleged that the Secretary's ratification was invalid because there was no evidence to demonstrate that the Secretary interviewed or in any other way engaged in a "general...thoughtful consideration of potential candidates." The BRB found that the Employer had not rebutted the presumption of regularity and held that Secretary's ratification is valid. Second, the Employer argued that the ALJ took significant actions prior to his proper appointment. The BRB found that the ALJ only issued a Notice of Hearing, which did not involve any

consideration of the merits of the claim and, therefore, did not affect the ALJ's ability to consider the matter as if he had not heard it before. Third, the Employer argued that the two levels of removal protections for ALJs is unconstitutional per *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). The BRB found that the *Free Enterprises Fund* decision did not apply to administrative law judges. The BRB further noted that the *Lucia* court declined to address the removal clause. As such, it held that the Employer failed to establish that the removal clause is unconstitutional.

### **Onset of Benefits**

In [\*Pennington v. Associated Contracting, LLC\*](#), BRB No. 19-0114 BLA, (February 28, 2020)(unpub), the Board affirmed the award of benefits. However, it remanded the claim to the ALJ for reconsideration on the onset date of disability. It found that the onset date of disability was not the date the claim was filed as there was evidence in the record that could establish the miner's date of disability. Although the claim was filed in 2014, early medical evidence did not indicate total disability. Later evidence, upon which the ALJ relied in awarding benefits, did indicate total disability. The BRB therefore remanded for reconsideration of the commencement date. See also: *Faine*, supra.

### **Evidence Summary Form**

[\*Noble v. Mor-Coal, Inc.\*](#), BRB No. 19-0142 BLA (February 18, 2020) (unpub.), the BRB held that the ALJ did not err in awarding benefits based on the evidence designated on the parties' respective evidence summary forms. The employer had filed the x-ray interpretation of Dr. Adcock at the Director's level. It was contained in the Director's exhibits. However, it was not designated on the evidence summary form. Rather, Employer had designated two other reports as affirmative evidence on this form. In addition, the inclusion of Dr. Adcock's report in the record would exceed evidentiary limitations. As such, the BRB found that the ALJ acted within his discretion as fact-finder when he did not address Dr. Adcock's report in his decision.