



RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 319

April - December 2022

Stephen R. Henley
Chief Judge

Paul R. Almanza
Associate Chief Judge for Longshore

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

A. U.S. Circuit Courts of Appeals¹

[Edd Potter Coal Co., Inc. v. Director, OWCP, 39 F.4th 202 \(4th Cir. 2022\).](#)

This Black Lung decision is notable as it involved an Appointments Clause challenge. The Fourth Circuit affirmed the Board's order denying employer's request to reassign the case to a different ALJ due to an alleged Appointments Clause violation. The court held that employer was required to exhaust this issue before both the ALJ and the Board and failed to do so. The Board's remanding the case to the ALJ did not turn back the clock and allow employer to raise a forfeited issue.

B. U.S. District Courts

No published decisions to report.

C. Benefits Review Board

[Garcia v. Calzadilla Construction Corp., BRBS \(2022\).](#)

Agreeing with the Director, the Board held that, because marijuana is a controlled substance under the Controlled Substance Act's, 21 U.S.C. § 801 et seq. ("CSA"), it cannot constitute "reasonable and necessary" medical treatment under § 7 and is not compensable under the Longshore Act.

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, where citation to a reporter is unavailable, refer to the Westlaw identifier (id. at *___).

Claimant injured his back at work in 1994, resulting in permanent total disability. In 1998, employer was ordered by the district director to furnish claimant medical care pursuant to § 7. In 2019, Dr. Soler, a licensed physician in Puerto Rico, stated claimant “has steadily responded well” for “over one year” to prescribed “edibles infused with a specific dosage of medical cannabis,” which seemed to be “one of the only treatments that best works for the patient [] at night time due to its absorption and dose doubling effect.” Claimant sought, but employer denied, reimbursement for “payment of medical cannabis-infused cookies and edibles.”

The ALJ found because marijuana remains a controlled substance under federal law, it cannot constitute reasonable and necessary medical treatment under the federal Longshore Act. Claimant appealed. Employer and the Director urged affirmance of the ALJ’s decision.

The Board affirmed. Under § 7 of the LHWCA and the relevant regulation at 20 C.F.R. § 702.402, an employer is liable for reasonable and necessary medical expenses related to a claimant’s work injury. A claimant can establish a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. 20 C.F.R. § 702.401(a) provides that medical treatment which is recognized as appropriate by the medical profession is covered.

The CSA places all substances which were in some manner regulated under existing federal law into one of five schedules based on three factors: 1) Potential for abuse; 2) Accepted medical use in the U.S.; and 3) Safety and potential for addiction. The CSA makes it illegal to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. Marijuana is classified as a Schedule I controlled substance so, under federal law, it “has no currently accepted medical use in treatment in the United States.” Slip op. at 4, quoting *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 491 (2001) (holding there is no medical need defense for the manufacture and distribution of Schedule 1 controlled substances) (quoting 21 U.S.C. § 812(b)(1)(B)) (additional citation omitted). Despite its federal classification, as of May 18, 2021, a total of 36 states, the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands have approved medical marijuana/cannabis programs. In 2017, Puerto Rico classified “Cannabis” as a Schedule II drug under the Puerto Rico Controlled Substance Act (“PRCSA”), thereby recognizing that it has a currently accepted medical use in the United States or a currently accepted medical use with severe restrictions.

The Board reasoned that claimant’s claim arises under a federal Act; thus, it was necessary for the ALJ to accept the CSA as binding federal law in discerning whether marijuana constitutes medical care “which is recognized as appropriate by the medical profession for the care and treatment of the injury.” 20 C.F.R. § 702.401(a). By virtue of the CSA’s present classification of marijuana as a Schedule I substance, the federal government has explicitly recognized it has “no currently accepted medical use in treatment in the United States.” 21 U.S.C. § 812(b)(1)(B). It follows, as the ALJ found, marijuana is neither “reasonable” nor “necessary” treatment under § 7 of the federal Longshore Act because it is not presently “recognized as appropriate” treatment by the federal government. Consequently, the Board did not need to consider the applicability of the PRCSA classification of marijuana in resolving a federal question of law arising under a federal Act. Even if the PRCSA were to apply, it would be clearly preempted as conflicting with federal law. The OALJ and Board are federal entities and as such, hold authority under the federal laws of the United States, which includes the CSA. While the federal government’s enforcement of the CSA’s prohibition of medical marijuana has been equivocal in recent years in states that have permitted the use of marijuana, it is up to Congress to change

federal law with respect to marijuana's classification for the purposes of federal law -- and Congress has not done so.

The Board's majority concluded that recent Congressional appropriations riders prohibiting federal interference with state legalization laws do not impact this inquiry. Originally enacted in 2014 and extended and reenacted in subsequent years, the riders prohibit the Department of Justice ("DOJ") from using any of its funds to prevent states from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana. The riders forbid the use of DOJ funds to prosecute individuals acting in accordance with state law; they do not address the appropriateness of authorizing the use of marijuana as reasonable and necessary medical treatment under a federal act. The prospect of federal prosecution for marijuana crimes is not implicated by this case. For the purposes of administering federal law, there remains an unavoidable distinction between refraining from prosecuting people participating in state-authorized programs and requiring employers to pay for medical marijuana use under a federally administered program. The regulated behavior in this case is not a state system that Congress has expressly exempted from federal prosecution in appropriations bills -- it is care administered under a federal act by a federal agency. The riders do not address, let alone alter, the CSA's characterization of marijuana as a Schedule I substance that, for the purposes of federal law, still -- whether reasonable or not -- plainly establishes it "has no currently accepted medical use in treatment in the United States."

The Board stated that it was relying on plain language of binding federal law, and that neither the policy nor enforcement influences cited by the dissent are relevant considerations. It further noted that, from a practical standpoint, approving reimbursement for medical marijuana under state law would put in place inconsistent definitions as to whether it constitutes a reasonable and necessary medical treatment for different claimants depending on where they live. Such a patchwork outcome is untenable. The Board stated that the path to approving the use of medical marijuana under federal law is through further Congressional action, noting draft legislation to that effect currently pending before Congress.

Administrative Appeals Judge Buzzard dissented. He reasoned that federal law specifically allows states and territories to establish systems for physicians to recommend and patients to consume medical marijuana. The Board therefore has no basis to deem such medical treatment unreasonable or unnecessary under the Longshore Act as a matter of law. The Board reviews questions of law de novo. The CSA makes no reference to the LHWCA, and the LHWCA makes no reference to the CSA. The appropriations riders passed by Congress prohibit the DOJ from enforcing the CSA against any individual or company lawfully participating in a State-regulated medical marijuana system. This law conveys at least two critical developments in federal medical marijuana policy since passage of the CSA in 1970. First, in describing marijuana as "medical," Congress is acknowledging that marijuana can have an accepted medical purpose. Second, by prohibiting the DOJ from "preventing" States and territories from "implementing their own State [medical marijuana] laws," Congress is acknowledging States' authority to lawfully "authorize" the prescription of this specific substance as part of a patient's medical care, despite an otherwise broad prohibition on any use under the CSA, medical or recreational. The Board is not free to ignore the judgment of Congress. Congress has decided the order of priorities in this area by specifically enabling States and territories to establish systems for patients to lawfully use physician-recommended medical marijuana. So long as this Congressional policy remains in effect, the Board is without basis to hold medical marijuana, lawfully recommended by a physician and lawfully consumed by a patient under a State or territory system, can never constitute appropriate medical care under the Longshore Act. In this case, Claimant

established a prima facie case for the compensability of his treatment under the LHWCA with Dr. Soler's opinion. The Board's decision unnecessarily denies claimant "one of the only treatments that best works" to treat severe chronic pain from his decades-old work injury, despite Congress enabling States and territories to permit its use, and his territory, Puerto Rico, choosing to do so.

[Section 7 – Medical Benefits]

Tower v. Total Terminals International, BRBS (2022).

Agreeing with the Director, Office of Workers' Compensation Programs ("Director"), the Board held that, when tinnitus affecting both ears is a factor in a claimant's work-related hearing loss, benefits under the Sixth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment ("AMA Guides") are to be awarded under § 8(c)(13)(B), even if there is measurable hearing loss in only one ear.

Claimant was evaluated for his work-related hearing loss by Dr. Langman. An audiogram indicated: 0% right monaural hearing loss; 9.375% left monaural hearing loss; and a combined binaural hearing loss rating of 1.56%. Pursuant to the Sixth Edition of the AMA Guides, Dr. Langman initially added 2% for tinnitus to the 1.56% binaural hearing loss score, bringing the total binaural impairment to 3.56%. He further declared claimant has sensorineural hearing loss in his right ear despite the audiogram measure of 0% loss, particularly at 3000 Hz, necessitating hearing aids in both ears. After learning that claimant was prescribed a sleep medication as a result of tinnitus, Dr. Langman increased claimant's tinnitus rating from 2% to 4% due to the degree it affected his daily activities. Claimant filed a claim, and Employer voluntarily paid benefits for the monaural loss only, pursuant to § 8(c)(13)(A). Claimant sought additional benefits, and Employer controverted the claim.

The ALJ granted employer's motion for summary decision ("MSD"). Relying on cases that did not involve bilateral tinnitus or the Sixth Edition of the AMA Guides, he decided monaural impairment is not to be converted to binaural impairment under any circumstances and awarded claimant compensation pursuant to § 8(c)(13)(A). He determined the *AMA Guides* cannot override the language of the statute as explained in the case law. Claimant appealed.

On appeal, claimant argued that he is entitled to benefits under § 8(c)(13)(B) in order to include his bilateral tinnitus. He asserted the Act requires use of the AMA Guides, 33 U.S.C. §908(c)(13)(E), for computing hearing loss benefits, and the current AMA Guides support converting his monaural impairment to a binaural rating to which his tinnitus rating may be added. He asserted his bilateral tinnitus distinguishes his situation from the cases the ALJ relied on where compensation for monaural hearing loss was calculated under § 8(c)(13)(A). The Director supported this interpretation.

The Board agreed. In ruling on a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 18.72. To defeat a motion for summary decision, the non-moving party must "come forward with specific facts" to show "there is a genuine issue for trial." If the ALJ could find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate. In this case, the facts were not in dispute.

The Board reasoned that, unlike previous editions, the current edition of the AMA Guides' formula specifically provides for compensation for tinnitus by converting Claimant's monaural impairment to a binaural rating. The case law that the ALJ cited simply holds it improper to always convert monaural loss to binaural loss in cases of injury solely to one ear (which would make subsection A obsolete) -- not that such a conversion is not allowed where a claimant suffers from tinnitus in both ears. The language of the statute specifically incorporating the use of the AMA Guides, the method included in the current AMA Guides, and the inapposite case precedent that the ALJ relied on -- which exclusively involved injuries to one ear and not the bilateral tinnitus at issue in this case -- establish he erred.

Section 8(c)(13) of the Act, which addresses permanent partial disability benefits under the schedule for work-related hearing loss, states in pertinent part:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(13) Loss of hearing:

(A) Compensation for loss of hearing in one ear, fifty-two weeks.

(B) Compensation for loss of hearing in both ears, two-hundred weeks.

(E) Determinations of loss of hearing shall be made in accordance with the guides for the evaluation of permanent impairment as promulgated and modified from time to time by the American Medical Association.

