



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 280**  
**March - April 2017**

*Stephen R. Henley*  
*Chief Judge*

*Paul R. Almanza*  
*Associate Chief Judge for Longshore*

*Yelena Zaslavskaya*  
*Senior Attorney*

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

*Alexander Smith*  
*Senior Attorney*

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

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

[there are no published Circuit Court decisions to report]

**B. Benefits Review Board**

***Christie v. Georgia-Pacific Co., 51 BRBS 7 (2017).***

The Board reversed the ALJ's award of post-retirement permanent total disability ("PTD") benefits to a claimant who suffered a work-related back injury.

Claimant injured his back in 1999 while working for employer as a carpenter. He later underwent back surgery and returned to work with restrictions. Due to concerns that his job could aggravate his back, by 2007 or 2008 claimant had begun to work exclusively as a safety inspector. In 2010, claimant was informed that his union planned to eliminate its early retirement option in 2011. Elimination of this option meant that claimant, age 56 at that time, would be ineligible to receive pension income until he was 62. Believing that his work-related back condition might prevent his continued employment until he was 62, claimant retired in December of 2010. On 12/3/12, his treating physician imposed additional work restrictions. Claimant sought PTD compensation.

The ALJ found that claimant was physically capable of working as a safety inspector at the time he retired in December 2010. He further found, however, that claimant is not

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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 refer to the Westlaw identifier.

barred by his retirement from receiving compensation for PTD, as his decision to stop working in December 2010 was “involuntary.” That is, the ALJ found that claimant retired, at least in part, because of concerns that his work injury would prevent him from working until the full retirement age of 62, and that he would, therefore, have no pension income prior to that time. Because claimant’s retirement was motivated at least in part by his work-related injury, the ALJ found that claimant’s receipt of post-retirement benefits is not precluded. The ALJ found that claimant became permanently totally disabled on 12/3/12. In the absence of suitable alternate employment at that time, the ALJ ordered employer to pay PTD compensation from that date forward. Employer appealed.

The Board reversed the ALJ’s award of PTD benefits based on its recent decision in *Moody v. Huntington Ingalls, Inc.*, 50 BRBS 9 (2016), *recon. denied*, BRB No. 15-0314 (May 10, 2016), *appeal pending*, No. 16-1773 (4th Cir.) (reversing ALJ’s award of temporary total disability for the period claimant recuperated from shoulder surgery after he had voluntarily retired). After discussing *Moody* and other pertinent precedent, the Board concluded that:

“[t]hese cases thus represent controlling authority for the proposition that an employee is not entitled to receive a total disability award after he retires for reasons unrelated to the work injury because there is no loss of wage-earning capacity due to the injury. As explained by the Board in *Moody*, Section 2(10) of the Act provides that: “Disability’ means incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury in the same or any other employment[.]’ 33 U.S.C. §902(10) (emphasis added); *Moody*, 50 BRBS at 10. Thus, the disability inquiry encompasses both physical and economic considerations. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 126, 31 BRBS 54, 56(CRT) (1997). In a traumatic injury claim for post-retirement disability compensation for lost earning capacity, the only relevant inquiry is whether claimant’s work injury precluded him from performing his usual work or suitable alternate employment at the time of his retirement such that the loss of earning capacity was ‘because of injury.’”

51 BRBS at 8-9.

The Board reasoned that:

“This case is not legally distinguishable from *Moody*. As in *Moody*, claimant’s work-related injury did not preclude his continued work for employer and had not resulted in a loss of any wage-earning capacity at the time he stopped working. The [ALJ] found ‘most important’ claimant’s testimony that he could have kept working and that he had planned to continue working beyond December 2010 until he learned about the change in employer’s pension plan. Claimant’s increased restrictions were not imposed until two years after claimant took his early retirement.

In finding *Hoffman [v. Newport News Shipbuilding & Dry Dock Co.]*, 35 BRBS 148 (2001)] distinguishable and that claimant’s retirement thus was ‘involuntary,’ the [ALJ] relied on claimant’s testimony that his back condition influenced his decision to retire early, given the imminent change in the pension plan, and claimant’s ‘well-placed fear’ that he would lose his job if he could not perform his duties. In contrast, the [ALJ] noted, claimant Hoffman retired due to a ‘good-deal’ early retirement offer. However, these facts are not legally significant in view of the [ALJ]’s finding that claimant was capable of performing his work for employer with no loss of wage-earning capacity at the time he retired. The only relevant inquiry is whether claimant’s work injury caused a loss of earning capacity two years later, when increased restrictions were imposed. As claimant had no earning capacity at that time, due to his decision to take early retirement at a time that he was not

disabled within the meaning of Section 2(10) of the Act, the answer to this inquiry must be that the injury did not cause any loss of earning capacity.”

