U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

RECENT SIGNIFICANT DECISIONS -- MONTHLY DIGEST # 171
May - June 2004

John M. Vittone
Chief Judge

A.A. Simpson, Jr.
Associate Chief Judge for Longshore

Thomas M. Burke
Associate Chief Judge for Black Lung

I. Longshore

A. Circuit Courts of Appeals

Stevedoring Servs. Of Am. v. Price, ___ F.3d ___ (Nos. 02-71207, 02-71578) (**9th Cir.** May 11, 2004).

When a longshoreman has worked more than 75 percent of the workdays in the year preceding injury, the **Ninth Circuit** found that Section 10(a) does not excessively overcompensate the claimant.

The court also found that Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, not from all awards combined. In situations of multiple awards, the court stated that it recognized that the amount of adjustments needed, if any, depended on the factual determination of the cause of the employee's increase in earnings between the time of his first and second injury:

> "If an employee's increase in earnings is not caused by a change in his wage-earning capacity, allowing the employee to retain the full amount of both awards does not result in any double dipping. The reason is that the prior partial disability award compensates the employee for the reduction in his wage-earning capacity from the first accident, and the subsequent permanent total disability award compensates the employee for what remains of his earning capacity after that accident. [Citation omitted.] Taken together, the awards do not compensate the employee for more earning capacity than he has actually lost. In comparison, a double dipping problem would arise if a change in conditions since the first accident has mitigated or eliminated the prior injury's negative economic effect on the employee's ability to earn wages. In that case, because the first award overestimated the effect of the first injury on the employee's wage end up compensating the employee for more wage-earning capacity than he has actually lost"

The **Ninth Circuit** stated that its holding as to Section 6(b)(1) is consistent with the plain language of the LHWCA and effectuates the underlying policy of the Act by shielding employers from high compensation payments for injuries to highly paid workers while providing employers an incentive to prevent future injuries to formerly injured employees.

[Topics 6.2.1 Commencement of Compensation—Maximum Compensation for Disability and Death Benefits; 10.2.4 Determination of Pay—Section 10(a)—"Substantially the Whole of the Year"]

Thibodeaux v. Grasso Production Management Inc., ___ F.3d ___ (No. 03-60131)(**5th Cir**. May 18, 2004).

At issue here was whether a fixed oil production platform built on pilings over marsh and water and inaccessible from land constitutes either a "pier" or an "other adjoining area" within the meaning of Section 3(a) of the LHWCA. Distinguishing itself from both the **Second Circuit** and the **Ninth Circuit** in its analytical approach, the **Fifth Circuit** held that the platform in question was neither. The court held that the context of the statute indicates the enumerated sites should have some maritime purpose.

Noting that the ALJ and Board had disagreed as to whether a portion of the platform was driven into dry land as opposed to marsh, the court stated that it adhered to a functional approach to defining "pier," thus making it unnecessary to decide whether the platform was in fact secured to dry land or marsh, "a determination that would likely change with the tide."

Historically the **Fifth Circuit** has followed a functional approach when construing the parenthetically enumerated structures in Section 3(a). *Jacksonville Shipyards, Inc. v. Perdu*e, 539 F.2d 533, 541 (**5th Cir.** 1976), *vacated and remanded*, *Pfeiffer Co., Inc. v. Ford*, 433 **U.S.** 904, 53 L.Ed. 2d 1088 (1977), *reaffirmed*, 575 F.2d 79 (**5th Cir.** 1978), *cert. denied*, 440 U.S. 967 (1979), *overruled on other grounds*, *Texports Stevedoring Co. v. Winchester*, 632 F.2d 504, 516 (**5th Cir.** 1980). "In Jacksonville Shipyards [sic], we required an employee to demonstrate that "a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. In this way, we interpreted the statute not to encompass all possible instances of the enumerated structures, but rather only those with some relation to the purpose of the LHWCA—providing compensation for maritime workers injured in areas used for maritime work. Under the reasoning of Jacksonville Shipyards [sic], while a structure built on pilings and straddling both land and water may bear some physical resemblance to a pier, it it does not serve a maritime purpose, it is not a pier within the meaning of § 903(a). " The **Fifth Cicuit** noted that its position has been criticized in *Hurston v. Dir., OWCP*, 989 F.2d 1547 (**9th Cir.** 1993), and *Fleischmann v. Dir., OWCP*, 137 F.3d 131 (**2d Cir.** 1998).

