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RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 271
April - May 2016

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

A. U.S. Circuit Courts of Appeals[1]

***SSA Terminals & Homeport Ins. Co. v. Carrion*, __ F.3d __, 2016 U.S. App. LEXIS 8637 (9th Cir. 2016).**

The Ninth Circuit held that, although claimant experienced ongoing pain and required ongoing medical treatment following his 1987 knee injury, his 2008 claim for disability benefits based on a cumulative trauma knee injury was timely under Section 13 as he filed it within one year of receiving cumulative trauma diagnosis. The court further held that claimant's disability was permanent as it persisted for years without any expectation of "normal or natural healing," and a mere prospect of eventual surgery cannot transform a permanent disability into a temporary one. Finally, while claimant did not raise the permanency issue until his post-hearing brief before the ALJ, the doctrines of exhaustion and waiver did not preclude this argument, as it was raised before the conclusion of the administrative process and neither employer nor the agency were blindsided by it.

Claimant sustained a knee injury in 1987 while working for Matson. Although he continued his physically demanding job, his knee continued to deteriorate. When SSA Marine Terminals ("SSA") took over Matson, Matson continued paying for his treatment. Claimant took early retirement in 2002. His treating physician, Dr. Caldwell, advised him that he would eventually require a total knee replacement, but recommended forgoing the surgery until symptoms worsened. Matson subsequently stopped authorizing treatment. In the spring of 2008, claimant filed claims under the LHWCA against both Matson and SSA. Dr. Stark, hired by Matson, examined claimant in September of 2008. He opined that claimant required total knee replacement. He diagnosed claimant's knee condition as the result of both a natural progression of his degenerative arthritis and also the cumulative trauma. SSA later hired Dr. von Rogov, who agreed that claimant would need total knee replacement surgery and further opined that his condition was solely the result of the natural progression of the 1987 injury.

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[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions. Short form case citations (*id.* at *__) pertain to the cases being summarized and refer to the Lexis identifier.

The court initially affirmed the ALJ/BRB's determination that claimant's claim against SSA for disability benefits based on a cumulative trauma injury was timely under §13, as it was filed within one year of claimant receiving the report of Dr. Stark who diagnosed cumulative trauma. The LHWC imposes a one-year statute of limitations on disability claims, which begins to run once the employee is, or should be, aware "of the relationship between the injury . . . and the employment." 33 U.S.C. § 913(a). This court has held that §13(a) contemplates an impairment of earning power, and thus an employee only becomes aware of an injury for statutory purposes when he becomes "aware of the full character, extent, and impact of the harm done to him." *Id.* at *7 (citation omitted). Both the ALJ and the BRB correctly applied this standard by looking to the date when claimant became aware that his work for SSA caused a second, cumulative traumatic injury resulting in an impairment of his earning power. Further, substantial evidence supported the ALJ's finding that claimant did not learn of the causal connection between his work for SSA and his cumulative trauma until he received Dr. Stark's 2008 report, several months after he filed his claim against SSA. Claimant did not "become aware of the full character, extent, and impact of the harm done to him" until he received the report. Before seeing the report, claimant had no understanding of the medical principle of cumulative trauma. Dr. Caldwell, testified that he never explained this concept to claimant, and a layperson would not understand that the incremental erosion or worsening of a knee condition can be the basis for a cumulative trauma claim. Even after claimant became an SSA employee, Matson continued paying for his knee treatments, thus reinforcing his reasonable belief that his disability was solely the result of the 1987 trauma. Indeed, SSA's own expert initially opined that his disability was due solely to the 1987 injury. Although claimant experienced ongoing pain and required ongoing medical treatment, those circumstances alone are insufficient to establish knowledge of a cumulative trauma.

Next, reversing the ALJ/BRB, the court held that claimant's disability is permanent rather than temporary in nature. The LHWCA does not define "temporary" or "permanent." This court has held that disability is temporary so long as there is a possibility or likelihood of improvement through normal and natural healing. A disability may become permanent if (1) a claimant reaches "maximum medical improvement"—the point at which the injury has healed to the full extent possible and normal and natural healing is no longer likely; or (2) the condition has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. "Permanent" is not tantamount to "eternal" or "everlasting" and does not foreclose the possibility that the condition may change. In accordance with this rationale, a disability may be categorized as permanent even if it is not medically incurable. Under either test, the question is whether the disability will resolve after a normal and natural healing period. If the answer is yes, the disability is temporary. If the answer is no, the disability is permanent.

