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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 196 March 2008

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A. U.S. Circuit Courts of Appeals

***Day v. James Marine, Inc.*, 518 F.3d 411, Case No. 06-4004 (6th Cir. Mar. 7, 2008).**

In a dispute involving the LHWCA fee-shifting provisions, the Sixth Circuit held that Sections 928(a)-(b) of the Act do not allow an employee to collect pre-controversion attorney's fees. The Sixth Circuit, upholding the Board's decision in part, rejected the claimant's argument that §928(a) permits the award of attorney fees for the period of time *before* his employer received formal notice of and rejected his claim.

Of factual import, the claimant was successful in filing a workers' compensation claim under the Act and subsequently sought attorney's fees. The Board awarded fees for two time periods: (1) from the date the employer received the deputy commissioner's formal notice of the claim until the employer began paying compensation; and (2) from the date the employer stopped paying compensation until the case was transferred to an ALJ. The claimant then appealed the Board's decision, arguing that the language in §928(a)-(b) of the Act allows him to obtain attorney's fees for the period of time *before* his employer had received formal notice of and rejected his claim.

In rejecting the claimant's argument, the Court observed the following "temporal limitation" provided in §928(a): "'the person seeking benefits shall *thereafter* have utilized the services of an attorney at law in the successful prosecution of his claim.'" The Court noted that the "elaborate" detail of the statute suggests the importance of each and every word, and reasoned, "[b]ecause 'thereafter' has a sensible fee-limiting purpose, because it is surrounded by words that share that purpose and because Congress gave the word a similar meaning throughout § 928, we will not sideline the term." The Court similarly noted the "thereafter" clauses set forth in §928(b).

Of note, the Court looked to the Black Lung Act, among other fee-shifting statutes in its analysis, and stated:

> The Black Lung Act . . . does not provide a meaningful analogy. . . . [it] does not incorporate §928 in its entirety. It says the provisions of the Longshoremen's Act shall apply to coal mine operators 'except as otherwise provided . . . by regulations of the Secretary.' 30 U.S.C. §932(a). One exception concerns fees: The Secretary allows a black lung claimant to recover 'reasonable fees for necessary services performed prior to the creation of the adversarial relationship.' 20 C.F.R. §725.367(a). The Secretary has made no similar rule for Longshoremen cases."

Although the Sixth Circuit upheld the Board's decision prohibiting the award of pre-controversion attorney fees, the Court reversed the Board's holding that Day could not recover *post*-controversion fees under §928(a).

B. Benefits Review Board

L.D. v. Northrop Grumman Ship Systems, Inc. **(BRB No. 07-0963)(Mar. 19, 2008).**

At issue in this case was the extent of authority retained by the district director over the claim after it was transferred to the Office of Administrative Law Judges (OALJ). After the claim was referred to the OALJ for a formal hearing, the district director suspended benefits due to the claimant's refusal to undergo an independent medical examination (IME) ordered by the district director. The claimant then appealed the suspension of benefits by the district director.

In response, the employer argued it was inappropriate for the Board to decide the appeal of an interlocutory order. The employer alternatively urged affirmance of the district director's Order suspending the claimant's compensation. The Director of OWCP also filed a response brief contending that the district director had discretionary authority to suspend claimant's compensation and that the suspension was reasonable and should be affirmed. In particular, the Director pointed out the broad grant of authority given to the Secretary under 20 C.F.R. § 702.408, to authorize an IME "in any case."

The Board first rejected the employer's contention that it should not rule on an appeal of an interlocutory order. Citing to its decision in *Baroumes v. Eagle Marine Services*, 23 BRBS 80 (1989), the Board stated "[w]hile the Board does not ordinarily accept interlocutory appeals, the Board will grant interlocutory review of a non-final order if it is necessary to properly direct the course of the adjudicatory process." The Board further stated that, in this case, "the issue raised on appeal by claimant is significant to the parties and the industry." (Citing to *Hardgove v. Coast Guard Exch. Sys.*, 37 BRBS 21 (2003)).

Next, the Board rejected the Director's interpretation of 20 C.F.R. § 702.408 that the regulation authorized a district director to suspend compensation "in any case." The Board noted that while the statutory framework of 20 C.F.R. grants broad authority to the Secretary to supervise an employee's medical care, including the scheduling of an IME, "in any case," the statute authorizes both ALJs and district directors to suspend a claimant's compensation. The Board reasoned:

> [T]he Director's interpretation that a district director may order the suspension of compensation after a case has been referred to the OALJ allows for the possibility that both a district director and an administrative law judge could issue opposing orders based upon the same evidence or that an administrative law judge could order an employer to pay benefits without incorporating a suspension order issued by the district director. . . .The better interpretation of these provisions is that only the entity before whom the case is pending has the authority to suspend compensation pursuant to Section 7(f) in order to avoid administrative confusion."

