



**RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 262
April 2014**

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I. Longshore and Harbor Workers' Compensation Act

A. U.S. Circuit Courts of Appeals¹

[there are no decisions to report for this month]

B. Benefits Review Board

***Misho v. Global Linguist Solutions*, __ BRBS __ (2014).**

Agreeing with the OWCP Director, the Board held that where a claimant has established her inability to perform her usual work due to only one work-related condition, rather than to a combination of work-related injuries, the nature of that disabling condition governs the award of benefits.

Claimant slipped and fell while working for employer in Iraq, sustaining both physical and psychological injuries as a result of her fall. Employer voluntarily paid claimant temporary total disability (TTD) benefits from 9/18/09 through 8/11/11, but disputed her entitlement to additional benefits. The ALJ accepted the parties' stipulation that claimant sustained two distinct work-related injuries, one physical and one psychological. The ALJ further found that claimant's psychological injury alone has rendered her totally disabled, as she is unable to return to her former employment as a linguist with employer due to her psychological injuries and employer did not establish the availability of suitable alternate employment with respect to

¹ 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.

that condition. The ALJ determined that this condition reached maximum medical improvement (MMI) on 5/3/12. With respect to claimant's physical injuries to her shoulder and thumb, the ALJ found that they are not at MMI, but that claimant failed to establish that these two conditions prevent her from returning to her usual work; thus, she did not establish a *prima facie* case of total disability on this basis. The ALJ awarded claimant TTD benefits from 8/12/11 and continuing, as well as medical benefits; and he denied claimant's request for reconsideration.

The Board initially rejected employer's assertion that the ALJ erred in relying on Dr. Ajluni's opinion that claimant's psychiatric condition has reached MMI. The ALJ properly found that, as claimant's treating psychiatrist, Dr. Ajluni was best able to make this determination; and that his opinion was supported by treatment records indicating that claimant's psychological condition was persisting. Contrary to employer's assertion, Dr. Ajluni's recommendation for further treatment does not undermine his conclusion that claimant's condition is at MMI.

Next, agreeing with claimant and the Director, the Board held that claimant is entitled to permanent, rather than temporary, total disability benefits as of 5/3/12; and it modified the ALJ's award accordingly. Because the ALJ found that claimant's total disability is due solely to her psychological condition, only the nature of that injury is relevant to the award of benefits. In so holding, the Board cited unpublished decisions in *Wilson v. Atlas Wireline Serv.*, No. 00-60511 (5th Cir. June 1, 2001), and *Stein v. Navy Exch.*, BRB No. 12-0177 (Dec. 17, 2012) (unpub.), affirming an award of PTD benefits where a claimant was permanently totally disabled physically, but had not reached MMI with regard to a psychological condition. The Board distinguished the two cases cited by the ALJ for the proposition that an award of temporary, as opposed to permanent, disability benefits is appropriate in cases where all of a claimant's injuries have not yet reached MMI, *i.e.*, *Jenkins v. Kaiser Aluminum & Chemical Sales, Inc.*, 17 BRBS 183 (1985), and *Porter v. Dix Shipping Co.*, BRB No. 99-443 (Jan. 24, 2000) (unpub.). The Board reasoned that claimants in those cases were found to be disabled as a result of a combination of two distinct work-related injuries (*i.e.*, physical and psychological injuries in *Jenkins*, and back and neck injuries in *Porter*). These cases are therefore distinguishable from the present case, wherein the ALJ found that, while claimant sustained two distinct injuries, one physical and one psychological, only one injury, claimant's psychological condition, has rendered her disabled. The BRB observed that its holding is consistent with Section 8 of the Act.²

² The BRB noted that, contrary to employer's contention that no "manifest injustice" has occurred to claimant due to the ALJ's award of TTD temporary rather than permanent total disability benefits, an award of PTD benefits may entitle claimant to the new maximum compensation rate pursuant to § 6, or to annual cost-of-living adjustments pursuant to §

Finally, at the claimant's request (and with employer's agreement), the Board further modified the ALJ's decision to reflect claimant's entitlement to TTD benefits for the period from 9/18/09 to 8/12/11, during which employer previously paid compensation and for which employer has been awarded credit by the ALJ.

[Topic 8.1 DISABILITY - NATURE OF DISABILITY (PERMANENT V. TEMPORARY); Topic 8.1.3 Permanency of Disability is a Medical Determination; Topic 8.1.4 Permanency Not Reached Where a Condition Is Improving; Topic 8.1.6 Effect of Second Occupational Injury on Date of Permanency]

Jacobs v. G & J Land and Marine Food Distributors, ___ BRBS ___ (2014).