51 BRBS at 9 (citations to record and footnote omitted).

**[Topic 2.10 DEFINITIONS – SECTION 2(10) DISABILITY; 8.2.4.7 EXTENT OF DISABILITY -- Factors affecting/not affecting employer’s burden (Retirement)]**

**II. Black Lung Benefits Act**

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

**[There are no published Circuit Court decisions to report.]**

**B. U.S. District Courts**

[Arch Coal, Inc., v. Hugler, 2017 WL 1034688 \(D. D.C. Mar. 16, 2017\)](#) involved an April 8, 2016 lawsuit filed by Arch Coal against the Department of Labor. Generally, the subject of the lawsuit was the Department’s processing of cases impacted by Patriot Coal’s bankruptcy. The crux of the suit was Arch Coal’s challenge to the Department’s policy, contained in [Black Lung Benefits Act \[BLBA\] Bulletin No. 16-01](#), of naming Arch Coal or certain other Patriot subsidiaries as liable responsible operators in particular cases when Patriot Coal was no longer capable of securing the payment of benefits.

In *Hugler*, the court granted the Department’s motion to dismiss for lack of subject matter jurisdiction. The court concluded “that Arch Coal’s challenges to [Bulletin 16-01] are within the scope of [the review structure laid out by the BLBA] because they are ultimately about whether Arch Coal is liable for certain miners’ compensation claims—which is the core issue that the agency adjudicates (i.e., who is the responsible operator?) through orders under this review structure.” In the case, Arch Coal estimated that there were 175 claims in which district directors had determined that it was a responsible operator.

**[Department of Labor jurisdiction]**

In [Byrge v. Premium Coal Co., Inc., 2017 WL 1208586 \(E.D. Tenn. Mar. 31, 2017\)](#), the magistrate judge addressed and granted Claimant’s Motion for Summary Judgment. Prior to the federal court action, the miner filed his black lung claim in June 2010. In April 2011 the district director awarded benefits and, following Employer’s request for a hearing, an administrative law judge awarded benefits in January 2013, with an onset date of June 2010. Employer appealed to the Benefits Review Board, which affirmed the administrative law judge’s decision in February 2014. The Board denied Employer’s motion for reconsideration, and the Sixth Circuit thereafter affirmed the award in 2015. Only following the Sixth Circuit’s decision did Employer repay the Black Lung Disability Trust Fund the \$52,676.50 in interim benefits paid to the miner.

In March 2016, Claimant filed the action at issue, which involved Claimant’s seeking 20% additional compensation and interest in light of the Employer’s failure to pay the miner his benefits from February 2013 until February 2015, while Claimant’s black lung claim was pending on appeal. See 33 U.S.C. §§914(f), 921(d); 20 C.F.R. §§725.530(a), 725.604, 725.607(a), 725.608(a)(3).

Following a finding that Claimant had standing to sue, the magistrate judge addressed her contention that she is entitled to 20% additional compensation. Upon finding that the “compensation order” at issue was the administrative law judge’s January 2013

award and that Claimant's action was properly filed in accordance with Section 921(d), as incorporated into the BLBA, the magistrate judge further found that the administrative law judge's award became effective when it was filed with the district director in February 2013. The magistrate judge therefore found that Employer was "required to start paying benefits because the ALJ's Order became effective and [it] did not receive, let alone request, a stay of the ALJ's decision granting benefits." In addition, the magistrate judge rejected Employer's challenge to Section 725.607, the regulation which, generally, provides for 20% additional compensation when benefits payable pursuant to an effective award "are not paid by an operator or other employer ordered to make such payments within 10 days after such payments become due . . . ." The magistrate judge also concluded that Claimant is entitled to interest on the additional compensation from March 25, 2013, to February 23, 2015, the date the miner died.

In light of the above, the magistrate judge granted Claimant's Motion for Summary Judgment.