Neither the permanent nor the temporary classification is necessarily static. In *Pac. Ship Repair & Fabrication, Inc. v. Dir., Office of Workers' Comp. Programs (Benge)*, 687 F.3d 1182, 1185 (9th Cir. 2012), the court held that permanent disability can be reclassified as temporary. The court reasoned that, "healing related to a flare up, relapse, surgery, or other major treatment could" transform a permanent disability into a temporary one, as the "vicissitudes of the individual's responsiveness to medical treatment" lead to a "new and unknown maximum medical improvement point." *Id.* at 1186-87. As a practical matter, the start of a new "healing period functions as a 'reset' button for a disability previously-determined to be permanent." *Id.* at 1186.

In this case, the question for the court was whether, after such a protracted period of disability, the prospect of a hypothetical future surgery and its anticipated benefits can transform an otherwise permanent disability into a temporary one. The court held that it cannot, stating:

> *"Benge*'s logic dictates our answer to the question of whether the prospect of future surgery rendered Carrion's disability temporary. Absent the contingency of future surgery, Carrion's disability would unequivocally be permanent. From the time of his injury until his hearing, Carrion lived with constant, debilitating pain. He had no hope of normal or natural healing, only an expectation of further deterioration and the theoretical possibility of improvement through a still-distant surgery. Even the ALJ acknowledged that if Carrion 'decided to forgo the surgical option and live with the knee pain indefinitely, he would be found permanently disabled.'
>
> Nevertheless, the ALJ concluded that Carrion's 'condition is not one of lasting or indefinite duration because the symptoms will likely be diminished through surgery,' and found that Carrion 'is temporarily disabled because he is seeking surgery to improve his condition.' Evaluating an individual's condition based on the presumed effect of a theoretical future treatment makes scant sense—particularly in light of the 'vicissitudes of the individual's responsiveness to medical treatment.' For example, an anticipated surgery or course of treatment may never come to pass if an individual develops a heart condition, becomes immuno-compromised, or simply concludes that the risks of the procedure outweigh the benefits. Worse yet, a claimant might die without ever having the surgery. Alternatively, advances in medical therapies and technologies could lead to more successful medical interventions for chronic conditions, which in turn could lead to new periods of healing and 'a new and unknown maximum medical improvement point' for the patient. Accordingly, the appropriate question to ask is not whether a future surgery would ameliorate Carrion's knee condition, but whether there was actual or expected improvement to his knee after a normal and natural healing period.
>
> The impact of a future knee replacement should be assessed after the surgery, not in anticipation of such a contingency. Importantly, the Longshore Act permits modifications of disability awards to account for just such changed circumstances."

Id. at *11-14 (citations and footnote omitted). In a footnote, the court noted that:

> "Both the ALJ and the Board cited several BRB decisions categorizing disabilities as temporary where surgery was anticipated. In these cases, however, surgery was either imminent or the claimants' disabilities had not persisted for prolonged periods without actual or expected improvement. In relying on these cases, the ALJ and the Board neglected to consider that Carrion's disability persisted for years without any expectation of "normal or natural healing." Under such circumstances, the mere prospect of eventual surgery cannot transform an otherwise undeniably permanent disability into a temporary one."

Id. at *12 n.1.

Finally, the court rejected SSA's assertion that claimant waived his argument that his disability is permanent because he did not raise it until his post-hearing brief before the ALJ. The administrative waiver doctrine, commonly referred to as issue exhaustion, provides that it is inappropriate for courts reviewing agency decisions to consider arguments not raised before the administrative agency involved. In this case, the question of permanency did not spring up on appeal. Rather, claimant raised it in his post-hearing brief, and both the ALJ and the Board addressed this issue. If the agency actually addressed the issue, the policies underlying the exhaustion doctrine are satisfied. Because claimant presented his claim of

permanent disability well before the conclusion of the administrative process and neither SSA nor the agency were blindsided by the argument, the doctrines of exhaustion and waiver are inapplicable.