Thus, under the Act, claimants are entitled to compensation for work-related hearing loss, and impairment is determined by using the *AMA Guides*. 33 U.S.C. §908(c)(13); see also *Pierce v. Elec. Boat Corp.*, 54 BRBS 27 (2020) (where the Act requires use of the *AMA Guides*, the doctor is to use the Guides' most recent version at the time he renders a rating). Claimants therefore are permitted awards for tinnitus under the framework provided in § 8(c)(13)(E) that incorporates the *AMA Guides*. See, e.g., *West v. Port of Portland*, 21 BRBS 87, modifying in part on recon. 20 BRBS 162 (1988).

In *West*, the Board initially held compensation for tinnitus is subsumed in a hearing loss award under § 8(c)(13) and thus claimant was not entitled to a separate award under § 8(c)(21). On reconsideration, the Board reversed its decision and held that the Second Edition of the *AMA Guides* "may allow a separate award for tinnitus under Section 8(c)(21) in an appropriate case." Since *West* was issued in 1988, the *AMA Guides* have undergone four editions of changes. Later editions of the *Guides* have more specific commentary about tinnitus, clarifying it may contribute to a person's impairment. The Sixth Edition of the *Guides*, published in 2007, is the latest and is also the one in effect as of the date Dr. Langman rated Claimant. Chapter 11 addresses hearing loss; Section 11.2 acknowledges tinnitus is "subjective" and must be "based on the individual's self-reports" because it "cannot be measured objectively." Section 11.2b states, in part:

[T]innitus is not a disease but rather is a symptom that may be the result of disease or injury. *** [I]f tinnitus interferes with [Acts of Daily Living], including sleep, reading (and other tasks requiring concentration), enjoyment of quiet recreation, and emotional well-being, up to 5% may be added to a measurable binaural hearing impairment.

Section 11.2c covers criteria for rating hearing loss and states: “[t]he binaural hearing impairment percentage is based on the severity of the hearing loss, which accounts for changes in the ability to perform ADLs.” Sections 11.2d, e, and f discuss calculating impairment ratings. Section 11.2f specifies:

Binaural Impairment is determined by the following formula:
Binaural Hearing Impairment (%) = [5 x (% hearing impairment better ear)
+ (% hearing impairment poorer ear)] ÷ 6
To calculate binaural impairment when only 1 ear exhibits hearing impairment, use this formula, allowing 0% impairment for the unimpaired ear.

As the applicable Sixth Edition of the AMA Guides now unambiguously incorporates bilateral tinnitus impairment by adding it to a binaural hearing loss rating (which was not the case when West was decided), benefits for tinnitus-related impairment now must be included under § 8(c)(13) instead of § 8(c)(21). The “up to 5%” binaural impairment may only be added to a binaural rating and is not meant to be added directly to a monaural impairment rating. The AMA Guides make clear: 1) tinnitus is a symptom of hearing loss and should not be treated as a separate impairment; 2) if tinnitus interferes with daily activities, up to a 5% impairment may be added to a measurable binaural hearing impairment; and 3) there is a specific formula for binaural conversion, including when one ear has 0% loss.

Accordingly, the ALJ should have converted Claimant’s monaural rating to a binaural rating and added the tinnitus rating per the AMA Guides. The Act requires use of the AMA Guides to determine hearing impairment. If tinnitus is a factor, the doctor must compute binaural hearing impairment to which he may then add up to 5% binaural impairment to account for the tinnitus. Indeed, under the Guides’ blueprint, “binaural impairment” may only be determined once both ears have been tested and their results entered into the formula or chart. And, because the formula states 0% is to be used for the unimpaired ear, the only way for a claimant with a monaural hearing loss to be compensated for the related effects of his tinnitus under the current edition is to convert it to a binaural impairment.

Consequently, claimant does not need to have measurable hearing loss in both ears to be entitled to compensation for tinnitus. Rather, he need only have a “measurable binaural impairment” following use of the conversion formula provided in the most recent addition of the AMA Guides. Once it is calculated, the ALJ may rely on a credited doctor’s opinion and add up to 5% to account for tinnitus impairment. Therefore, when tinnitus affecting both ears is a factor in a claimant’s work-related hearing loss, benefits under the current AMA Guides are to be awarded under § 8(c)(13)(B), even if there is measurable hearing loss in only one ear.

The BRB disagreed with employer’s assertion that this interpretation of the AMA Guides reads § 8(c)(13)(A) out of the Act. To the contrary, claimants who have monaural hearing loss and no tinnitus are still entitled to hearing loss benefits under § 8(c)(13)(A). But unlike those cases, claimant in this case has tinnitus in both of his ears. Cases involving hearing loss related to injuries to one ear and different versions of the AMA Guides do not apply.

Chief Administrative Appeals Judge Boggs concurred and dissented. She concurred with the majority that the ALJ erred in failing to award claimant compensation for tinnitus, but dissented from their decision to award claimant benefits under § 8(c)(13)(B), reasoning that this determination is in conflict with the language of the Act and case precedent.

[Hearing loss - Section 8(c)(13); Procedure Before the Administrative Law Judge - Summary Decision]

[Albonajim v. Aecom, BRBS \(2022\).](#)

Agreeing with the Director, OWCP, the Board held that § 10(i) does not require use of an injured employee's wages at the time of diagnosis when determining average weekly wage ("AWW") in cases involving delayed onset PTSD.

Claimant worked as a translator for employer in Iraq from 2010 until August 2011. In 2011, employer terminated the program claimant was assigned to, and he returned to the U.S. Claimant has been gainfully employed in multiple jobs ever since. On July 1, 2020, Dr. Jennifer Eldridge, a clinical psychologist, evaluated claimant and diagnosed post-traumatic stress disorder ("PTSD"). Dr. Eldridge used four assessment tools and found no indication of malingering or untruthfulness. She recommended that claimant should never return to contracting work in war zones. Claimant filed a claim under the Defense Base Act ("DBA"). Employer did not respond to the claim, nor did it respond to claimant's motion for summary decision.

The ALJ granted claimant's motion for summary decision. Despite concluding claimant is permanently partially disabled due to his work-related psychological condition, the ALJ denied disability benefits. Relying on § 10(i), the ALJ concluded that claimant's AWW must be determined as of the date he became aware of his injury in 2020. Because claimant was gainfully employed at that time and continues to be, the ALJ found no actual loss in WEC.

On appeal, claimant asserted that the ALJ erred by ignoring § 10(c) and basing his AWW solely on his stateside post-diagnosis salary, rather than considering his salary from his overseas employment. Claimant also argued the ALJ erred in granting summary decision but then denying benefits before giving him a chance to respond to the application of § 10(i). Finally, claimant argued § 10(i) is unconstitutional if it mandates a denial of disability benefits under these circumstances, and it should be unenforceable as to "delayed expression" PTSD claims. The Director responded, asserting that the ALJ erred in interpreting § 10(i) as requiring that claimant's AWW be determined using his lower stateside earnings as opposed to his higher overseas earnings, because claimant's DBA injury deprived him of his economic choice to return to overseas employment. The Director urged the Board to hold that claimant should receive disability compensation based on his overseas earnings. Employer did not respond.

The Board initially observed that, in ruling on a party's motion for summary decision, the ALJ must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. The non-moving party must come forward with specific facts to show there is a genuine issue for trial. If the ALJ could find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented, summary decision is inappropriate.

The Board further observed that § 10 provides three alternative methods for calculating an employee's average annual earnings, which serve as the basis for determining his AWW "at

the time of the injury:" (a) the employee's earnings from the previous year, if the employee worked in the field in which he was injured for "substantially the whole of the year immediately preceding his injury;" (b) if (a) does not apply, the average daily wage of a similarly-situated employee, working in the same or similar employment, in the year preceding the employee's injury; or (c) if (a) or (b) "cannot reasonably and fairly be applied," a combination of factors, namely the employee's previous earnings in the job he was performing when he was injured, his other employment, and previous earnings of similarly situated employees. The ALJ has significant discretion when calculating AWW under § 10(c). Here, claimant worked seven days per week, not the five or six days contemplated by subsections 10(a) and (b); thus, § 10(c) applied.

The Board initially addressed claimant's contention that the ALJ erred in applying § 10(i) to define "time of injury" for purposes of calculating his AWW. The Board stated that § 10(i) does not provide a method for calculating AWW but defines the "time of injury" in occupational disease cases. It states:

For purposes of this section with respect to a claim for compensation for death or disability due to an occupational disease which does not immediately result in death or disability, the time of injury shall be deemed to be the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability.

33 U.S.C. § 910(i). Claimant and the Director asserted that § 10(i) does not require use of an injured employee's wages at the time of his diagnosis in cases involving delayed onset PTSD, and that the ALJ's decision is contrary to *Robinson v. AC First, LLC*, 52 BRBS 47 (2018). The Board noted that in *LaFaille v. General Dynamics Corp.*, 18 BRBS 88 (1986), it held that applying § 10(i) to certain occupational disease cases can result in unwarranted under-compensation; in cases where the disability predates awareness of the relationship between disability and employment, the AWW should reflect earnings prior to the onset of disability rather than the subsequent earnings at the later time of "awareness."

In *Robinson*, the ALJ held that because claimant voluntarily left his overseas employment for reasons unrelated to his subsequently diagnosed PTSD, the decrease in his WEC was not compensable. The Board reversed. Relying on *Moody v. Huntington Ingalls, Inc.*, 879 F.3d 96, 51 BRBS 45(CRT) (4th Cir. 2018) (reversing the BRB and holding that claimant was entitled to disability benefits after his voluntary retirement), and *Christie v. Georgia-Pacific Co.*, 898 F.3d 952, 52 BRBS 23(CRT) (9th Cir. 2018) (same), the Board held that if a claimant is unable to return to his former work for his employer, he is entitled to compensation for any loss of WEC based on the "deprivation of economic choice" due to his work-related PTSD." It rejected employer's argument that claimant suffered no loss of his WEC because he remained employed by the same stateside employer for whom he worked when his PTSD became manifest. In the present case,

We agree with Claimant's and the Director's position that the ALJ's decision is contrary to *Robinson*. It is undisputed Claimant suffers from work-related PTSD after being exposed to traumatic events working as an interpreter in an Iraqi warzone, and he is unable to return to his usual employment with Employer because of his PTSD. As in *Robinson*, the fact that Claimant stopped working overseas prior to developing and becoming aware of his work-related PTSD is not a basis for the denial of benefits. Claimant has been deprived of the economic choice to return to any work overseas, including for Employer, because of his work-related PTSD. He therefore is "entitled to compensation

for any loss of wage-earning capacity based on the 'deprivation of economic choice' due to his work-related PTSD." Robinson, 52 BRBS at 48; see also H.R. Rep. 98-1027, 98th Cong., 2d Sess. 30, 1984 U.S. Code Cong. & Admin. News 2771, 2780 (1984).

Slip op. at 7 (citation to record omitted). The Board elaborated that the ALJ's decision is contrary to Congressional intent as is evident from the Conference Committee Report accompanying the 1984 Amendments enacting § 10(i). While § 10(i) effectively overruled pre-1984 Board decisions which held the date of last exposure was the time of injury, the Committee stated it did not intend to deprive a claimant of benefits. Where application of § 10(i) could result in a claimant not being compensated for a wage loss attributable to an occupational disease, the Committee stated the intent is to apply § 10(c)'s "other employment of such employee" so as to base compensation on wages prior to the disabling employment.