In the instant case the claimant was a pumper/gauger injured on a fixed oil production platform in the territorial waters of Louisiana. As part of his duties, the claimant monitored gauges both on the platform and on nearby wells, reaching the wells by using a 17-foot skiff. He also piloted a 24-foot vessel used to transport employees to the platform along with their personal supplies and, on occasion, equipment used for production. The platform where he spent the majority of his working hours rests on wooden pilings driven into a small bank next to a canal; the platform extends over marsh and water, but is accessible only by vessel and has a docking area. In order to inspect a discharge line which was leaking oil under the deck of the platform, the claimant lowered himself to a small wooden platform below the deck and the wood gave way.

[Topic 1.5.2 Jurisdiction—Development of Jurisdiction/Coverage—Navigable waters]

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Sidwell v. Virginia International Terminals, ___ F.3d ___ (No. 03-1966)(**4th Cir.** June 7, 2004).

The **Fourth Circuit** held that employment as president of a local longshore union did not constitute maritime employment that exposed the worker to injurious stimuli and that therefore, the local union was not responsible for his noise-induced hearing loss. The claimant was diagnosed with his hearing loss while union president. Although the president generally discharged his duties as president from his home, in order to address specific issues or grievances he would appear from time to time at one or more of the waterfront terminals where his members worked. As a result of these visits, he spent approximately one hour per week at locations where longshoring activity was taking place. Prior to becoming a full-time employee of the local union, the claimant worked as a container repair mechanic routinely using air-powered pressure-washers, chippers, grinders, and tire changers. It was undisputed that the operation of these tools as well as other machinery and vehicles in the area contributed to high levels of noise throughout the work-day.

In deciding this issue, the **Fourth Circuit** found that the question becomes one of whether the president's duties were such that his occupation can be considered "integral or essential" to the process of loading or unloading vessels so as to bring him within the category of other persons engaged in longshoring operations. The court distinquished the instant case from that of *American Stevedoring Limited v. Marinelli*, 248 F.3d 54 (**2d Cir.** 2001)(work of a union steward paid by a stevedoring company was integral and essential to the company's longshoring operation.) In *Marinelli*, the steward worked at the waterfront terminal serving as an arbitrator between the company and union members. "Significantly, as an adjunct to his responsibilities for maintaining safety and enforcing its terms, the collective bargaining agreement under which the shop steward worked vested him with authority to unilaterally order a work stoppage. Important to the court

was the fact that the union steward in *Marinelli* could stop work, halting the ship loading process.

[Topic 1.7.1 Jurisdiction—STATUS—"Maritime Worker" ("Maritime Employment")]

Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC., ___ F.3d ___ (No. 03-2323)(**1st Cir.** June 28, 2004).

Here the **First Circuit** notes that windmills to be erected in Nantucket Sound would be subject to the jurisdiction, control, and power of the United States government, according to the OCSLA and would be a natural resource reserve held by the Federal Government for the public. News reports from New Orleans indicate that there is growing consideration to develop new rigs, as well as abandoned oil rigs, as alternative energy source wind turbines in the Gulf of Mexico.

[Topic 60.3.2 Extension Acts—Outer Continental Shelf Lands Act--Coverage]

P&O Ports Louisiana, Inc. v. Newton, (**Fifth Circuit** No. 04-60403)(Petition for Review).

Recently P & O Ports filed a Petition for Review with the Fifth Circuit, asking that the court review the Board's interlocutory Order in this matter. *See Newton v. P & O Ports Louisiana, Inc*., ___ BRBS ___ (BRB No. 04-0200)(March 11, 2004), reported in the March/April Digest. In response to the Petition for Review, the Director has filed a Motion in Opposition urging that the issues are not final. Interestingly, in a foot note in the motion, the Director questions the scope of *Maine v. Brady-Hamilton Stevedore Co*., 18 BRBS 129 (1986)(*en banc*) which limits the powers of district directors to issue subpoenas. In *Maine*, the Board held that only ALJs have authority to issue subpoenas, even in cases pending before the Director.

[Topics 19.3.6.2 Procedure—Discovery; 27.2 Powers of ALJs--Discovery]

B. Federal district courts

Nicole v. Southstar Industrial Contractors, ___ F. Supp 2 d ___ (Civ. Action No. 03-1432 Sec. A (2)) (E.D. La. April 29, 2004).