[Topic 13.1 TIME FOR FILING OF CLAIMS -- STARTING THE STATUTE OF LIMITATIONS; Topic 8 NATURE OF DISABILITY (PERMANENT V. TEMPORARY); Topic 8.1.5 NATURE OF DISABILITY -- Generally Permanency Is Not Reached Where Surgery Is Anticipated; Topic 21.2.2 REVIEW OF COMPENSATION ORDERS -- New Issue Raised on Appeal]

[Ed. Note: The following unpublished decision and is included for informational purposes only]

***Compton v. Dyncorp Int'l, Inc.*, 2016 U.S. App. LEXIS 9738, No. 14-71470 (9th Cir. 2016)(unpub)**.

The Ninth Circuit affirmed the ALJ/BRB's decision denying claimant's claim for benefits under the Defense Base Act, 42 U.S.C. §§ 1651-54.

The Board correctly concluded that substantial evidence supported the ALJ's determination that employer rebutted the presumption of compensability. First, the "zone of special danger" doctrine is not relevant here because it governs whether an injury occurs in the course of employment, an issue not in dispute. The issue here is whether claimant suffered injuries "arising out of" that course of employment, which the "zone of special danger" doctrine does not answer. Second, to rebut the presumption, employer was not required to provide evidence sufficient to "rule out" the possibility that claimant's employment caused or aggravated his injuries. That standard is inconsistent with the statutory requirement that the presumption be rebutted with "substantial evidence to the contrary." Third, the testimony offered by employer's medical experts was substantial evidence that claimant's heart failure resulted from a degenerative condition and was not caused or aggravated by his employment.

The BRB correctly concluded that substantial evidence supports the ALJ's determination that, weighing the evidence as a whole, claimant's heart condition and rheumatoid arthritis are not related to his employment and do not support a claim for benefits. The ALJ reasonably relied on the rebuttal medical evidence that indicated no causal relationship existed between claimant's claimed injuries and his employment, and reasonably discounted the evidence suggesting otherwise. The ALJ also reasonably found claimant's testimony to be only modestly credible. It often differed from the medical records, and various doctors questioned his ability to accurately recount medical histories. When evaluating claimant's rheumatoid arthritis, the ALJ reasonably discounted Dr. Vaz's opinion because Dr. Vaz based his opinion on claimant's own self-reports.

The BRB correctly concluded that the ALJ did not err by addressing claimant's chronic obstructive pulmonary disease ("COPD") as a symptom of his heart condition or rheumatoid arthritis, and not as an independent condition. Claimant waived an independent claim for COPD. First, he did not identify COPD as a basis for his benefits claim in his initial application. Second, when the ALJ asked for clarification as to what injuries claimant alleged, he described COPD only as a related condition. Third, he did not brief COPD in any significant way before the ALJ, and his briefing framed it as a condition related to his heart condition.

In a concurring opinion, Circuit Judge O'Scannlain opined that the holding in *Pearce v. Dir., Office of Workers' Comp. Programs*, 603 F.2d 763 (9th Cir. 1979), that the Circuit Court has jurisdiction to entertain petitions for review under the Defense Base Act is

mistaken and should be overruled. Instead, statutory authority directs that jurisdiction lies in the first instance with the federal district courts.

B. Benefits Review Board

[There have been no published Board decisions under the LHWCA in April – May 2016]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Dixie Fuel Co., LLC and Bituminous Casualty Corp. v. Director, OWCP* [*Hensley*], ___F.3d ___, 2016 WL 1719117 (6th Cir. Apr. 29, 2016), which involved a miner's subsequent claim before the court for the second time, the ALJ on remand found Claimant was totally disabled due to pneumoconiosis arising out of coal mine employment (CME). Accordingly, the ALJ awarded benefits. The Benefits Review Board affirmed, and Employer appealed to the Sixth Circuit.

The ALJ on remand noted that, while the x-ray evidence from the prior claims did not support a finding of pneumoconiosis, the readings of the more recent x-rays were either positive for pneumoconiosis or in equipoise. Accordingly, the ALJ found that the x-ray evidence supported a finding of pneumoconiosis. The ALJ also found that the results of a needle core biopsy "were of no probative value."