The Board concluded that:

In light of the flexibility and discretion an ALJ has in applying Section 10(c), which incorporates the phrase "other employment of such employee," and for the reasons set forth in Robinson, we vacate the ALJ's denial of disability benefits and remand the case for reconsideration. On remand, the ALJ must award compensation by calculating Claimant's disability benefits under Section 10(c) of the Act without applying the Section 10(i) "time of injury" definition, pursuant to Robinson.

Slip op. at 7-8 (footnotes and citation to record omitted). The Board noted that the evidence of record establishes that claimant worked seven days per week during his overseas employment, not the five or six days contemplated by subsections 10(a) and (b); therefore, § 10(c) must be used because the other sections cannot be "fairly and reasonably applied." Section 10(c), the catch-all section, is to be used where there is insufficient information to apply the other subsections, and its flexible calculation of AWW permits consideration of the wages claimant earned overseas when his injurious exposure occurred. The Board vacated the ALJ's denial of disability benefits and remanded the case; claimant's remaining contentions did not need to be addressed. In all other respects, the ALJ's order granting summary decision was affirmed.

[Average Weekly Wage – Section 10(c), Section 10(i); Administrative Law Judge Adjudication – Decisions under the APA – Summary Decision]

[Rose v. Vectrus Systems Corp., BRBS \(2022\).](#)

In an en banc decision, the Board granted Claimant's request for reconsideration of its prior decision in this case, *Rose v. Vectrus Systems Corp.*, BRB No. 20-0279 (May 25, 2021) (unpub.) (Buzzard, J., dissenting), which affirmed the ALJ's denial of benefits under the Defense Base Act. Agreeing with the Director, the Board held: (1) the proper burden of proof for a claimant's prima facie case is one of production; (2) if the claimant produces "some evidence" to support her prima facie case, she is entitled to the Section 20(a) presumption that her injury is work-related and compensable; and (3) credibility does not come into play in addressing whether a claimant has established a prima facie case.

Claimant worked for employer in Afghanistan from 2011 to 2013 at Bagram Airfield. In 2016, she was first diagnosed with post-traumatic stress disorder ("PTSD"). Claimant filed a claim under the Defense Base Act seeking benefits for a "psychological injury." In 2016, claimant's psychiatrist, Dr. Naqvi, diagnosed her with PTSD and Generalized Anxiety Disorder. As the basis for his diagnosis of PTSD, he listed claimant's direct experience of suicide bombings and mortar attacks, nightmares, anxiety, and isolation from people. Claimant's therapist, Ms. Bell-Callahan, reported claimant's problems with loud noises and crowds. She also diagnosed claimant with PTSD. Further, Dr. Datz, a licensed clinical

health psychologist, found claimant had significant attention and concentration issues. She diagnosed PTSD and panic attacks. At employer's request, claimant underwent an examination with Dr. Steve Shindell, a Board-certified neuropsychologist. Dr. Shindell conducted neuropsychological tests and reviewed some of claimant's records. He could not determine claimant's abilities "due to her failure on tests of cognitive effort." Reviewing the criteria for a PTSD diagnosis under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, he concluded claimant does not have PTSD because she was not exposed to any death or violence to herself or a loved one (stressors) and did not report negative alterations in cognitions and mood. He opined malingering was the only possible explanation for claimant's test results and the inconsistencies between her records and her own self-reporting. He concluded that there was no evidence of any mental health diagnosis.

The ALJ found claimant's testimony lacked credibility and therefore undermined the opinions of her medical providers. In contrast, the ALJ gave probative weight to Dr. Shindell's opinion that claimant does not have PTSD or any other mental health diagnosis, finding he is well-qualified, and his opinions are supported by claimant's test results and the record. She therefore found claimant did not establish any psychological harm, did not establish a prima facie case, and therefore did not invoke the Section 20(a) presumption. Accordingly, she denied benefits.

In a split unpublished decision, the Board initially affirmed the ALJ's denial of benefits. The Board's majority held the ALJ did not err in weighing claimant's credibility at the initial stage of determining whether she established a prima facie case, noting it is claimant's burden to prove each element of her prima facie case. The majority also affirmed the ALJ's finding that claimant was not credible and her discrediting of the medical opinions based on claimant's subjective reports. Claimant sought reconsideration of the Board's decision, urging the Board to clarify the applicable legal standard. The Director, Office of Workers' Compensation Programs ("the Director"), and the Workers' Injury Law and Advocacy Group, as amicus curiae, filed briefs in support of claimant's position. All three parties asserted a claimant bears only a burden of production in establishing a prima facie case to invoke the Section 20(a) presumption, and the ALJ improperly held claimant to a higher burden and improperly considered claimant's credibility at the invocation stage. The Board rejected as "spurious" employer's assertion that the Director's participation in this case was suspect. It noted, inter alia, that the Director has not asked for deference in this case, but rather was acting in his capacity as the administrator of the Act, and not as a litigant.

Section 20(a) Burdens of Proof

Section 20(a) of the Act states:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary –

- (a) That the claim comes within the provision of this chapter.

Section 20(a) aids a claimant in establishing injury causation under Section 2(2) of the Act. When the Section 20(a) presumption is invoked, it links a claimant's harm with her employment.

The Board noted the Supreme Court's holding that in order to invoke the Section 20(a) presumption, the claimant must allege she suffered an injury which "arose in the course of

employment as well as out of employment.” U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 14 BRBS 631 (1982). Subsequently, in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43(CRT) (1994), the Court held the “true doubt” rule (which found for the claimant in cases where the evidence was evenly balanced) violated the Administrative Procedure Act (“APA”), and concluded the LHWCA requires the claimant bear the ultimate burden of persuasion. Nevertheless, the Court stated that, in part due to Congress’ recognition that claims would be difficult to prove, claimants benefit from certain statutory presumptions easing their burden.

The Board next reviewed the relevant circuit court decisions. In American Grain Trimmers v. Director, OWCP [Janich], 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), cert. denied, 528 U.S. 1187 (2000), the Seventh Circuit recognized that the burden-shifting approach of Section 20(a) is “analogous” to the three-part burden-shifting scheme that the Supreme Court enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to apply in discrimination claims under Title VII of the Civil Rights Act. The Seventh Circuit thus held the burden in LHWCA cases that shifts to the employer is a burden of production only. This approach has been followed, in varying degrees, by other circuits. The First, Second, Third, Fourth, Fifth, Ninth, and District of Columbia Circuits have, at the very least, identified an employer’s burden at rebuttal as one of production. Further, the Third and Ninth Circuits have used language indicating that claimant’s initial burden at invocation is one of production.

The Fifth Circuit, however, has seemingly adopted a different approach. In Bis Salamis, Inc. v. Director, OWCP [Meeks], 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016), the court used language suggesting that a claimant’s burden at invocation, though “fairly light,” is one of persuasion as well as production. This interpretation is bolstered by the court’s conclusion that an ALJ may make credibility determinations at that initial stage in considering Section 20(a) invocation. But see Conoco Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). Meeks arguably indicates a claimant must do more than just produce “some evidence” in order to prove each element of a prima facie case, with credibility coming into play.

Upon review of its own prior case law, the Board concluded that it has applied an inconsistent standard over the years. In its earlier decisions, the Board indicated claimants bore a dual burden of production and persuasion in establishing a prima facie case under Section 20(a). Subsequently, in discussing a claimant’s requirements for establishing a prima facie case, the Board has used a variety of terms such as “allege,” “demonstrate,” “prove,” “show,” or “establish,” without addressing whether the initial burden is one of production, persuasion, or both. Though it has not since directly addressed the production versus persuasion issue regarding a claimant’s burden on invocation, the Board has applied the various courts’ positions, including the “some evidence” standard espoused by the D.C. and Ninth Circuits, as well as the principle that the burden on rebuttal is one of production, not persuasion, and is not dependent on credibility. On the other hand, the Board has also affirmed decisions in which ALJs made credibility determinations at the prima facie stage.

Burden of Proof Required to Invoke the Section 20(a) Presumption

The issue presented in this case involved the burden of proof claimants face to invoke the Section 20(a) presumption, as well as the ancillary issues of the standard of proof required to meet that burden and whether credibility should factor into determining if a claimant’s evidence is sufficient to establish the prima facie case. The Board agreed that it was necessary to clarify the applicable standard.

The Board reasoned that the phrase "burden of proof" refers to two distinct obligations with regard to the law and evidentiary procedure. Generally, depending upon the context, it may signify the burden of production, the burden of persuasion, or both. In terms of the Section 20(a) presumption and causation analysis, it is clear the claimant and employer each bear particular burdens of proof. Case law establishes the employer's burden on rebuttal is one of production. It is also clear the claimant, as the proponent seeking benefits under the Act, bears the ultimate burden of persuasion on causation by proving the facts by a preponderance of the evidence and, after a weighing of the evidence as a whole, establishing she sustained a work-related injury.

Upon review of the Act, its purposes, and relevant case law, the Board held Claimant bears an initial burden of production in order to invoke the Section 20(a) presumption. Thus, the Section 20(a) shifting burdens under the Act are: claimant bears a burden of production to invoke (to the extent the Board's prior decisions indicate otherwise, they are overruled); employer bears a burden of production to rebut; and claimant then bears burden of persuasion to establish a work-related injury by a preponderance of the evidence. This conclusion gives true meaning to the Supreme Court's recognition in *Greenwich Collieries* that the Act's statutory presumptions are meant to benefit claimants in adjudications by "easing their burden." It also comports with the declaration in *Greenwich Collieries* and the APA mandate that claimants bear the ultimate burden of persuasion on causation. Additionally, it is in line with other burden-shifting schemes, most notably those in employment discrimination cases. The Board was persuaded by the Supreme Court's decision in *McDonnell Douglas*, as that case contained analysis of a similarly functioning presumption and burden shifting scheme. The Board also agreed with the Director's position that this approach preserves the humanitarian purpose of the Act.

A burden of production rather than persuasion "eases" claimant's initial burden and places a similar burden on both claimants and employers with respect to their initial proffers under Section 20(a). Moreover, this burden of production applies equally to both physical and psychological injury claims because the Act does not differentiate between these types of injuries with respect to the causation analysis.

Standard of Proof Required to Invoke the Section 20(a)

The Board next considered what type of evidence satisfies claimant's initial burden of production. It held that, if a claimant produces some evidence to support her prima facie case, she is entitled to the presumption that her injury is work-related and compensable. All the claimant need adduce is some evidence tending to establish the pre-requisites of the presumption. That is, a claimant must produce "some evidence" of a harm and "some evidence" of either a work accident or working conditions which has the potential of resulting in or contributing to that harm. While "some evidence" is a light burden, the Board sought to make it "very clear" that the mere filing of a claim for benefits, in and of itself, is insufficient to invoke the Section 20(a) presumption. The claimant's theory as to how the injury arose must go beyond "mere fancy."

Credibility does not come into play in addressing whether a claimant has established a prima facie case. The question of whether the claimant's showing is "contradicted and overcome by other evidence[,]" 33 U.S.C. § 920(a), is not to be addressed at invocation; rather, such an inquiry necessarily involves the subsequent stages of rebuttal and weighing of the evidence as a whole of the Section 20(a) analysis. Application of a "some evidence" standard at invocation, in the presence of a burden of production rather than persuasion analysis, does not require examination of the entire record, an independent assessment of witness' credibility, or weighing of the evidence at step one. Rather, it involves having a

claimant present some evidence or allegation that if true would state a claim under the Act. This requirement is consistent with the Supreme Court's statement in burden-shifting cases that determinations at steps one and two of the McDonnell Douglas framework can involve no credibility assessment because the burden-of-production determination necessarily precedes the credibility assessment stage.