The federal district court found that an injured worker who was land-based and had only a sporadic or transitory connection to a vessel was not entitled to Jones Act coverage. Here the worker (an electrician's helper on a barge) had been contracted out to a customer by his employer. While the worker was supposed to be contracted out for seven weeks of work on the barge, he was injured on the third day. There was no evidence as to the worker's past employment and any allegations as to future employment were found to be speculative: "[S]eaman status is Plaintiff's burden to prove and he has nothing other than speculation to offer as to what his next job assignment might be. But Plaintiff cannot rely upon mere future possibilities to create seaman status in the present."

[Topic 1.4.2 Jurisdiction—Master/member of the Crew (seaman); 1.4.4 Jurisdiction—Attachment to Vessel]

C. Benefits Review Board

Kirkpatrick v. B.B.I, Inc., ___ BRBS ___ (BRB Nos. 03-0561 and 03-0561) (May 20, 2004).

The Board affirmed the ALJ's finding that the claimant was covered by the OCSLA although the claimant was not directly involved in the physical construction of an offshore platform. The parties had stipulated that the worker's "primary job function was supervising the ordering and transportation of materials necessary to the construction of the Conoco platform complex, upon which he was injured." As the claimant's purpose for being on the platform was to procure supplies necessary to construct the platform, and his injury occurred during the course of his duties, his work satisfies the OCSLA status test.

The Board also found that Sections 12 and 13 apply to a claimant's notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits. The Board stated, "There is, in fact, no statutory provision requiring a carrier seeking reimbursement from another carrier to do so within a specified period."

Here INA claimed that it relied on Houston General's 12 year acceptance of this claim and, to its detriment, "is now facing a claim for reimbursement approaching three-quarters of a million dollars, without the opportunity to investigate contemporaneously, manage medical treatment, engage in vocational rehabilitation, monitor disability status, etc." The Board rejected this argument "as there was no representation or action of any detrimental reliance, there can be no application of the doctrine of equitable estoppel."

Further, the Board noted that the doctrine of laches precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. Additionally the Board noted that because the LHWCA contains specific statutory periods of limitation, the doctrine of laches is not available to defend against the filing of claims there under. "As the claim for reimbursement is related to claimant's claim under the Act by extension of OCSLA, and as the Supreme Court has stated that the doctrine of laches does not apply under the OCSLA, the doctrine of laches does not apply to this case.

The Board found that neither judicial estoppel or equitable estoppel applied and noted that "jurisdictional estoppel" is a fictitious doctrine.

The Board vacated the ALJ's ruling that he did not have jurisdiction to address the issue of reimbursement between the two insurance carriers. "Because INA's liability evolved from claimant's active claim for continuing benefits, and because its responsibility for those benefits is based entirely on the provisions of the Act, as extended by the OCSLA, we vacate the [ALJ's] determination that he does not have jurisdiction to address the reimbursement issue, and we remand the case to him…."

[Topics 13.4.5 Time for Filing Claims—Laches; 60.3.2 Longshore Extension Acts—Outer Continental Shelf Lands Act—Coverage; 70.12 Responsible Employer—Responsible Carrier; 85.1 Res Judicata, Collateral Estoppel, Full Faith and Credit, Election of Remedies—Introduction and General Concepts]

Jackson v. Newport News Shipbuilding & Dry Dock Co., ___ BRBS ___ (BRB No. 03-0629)(June 15, 2004).

At issue in these consolidated cases is whether an employer validly "tendered" compensation within the meaning of Section 28(b) .In both cases the Employer sent letters to each counsel for claimants stating that they were "unconditionally tendering" compensation. The Employer enclosed proposed stipulations, which included the following statement: "That the parties are aware of no other outstanding issues as of the date of the execution of these stipulations." Counsel refused to agree. In one case [Jackson]counsel explained why the offending language was to his client's detriment and the ALJ awarded an attorney fee in that case. In the other case [Atkins] Claimant's counsel stated that the only reason he objected to the proposed stipulation was that his attorney's fee remained at stake. The ALJ found that this was an improper attempt to shift fee liability, and denied an attorney fee.