## **[Jurisdiction: Sixth Circuit]**

### **C. Benefits Review Board**

[Neal v. Union Carbide Corp., BRB Nos. 16-0317 BLA and 16-0317 BLA-A \(Apr. 13, 2017\) \(unpub.\)](#), involved Claimant's appeal and Employer's cross-appeal of a decision denying benefits in a miner's subsequent claim. Although the administrative law judge found that the miner suffered from a totally disabling respiratory or pulmonary impairment, and that Claimant thereby demonstrated a change in an applicable condition of entitlement, the administrative law judge further found that the miner suffered from neither clinical nor legal pneumoconiosis.<sup>2</sup> Therefore, the administrative law judge denied benefits.

On appeal, Claimant challenged the administrative law judge's finding that the evidence did not establish the existence of clinical or legal pneumoconiosis. Employer also cross-appealed, "arguing that the administrative law judge erred in discrediting Dr. Zaldivar's medical opinion that the miner did not have legal pneumoconiosis." Slip op. at 3.

First, the Board affirmed, as unchallenged on appeal, the administrative law judge's determination that the miner worked for fewer than 15 years in qualifying coal mine employment, that he was totally disabled in accordance with 20 C.F.R. §718.204(b)(2), and that Claimant thereby established a change in an applicable condition of entitlement. The Board also affirmed the finding that Claimant did not establish the existence of complicated pneumoconiosis.

Second, the Board addressed Claimant's contention that the administrative law judge erred in determining that the x-ray, CT scan, and medical opinion evidence failed to establish the presence of clinical pneumoconiosis. Concerning the x-ray evidence, the administrative law judge weighed five readings of two x-rays:

Dr. Gaziano, a B reader, and Dr. Smith, a dually-qualified Board-certified radiologist and B reader, read the October 20, 2011 x-ray as positive for pneumoconiosis, while Dr. Meyer, also a dually-qualified radiologist, read this

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<sup>2</sup> The administrative law judge also found that the evidence did not establish the existence of complicated pneumoconiosis or at least 15 years of qualifying coal mine employment. Claimant was thus unable to avail herself of the irrebuttable presumption at 30 U.S.C. §921(c)(3) or the 15-year rebuttable presumption at 30 U.S.C. §921(c)(4).

x-ray as negative. Dr. Smith read the August 22, 2012 x-ray as positive for pneumoconiosis, while Dr. Meyer read it as negative.

Slip op. at 4 (internal citations omitted). According to the Board, "part of Dr. Meyer's rationale for concluding that the miner's x-rays and CT scans were negative for pneumoconiosis was that the opacities seen were linear and irregular and were located in the lower lung zones, whereas, in Dr. Meyer's opinion, clinical pneumoconiosis typically appears as rounded or nodular opacities, predominantly in the upper lung zones." *Id.* Before the administrative law judge, Claimant had contended that Dr. Meyer's readings should be given no weight, as recent medical literature called into question his reliance on the shape and location of the miner's opacities. *Id.*, citing Laney and Petsonk, *Small pneumoconiotic opacities on U.S. coal workers' surveillance chest radiographs are not predominantly in the upper lung zones*, Am. J. Indus. Med., 55: 793-98 (2012). The administrative law judge found both x-rays to be negative for the disease based on Dr. Meyer's credentials.

The administrative law judge then addressed the two CT scans of record. While Dr. Smith read each CT scan as being positive for pneumoconiosis, Dr. Meyer concluded that each CT scan was negative for the disease. The administrative law judge again found each CT scan to be negative based on Dr. Meyer's credentials.

Next, the administrative law judge weighed five medical opinions from the following physicians: Drs. Gaziano, Sood, Rasmussen, Meyer, and Zaldivar. Drs. Gaziano, Sood, and Rasmussen diagnosed clinical pneumoconiosis, while Drs. Meyer and Zaldivar did not and instead opined that the miner had idiopathic pulmonary fibrosis. According to the Board:

The administrative law judge summarized Dr. Meyer's explanation that coal workers' pneumoconiosis "typically presents on x-ray as small nodules with an upper zone predominance, typically greater on the right than the left, and if the disease continues to progress, the nodules can be diffusely spread throughout the entire lung." Because that pattern was absent from the miner's x-rays and CT scans, Dr. Meyer read them as negative.