The Board stated that its position on invocation of the Section 20(a) presumption seemingly conflicts with that of the Fifth Circuit. Thus, the Board will apply its present holding in all cases except those arising within the jurisdiction of the Fifth Circuit (this case arose within the jurisdiction of the Eleventh Circuit).

The Board summarized the burden-shifting framework as follows. If the claimant produces some evidence to support her prima facie case, she is entitled to the presumption that her injury is work-related and compensable. The burden of proof then shifts to the employer to produce substantial evidence showing otherwise. If the employer satisfies its burden on rebuttal, the presumption drops from the case, and the claimant must bear the overall burden of persuasion and establish her injury is work-related by a preponderance of the evidence. At this third step of the analysis, the ALJ may weigh the evidence, assess the credibility of the witnesses, and make any reasonable inferences. If the evidence proffered at step one is ultimately found to be incredible at step three when weighing of the evidence comes into play, and that conclusion is supported by substantial evidence, the decision will stand.

The burden of production or "some evidence" standard is a light burden and is no greater than an employer's burden on rebuttal. Whether the claimant's evidence fails or carries the day is a matter to be resolved at step three when weighing the evidence, not at step one invocation. The Board specifically rejected the view that the ALJ must weigh and evaluate the credibility of evidence on invocation based on a review of all or part of the record to decide whether a claimant has provided substantial evidence of a genuine issue for a hearing akin to surviving a motion for summary judgment in a civil trial under FED. R. CIV. P. 56. Or, alternatively, that the ALJ must decide invocation based on a review of all of the record to determine whether a claimant could meet her ultimate burden. Instead, "a claimant's burden on invocation must . . . be viewed as akin to surviving a motion to dismiss under FED. R. CIV. P. 12(b): the ALJ should assume a claimant's allegations are true, and if they state a claim for relief, a claimant has satisfied her initial burden." Slip op. at 23 n.35.

Section 20(a) Invocation in this Case

The Board reversed the ALJ's finding that claimant did not establish a prima facie case, because the ALJ improperly considered claimant's credibility and weighed the conflicting evidence at the initial invocation stage, effectively applying a burden of persuasion standard. Noting instances of dishonesty, inconsistencies, and withholding of information, the ALJ found "Claimant is not credible, and her statements, testimony, and reports to others are not trustworthy or reliable." She therefore found the opinions of claimant's treatment providers in support of her prima facie claim were "questionable" and entitled to "little weight." The ALJ then compounded her error by weighing the conflicting evidence and finding Dr. Shindell's reports are "entitled to substantial evidentiary weight."

As a matter of law, claimant satisfied her initial burden of production under Section 20(a) and, therefore, is entitled to invoke the Section 20(a) presumption that her psychological injuries are work-related. Claimant has produced "some evidence" of the requisite harm and working conditions necessary to establish a prima facie case. She testified and

submitted doctors' and therapist's statements regarding her psychological symptoms and diagnoses. As such, she has produced "some evidence" to support her allegation that she sustained a harm. Similarly, claimant has produced "some evidence" that she encountered working conditions which could have caused her psychological injury, as the undisputed evidence (including a list of incidents at Bagram Airfield and her supervisor's testimony) established repeated occurrences of terror attacks and explosions at the base.

The case was remanded for the ALJ to address whether employer's evidence is sufficient to rebut the Section 20(a) presumption with regard to all of claimant's diagnosed and claimed psychiatric conditions. If employer satisfies its burden, the ALJ must then weigh the evidence on the record as a whole, with claimant retaining the ultimate burden of persuasion by establishing, by a preponderance of the evidence, a causal relationship between her employment exposures and her injuries.

Administrative Appeals Judge Buzzard concurred and dissented. He concurred in the majority's decision to reverse the ALJ's finding that claimant did not invoke the Section 20(a) presumption. He wrote separately, however, to express his views on the type and quality of evidence that must be produced and the role of "credibility" findings in assessing that evidence at the invocation and rebuttal stages. To rebut the Section 20(a) presumption an employer bears the burden of producing "substantial evidence," which is defined as "more than a scintilla but less than a preponderance." Thus, a party must produce not the degree of evidence which satisfies the ALJ that the requisite fact exists, but merely the degree which could satisfy a reasonable factfinder. To the extent a claimant's burden at invocation is no greater than an employer's burden at rebuttal, it follows that a claimant must produce substantial evidence of a harm and working conditions that could have caused the harm. In the present claim, rather than basing her invocation analysis on the proper "objective test," i.e., whether claimant produced evidence that could satisfy a reasonable factfinder, the ALJ based her finding on whether she, personally, was persuaded by a preponderance of that evidence when weighed against the other evidence of record.

Judge Buzzard further opined that the majority's statement that the burden of production analysis involves no assessment of credibility should not be construed to negate the ALJ's role in evaluating the sufficiency of a claimant's evidence at invocation or an employer's evidence at rebuttal. Not all evidence is substantial evidence (collecting cases). Thus, the substantial evidence standard necessarily allows for a limited credibility assessment, one that considers not whether the ALJ is subjectively persuaded by the evidence or finds it outweighed by other evidence, but whether, objectively speaking, the evidence presented "could satisfy a reasonable factfinder" that the "requisite fact exists." This conclusion could also explain the outcome in Meeks, as that claim hinged almost exclusively on the statements of a claimant whom the ALJ concluded was the least credible witness he had encountered in fifteen years on the bench and, thus, no reasonable factfinder could credit his testimony.

Lastly, Judge Buzzard dissented from the Board's majority in that he would have vacated the ALJ's credibility findings because, in his view, they were based on mischaracterizations of claimant's testimony and the record.

Chief Administrative Appeals Judge Boggs dissented from the majority's decision, including its analysis of a claimant's burden in establishing entitlement to the Section 20(a) presumption. She would have affirmed the ALJ's finding that claimant did not establish the requisite harm element of her prima facie claim. It is the claimant's burden to "establish" each element of her prima facie case. Establishing the elements of a prima facie case requires that the claimant produce substantial credible/reliable evidence that: (1) she

suffered a harm; and (2) a condition of the workplace could have caused, aggravated, or accelerated the harm. In this regard, the ALJ is entitled to assess the sufficiency of a claimant's evidence supportive of her prima facie case and she may make credibility determinations and draw reasonable inferences in deciding whether a claimant has met her burden and invoked the Section 20(a) presumption. The ALJ's duties necessarily involve some inquiry into the quality of the evidence submitted by a claimant to invoke the Section 20(a) presumption. In this case, the ALJ permissibly discredited claimant's testimony and her finding that claimant did not the harm element of her prima facie case is supported by substantial evidence.

[Application of Section 20(a) – Prima Facie Case (In General; Establishing Injury; Accident or Working Conditions; Proper Invocation; Failure to Properly Apply Section 20(a))]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

1. Published decisions:

[Edd Potter Coal Co. v. Dir., OWCP, United States Dep't of Labor](#), 39 F.4th 202 (4th Cir. June 30, 2022):

On June 30, 2022, the Fourth Circuit Court of Appeals issued a published opinion holding that the Department of Labor's regulations require issue exhaustion both before the ALJ and before the Board. Edd Potter Coal Company, Inc. ("Employer") did not raise an Appointments Clause challenge either when the case was first pending before the ALJ or when it was first pending before the Board. After the Board remanded the case to the ALJ, the Employer raised an Appointments Clause challenge pursuant to *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and it asked for the case to be reassigned to a properly appointed ALJ. The Fourth Circuit held that: (1) issue exhaustion is required before the ALJ and before the Board; (2) the Employer did not exhaust its Appointments Clause challenge; and (3) the Employer's forfeiture should not be excused. Consequently, the Fourth Circuit denied the Employer's petition for review.

[Issue exhaustion; Appointments Clause challenge]

[Huscoal, Inc. v. Dir., OWCP](#), 48 F.4th 480 (6th Cir. Sep. 7, 2022):

On September 7, 2022, the Sixth Circuit Court of Appeals issued a published opinion affirming an award of benefits to Peggy Clemons ("Claimant"), the survivor of James Clemons ("Miner"). The ALJ found that the Miner worked as a coal miner for ten years and smoked cigarettes for sixty pack-years. The ALJ noted that Dr. Ayesha Sikder considered a coal mine employment history of fourteen to fifteen years and a smoking history of sixty pack-years, and they credited Dr. Sikder's opinion over the other opinions of record. After concluding that the Miner had legal pneumoconiosis and that COPD in the form of legal pneumoconiosis caused the Miner's totally disabling pulmonary impairment, the ALJ awarded benefits in the Miner's and Survivor's claims.

On appeal, the Board affirmed the ALJ's decision. Huscoal, Inc. ("Employer") argued before the Board that Dr. Sikder made a handwritten note in their report documenting that the Miner smoked for "2 ppd- 21 years," suggesting that Dr. Sikder may have considered a lesser smoking history than the ALJ said they considered. In rejecting the Employer's argument, the Board noted that Dr. Sikder specifically wrote that the Miner smoked two packs of cigarettes per day from 1978 until February 2009, which was consistent with the smoking history the other doctors recorded and with the ALJ's finding that the Miner smoked for sixty pack-years. In a dissenting opinion, Judge Boggs said they would have remanded the case for the ALJ to explain why Dr. Sikder's opinion was reliable despite their consideration of an inaccurate employment history and a possibly inaccurate smoking history.

The sole issue on appeal to the Sixth Circuit was whether substantial evidence supported the ALJ's conclusion that the Miner's disabling COPD constituted legal pneumoconiosis. The Employer argued that because Dr. Sikder understated the Miner's smoking history and overstated their coal mine employment history, the ALJ erred in crediting their opinion. In rejecting the Employer's argument, the Sixth Circuit found that the ALJ reasonably concluded that the actual smoking history Dr. Sikder relied on was the specific date range detailing that the Miner smoked two packs of cigarettes per day from 1978 until 2009, which was consistent

with the ALJ's finding. Therefore, it concluded that substantial evidence supported the ALJ's finding that Dr. Sikder relied on a correct smoking history. The Sixth Circuit further found that the ALJ was not required to completely discount Dr. Sikder's opinion just because they relied on an inaccurate coal mine employment history. It noted that the ALJ acknowledged that Dr. Sikder relied on an inaccurate coal mine employment history, but the ALJ adequately explained why the opinion was nevertheless entitled to greater weight than the other opinions of record.

Finally, the Sixth Circuit considered whether the ALJ properly discounted the opinions of the Employer's doctors, who opined that smoking caused the Miner's COPD. The Sixth Circuit noted that the ALJ discounted the opinions of the Employer's doctors because they were equivocal, conflated legal and clinical pneumoconiosis, and relied on the Miner's response to bronchodilators and the nature of the Miner's impairment (restrictive versus obstructive) in concluding that the Miner did not have legal pneumoconiosis. The Sixth Circuit held that given the flaws in the Employer's doctors' opinions, substantial evidence supported the ALJ's decision to credit Dr. Sikder's opinion that coal dust caused the Miner's COPD.