The Board noted that "tender" was not used in the statute and therefore looked to the jurisprudence as well as to Black's Law Dictionary. The Board noted *Armor v.*

Maryland Shipbuilding & Dry Dock Co., 19 BRBS 119 (1986) (*en banc*)(*Held*, an offer to settle a claim may constitute a valid tender if the offer demonstrates a 'readiness, willingness and ability on the part of employer or carrier, expressed in writing, to make…a payment to the claimant.'). In *Richardson v. Continental Grain Co*., 336 F.3d 1103, 37 BRBS 80 (CRT) (9th Cir. 2003), the **Ninth Circuit** quoted Black's and stated that a "tender" is "'an unconditional offer of money or performance to satisfy a debt or obligation."' The Board additionally noted that the Fifth Edition of Black's defined "tender" as "an offer of money… in satisfaction of [a] claim or demand, without any stipulation or condition." The Board stated that "Pursuant to these definitions and in conjunction with the Board's decision in Armor, we hold that a 'tender' under Section 28(b) must be an offer to pay, expressed in writing without any conditions attached thereto."

The Board found that whether a "tender" is unconditional should not be decided on a case-by-case basis because to do so would shift to claimants the burden of justifying their refusals to accept the stipulations that accompanied offers of compensation when the burden is properly on the employer to establish that it tendered compensation within the meaning of the LHWCA in order to avoid fee liability. In the Board's words, "As a tender must be 'unconditional' it cannot be dependent on the validity of the claimant's reasons for rejecting a condition or stipulation imposed by employer."

[Topic 28.2.2 Attorney's Fees—Tender of Compensation]

Mapp v. Transocean Offshore USA, Inc., ___ BRBS ___ (BRB No. 03-0607) (June 16, 2004).

Here the Board held that when obtaining prior written approval of a third-party settlement under Section 33(g), employer and carrier are separate and distinct entities and that the separate approval of each is required. In the instant case, the claimant sued the employer in state court under the Jones Act, as well as under the general maritime law as a third-party defendant. The claimant then turned around and sued the employer under the LHWCA. The employer had different insurance carriers for each claim. The employer, by virtue of its active participation in the negotiation of the settlement and the fact that it was an actual signatory to that agreement, received adequate notice and provided satisfactory approval of the agreement in compliance with Section 33(g)(1). However, the Claimant's claim is barred pursuant to Section 33(g) because he did not obtain the prior written approval of the carrier.

Additionally, the Board noted that in this particular case, the claimant was aware that the employer had contracted with separate carriers and that the claimant was fully aware of his obligations under Section 33(g)(1) and its accompanying regulations as to the need to obtain approval before executing the third-party settlement.

[Topic 33.7 Compensation for Injuries Where Third Persons Are Liable—Ensuring Employer's Rights—Written Approval of Settlement; 33.7.3 Involvement of the Employer in Third-Party Settlements]

Phillips v. Chevron, U.S.A., (Unpublished)(BRB No. 03-0613)(June 17, 2004).

The Board upheld the ALJ's denial of benefits where the claimant alleged that he developed a disabling psychological condition following events surrounding an oil spill because the claimant could not present a prima facie case. The Board noted that while a psychological impairment which is work-related is compensable and that Section 20(a) does apply, in this particular case there was evidence only of personnel issues causing stress, and not an indication that incidents of day-to-day working conditions causing the claimant's illness. The Board noted that it will not second-guess an employer's business practices: "It is not the role of the Board to determine whether the actions taken by employer were based on valid concerns, but rather whether they were legitimate personnel decisions made in the course of business."

[Topics 20.2.1 Presumptions—Prima Facie Case; 20.2.3 Presumptions—Occurrence of Accident or Existence of Working Conditions Which Could Have Caused the Accident]

Ferro v. Holt Cargo Systems, (Unpublished)(BRB Nos. 04-0226 and 0400226A)(May 28, 2004).

The Board held that the Director was essentially estopped from contending that he is not bound by an underlying award where the Director's brief did not challenge the award of permanent total benefits. *See Director, OWCP v. Coos Head Lumber & Plywood Co*., 194 F.3d 1032, 33 BRBS 131 (CRT)(9th Cir. 1998). However, the Board did find that there was no effective award in-as-much-as there was no proof that a copy had been sent by registered or certified mail. See Section 19(e), 21(a): 20 C.F.R. §§702.349, 702.350; *see generally Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT)(7th Cir. 1989).