The Board reversed the ALJ's determination that claimant whose job was to truck groceries from employer's inland warehouse to staging areas within a port, as well as unloading groceries, satisfied the status requirement under Section 2(3) of the LHWCA.

Claimant worked for employer as a truck driver. In addition to delivering groceries, claimant would sometimes push a pallet to the back of the truck and manually offload the groceries to containers on the dock, or dock workers would offload the groceries with a forklift or crane. If a crane was used, claimant would couple straps from the pallets to the crane; the pallet was then put into a temporary staging area or, sometimes, directly onto a supply boat. His additional "very infrequent" tasks included operating the forklifts and boarding vessels to communicate with the captains. Claimant injured his back while moving an ice chest from his truck to a grocery box which would be loaded on a supply boat. The ALJ found that claimant's work was covered employment because a regular but rare part of his job was hooking straps from the grocery pallet to the crane, as well as boarding vessels and driving the forklift. On appeal, employer challenged only the ALJ's finding of status.

The Board observed that the status analysis involves two parts: 1) is claimant's job specifically excluded by Section 2(3)?; and 2) did claimant perform maritime work? The Board initially affirmed the ALJ's determination that, contrary to employer's assertion, claimant was not excluded from coverage by the vendor exclusion in Section 2(3)(D). This provision excludes from coverage:

"(D) individuals who

10(f) of the Act, so long as two-thirds of her average weekly wage is lower than the maximum compensation rate.

- (i) are employed by suppliers, transporters, or vendors,
- (ii) are temporarily doing business on the premises of an employer described in paragraph 4, and
- (iii) are not engaged in work normally performed by employees of that employer under this chapter."

Here, only the last element was disputed, and the ALJ found that both claimant and the dock employees unloaded claimant's truck. Because the ALJ's finding that claimant engaged in work normally performed by the dock crew was supported by substantial evidence, the Board concluded that the third element of § 2(3)(D) was not met, and thus claimant was not expressly excluded from coverage.

The Board further found that claimant was not engaged in maritime employment, as his employment was related solely to land transportation. It was undisputed that claimant did not load or unload ships. Further, precedent holds that an employee works in covered employment if he is engaged in intermediate steps of moving cargo between ship and land transportation. The Board concluded that "claimant's work delivering groceries from an inland supplier to a maritime site was not an intermediate step in maritime transportation. Rather, it was the last step in land transportation." Slip op. at 4. The Board observed that in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), the Supreme Court stated that coverage under the Act is limited to those whose work facilitates the un/loading of vessels, and that "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered." Slip op. at 4, citing *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61. The Board discussed case law holding that claimants who performed the initial steps of placing cargo onto, or removing it from, a vehicle of land transportation within the terminal were covered (e.g., unloading cotton from a dray wagon used to move cotton within the port after it had been delivered to the port by an inland shipper); while those who drove a vehicle transporting goods overland were not covered. Same distinctions are equally applicable in this case. The Board reasoned that

"[i]n this case, claimant's deliveries to maritime facilities make him a non-covered truck driver 'whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation.' Claimant's work manually unloading groceries or fastening crane straps to the pallets were the last step in land transportation; the groceries were not yet at their point of rest at the maritime facility. Claimant's infrequent communications with ship captains regarding a delivery were incidental to his primary non-maritime responsibility of trucking groceries to the site. Thus, we hold

that claimant's delivery of groceries by truck from an inland warehouse to maritime sites, and his unloading of those groceries, are not covered activities under Section 2(3)."

Id. at 5-6 (citations omitted). The ALJ's award of benefits was therefore reversed.

[Topic 1.11.10 EXCLUSIONS TO COVERAGE -- Employees of suppliers, transporters, or vendors; Topic 1.7.1 JURISDICTION/COVERAGE – STATUS - "Maritime Worker" ("Maritime Employment")]

***Cline v. Huntington Ingalls, Inc.*, __ BRBS __ (2013).³**

Claimant developed respiratory symptoms while working for employer as a shipfitter, and he was diagnosed by his treating physician, Dr. McCullough, with bronchiolitis obliterans with organizing pneumonia (BOOP). Claimant has been placed on portable oxygen and a number of medications, and the recommendation for his future treatment includes a lung transplant. He is not working. The ALJ found that claimant's respiratory condition is work-related, as claimant established his *prima facie* case and employer did not rebut the Section 20(a) presumption of compensability; and he awarded benefits. On appeal, employer challenged the ALJ's determination that the injury is work-related.