For all these reasons, the Sixth Circuit denied the Employer's petition for review.

In a concurring opinion, Judge Thapar joined the majority in full but wrote that because the preamble to the regulations did not go through notice and comment rulemaking, "overreliance on agency guidance" was "problematic." They added that treating the preamble as binding would undermine the black lung regulations. However, because the Employer did not argue that the ALJ treated the preamble as binding, Judge Thapar stated that the Court did not need to more closely scrutinize the ALJ's reasoning.

[Weighing medical opinion evidence; inaccurate smoking history; inaccurate employment history]

[Energy W. Mining Co. v. Dir., OWCP, United States DOL](#), 49 F.4th 1362 (10th Cir. Sep. 27, 2022):

On September 27, 2022, the Tenth Circuit Court of Appeals issued a published opinion affirming an award of benefits to Cecil Bristow ("Claimant"). This case was before two ALJs and before the Board twice. The first ALJ to consider the case found that the Claimant smoked cigarettes for over forty years and worked as a coal miner for approximately 6.5 years. The first ALJ further found that the Claimant had legal pneumoconiosis in the form of chronic obstructive pulmonary disease ("COPD") and was totally disabled from a pulmonary impairment but failed to show that pneumoconiosis was a substantially contributing cause of their disability.

The Board affirmed the ALJ's first two findings, but it reversed their finding on the cause of the Claimant's disability. Specifically, the Board noted that: (1) no physician of record disputed that the Claimant's respiratory impairment was due to COPD; and (2) the ALJ found that the Claimant's COPD was both legal pneumoconiosis and totally disabling. Because the record did not reveal any condition other than COPD that could have caused the Claimant's disabling respiratory impairment, the Board held that the opinions of the doctors who diagnosed legal pneumoconiosis established disability causation at 20 C.F.R. § 718.204(c). Therefore, it remanded the case for the first ALJ to enter an award of benefits. Because the first ALJ retired, the case was assigned to a second ALJ, who issued a decision and order awarding benefits. Emery Mining Corp. ("Employer") appealed to the Board, which affirmed, and then to the Tenth Circuit.

On appeal to the Tenth Circuit, the Employer first argued that the first ALJ erred in assessing whether exposure to coal dust contributed “at least in part” to the Claimant’s COPD when determining whether the Claimant had legal pneumoconiosis. In rejecting the Employer’s argument, the Tenth Circuit agreed with the Sixth, Seventh, and Eleventh Circuits and concluded that the regulation at 20 C.F.R. § 718.203(a) “unambiguously” requires only that the Claimant’s respiratory impairment arose partly out of coal mine work to constitute legal pneumoconiosis.

The Employer next argued that the Board erred in reversing the first ALJ’s decision on disability causation. The Tenth Circuit disagreed, finding that if the Claimant’s “COPD constituted legal pneumoconiosis, the Claimant needed only to show that the legal pneumoconiosis had caused a disability.” Because the Claimant’s COPD was totally disabling and constituted legal pneumoconiosis, the Tenth Circuit held that the Board correctly found that the Claimant had established that pneumoconiosis was a substantially contributing cause of their disability.

Finally, the Tenth Circuit concluded that the Board did not err in affirming the first ALJ’s decision to credit Dr. Akshay Sood’s opinion and discredit the opinions of Drs. Jeff Selby and James Castle, who attributed the Claimant’s COPD to smoking. For all these reasons, the Tenth Circuit denied the Employer’s petition for review.

[Weighing medical opinion evidence; legal pneumoconiosis; substantially contributing cause]

2. Unpublished decisions:

[Walsh v. Dir. OWCP](#), No. 21-1354, 2022 U.S. App. LEXIS 21821 (3d Cir. Aug. 8, 2022):

On August 8, 2022, the Third Circuit Court of Appeals issued an unpublished opinion affirming a decision and order denying benefits to William Walsh (“Claimant”). The ALJ denied benefits after concluding that although the Claimant established that they were totally disabled from a pulmonary impairment, they failed to establish that pneumoconiosis was causing their disability. The Board affirmed the ALJ’s decision.

On appeal to the Third Circuit, the Claimant argued that the ALJ: (1) erred in concluding that they failed to show that pneumoconiosis was a substantially contributing cause of their totally disabling pulmonary impairment; and (2) violated their due process rights under the Administrative Procedure Act (“APA”) by not explaining the decision.

As to the first issue, the Third Circuit concluded that the ALJ reasonably found that the opinion of Dr. Greco, the only physician who attributed the Claimant’s disability to pneumoconiosis, was inconsistent and unexplained. Dr. Greco first opined that cardiovascular disease caused the Claimant’s pulmonary symptoms but then opined that pneumoconiosis caused them. As Dr. Greco did not sufficiently explain why they changed their opinion, the Court held that substantial evidence supported the ALJ’s decision to give their opinion little probative weight. The Court further rejected the Claimant’s second argument on appeal. Because the ALJ weighed the evidence, explained their decisions, and determined the relative credibility of the medical experts, the Court held that the ALJ did not violate the APA. For both reasons, the Fourth Circuit denied the Claimant’s petition for review.

[Establishing disability causation]

[Mining v. Dir., Office of Workers' Comp. Programs](#), No. 21-1015, 2022 U.S. App. LEXIS 35283 (4th Cir. Dec. 21, 2022):

On December 21, 2022, the Fourth Circuit Court of Appeals issued an unpublished opinion affirming the Board's decision upholding an ALJ's decision and order granting the request for modification filed by Gary W. Malcomb ("Claimant") and awarding benefits. Because Island Creek Kentucky Mining ("Employer") did not exhaust its due process and equal protection claims before the ALJ and the Board, the Fourth Circuit held that the Employer forfeited review of both arguments. It also concluded that the ALJ's consideration of the medical evidence was supported by substantial evidence. Finally, the Court concluded that the ALJ adequately considered whether granting modification would render justice under the Black Lung Benefits Act. Therefore, it denied the Employer's petition for review.

[Issue exhaustion; justice under the Act]

B. Benefits Review Board

3. Published decisions:

[Graham v. Eastern Associated Coal Co.](#), 25 BLR 1-289, BRB No. 20-0221 BLA (June 23, 2022):

In a published opinion, the Board affirmed an ALJ's finding that Eastern Associated Coal Company ("Eastern") was the responsible operator and Peabody Energy Corporation ("Peabody") was the responsible carrier (hereinafter the "Employer").

On appeal to the Board, the Employer argued the ALJ erred in finding that Peabody was the liable carrier. Although the Employer admitted that Eastern was the correct responsible operator and was self-insured through Peabody on the last day Eastern employed the Claimant, it contested Peabody's liability as the responsible carrier. The Employer maintained that Patriot was the responsible carrier because Patriot last insured Eastern's black lung liabilities, the Department of Labor released Peabody from liability, and the Director, OWCP, was equitably estopped from imposing liability on Peabody. Finally, the Employer maintained that Black Lung Benefits Act Bulletin numbers 12-07 and 14-02 ("Bulletins") require the Black Lung Disability Trust Fund ("Trust Fund") to assume liability when a private insurer is unable to assume liability. The Board rejected all the Employer's arguments and affirmed the ALJ's finding that Eastern, self-insured by Peabody, was liable for paying benefits.

Regarding the Employer's first argument on appeal, the Board affirmed the ALJ's decision to exclude Employer's Exhibits 1-7. The Board concluded that because the Employer failed to submit its liability evidence and designate potential liability witnesses when the case was pending before the district director, and the Employer did not show extraordinary circumstances to excuse its failure, the ALJ acted within their discretion in rendering their evidentiary rulings.

Next, the Board addressed the ALJ's decision to reject the Employer's argument that the doctrine of equitable estoppel should relieve it of liability. As the Employer failed to establish the necessary elements to invoke equitable estoppel, the Board affirmed the ALJ's decision.

The Board further found that because Patriot never employed the Claimant, the ALJ correctly concluded that 20 C.F.R. § 725.495(a)(4), which transfers liability to the Trust Fund in certain cases, did not apply in this case. It also rejected the Employer's contention that the Director failed to present evidence to show that Peabody self-insured Eastern, noting that once the

Director established Eastern as a potentially liable operator, the burden shifted to the Employer to prove that it was incapable of assuming liability.

Finally, the Board rejected the Employer's contention that the Bulletins required the Trust Fund to assume liability based on Patriot's inability to pay benefits as Eastern's bankrupt self-insurer. The Board noted that the Employer improperly presumed that Eastern did not meet the requirements for primary liability and improperly relied on the Bulletins as establishing a policy applicable to all bankrupt self-insurers.

For all these reasons, the Board affirmed the ALJ's Decision and Order Awarding Benefits.

[Carrier liability; exclusion of carrier liability evidence; equitable estoppel]

[Howard v. Apogee Coal Co.](#), 25 BLR 1-301, BRB No. 20-0229 BLA (Oct. 18, 2022):

In a published decision issued on October 18, 2022, the Board affirmed an ALJ's decision to award benefits and to find liable Apogee Coal Co. ("Apogee") as the responsible operator and Arch Coal, Inc. ("Arch") as the responsible carrier (referred to jointly as the "Employer").

The Board first rejected the Employer's argument that the removal provisions for ALJs contained in the Administrative Procedure Act ("APA"), 5 U.S.C. § 7521, are unconstitutional. Citing *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021), the Board noted that the only circuit court to address this precise issue regarding Department of Labor ("DOL") ALJs has upheld the constitutionality of the APA's removal provisions.

The Board then addressed the Employer's arguments regarding the responsible insurance carrier. The Claimant last worked for Apogee, which was self-insured through Arch. Arch later sold Apogee to Magnum Coal ("Magnum"), and Patriot Coal Corp. ("Patriot") later bought Magnum. The Employer first argued that the DOL violated its due process rights by failing to initially designate Arch as a responsible carrier and failing to properly serve Arch with the proposed decision and order ("PDO"). In rejecting the Employer's argument, the Board concluded that the ALJ accurately found that the district director properly named Arch in the PDO and properly served the PDO on Arch, as evidenced by the service sheet, the certified mail receipt, and Arch's response to the PDO. The Employer next contended the ALJ abused their discretion in denying its request for discovery regarding BLBA Bulletin No. 16-01 and quashing its subpoenas for testimony and documents from two DOL employees. As the Employer failed to submit liability evidence or designate any liability witnesses other than the Claimant while the claim was before the district director, the Board concluded that the ALJ did not abuse their discretion in finding that the Employer was required to establish extraordinary circumstances to admit the evidence. The Employer then claimed that even though Arch provided self-insurance coverage to Apogee on the Claimant's last date of employment with it, the ALJ erred in finding that self-insurance coverage applied to this claim. It asserted the filing date of the claim triggered self-insurance liability, whereas the date of a miner's last coal mine employment triggered commercial insurance liability. The Board concluded that the ALJ correctly found that the regulations do not support the Employer's argument. Finally, the Board affirmed the ALJ's decision to find immaterial Bulletin No. 16-01, as the admissible evidence established Arch was liable for the claim under the Act and regulations. For all these reasons, the Board affirmed the ALJ's finding that Apogee, insured by Arch, was liable for paying benefits.

Regarding the merits of the claim, the Board affirmed the ALJ's finding that the Claimant had a totally disabling pulmonary impairment and that the Employer failed to rebut the

presumption that the Claimant had pneumoconiosis and that their disability was due to pneumoconiosis. Therefore, the Board affirmed the ALJ's award of benefits.