The administrative law judge found that "Dr. Meyer persuasively explained why the miner's irregular opacities combined with his pattern of basilar fibrosis and honeycombing seen here did not suggest a diagnosis of [coal workers' pneumoconiosis]." The administrative law judge further found that the medical opinions of Drs. Meyer and Zaldivar were consistent with the weight of the x-ray evidence, which the administrative law judge found to be negative for clinical pneumoconiosis. The administrative law judge rejected the diagnoses of clinical pneumoconiosis by Drs. Gaziano, Rasmussen, and Sood, because he found that they were inconsistent with the weight of the x-ray evidence. Based on the foregoing findings, the administrative law judge concluded that claimant did not establish that the miner had clinical pneumoconiosis under 20 C.F.R. §718.202(a).

Slip op. at 6 (internal citations and footnote omitted).

The Board agreed with Claimant and the Director, OWCP, "that the administrative law judge failed to consider claimant's argument that Dr. Meyer's rationale for excluding clinical pneumoconiosis on x-ray and CT scan testing is undermined by recent medical science." *Id.* at 6-7. The Board noted that Claimant had argued that the Laney and Petsonk study undercut Dr. Meyer's reasoning and "found that, among coal miners with pneumoconiosis, small opacities were found equally over all lung zones and that 37.9% of opacities were irregular, contrary to Dr. Meyer's rationale." *Id.* at 7, citing Claimant's Post-Hearing Brief at 5. According to the Board, Dr. Sood "set forth the results of this study,

along with other relevant studies, in his October 19, 2015 medical report in which he diagnosed clinical coal workers' pneumoconiosis." *Id.*, citing Claimant's Exhibit 9 at 11-12, 17-19. The Board concluded that the administrative law judge failed to "address the credibility issue raised below before assigning the most weight to Dr. Meyer's x-ray and CT scan readings and medical opinion," and he therefore "did not adequately explain the weight he accorded the relevant evidence." *Id.* The Board thus vacated the administrative law judge's clinical pneumoconiosis finding overall, and specifically his findings based on the x-ray, CT scan, and medical opinion evidence.<sup>3</sup> In light of the above, the Board also vacated the administrative law judge's disability causation finding.

Third, and finally, the Board affirmed the administrative law judge's finding that the miner did not suffer from legal pneumoconiosis. Therefore, the Board concluded that it "need not reach employer's cross-appeal challenging the discrediting of Dr. Zaldivar's opinion on that issue." *Id.* at 9 n.13.

In accordance with the above, the Board remanded the matter for further consideration.

### **[Citation to medical literature: Generally]**

[Funka v. Consolidation Coal Co., BRB No. 16-0184 BLA \(Mar. 15, 2017\) \(unpub.\)](#), involved a miner's claim and a survivor's claim that were before the Board for the fourth time. Most recently, the Board had remanded the case for the administrative law judge to determine (1) the proper classification of a report submitted by Dr. Oesterling, (2) whether the evidence established the existence of pneumoconiosis, and (3) if the evidence did establish its existence, whether the disease was totally disabling.

On remand, the administrative law judge found that the miner was totally disabled by pneumoconiosis arising out of his coal mine employment. The administrative law judge therefore awarded benefits in the miner's claim and found Claimant automatically entitled to survivor's benefits based on this award, in accordance with Section 422(f) of the BLBA.

In its appeal, Employer initially challenged the administrative law judge's requirement, on remand, that the parties submit evidence summary forms and thereby designate their evidence in each of the pending claims. The Board concluded that the administrative law judge did not err in requiring the parties to designate their evidence, and it further held that Employer failed to demonstrate how this requirement on remand violated its due process rights or was prejudicial.

Addressing the administrative law judge's findings on the merits on remand, the Board noted that, "because the physicians agree that the miner was totally disabled by a diffuse form of interstitial pulmonary fibrosis, proving the requisite causal relationship between the miner's coal dust exposure and his interstitial pulmonary fibrosis establishes the existence of both pneumoconiosis and total disability due to pneumoconiosis under the Act and regulations." After finding the autopsy evidence to be negative for the disease, the administrative law judge addressed the medical opinion evidence, which consisted of reports from Drs. Tomashefski and Fino, who did not diagnose pneumoconiosis, and Dr. Green, who diagnosed both clinical and legal pneumoconiosis. The administrative law judge credited the opinion of Dr. Green and thereby found Claimant established the existence of clinical and legal pneumoconiosis.