In addressing the medical opinions of record, the ALJ gave Claimant's three treating physicians, each of whom opined that Claimant suffered from pneumoconiosis, little weight. Three other physicians – Drs. Baker, Dahhan, and Rosenberg – offered medical opinions as part of the claim. Dr. Baker, who conducted the complete pulmonary evaluation on behalf of the Department, diagnosed pneumoconiosis in light of the x-ray results and further opined that Claimant suffered from COPD, hypoxemia, and chronic bronchitis. Dr. Baker noted his belief that each of these diseases was "significantly contributed to or substantially aggravated by coal dust exposure." He also opined that Claimant's pneumoconiosis and other diseases contributed to Claimant's pulmonary impairment. Because Dr. Baker did not review medical records that indicated rheumatoid disease could be a cause of Claimant's condition, the ALJ gave little weight to Dr. Baker's pneumoconiosis diagnosis, though he gave "probative weight" to the physician's opinion that Claimant is totally disabled due to pneumoconiosis. Dr. Dahhan diagnosed pneumoconiosis, but concluded that Claimant's totally disabling pulmonary impairment was due to rheumatoid lung disease and possibly smoking. The ALJ gave little weight to Dr. Dahhan's pneumoconiosis diagnosis, but relied on his opinion at disability causation. Finally, Dr. Rosenberg opined that the miner's lung disease does not constitute pneumoconiosis.

Although three CT scan readings were of record, the ALJ gave little weight to these readings because they did not address the existence of pneumoconiosis. The ALJ accorded Claimant's treatment records from Dr. Powers, Dr. Augustine, and Stone Mountain Health Services only "some limited probative value," due to their brief nature.

The court first addressed Employer's argument that the Board erred in concluding that the ALJ's failure to rule on its request to substitute an x-ray reading from Dr. Wheeler for one by Dr. Rosenberg was harmless error. Employer contended that the Board predicated its harmless error conclusion on the Department's BLBA Bulletin 14-09, which directed District Directors to take notice of the ABC News and CPI reports and not credit Dr. Wheeler's negative x-ray readings in the absence of persuasive evidence (1) challenging the reports' conclusions, or (2) otherwise rehabilitating his readings. The court concluded that Employer's argument – that the Board's decision turned on reliance on the BLBA Bulletin – "simply diverges from any literal reading of the decision." The court noted that, instead, the Board clearly stated that any failure on the part of the ALJ to substitute Dr. Wheeler's reading was harmless, as the substitution "would not render inaccurate the administrative law judge's determinations that 'the most recent x-rays have been found to be either

positive for pneumoconiosis or in equipoise,' and that 'the only negative x-ray is from 2004.'" Accordingly, the court rejected Employer's argument.[2]

The court next addressed Employer's challenges to the ALJ's finding that the miner's pneumoconiosis arose out of his CME. First, while the court agreed that "the ALJ unreasonably discounted Dr. Rosenberg's contrary opinion and willfully disregarded the negative results of [Claimant's] CT scans and biopsy," it noted that Employer had not sufficiently raised this issue before the Board and therefore did not preserve the issue for appeal. The court also was not persuaded by Employer's remaining arguments, which the court determined "essentially urge us to ignore the ALJ's findings and to reweigh the evidence ourselves."

Of note, the court rejected Employer's contention "that the ALJ impermissibly relied on internet research outside the administrative record to refute Dr. Rosenberg's opinion," thereby substituting his opinion for the physician's and violating the APA and Employer's right to a fair hearing. The court concluded that the ALJ did not "play doctor," but instead fulfilled his role as the fact-finder. In opining that Claimant's interstitial scarring was not due to coal mine dust exposure, Dr. Rosenberg referenced a study indicating a correlation between age and lung abnormalities, and "criticized several studies that indicated a link between coal mine dust exposure and linear interstitial lung disease." According to the court, "[t]he ALJ properly examined the articles upon which Dr. Rosenberg relied and determined that, while some of the articles supported Dr. Rosenberg's conclusions, others did not." The court rejected Employer's argument that, because these articles were "outside the administrative record," the ALJ erred in taking judicial notice of them:

> [Employer] do[es] not claim to have been unaware of the articles or their contents. Nor could [it] do so reasonably, having submitted a medical opinion that relied on them. And, [Employer] makes no attempt to argue that the ALJ misread or misinterpreted the articles. Any error by the ALJ was, thus, harmless.

Finally, the court disagreed with Employer's contention that the ALJ erred in his consideration of the biopsy and CT scan evidence.

At disability causation, Employer argued that the ALJ applied an improper standard in finding Claimant established total disability due to pneumoconiosis. After noting Employer's "subtle, yet significant, distortion of the ALJ's written decision," the court clarified that the ALJ applied the proper "substantially contributing cause" disability causation standard. Furthermore, the court concluded that the ALJ did not err in relying on the opinions of Drs. Baker, Rosenberg, and Dahhan in finding that Claimant established disability causation.

In light of the above, the court determined that the ALJ's decision was supported by substantial evidence and contained no error of law requiring remand. The court, therefore, denied Employer's petition for review.