[Removal provisions; carrier liability]

[Stevy C. Bailey v. Eastern Associated Coal Co.](#), ___ BLR ___, BRB No. 20-0094 BLA (Oct. 25, 2022) (en banc):

On October 25, 2022, the Board issued a published opinion affirming an ALJ's decision and order awarding benefits. The ALJ found that Eastern Associated Coal Co. ("Eastern") was the responsible operator and Peabody Energy Corp. ("Peabody") was the responsible carrier (referred to jointly as the "Employer"). On appeal, the Employer argued that the Department of Labor ("DOL") district director was not appointed in a manner consistent with the Appointments Clause of the U.S. Constitution ("Appointments Clause") and that the ALJ erred in finding that Peabody was the liable carrier.

Citing *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Employer first contended that the DOL district director is an inferior officer not properly appointed under the Appointments Clause and, therefore, lacked the authority to identify the responsible operator and process this claim. The Board held that the Employer forfeited its challenge. It stated that because Appointments Clause issues are non-jurisdictional, they are subject to the doctrines of waiver and forfeiture. The Board explained that the Act and regulations clearly outline the steps a party must take to preserve an issue before each adjudicatory body, and failure to contest an issue at the district director level has consequences. The Employer raised its Appointments Clause challenge for the first time during the ALJ's June 2019 hearing. Because the Employer failed to raise its argument either while this case was pending before the district director or in its request for a hearing, the Board held that it failed to adhere to the regulations addressing issue exhaustion at 20 C.F.R. §§ 725.419(b), 725.451, and 725.463. Moreover, the Employer did not argue before the ALJ or the Board that the issue was not reasonably ascertainable. As the Employer failed to comply with the issue exhaustion regulations, the Board concluded that the Employer forfeited its right to challenge the district director's authority.

The Employer next contested Peabody's liability as the responsible carrier. The Employer admitted that Eastern was the correct responsible operator and was self-insured by Peabody on the last day of the Claimant's employment, but it argued that the Black Lung Disability Trust Fund ("Trust Fund") was responsible for paying benefits following the bankruptcy of Patriot Coal Co. ("Patriot"). The Board considered and rejected all the Employer's arguments pertaining to responsible carrier liability. First, because the Employer did not timely submit liability evidence before the district director and failed to show extraordinary circumstances to admit the evidence, the Board affirmed the ALJ's decision to exclude the evidence. The Board next affirmed the ALJ's finding that a letter from a DOL employee to Patriot releasing a letter of credit financed under Peabody's self-insurance program did not absolve Peabody from potential liability under the Act. The Board further found that the Employer failed to establish the elements needed to invoke equitable estoppel. The Board next rejected the Employer's argument that DOL's failure to secure proper funding from Patriot absolved Peabody of liability. The Board noted that because the Employer presented the same argument under the same facts as it did in *Graham v. Eastern Associated Coal Co.*, 25 BLR 1-289, BRB No. 20-0221 BLA (June 23, 2022), the Board's decision in *Graham* foreclosed the Employer's argument. Finally, the Board rejected the Employer's argument that the regulatory scheme whereby the district director determines the liability of a responsible operator and its carrier while also administering the Trust Fund creates a conflict of interest

that violates its due process. For all these reasons, the Board affirmed the ALJ's finding that the Employer was liable for benefits and affirmed the ALJ's award of benefits.

Two members of the Board authored a concurring opinion expressing their view that the Employer did not show that district directors are inferior officers subject to the Appointments Clause. They would have found that district directors are not inferior officers.

[Issue exhaustion; Appointments Clause challenge; carrier liability]

2. Unpublished decisions:

[Emil J. Deel \(obo and survivor of Carlis R. Deel\) v. Dominion Coal Corp.](#), BRB No. 21-0071 BLA and 21-0072 BLA (April 8, 2022):

The ALJ found that because the Miner repaired machinery for underground mining operations in the Employer's Central Shop and "was in the mines about every day," they did not need to determine whether the dust conditions were substantially similar to those in underground coal mines. They nonetheless found that the Claimant's uncontradicted testimony established that when the Miner returned from work in the Central Shop, they were just as dusty as they were when they worked underground. On appeal, the Board noted that employment as a mechanic in a repair shop is qualifying coal mine employment so long as their work took place in or around a coal mine or coal preparation facility. The Board affirmed the ALJ's decision to rely on uncontested testimony to support a finding that the Miner was regularly exposed to coal mine dust both when they repaired machinery in the mines and when they worked in the Employer's Central Shop. Therefore, it affirmed the ALJ's conclusion that the Miner had at least fifteen years of qualifying coal mine employment.

[Duration of coal mine employment; substantially similar employment]

[James G. Huddleston v. Island Creek Kentucky Mining](#), BRB No. 20-0309 BLA (April 27, 2022):

The Board held that the ALJ erred in remanding the case for a third DOL-sponsored PFT. Because the Claimant had already been accorded a second DOL-sponsored PFT, the Board found that the Claimant was not entitled to a third DOL-sponsored PFT. Therefore, it vacated the ALJ's award of benefits and remanded the case for the ALJ to consider whether the Claimant is entitled to benefits without considering the third DOL-sponsored PFT and accompanying supplemental medical reports.

[DOL pulmonary evaluation; additional testing under 20 CFR § 725.406(c)]

[James M. Vanover v. Diamond May Coal Co.](#), BRB No. 21-0088 BLA (April 27, 2022):

The ALJ considered ABGs performed in August 2015 (qualifying), April 2016 (qualifying), and May 2018 (not qualifying). Because it would be inconsistent with the principle that pneumoconiosis is a latent and progressive disease, the ALJ declined to give more weight to the most recent, non-qualifying ABG. The Board held that the ALJ properly declined to find the 2018 ABG more probative solely because it was the most recent and affirmed the ALJ's decision to find the preponderance of the ABG evidence qualifying.

[Total disability; weighing ABG evidence]

[Helen Kendrick \(obo Hassel Kendrick\) v. Cimaron Minerals, Inc.](#), BRB No. 21-0111 BLA (April 29, 2022):

The Board affirmed the ALJ's finding that benefits commenced in July 2012, the month the Miner filed their request for modification. The ALJ awarded benefits after finding that the Claimant established a change in the Miner's condition based on a newly submitted, qualifying ABG dated July 20, 2013. Although benefits are payable beginning with the month of the onset of total disability due to pneumoconiosis when an ALJ awards benefits pursuant to a request for modification based on a change in condition, the ALJ found that the evidence did not establish exactly when the Miner became totally disabled. Therefore, they concluded that benefits should commence in July 2012, the month the Miner filed their request for modification. As the qualifying ABG did not establish the date the Miner became totally disabled, it merely showed that the Miner became totally disabled at some time prior, the Board affirmed the ALJ's onset date for commencement of benefits.

[Modification; onset date for payment of benefits]

[Ronnie L. Hall v. Pontiki Coal Corp.](#), BRB No. 21-0167 BLA (May 24, 2022):

The Board affirmed the ALJ's determination that the Employer failed to establish that another potentially liable operator more recently employed the Claimant. Before the ALJ, the Employer argued that two other coal mine operators, Universal and Apollo, more recently employed the Claimant for at least one year. Even though Universal and Apollo had the same address listed on the Claimant's Social Security Itemized Statement of Earnings, the ALJ found no evidence showing that Apollo acquired Universal or its mines or assets. Therefore, the ALJ found the evidence insufficient to show a successor relationship between the two operators. Moreover, although the Claimant testified that they thought Apollo and Universal were the same company, the Board agreed that the Claimant did not show knowledge of the companies' corporate structures or of any transactions or acquisitions between them. The Board concluded that the ALJ permissibly found that a shared mailing address and the Claimant's testimony were not sufficient to establish that Apollo was Universal's successor operator.

[Responsible operator; successor operator]

[Tammie R. Adams \(widow of and obo Kenneth D. Adams\) v. Bishop Coal Co.](#), BRB Nos. 21-0371 BLA and 21-0372 BLA (May 31, 2022):

The Miner filed seven claims during their lifetime. The Employer argued that the physician who authored the DOL-sponsored medical report in the Miner's sixth claim for benefits (the Miner's most recent prior claim) triggered the running of the statute of limitations. The ALJ assigned to the Miner's sixth claim dismissed the claim as abandoned and remanded it to the district director "for appropriate action." The Board agreed with the Director that the district director's denial of benefits in the Miner's sixth claim became the last determination on the merits in that claim. Consequently, the Board found that the district director's denial in the Miner's sixth claim rendered the DOL-sponsored medical report a misdiagnosis for triggering the running of the statute of limitations.

[Statute of Limitations]

[John W. Sexton v. A & G Coal Corp.](#), BRB No. 21-0148 BLA (May 31, 2022):

The Board affirmed the ALJ's finding that the Claimant had legal pneumoconiosis. The Board further agreed that because the Claimant had a totally disabling obstructive respiratory impairment, and the ALJ properly found that the Claimant's obstructive impairment was legal pneumoconiosis, the Claimant established disability causation based on the opinion of the only physician who diagnosed legal pneumoconiosis.

[Total disability; disability causation as a matter of law]

[Tabathia Crouse \(obo Richard L. Carper\) v. Eastern Associated Coal Co.](#), BRB No. 20-0044 BLA (May 31, 2022):

The Board affirmed the ALJ's decision to commence benefits five years before the Miner filed their claim. The ALJ found that the Miner was totally disabled due to complicated pneumoconiosis, and they ordered benefits to begin in February 2011, the month and year of the first x-ray they credited as positive for complicated pneumoconiosis. Because the ALJ gave probative weight to the February 2011 x-ray, and no party rebutted it, the Board held that the ALJ permissibly concluded that the Miner's simple pneumoconiosis had progressed to complicated pneumoconiosis no later than that date. Moreover, although the Employer withdrew the issue of timeliness when the case was pending before the ALJ, the Board noted that an x-ray that is positive for complicated pneumoconiosis does not, on its own, start the running of the statute of limitations.

[Modification; onset date for payment of benefits; complicated pneumoconiosis; statute of limitations]

[Elsie Dotson \(obo and survivor of Raymond Dotson\) v. Heritage Coal Co., LLC](#), BRB Nos. 21-0089 BLA and 21-0090 BLA (June 22, 2022):

The Board agreed with the ALJ that the Employer's appeal, filed on February 23, 2017, was untimely given that the district director issued the proposed decision and order on January 19, 2017. Therefore, it affirmed the ALJ's decision to dismiss the Employer's request for a hearing. However, the Board agreed with the Employer and Director that the Employer's appeal could be construed as a request for modification. Therefore, it remanded the case to the district director for modification proceedings.

[Timeliness of appeal]

[Ronnie Bowen v. Pilgrim Mining Co., Inc.](#), BRB No. 21-0244 BLA (June 22, 2022):

The Board affirmed the ALJ's conclusion that the Claimant's two PFTs, which were taken eight months apart, were "essentially contemporaneous." As neither PFT was more recent, the Board found moot the Employer's argument that the ALJ should have credited the most recent non-qualifying PFT. In a concurring opinion, Judge Rolfe explained that because the most recent PFT was not qualifying, the ALJ could not have credited it over the other PFT. Because the ALJ could not have applied the later evidence rule, Judge Rolfe stated that whether the two PFTs were essentially contemporaneous was immaterial. They would have rejected the Employer's contention that the most recent PFT could be entitled to controlling weight based on its recency.