[Topics 19.6 Procedure—Formal Order Filed With District Director; 21.4.1 Timeliness of Appeal—Appeal to Benefits Review Board]

Woodmansee v. Newport News Shipbuilding & Dry Dock Co., (Unpublished)(BRB No. 03-0614)(May 7, 2004).

[ED. Note: *Might not consideration be given to limiting the "judicial economy" rule to issues where the claimant has an interest? Claimants have no standing concerning the application of Section 8(f). If employers are forced to "litigate" all issues, they may be reluctant to enter into agreements to pay compensation until the Section 8(f) issue is resolved. And, would such a scenario impact attorney fees at the OALJ level?***]**

Despite the fact that there was no specific statute of limitations regarding when a party should request a hearing of the district director's recommendation that Section 8(f) relief be denied, the Board upheld the ALJ's determination that the employer waived the Section 8(f) issue by allowing compensation orders awarding claimants permanent disability benefits to become final without disposing of the Section 8(f) issue. The Board found the employer's actions to be an impermissible attempt to bifurcate issues. "The policy of judicial economy dictates that all claims relating to a specific injury, including affirmative defenses such as Section 8(f), be raised and litigated at the same time, especially as the Director is not bound by stipulations into which the private parties enter without his agreement."

[Topics 8.7.92 Section 8(f) Relief—Timeliness of Employer's Claim for Relief; 19.3.6.1 Procedure—Issues at Hearing]

D. Other Jurisdictions

Gorman v. Garlock, Inc., ___ Wash. App. ___ (No. 52188-8-I (consolidated w/52329-5-I) (May 3, 2004).

Noting that Washington State law precluded a claim under the Washington Industrial Insurance Act, when a worker qualifies for compensation under the LHWCA, the appealant court upheld the trial court's dismissal of actions brought against maritime employers as a result of asbestos-related injuries. While the court found that the LHWCA does not preempt Revised Code of Washington (RCW) claims, the RCW itself preempts them. "Because they have the right to compensation under federal law, they cannot state a claim under the Washington statute."

[Topic 85.3 Election of Remedies—Federal/State Conflicts]

II. Black Lung Benefits Act

A. Circuit Courts of Appeals

In *Lewis Coal Co. v. Director, OWCP [McCoy]*, ___ F.3d ___, Case No. 03-1425 (4th Cir. June 24, 2004), the court addressed Employer's challenge to application of *Doris Coal Co. v. Director, OWCP*, 938 F.2d 492, 494 (4th Cir. 1991) in this medical treatment dispute case. In essence, *Doris Coal* provides that, if a miner has been adjudged totally disabled due to coal workers' pneumoconiosis in a Part B claim and he receives treatment for a pulmonary disorder, then "a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis." Employer may rebut the presumption by demonstrating that a particular medical treatment expense is (1) "for a pulmonary disorder apart from those previously associated with the miner's disability"; (2) "beyond that necessary to treat a covered disorder"; or (3) "not for a pulmonary disorder at all."

Upon review of the miner's Part B award of benefits, the court noted that the award "was predicated on both the presence of pneumoconiosis and McCoy's chronic bronchitis" such that the ALJ found that Claimant was entitled to reimbursement for medical expenses related to either condition. The court reiterated that the concept of "legal" pneumoconiosis is broader than that of "clinical" pneumoconiosis. Indeed, "legal" pneumoconiosis "also encompasses diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nonetheless been made worse by coal dust exposure." As a result, the court affirmed that the miner's treatment for chronic bronchitis was reimbursable.

[**medical treatment dispute**]

In *Consolidation Coal Co. v. Director, OWCP [Swiger]*, Case No. 03-1971 (4th Cir. May 11, 2004) (unpub.), the court's decision is unpublished, but may be useful with regard to several legal issues.

Percentage of contribution to disability not required. The ALJ properly accorded greater weight to the opinions of Drs. Rasmussen, Abrahams, and Koenig with regard to the cause of the miner's respiratory disability, even though they were unable to specifically state the percentage of contribution:

> Although these physicians could not determine with any precision what percentage of [Swiger's] impairment was caused by asthma, cigarette smoking, or coal mine dust . . . doctors need not make such particularized findings. The ALJ needs only to be persuaded, on the basis of all available evidence, that pneumoconiosis is a contributing cause of the miner's disability. (citation omitted) In this case, Drs. Rasmussen, Koenig, and Abrahams unequivocally concluded that coal mine dust exposure was a contributing factor to Swiger's total disability. That was

> enough evidence to support the ALJ's decision. At least two other circuits have reached the same conclusion on this exact issue.