[Official Notice and Stipulations: Official notice; Investigative reporting]

In *Drummond Co., Inc. v. Director, OWCP [Allred]*, ___ Fed. Appx. ___, 2016 WL3000328 (11th Cir. May 25, 2016), which concerned a miner's claim and a survivor's claim consolidated for decision, the ALJ below found that Claimant invoked the 15-year

[2] The court also found no merit to Employer's contention that the Board, below, had improperly invoked the law of the case doctrine in declining to revisit four of Employer's arguments that the Board had addressed previously and that were not disturbed by the court in its limited remand.

rebuttable presumption that the miner was totally disabled due to pneumoconiosis arising out of his coal mine employment (CME) at the time of his death. Upon finding that Employer failed to rebut the presumption, the ALJ awarded benefits in the miner's claim. The ALJ also found Claimant automatically entitled to benefits pursuant to Section 932(*l*) in her survivor's claim. The Benefits Review Board affirmed the awards on appeal.

Employer did not contest, either below or before the Eleventh Circuit, that Claimant invoked the 15-year presumption by establishing that the miner had worked for 15 years in qualifying CME and was totally disabled due to a respiratory or pulmonary impairment. Instead, before the court Employer argued "that the ALJ applied the wrong legal standard as to the first method of rebutting the presumption—that [the miner] did not have clinical or legal pneumoconiosis."[3]

The court avoided addressing the merits of Employer's contention on appeal by noting that Employer had failed to raise the issue below:

> [Employer] failed to present the argument to the BRB, and of course for that reason, the BRB did not address it. As we stated before regarding the BLBA, "[u]nder general rules of appellate review, an appellate court should not overrule an administrative decision unless the administrative body erred against objections presented to it." *Dir., OWCP v. Drummond Coal Co.*, 831 F.2d 240, 243 (11th Cir. 1987) (quotation marks omitted) (quoting *Taft v. Ala. By-Products Corp.*, 733 F.2d 1518, 1523 (11th Cir. 1984)). The BRB's regulations require petitions to "list[] the specific issues to be considered on appeal." 20 C.F.R. § 802.211(a); *Sims v. Apfel*, 530 U.S. 103, 108, 120 S. Ct. 2080, 2084, 147 L. Ed. 2d 80 (2000) (using the BRB as an example of an administrative agency that requires issues to be exhausted before it). Courts require administrative issue exhaustion, even in the absence of an explicit statutory command, "'as a general rule' because it is usually `appropriate under [an agency's] practice' for `contestants in an adversary proceeding' before it to develop fully all issues there." *Sims*, 530 U.S. at 109, 120 S. Ct. at 2084-85 (alteration in original) (quoting *United States v. L.A. Trucker Truck Lines, Inc.*, 344 U.S. 33, 33-37, 73 S. Ct. 67, 68-69, 97 L. Ed. 54 (1952). The Supreme Court has instructed that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.*, 120 S. Ct. at 2085. That is to say, if the administrative proceedings were adversarial and resembled court proceedings, then courts ought to apply an issue exhaustion requirement, lest courts encourage litigants to "bypass" agency requirements, like 20 C.F.R. § 802.211(a). *See id.* at 108, 120 S. Ct. at 2084.

The court noted that, in the instant case, "there can be no doubt that proceedings held before the BRB were adversarial" and, therefore, it saw "no reason not to apply the 'general rule' here."

As Employer did not exhaust its remedies before the Board, the court denied Employer's petition for review.

[Waiver of objection to new issue, failure to object]

[3] When addressing prong one of rebuttal, the ALJ stated, "I find that the Employer has failed to rebut the presumption by ruling out legal pneumoconiosis or by ruling out coal mine employment as a cause of the Miner's disability."

In *Consolidation Coal Co. v. Galusky*, ___ Fed. Appx. ___, 2016 WL2642784 (4th Cir. May 10, 2016), a case involving an ALJ's application of the 15-year rebuttable presumption, the ALJ had found that Employer failed to rebut the presumption. The Board affirmed the award. On appeal, the court addressed Employer's primary contention that the ALJ used an improper standard in determining whether Employer had disproved the existence of pneumoconiosis.[4]

Of relevance to Employer's appeal, the ALJ considered the medical opinions of four physicians: Drs. Jaworski, Renn, Begley, and Basheda. Although all of these physicians believed Claimant was totally disabled, only Dr. Jaworksi opined that Claimant had pneumoconiosis. Drs. Renn, Begley, and Basheda concluded that Claimant suffered from various impairments other than pneumoconiosis, and all three attributed his total disability to smoking, not pneumoconiosis.