[Weighing evidence; later evidence rule]

[Wilma J. Honeycutt \(obo Ronald D. Honeycutt\) v. Hondo Coal Co.](#), BRB No. 21-0125 BLA (June 22, 2022):

The Board agreed with the Director that because the regulations provide that a “working day” means “any day or part of a day for which a miner received pay for work as a miner,” 124.8 working days equated to 125 working days for the purpose of determining whether the Miner worked for the Employer for one year.

[Length of coal mine employment; weight of claimant’s testimony]

[Billy Wilson v. Lone Mountain Processing, Inc.](#), BRB No. 21-0376 BLA (June 23, 2022):

The Board remanded the case for the ALJ to reconsider whether the Claimant was totally disabled. The Claimant underwent four ABGs, which were both qualifying and not. Because the most recent ABG was not qualifying, the ALJ held that the ABG evidence did not support finding the Claimant totally disabled. The Board held that because the most recent ABG showed that the Claimant’s condition improved, and the most recent ABG was the ALJ’s sole rationale for concluding that the Claimant’s ABGs did not show a totally disabling impairment, the ALJ erred in applying the later evidence rule.

[Total disability; weighing ABG evidence; proper application of later evidence rule]

[Virginia D. Smith v. Heritage Coal Co.](#), BRB Nos. 20-0147 BLA and 20-0148 BLA (June 29, 2022):

Arising in the Fourth Circuit, the Board remanded the case for the ALJ to recalculate how long the Miner worked as a coal miner. The ALJ credited the Miner with one year of coal mine employment for each year in which they worked for 125 days. The majority of the panel held that the ALJ failed to first determine whether the Miner worked in coal mine employment for one calendar year (365 days) or partial periods totaling one year. In a dissenting opinion, Judge Buzzard disagreed that the ALJ was required to determine whether the Miner was employed for one calendar year. Judge Buzzard would have followed the Sixth Circuit’s rationale in *Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019), and held that 125 days of coal mine employment in a year equated to one full year of coal mine employment.

[Length of coal mine employment; legal pneumoconiosis]

[Bruce D. Smith v. Buffalo Mining Co.](#), BRB No. 21-0375 BLA (July 28, 2022):

The Board affirmed the ALJ’s finding that the Claimant established complicated pneumoconiosis by a preponderance of the x-ray evidence at 20 C.F.R. § 718.304(a) where one x-ray was positive for complicated pneumoconiosis and three subsequent x-rays were in equipoise.

[Complicated pneumoconiosis; weighing x-ray evidence]

[Teresa Lilly \(obo Virgil R. Lilly\) v. Ranger Fuel Corp.](#), BRB No. 21-0324 BLA (July 28, 2022):

The Board affirmed the ALJ’s decision to prohibit the Employer from substituting previously designated evidence with new evidence on modification. In the initial claim, the Employer

submitted its full complement of x-ray evidence, which the ALJ considered in making their decision. Citing its decision in *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007), the Board held that the ALJ in this subsequent claim properly concluded that the regulations do not permit substitution of evidence that constituted the basis of the original award of benefits. Therefore, the Board found that the ALJ properly determined that the Employer was only permitted to submit one additional x-ray interpretation on modification. However, the Board agreed with the Employer that instead of excluding both the Employer's x-rays, the ALJ should have rendered their evidentiary ruling prior to issuing a decision and allowed the Employer to designate one of its two proffered x-ray interpretations on modification. The Board also agreed with the Employer that the ALJ erred in concluding that evidence submitted on modification could not establish a mistake in determination of fact in the prior ALJ's decision. The Board emphasized that once a party files a request for modification, the ALJ must reconsider all the evidence for a mistake of fact or change in conditions. Because the ALJ did not conduct a de novo review of the cumulative record, the Board vacated their finding that the Employer did not establish a mistake in a determination of fact. Moreover, in a footnote, the Board stated that while making a threshold determination of whether granting modification renders justice under the Act before considering the modification petition on the merits might make sense in cases of obvious bad faith, a threshold determination is not appropriate in cases without an indication of improper motive. Rather, the Board stated that an ALJ must consider the evidence and render findings on the merits to properly assess whether to grant modification. Therefore, it vacated the ALJ's decision and remanded the case for further consideration.

[Substitution of evidence in modification proceeding; justice under the Act]

[Roy Kinder v. Jamie Marcus Coal Co., Inc.](#), BRB No. 21-0443 BLA (July 28, 2022):

The Board modified the commencement date for paying benefits to November 2015, the month after the date of the only x-ray that was negative for complicated pneumoconiosis, which was also the only evidence establishing that the Claimant only had simple pneumoconiosis. The Claimant filed a subsequent claim on September 8, 2015. The ALJ weighed conflicting interpretations of x-rays dated October 8, 2015, August 10, 2018, and July 10, 2019, and concluded that the October 2015 x-ray was negative for complicated pneumoconiosis, the August 2018 x-ray was inconclusive, and the July 2019 x-ray was positive for complicated pneumoconiosis. After giving the most weight to the most recent x-ray, the ALJ concluded that the x-ray evidence established complicated pneumoconiosis and benefits were payable beginning in September 2015, the month in which the Claimant filed their subsequent claim. The Board agreed with the Employer that because the ALJ found the October 2015 x-ray negative for complicated pneumoconiosis, the record showed that the Claimant only had simple pneumoconiosis after the date they filed their claim in September 2015. Because the Claimant did not have complicated pneumoconiosis as of October 2015, the Board stated that the earliest the ALJ could set a commencement date was the following month, November 2015. Given that the ALJ could not determine the date the Claimant developed complicated pneumoconiosis, and the ALJ did not credit any other evidence establishing that the Claimant only had simple pneumoconiosis after November 2015, Board concluded that the case did not require a remand. Therefore, it modified the commencement date for benefits to November 2015. In a footnote, the Board also noted that when x-ray interpretations are inconclusive, their weight neither confirms nor disproves pneumoconiosis; therefore, the August 2018 x-ray, which was inconclusive, did not establish that the Claimant did not have complicated pneumoconiosis at that time.

[Modification; onset date for payment of benefits; complicated pneumoconiosis]

[Allen D. Yates v. Paramount Contura, LLC](#), BRB No. 21-0477 BLA (July 29, 2022):

The Board found that the ALJ “permissibly considered other factors,” “such as Dr. Crum’s recent participation in a study with the National Institute for Occupational Safety and Health on the resurgence of progressive massive fibrosis in eastern Kentucky,” in giving Dr. Crum’s CT scan interpretation more probative weight than Dr. Seaman’s interpretation.

[Weighing evidence: physician’s credentials]

[Diane F. Haight \(survivor of Robert A. Haight\) v. Helen Mining Co.](#), BRB No. 21-0334 BLA (Aug. 15, 2022):

The Board vacated the ALJ’s award of benefits and remanded the case for the ALJ to resolve evidentiary issues on modification. In the underlying claim, the Claimant designated Dr. Goldblatt’s report as an affirmative autopsy report. On the day of the hearing before the first ALJ, the Claimant amended their Evidence Summary Form by designating Dr. Caffrey’s report as an affirmative medical report. Dr. Caffrey reviewed autopsy slides and other evidence of record. The first ALJ excluded Dr. Caffrey’s report because it was untimely, exceeded the evidentiary limitations for autopsy reports, and did not constitute a medical report. On modification, the Claimant resubmitted Dr. Caffrey’s report and designated it as an affirmative medical report. The second ALJ admitted it over the Employer’s objection and considered it in concluding that the Miner’s death was due to pneumoconiosis. On appeal, the Board stated that because Dr. Caffrey’s report could constitute both an autopsy report and a medical report, each portion of it needed to comply with the evidentiary regulations. The Board agreed with the Employer that the second ALJ erred in admitting Dr. Caffrey’s report without explaining why it complied with the evidentiary limitations. Therefore, it vacated the second ALJ’s finding that the report was admissible and remanded the case for further consideration. The Board stated that if, on remand, the second ALJ finds Dr. Caffrey’s report admissible as a medical report, but not as an autopsy report, they must consider the extent to which Dr. Caffrey’s report is tainted by their review of the inadmissible, autopsy-related evidence.

[Modification; evidentiary designations]

[Edward A. Lidwell v. Consolidation Coal Co.](#), BRB No. 21-0353 BLA (Aug. 15, 2022):

The Board affirmed the ALJ’s finding that the Claimant was totally disabled due to pneumoconiosis. The Board explained that every doctor of record agreed that the Claimant was totally disabled by an obstructive respiratory impairment. The Board then concluded that because it affirmed the ALJ’s finding that the Claimant’s totally disabling impairment was legal pneumoconiosis, legal pneumoconiosis caused the Claimant’s total disability.

[Total disability; disability causation as a matter of law]

[John C. Goble v. Left Beaver Coal Co.](#), BRB No. 21-0012 BLA (Aug. 30, 2022):

The Board affirmed the ALJ’s decision to treat a PFT administered during Dr. Zaldivar’s examination as containing two non-qualifying post-bronchodilator PFTs as opposed to one non-qualifying pre-bronchodilator PFT and one non-qualifying post-bronchodilator PFT. The Board stated that the ALJ permissibly relied on Dr. Zaldivar’s statement that because the Claimant had already used a bronchodilator on the testing day, and was still under its

effects, all testing performed that day should be treated as done while the Claimant was medicated with bronchodilators.

[Weighing evidence: bronchodilators]

[Diana K. Faulkner \(survivor of Dwight D. Smith\) v. Banner Coal and Land Co.](#), BRB No. 21-0584 BLA (Sept. 19, 2022):

The Board reversed the ALJ's determination that the Claimant was not receiving "substantial contributions" from the Miner under 20 C.F.R. § 725.217(c). The Miner and the Claimant were divorced, and the divorce decree awarded a life estate in their marital home to the Claimant and required the Miner to pay the home's monthly mortgage until it was paid in full. The Miner failed to make mortgage payments resulting in the home's foreclosure. Thereafter, they were found in contumacious contempt of a court order for failing to pay the mortgage and ordered to pay \$400.00 per month until they paid the remaining value of the foreclosed home. When considering the dependency requirement under 20 C.F.R. § 725.217(b), the ALJ found the Claimant did not qualify as a dependent because the mortgage payments did not constitute "substantial contributions" the Miner made from their property, the Miner did not retain a property interest in the marital home, and no evidence showed the Claimant received any contributions at the "applicable time." In holding that the ALJ erred in determining the Claimant was not receiving "substantial contributions" from the Miner, the Board noted that the Miner demonstrated control when they elected to stop and start making mortgage payments on the Claimant's behalf and was required to continue making mortgage payments until the mortgage was fully paid. Moreover, the Board concluded that the ALJ's finding that the money used to make the mortgage payments was not the Miner's property was inconsistent with the plain language of the regulation, which defines payments made pursuant to court orders as "contributions." For all these reasons, the Board reversed the ALJ's determination that the Claimant did not establish they were the Miner's dependent.