The Board initially affirmed the ALJ's determination that claimant invoked the § 20(a) presumption by showing that he sustained a harm (respiratory condition) and that working conditions existed which could have caused the harm (based on claimant's testimony that he worked in poorly ventilated areas of the ship where he was exposed to smoke and fumes from the welding process and Dr. McCullough's statement that exposure to fumes could cause BOOP). The Board rejected employer's assertion that claimant failed to demonstrate he was actually exposed to toxins and fumes that could cause BOOP, as it found that the ALJ's finding was supported by substantial evidence. Specifically, although Dr. McCullough stated that exposure to toxins may cause BOOP, he also stated that exposure to fumes causes BOOP. Thus, as claimant has shown that he suffered a respiratory condition that could have been caused by the fumes he was exposed to at work, the ALJ properly invoked the § 20(a) presumption.

However, the Board further found that the ALJ erred in failing to find that employer rebutted the § 20(a) presumption with Dr. Jones's opinion. Dr. Jones diagnosed idiopathic interstitial pneumonia, and stated that the

³ In April 2014, the BRB granted a motion to publish this decision issued in December 2013.

“evidence does not support occupational causation or aggravation.” The ALJ found that Dr. Jones’s opinion does not rebut the § 20(a) presumption because Dr. Jones admitted that BOOP is difficult to diagnose and stated that the underlying medical data could lead to a diagnosis of BOOP, and because Dr. McCullough’s opinion is entitled to greater weight given his status as claimant’s treating physician. In rejecting the ALJ’s conclusion, the Board reasoned that employer’s burden on rebuttal is one of production, not persuasion. Thus, the Fifth Circuit has held that in order to rebut the § 20(a) presumption, employer need only offer substantial evidence that “throws factual doubt” on claimant’s *prima facie* case. Here, Dr. Jones stated that claimant’s lung condition is not related to his work exposures. This opinion constitutes substantial evidence and the ALJ erred in finding that it does not rebut the § 20(a) presumption.

The Board remanded the case to the ALJ to decide the issue of causation based on the record as a whole with claimant bearing the burden of persuasion. The Board observed that “because the record contains conflicting evidence, and the doctors’ opinions arguably contain internal conflicts, the administrative law judge must specifically set forth the basis for the weight to be accorded to the evidence.” Slip op. at 4-5.

[Topic 20.2.1 PRESUMPTIONS - 20(a) CLAIM COMES WITHIN PROVISIONS OF THE LHWCA – Prima Facie Case; Topic 20.2.3 Occurrence of Accident Or Existence of Working Conditions Which Could Have Caused the Accident; Topics 20.3 and 20.3.1 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE - Successful Rebuttal; Topics 20.4 and 20.4.1 IF SUCCESSFUL, PRESUMPTION NO LONGER AFFECTS OUTCOMES - Evidence Based on Record as a Whole]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Collins v. Pond Creek Mining Co.*, ___ F.3d ___, Case No. 13-1702 (4th Cir. May 1, 2014), the court reversed an Administrative Law Judge’s denial of survivor’s benefits in a widow’s claim that was filed shortly after the miner’s death in 1997.

The ALJ found that the physicians’ opinions relied upon by the survivor were not sufficiently reasoned or documented to support a finding that the miner’s pneumoconiosis caused his death. According to the ALJ, he could not give any weight to these opinions because they were “similarly conclusory” to the physicians’ opinion held to be insufficient by the court in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000). The ALJ also refused to consider as supportive of the survivor the opinions of two doctors

for the Employer who found that the miner's death was in fact hastened by COPD, although they believed the COPD was caused by smoking, not pneumoconiosis.

The Fourth Circuit held that the ALJ erred in according no weight to the physicians' opinions relied upon by the survivor. The court noted that one of the physicians, the miner's treating physician, had compiled copious treatment notes during the three years he was the miner's doctor, which show both the seriousness of the miner's pulmonary condition and the toll it had taken on his body, and in a letter to the Department of Labor, the treating physician laid out the details of the miner's final weeks and months, demonstrating his intricate understanding of his patients' worsening state of health. The other physician stated that his opinion was based on a review of the case file, which at the time included the miner's treatment history, death certificate, and additional hospital records. According to the court, The ALJ mistakenly equated the "fundamentally different situations" in *Sparks* and this case so as to find that *Sparks* applied. The court explained that

Unlike in *Sparks*, where a doctor with no significant ties to the patient decreed in a few cryptic words that pneumoconiosis had been a contributing cause of death, Dr. Younes's explanatory letter relied upon a lengthy treatment history and his first-hand observations of the damage the coal-dust triggered pulmonary disability inflicted upon his patient.

The physicians' opinions relied upon by the survivor in this case provide sufficient evidence that the miner's pneumoconiosis hastened his death. While the physicians could have explained in more detail the exact manner in which the miner's pneumoconiosis contributed to his respiratory and cardiac failure, their opinions were not poorly documented and their explanations were adequate and entitled to more weight than the physicians who mistakenly found no presence of pneumoconiosis at all.