At prong one of rebuttal, the ALJ found that Employer failed to disprove the existence of legal pneumoconiosis. The ALJ noted that Drs. Begley and Basheda had not "been able to 'rule out' coal dust as a contributing cause to [Claimant's] impairment." The ALJ also observed that, while Drs. Basheda and Renn diagnosed asthma, "neither had considered the possibility that coal dust exposure could have aggravated that asthma, which might bring it within the definition of legal pneumoconiosis." Finally, because Drs. Basheda and Renn made statements that the ALJ found to be inconsistent with the Black Lung Benefits Act and the preamble to its implementing regulations, the ALJ discredited their opinions regarding legal pneumoconiosis. Accordingly, the ALJ found Employer was unable to rebut the presumption at prong one.

At prong two of rebuttal, the ALJ found Employer unable to rule out pneumoconiosis as a cause of Claimant's total disability. According to the court, "[c]iting longstanding Fourth Circuit precedent, the ALJ discredited the disability-causation opinions of the experts who had failed to diagnose pneumoconiosis, contrary to his own determination — [Drs.] Basheda, Renn, and Begley." In light of the above, the ALJ found Employer unable to rebut the presumption and awarded benefits.

Before the court, Employer argued "that the ALJ committed legal error by applying the rule-out standard to its efforts to disprove pneumoconiosis, extending the rule-out standard from the second rebuttal prong to the first." The court disagreed, noting that the ALJ applied the appropriate legal standard at each prong of rebuttal:

> To suggest that the ALJ . . . applied the rule-out standard to pneumoconiosis rebuttal, improperly requiring [Employer] to disprove even the slightest connection between [Claimant's] coal mine employment and his lung impairment, [Employer] points to two references to the phrase 'rule out' in the ALJ's discussion of the existence of pneumoconiosis. In the first, the ALJ notes that Begley 'could not rule out a coal dust etiology,' or cause, for [Claimant's] lung impairment, J.A. 301, and in the second, that Basheda 'could not 100% rule out a coal dust contribution' to [Claimant's] lung condition, J.A. 303. In context, however, it is apparent that the ALJ is not referring to the so-called rule-out standard of 20 C.F.R. § 718.305(d)(1)(ii), but instead using 'rule out' in its everyday sense — precisely as it was used by the two doctors in their depositions, in the very passages from which the ALJ is quoting when he in turn uses the phrase in his opinion. *See* J.A. 201 (Begley testifying that 'we can't rule out that Claimant's exposure to coal dust

[4] Employer did not contest, before either the ALJ or the Fourth Circuit, that Claimant had invoked the 15-year presumption, i.e., that he worked for at least 15 years in qualifying CME and suffered from a totally disabling respiratory or pulmonary impairment.

> could have contributed' to his lung disease); J.A. 242 (Basheda testifying that 'you can never a hundred percent rule out' a different causal factor, 'but Claimant's medical condition and findings are [very] typical of tobacco use'). The ALJ's allusions to 'ruling out,' in other words, come directly from the doctors' testimony as to the causes of [Claimant's] lung disease, and not from the regulatory rule-out standard.

The court concluded that it could detect no "substantive error" in the ALJ's consideration of the testimony of Drs. Begley and Basheda.

In the alternative, Employer argued that substantial evidence does not support the ALJ's findings at either prong of rebuttal. Again, the court disagreed. As to prong one, the court noted "that it is for the ALJ to determine the persuasiveness of expert testimony," and concluded that it could not "say that the ALJ erred in concluding that Renn and Basheda failed to explain whether coal dust exposure could have aggravated [Claimant's] asthma." In concluding that substantial evidence supported the ALJ's finding that Employer failed to disprove the existence of pneumoconiosis, the court also noted Employer's failure to challenge the ALJ's decision "to discredit Basheda's opinion because there is no factual support for Basheda's claim that [Claimant] performed most of his mining work after dust-control measures were imposed." As to prong two, the court concluded that "the ALJ was well within his discretion in assigning little or no weight to [the views of Drs. Renn, Begley, and Basheda] on disability causation."

In light of the above, the court denied Employer's petition for review.

[Apply rebuttal standards at 20 C.F.R. 727.203(b)(3) and (b)(4)]

B. Benefits Review Board

No decisions to report.