[Surviving divorced spouse; substantial contributions]

[Robert Tocyloski v. Mallard Contracting Co., Inc.](#), BRB No. 21-0445 BLA (Sept. 27, 2022):

The Board held that the ALJ abused their discretion in disallowing the time the Claimant's counsel ("Counsel") spent traveling to and from and attending the hearing. The Board emphasized that attending and representing the Claimant at the hearing is "essential to client representation and clearly necessary to establish entitlement" rather than a clerical task. Therefore, it reversed the ALJ's disallowance of Counsel's time spent traveling to and from and attending the hearing.

[Attorney fees: travel time]

[Rhodes Ooten, III v. Pittston Coal Management Co.](#), BRB Nos. 18-0066 BLA and 18-0066 BLA-A (Sept. 30, 2022):

The Board held the ALJ erred as a matter of law in denying benefits. The ALJ found that the Claimant had clinical and legal pneumoconiosis and over fifteen years of qualifying coal mine employment. However, the ALJ concluded that because the Claimant's left lung transplant, necessitated by pneumoconiosis/pulmonary fibrosis, rendered him no longer totally disabled from a respiratory standpoint, the Claimant was not entitled to benefits. In reversing the ALJ's decision, the Board stated that because the Claimant was totally

disabled from a pulmonary impairment before their lung transplant, they were entitled to invoke the fifteen-year presumption. It added that the Claimant was not required to “reestablish disability after receiving a new lung.” Because substantial evidence supported the ALJ’s finding that coal dust caused the scarring in the Claimant’s lungs before the transplant, the Board stated that the Employer failed to meet its burden to rebut the presumption that the Claimant’s disabling lung scarring was legal pneumoconiosis. Given that finding, the Board found the Employer could not demonstrate that pneumoconiosis did not cause the Claimant’s disability. Therefore, the Board concluded the Claimant was entitled to benefits.

[Total disability; effect of lung transplant]

[Ralph Salaz v. Powderhorn Coal Co.](#), BRB Nos. 21-0406 BLA and 21-0406 BLA-A (Oct. 31, 2022):

Arising in the Tenth Circuit, the Board declined to find that 125 working days equated to one year of coal mine employment in the context of determining the responsible operator. It explained that the miner must have been engaged in coal mine employment for one calendar year or partial periods totaling one year and must have worked for at least 125 days during that one-year period to be credited with one year of coal mine employment. Therefore, it reversed the ALJ’s finding that the Trust Fund was liable for paying benefits.

[Responsible operator designation: year of employment]

[Tobey Dale Collins v. Bevins Branch Resources, Inc.](#), BRB No. 21-0430 BLA (Oct. 31, 2022):

The Board rejected the Employer’s argument that because Dr. Sikder did not specifically say the Claimant was totally disabled, the ALJ erred in finding their treatment notes sufficient to show that the Claimant could not perform the very heavy labor required of their usual coal mine work. The Board stated that a “medical opinion need not be phrased specifically in terms of ‘total disability’ to support such a finding.” Rather, “an ALJ must consider all relevant evidence concerning a miner’s respiratory capacity and may rationally conclude a miner is totally disabled based on a physician’s report as to the extent of a miner’s impairment.” Even though Dr. Sikder did not specifically state the Claimant was totally disabled, the Board found that they provided sufficient information from which the ALJ could conclude that fact. Consequently, it affirmed the ALJ’s finding that the Claimant suffered from a totally disabling pulmonary impairment and affirmed the ALJ’s award of benefits.

[Total disability: medical opinion evidence]

[Lexie L. Madon \(survivor of Jerma Madon\) v. Harlan Cumberland Coal Co.](#), BRB No. 22-0064 BLA (Nov. 14, 2022):

In this survivor’s claim, the ALJ discredited the opinions of the two physicians who opined that pneumoconiosis did not cause the Miner’s death because they did not diagnose clinical pneumoconiosis, contrary to the ALJ’s finding that the Employer failed to disprove clinical pneumoconiosis. The Board concluded that the ALJ rationally discredited their opinions on death causation and affirmed the ALJ’s finding that the Employer did not rebut the fifteen-year presumption.

[Death due to pneumoconiosis; rebuttal of 15-year presumption]

[Charles Hayse, Jr. v. Heritage Coal Co.](#), BRB Nos. 21-0570 BLA and 21-0570 BLA-A (Nov. 18, 2022):

The ALJ found that the Claimant was not totally disabled and, therefore, did not address any other contested issues, including responsible operator and length of coal mine employment. On cross-appeal to the Board, the Employer argued it was not the responsible operator. In response to the Employer's cross-appeal, the Director argued that if the Board remanded the case, it should instruct the ALJ to determine whether the Employer was the responsible operator. In its decision, the Board stated that because it affirmed the ALJ's denial of benefits, it did not need to address the Employer's cross-appeal on the responsible operator issue.

[Efficient decision drafting]

[Phillip M. Cline v. Hanover Resources, LLC](#), BRB No. 20-0260 BLA (Nov. 21, 2022):

The Claimant worked for DB Coal Mining ("DB Coal") from February 4, 2011 until June 2013. DB Coal actively produced coal until November 2011. After that, the Claimant continued to work there as a manager maintaining the non-active mine for viewing by prospective buyers. The ALJ determined that because the Claimant's work from November 2011 to June 2013 was not integral to the extraction or preparation of coal, it was not coal mine employment. On appeal, the Employer contended that the ALJ erred in finding that the Claimant's work as a mine manager for DB Coal was not coal mine employment. Similarly, the Director argued that the Claimant's work as a mine manager constituted coal mine employment if the mine was still open, even if idle, but not if the mine was sealed off and the Claimant stopped entering the mines. The Board agreed with the Director and reversed the ALJ's finding. Because the record contained conflicting evidence regarding when, or whether, DB Coal sealed the mine, the Board remanded the claim to the ALJ to determine whether DB Coal employed the Claimant as a miner for at least one year.

[Responsible operator; definition as a miner]

[Charles R. Barrett v. Southern Ohio Coal Co.](#), BRB No. 21-0571 BLA (Nov. 29, 2022):

The Employer did not challenge the ALJ's finding that the Claimant had totally disabling clinical and legal pneumoconiosis that necessitated a double lung transplant. However, it argued that because the Claimant was no longer totally disabled after the lung transplant, the ALJ erred in awarding benefits. The Board held that requiring the Claimant to show that they continued to suffer from totally disabling pneumoconiosis after a lifesaving lung transplant, which pneumoconiosis necessitated, "would plainly contradict the basic purpose of the Act." Therefore, it affirmed the ALJ's decision to discredit the opinion of the physician who opined that the Claimant did not have pneumoconiosis or a totally disabling respiratory impairment due to pneumoconiosis and affirmed the ALJ's award of benefits.

[Total disability; effect of lung transplant]

[Rinnie Ratliff v. R&H Coal Co.](#), BRB No. 21-0136 BLA (Nov. 29, 2022):

The Board vacated the ALJ's finding that the x-ray evidence established complicated pneumoconiosis. Because Dr. DePonte interpreted an x-ray "on behalf of the [d]istrict [d]irector, rather than an interested party," the ALJ gave Dr. DePonte's interpretation more probative weight than the other interpretations of record. The Board held that the ALJ erred

in giving more weight to Dr. DePonte's positive x-ray interpretation solely because it was interpreted as part of the Claimant's DOL-sponsored pulmonary evaluation. It added that absent conclusive evidence that other physicians of record are biased and the DOL's physician is independent, an ALJ cannot accord greater weight to physicians who provide opinions on behalf of the DOL due to their perceived impartiality. Therefore, the Board vacated the ALJ's decision and remanded the case for further consideration.

[Clinical pneumoconiosis; weighing x-ray evidence]

[Carole F. Hughes \(widow of Raymond H. Hughes\) v. Greenwich Collieries Co.](#), BRB No. 21-0349 BLA (Dec. 8, 2022):

The Board remanded the case for the ALJ to weigh all relevant evidence and to clarify their reliance on lay testimony in determining whether the Miner was totally disabled. The Board stated that because an ALJ may rely on lay testimony in a deceased miner's case if the medical evidence neither establishes nor refutes total disability, the ALJ did not err in considering the Claimant's testimony. However, the regulation at 20 C.F.R. § 718.305(b)(4) provides that in a deceased miner's claim, lay testimony "must be considered sufficient to establish total disability" if no relevant medical evidence exists, but "such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits... if the claim were approved." Because the ALJ did not clearly explain whether they gave any weight to the medical opinions and treatment records, the Board agreed with the Employer that to the extent the ALJ solely relied on the Claimant's lay testimony to establish total disability, they erred. Because the Claimant would be eligible for benefits if the claim was awarded, the Board stated that their testimony could not be the sole basis for such a finding. Therefore, it vacated the ALJ's finding on total disability and remanded the case for the ALJ to reconsider whether the Miner was totally disabled.

[Total disability; lay testimony]

[Carl Stepp v. Sturgeon Mining Co., Inc.](#), BRB No. 21-0488 BLA (Dec. 16, 2022):

The Board vacated the ALJ's denial of benefits and remanded the case to the district director for modification proceedings. The Board had previously remanded the case to the ALJ for further consideration. The Claimant filed a request for reconsideration, which the Board denied on November 16, 2018. On January 10, 2019, when the case was before the ALJ on remand, the Claimant submitted additional evidence and requested modification. The ALJ acknowledged the Claimant's request for modification but denied it as untimely filed. The Board concluded that because the Claimant filed their request for modification within one year of its order denying reconsideration, the ALJ erred in denying the request as untimely. The Board stated that once OALJ received the Claimant's request for modification and supporting evidence, it should have remanded the case to the district director for modification proceedings.

[Initiating modification proceedings]

[Robert R. Benamati, Sr. v. Helvetia Coal Co.](#), BRB No. 21-0458 BLA (Dec. 19, 2022):

The Employer argued that because Dr. Kanouff did not specifically identify the exertional requirements of the Claimant's job duties, the ALJ erred in crediting Dr. Kanouff's opinion on disability. In rejecting the Employer's argument, the Board stated that the ALJ correctly noted that Dr. Kanouff reviewed Dr. Cohen's report, which described the Claimant's job

duties. Because Dr. Cohen described the Claimant's usual coal mine work and Dr. Kanouff stated that they agreed with Dr. Cohen's opinion, the Board found that the ALJ permissibly inferred that Dr. Kanouff understood the exertional requirements of the Claimant's job duties in concluding that the Claimant was totally disabled.

[Evidentiary limitations; ABG evidence; exertional requirements]

[Alice M. Mullens \(widow of Alva A. Mullens\) v. Island Creek Kentucky Mining](#), BRB No. 21-0640 BLA (Dec. 19, 2022):

The Board found that the ALJ did not consider potentially relevant information from the Miner's treatment records when analyzing whether the Miner was totally disabled. It stated that although the ALJ found that none of the physicians specifically opined that the Miner was totally disabled, the ALJ still needed to determine whether they diagnosed a respiratory impairment that, when considered in conjunction with the exertional requirements of the Miner's usual coal mine work, supported finding the Miner totally disabled. The Board further stated that although the ALJ correctly noted that, under 20 C.F.R. § 718.204(d)(3), a finding of total disability could not be based solely on the Claimant's lay testimony, the ALJ erred in failing to consider whether lay testimony from the Claimant and the Miner, in conjunction with the Miner's physician-confirmed chronic respiratory symptoms and physical limitations, precluded the Miner from performing their usual coal mine work. Therefore, it vacated the ALJ's finding that the Miner was not totally disabled and remanded the case for further consideration.

[Total disability; lay testimony]