The court also held that, contrary to the holding of the ALJ, the opinions of physicians who found that the miner did not suffer from pneumoconiosis, but instead suffered from COPD due to cigarette smoking, provided at least some additional support for a finding that the miner's pneumoconiosis hastened his death. The court noted that although the physicians disagreed with the other physicians about what caused the miner's COPD, the physicians' opinions were all in accord that the COPD hastened the miner's death; and crucially, the court found earlier that the miner's COPD qualified as pneumoconiosis.

The court rejected the ALJ's reasoning, that "it is not a foregone conclusion that this same pulmonary impairment caused the miner's death; in fact, many of the physicians in the present case opined that the miner's

death was purely cardiac, despite his respiratory failure." The court found this reasoning flawed in two ways:

First, there is no support in the record that Mr. Collins suffered from a different pulmonary impairment beyond the COPD that we have already held to be pneumoconiosis. The ALJ's observation that some doctors opined that Mr. Collins's death was purely cardiac in nature provides no support for the presence of a second respiratory problem that may have contributed to his death. Second, the relationship between severe pulmonary impairment and cardiac functioning is well known. The body is an integrated organism. A part can drag down the whole. The ALJ was right to dismiss the possibility of a purely cardiac death, stating that "there is no disputing that miner suffered from, and died of, respiratory failure." It is only by relying on this rejected explanation of an exclusively cardiac event that it is possible to avoid the finding of death causation mandated by the record.

[**"Hastening death" standard**]

B. Benefits Review Board

In *Kreider v. Director, OWCP*, BRB No. 13-0311 (Apr. 11, 2014) (unpub.), the Administrative Law Judge denied a claim for survivor's benefits filed by the deceased miner's child. The ALJ found that Claimant failed to satisfy the "unmarried" eligibility requirement for establishing dependency on the deceased miner.

In determining whether Claimant satisfied the requirement, the ALJ considered, not whether Claimant was unmarried at the time she filed her claim, but whether Claimant was unmarried for a reasonable period of time prior to the miner's death. The administrative law judge noted that Section 725.227 provides that the determination, as to whether an individual purporting to be an entitled survivor of a miner was dependent upon the miner, "is based on the facts and circumstances with respect *to a reasonable period of time ending with the miner's death.*" Because Claimant was continuously married from October 27, 1979 to February 12, 1987, the date of the miner's death, the ALJ found that Claimant failed to demonstrate that she was "unmarried" for a reasonable period of time prior to the miner's death.

On appeal, the Director asserted that Claimant's reliance on her current "unmarried" status does not assist her in satisfying the dependency requirement and that in order to satisfy the requirement, the claimant must initially demonstrate that he or she was unmarried "for a reasonable period

of time ending with the miner's death." The Board agreed with the Director's position, explaining that "[s]ince the Director is charged with administration of the Act, deference is generally granted to his position on issues involving the interpretation or application of the Act."

Additionally, the Board found that, because of the unqualified requirement that a claimant be "unmarried" to receive benefits as a dependent surviving child, the ALJ properly found that she was not required to make a factual inquiry into whether claimant was financially dependent on the miner prior to his death, and the fact that claimant was separated from her second husband at the time of the miner's death is irrelevant for purposes of determining claimant's dependency. Accordingly, the Board held that the ALJ properly determined that the record failed to demonstrate Claimant's eligibility as a dependent surviving child of the deceased miner.

[Survivor's Claims: Child's Dependency on the Miner]

In *Toy v. Carpenter Coal & Coke Co.*, BRB No. 13-0384A (Apr. 30, 2014) (unpub.), the Administrative Law Judge determined that benefits augmented by reason of Claimant's dependent disabled adult stepson would properly begin with the first month in which the dependent satisfied the conditions of relationship and dependency. Accordingly, the ALJ found that Claimant qualified for augmented benefits for Claimant's stepson as of December 21, 2011, the date Claimant submitted a benefit report from the Social Security Administration, which provided sufficient evidence that the stepson was disabled (relationship had already been established by initial documentation submitted to the District Director).

On appeal, the Benefits Review Board agreed with the Director's interpretation of the plain language of Section 725.210, that the operative date for determining an augmentee's entitlement to benefits is the date the conditions of relationship and dependency are met or satisfied, rather than the date that the evidence of those conditions is submitted into the record. Consequently, the Board modified the ALJ's decision to reflect that Claimant is entitled to augmented benefits on behalf of his stepson as of June 2007, the date of Claimant's entitlement to benefits.

[Augmentation of benefits: Date of Commencement]