R.S. v. Virginia International Terminals **(BRB Nos. 07-0664 and 07-0664A) (Mar. 28, 2008).**

In this case, the Board applied a strict interpretation of Section 28(b) of the Act, 33 U.S.C. §928, and ruled that the ALJ incorrectly found the employer liable for the claimant's attorney's fee. The Board held that, in order for attorney fees to be awarded under § 28(b) for work performed before the ALJ, the informal conference held by the district director must have addressed the issue on which the claimant was successful before the ALJ.

Here, the informal conference held at the district director's level addressed only the claimant's knee impairment. Before the claim was transmitted to OALJ, the claimant also requested a recommendation from the district director on the issue of medical treatment for a back injury. The district director, however, referred the case to OALJ without issuing an additional recommendation with respect to the back injury. The ALJ, after finding the claimant's back injury was causally related to his right knee injury, and thus compensable under the Act, awarded attorney fees under Section 28(b).

On appeal, the Board agreed with the employer's contention that fees could not be awarded under Section 28(b) stating "any issues concerning claimant's back injury were not the subject of an informal conference or written recommendation by the district director. Moreover, the issue which was the subject of the 'informal conference' and subsequent recommendation was resolved before the case was transferred to the [ALJ]." In reaching its conclusion, the Board did note, however, that the ALJ "correctly found that correspondence between the parties and the district director may serve as the 'functional equivalent of an informal conference.'" (Citing to 20 C.F.R. §702.311; *Hassell*, 477 F.3d at 127, 41 BRBS at 4-4(CRT).

R.H. v. Bath Iron Works Corp. **(BRB No. 07-0739) (Mar. 28, 2008).**

In affirming an ALJ's granting of Section 8(f) relief to an employer, the Board held that Section 702.321 ("Procedures for Determining Applicability of Section 8(f) of the Act"), does not require an employer to produce an audiogram which meets the requirements of Section 702.441(b) to establish the level of the pre-existing hearing loss in order to qualify for Section 8(f) relief. The Board noted:

> The key question relating to hearing loss for purposes of Section 8(f) relief as well as establishing the extent of hearing loss in adjudicating any other aspect of the claim is whether there is sufficient probative evidence, applying the AMA Guides and procedures of Section 702.441(d), to establish the extent of a claimant's permanent loss of hearing at a particular point in time. Such determinations are squarely within the purview of the administrative law judge, and her findings on such matters must be affirmed if they are rational and supported by substantial evidence.

In reaching its decision, the Board also rejected the Director's argument that "his 'interpretation of his own regulation is controlling.'"

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Consolidation Coal Co. v. Director, OWCP [Beeler]*, ___ F.3d ___, Case No. 07-1884 (7th Cir. Apr. 3, 2008), the court affirmed the administrative law judge's award of benefits based on a finding that the miner suffered from totally disabling chronic obstructive pulmonary disease stemming from 13 years of coal mine employment. The court noted:

> What complicates this case is that (the miner) was also a smoker. He started smoking cigarettes at age 18 or 19, averaging one to one-half pack per day at varying times. He quit at age 54, after about 35 years of smoking.

The record further revealed that, by 2005, the miner was totally dependent on supplemental oxygen and "was taking three nebulizer treatments a day."

While noting that the regulations recognize the existence of "legal" pneumoconiosis, the court emphasized that the miner carried the burden of demonstrating "that his COPD was caused, at least in part, by his work in the mines, and not simply his smoking habit." In this vein, the court cited to medical opinions in the record supporting a finding that coal dust contributed to the miner's COPD, but it also noted the following:

> . . . Dr. Tuteur examined (the miner) . . .; he diagnosed severe COPD solely due to smoking. He concluded that coal dust exposure did not cause or contribute to (the miner's disease), noting that miners with no smoking history rarely have COPD, while smokers have a one in five chance of developing a severe obstruction. Dr. Renn reviewed the medical records and issued a report in 2004 where he diagnosed COPD due solely to smoking.

The administrative law judge accorded little weight to the opinions of Drs. Tuteur and Renn in this claim and the court agreed:

> First, the essence of (Dr. Tuteur's) opinion was a three sentence comment that presented a personal view that (the miner's) condition had to be caused by smoking

> because miners rarely have clinically significant obstruction from coal-dust-induced lung disease and would not attribute any miner's obstruction, no matter how severe, to coal dust. However, the Department of Labor reviewed the medical literature on this issue and found that there is consensus among scientists and researchers that coal dust-induced COPD is clinically significant. This medical authority indicates that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. 65 Fed. Reg. 79,938. Second, Dr. Tuteur did not rely on information particular to (the miner) to conclude that smoking was the only cause of his obstruction. Third, he did not cite a single article in the medical literature to support his propositions.