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<sup>3</sup> The Board explicitly instructed the administrative law judge to "address claimant's argument that the medical study cited by Dr. Sood undermines Dr. Meyer's rationale for finding no clinical pneumoconiosis on the miner's x-rays and CT scans." *Id.* at 8.

Before the Board, Employer contended that the administrative law judge erred in her weighing of the evidence to find that the miner was totally disabled due to pneumoconiosis. Specifically, Employer argued that the administrative law judge committed error in finding Dr. Green's opinion established the existence of pneumoconiosis. The Board disagreed, concluding that, in evaluating his opinion, the administrative law judge accurately characterized the physician as diagnosing "mild, 'classic' coal workers' pneumoconiosis" and "severe and disabling interstitial fibrotic lung disease, which he opined was caused by coal mine dust exposure." As "Dr. Green directly attributed the miner's interstitial pulmonary fibrosis and associated disabling impairment to coal dust exposure," the Board concluded that the administrative law judge permissibly determined that Dr. Green diagnosed both types of the disease. The Board also held that the administrative law judge gave satisfactory reasons for crediting the physician's opinion, considered all relevant evidence, and sufficiently explained the bases underlying her conclusion.

Additionally, the Board rejected Employer's allegation that the administrative law judge's decision to credit Dr. Green's opinion "is inconsistent with her finding that claimant failed to establish the existence of pneumoconiosis based on the autopsy evidence." According to the Board, such a finding, "based on the autopsy evidence[,] does not preclude a finding of pneumoconiosis based on the medical opinion evidence." See 20 C.F.R. §718.202(a)(4). Because the administrative law judge acted within her discretion in finding "that Dr. Green's opinion diagnosing pneumoconiosis 'merits significant weight because he support[ed] his opinion with objective medical evidence, his medical findings are consistent with the other evidence of record, and he explains the basis for his conclusion,'" the Board affirmed the administrative law judge's decision to give Dr. Green's diagnosis "significant weight."

The Board also rejected Employer's contention that the administrative law judge erred in discrediting Dr. Tomashefski's opinion. Notably, Dr. Tomashefski cited to a "McConnochie study as support for his opinion that the miner's fibrosis could not be due to coal dust because the miner had a limited amount of pigment in his lungs." The administrative law judge deemed this interpretation of the study to be "called into question by Dr. Green's explanation that the McConnochie study actually supported the conclusion that miners can have interstitial fibrosis with minimal dust particles in their lungs."<sup>4</sup> The Board also noted the administrative law judge's finding that Dr. Tomashefski failed to provide an explanation for, or cite to any medical literature that would support, his conclusion that the honeycombing present in the miner's lungs was not associated with fibrosis related to coal dust. In light of the above, the Board affirmed the administrative law judge's decision to give less weight to Dr. Tomashefski's opinion.

Finally, the Board disagreed with Employer that the administrative law judge erred in according less weight to Dr. Fino's opinion. As she found that his "opinion regarding the rapid progression of the miner's fibrosis was unsupported by the record" and that the physician "did not persuasively 'explain why [the] [m]iner's fibrosis is idiopathic,'" the Board affirmed her decision to give less weight to Dr. Fino's opinion.

In light of the above, the Board affirmed the administrative law judge's finding that Claimant established the existence of pneumoconiosis. Furthermore, the Board determined that the administrative law judge acted within her discretion in discounting the disability causation opinions of Drs. Tomashefski and Fino because these opinions were undercut by their conclusions regarding pneumoconiosis. "Moreover, having discredited the only

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<sup>4</sup> The Board concluded that the administrative law judge permissibly accorded Dr. Green's explanation more weight, as she found that he "was the co-author of the study and therefore has a better understanding of the study's conclusion."

contrary evidence of record, and having rationally relied on the opinion of Dr. Green to find that the miner's totally disabling pulmonary fibrosis constituted pneumoconiosis," the Board concluded that "the administrative law judge rationally relied on his opinion to find that the miner was totally disabled due to pneumoconiosis." As a result, the Board affirmed the administrative law judge's award of benefits in the miner's claim.

The Board further affirmed the award of survivor's benefits pursuant to Section 422(l) of the BLBA.

**[Medical reports]**