The court then rejected Employer's argument that Dr. Tuteur merely states that development of coal dust induced COPD is rare in miners:

> . . . the Department of Labor report does not indicate that this causality is merely rare. And even if the causation is rare, Dr. Tuteur does not explain why (the miner) could not be one of these 'rare' cases. This flaw is endemic to the entire opinion, because Dr. Tuteur did not appear to analyze any data or observations specific to (the miner).

On the other hand, the court approved of the administrative law judge's crediting of Dr. Cohen's report, which supported the miner's entitlement to benefits:

> First, it was based on objective data and a substantial body of peer-reviewed medical literature that confirms the causal link between coal dust and COPD. Second, he reviewed studies that were even more recent than the aforementioned Department of Labor study. Third, he linked these studies with (the miner's) symptoms, physical examination findings, pulmonary function studies, and arterial blood gas studies. Finally, he explained that (the

> miner's) pulmonary function studies showed 'minimal reversibility after administration of bronchodilator' and that he had an 'abnormal diffusion capacity,' all of which is consistent with a respiratory condition related to coal dust exposure.

[**total disability due to legal coal workers' pneumoconiosis, established**]

B. Benefits Review Board

In *M.W. v. Director, OWCP*, BRB No. 07-0663 BLA (Mar. 13, 2008) (unpub.), on motion of the Director, the Board vacated the administrative law judge's decision and remanded the claim to the district director on grounds that the district director improperly referred the claim for adjudication under Part C, instead of Part B, of the regulations.[1]

Notably, the miner was awarded benefits in conjunction with his Part B claim filed on January 9, 1970. He received benefits until his death on October 29, 1982, after which the widow received survivor's benefits until she died on July 31, 2003. The miner's surviving disabled child then filed a claim for benefits on August 7, 2003. The district director determined that, because Claimant had not been receiving Part B benefits "with her mother when her mother died," then her July 2003 claim should be considered under Part C of the Act.

On appeal, the Director cited to 20 C.F.R. § 410.231(d) and asserted that "because claimant's survivor's claim was filed within six months of the widow's death, her claim was also governed by Part B of the Act and . . . the district director and the administrative law judge erred in adjudication this claim under Part C." The Board agreed. Further, the Board agreed with the Director to find that adjudication of the claim under Part C was not "harmless" because:

> . . . unlike Part C claims, in which the Director may participate, submit evidence, and argue against

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[1] Claims filed prior to July 1, 1973 were adjudicated by the Social Security Administration under "Part B" of the Federal Coal Mine Health and Safety Act at 30 U.S.C. §§ 921-925 and benefits were paid by the federal government. On the other hand, claims filed on or after January 1, 1974 are adjudicated by the Department of Labor under "Part C" of the Act, 30 U.S.C. §§ 931-945, and benefits are paid by the responsible operator or the Black Lung Disability Trust Fund.

> entitlement, SSA black lung hearings were non-adversarial, and, therefore, it was error for the Director to have participated in the proceedings in an adversarial capacity.

As a result, the administrative law judge's denial of benefits was vacated and the claim was remanded to the district director so that it could proceed under Part B.

[**Part B claim, adjudication of**]

In a 2003 subsequent claim arising in the Sixth Circuit, *J.R. v. Tennessee Coal Co.*, BRB No. 07-0569 BLA (Mar. 31, 2008) (unpub.), the Board rejected Employer's position that the administrative law judge was required to conduct a "qualitative" analysis of the old and new medical evidence, as required by *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994), to determine whether the miner's condition had worsened. Rather, the Board adopted the Director's position and held that the claim was governed by the amended regulatory provision at 20 C.F.R. § 725.309(d)(3), "which requires only that a claimant establish a change in one of the elements of entitlement previously adjudicated against him to proceed with his claim."

[**no "qualitative" analysis for threshold determination under 20 C.F.R. § 725.309**]

In *M.F. v. Sullivan Brothers Coal Co.*, BRB No. 07-0554 BLA (Mar. 31, 2008) (unpub.), the Board held that disability causation is an element of entitlement that is capable of change under 20 C.F.R. § 725.309. As a result, where the miner's prior claim was denied on grounds that he failed to demonstrate that his totally disabling respiratory impairment was due to pneumoconiosis, it was proper for the administrative law judge to consider whether disability causation was established as a threshold matter in the subsequent claim.

[**disability causation is an element capable of change under 20 C.F.R. § 725.309**]