The court cited to decisions in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000) and *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481 (7th Cir. 2001).

Reliance on negative x-ray interpretations and obstructive impairment. The court also determined that the ALJ properly discounted physicians' opinions, which were based on negative chest x-ray interpretations, to find that the miner did not suffer from coal workers' pneumoconiosis, where the ALJ found that the chest x-ray evidence was inconclusive. Moreover, the court noted that the physicians focused on a presence of "clinical," and not "legal," pneumoconiosis. In this vein, the court held that it was proper for the ALJ to accord less weight to physicians' opinions that the miner did not suffer from pneumoconiosis because his impairment was obstructive in nature.

Partially reversible pulmonary impairment and residual disability. Finally, in weighing the medical opinions, the court held that a partially reversible obstructive impairment did not rule out the presence of pneumoconiosis where there was a residual disabling impairment:

> All of the experts agree that pneumoconiosis is a fixed condition and therefore any lung impairment caused by coal dust would not be susceptible to bronchodilator therapy. In this case, although Swiger's condition improved when given a bronchodilator, the fact that he experienced a disabling residual impairment suggested that a combination of factors was causing his pulmonary condition. As the trier-of-fact, the ALJ must 'evaluate the evidence, weight it, and draw his own inferences.' (citation omitted). Therefore, the ALJ could rightfully conclude that the presence of the residual fully disabling impairment suggested that coal mine dust was a contributing cause of Swiger's condition.

Slip op. at 8.

Letter constitutes petition for modification regardless of whether received by government. The court held that an August 10, 1993 letter from Claimant to the district director constituted a timely petition for modification even though the district director could not locate the letter in the record. The court noted that the district director testified that "he could not exclude the possibility that the letter had arrived and been misplaced or destroyed." The court further stated that Claimant's counsel submitted an affidavit "setting forth specific instances in which documents relating to various black lung claims had been lost or otherwise mishandled by the DOL in West Virginia." Under the circumstances presented, the court held that the letter properly constituted a petition for modification.

Representative's fees. The court affirmed the ALJ's award of an hourly rate of $225.00 per hour to Claimant's counsel, Robert Cohen, based on the ALJ's observations of counsel's performance and demeanor, the quality of counsel's representation, and counsel's experience in black lung matters.

[**weighing medical opinions; petition for modification; representative's fees]**

B. Benefits Review Board

In *Dempsey v. Sewell Coal Co.*, ___ B.L.R. ___, BRB Nos. 03-0615 BLA and 03-0615 BLA-A (June 28, 2004) (en banc), the Board has issued its first published decision addressing the validity of the evidentiary limitations at 20 C.F.R. § 725.414 (2001), as well as several significant issues arising from those limitations, and the subsequent claim provisions at 20 C.F.R. § 725.309 (2001).

Sitting *en banc*, the Board rendered the following holdings in a claim falling within the jurisdiction of the Fourth Circuit Court of Appeals:

Three year statute of limitations period and subsequent claims. The Board declined to apply the Sixth Circuit's decision in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602 (6th Cir. 2001), that a miner's subsequent claim is time-barred if it is not filed within three years of the date he received a medical determination of total disability due to pneumoconiosis. The Board stated that it would not apply *Kirk* to cases arising outside the "geographical jurisdiction" of the Sixth Circuit. Citing to its decision in *Faulk v. Peabody Coal Co.*, 14 B.L.R. 1-18 (1990), the Board concluded that applying the statute of limitations only to an initial claim "satisfies the purpose of the statute of limitations by ensuring that employer is provided with notice of the current claim and of the potential for liability for future claims, in view of the progressive nature of pneumoconiosis."

Evidentiary limitations at 20 C.F.R. § 725.414 (2001) and "Good Cause". Employer argued that the amended regulation was invalid and "that in any event, good cause existed to exceed the evidentiary limits because the excess evidence was relevant and would assist the physicians in determining whether claimant's lung disease constituted idiopathic pulmonary fibrosis (IPF) or pneumoconiosis."

The Board upheld the validity of § 725.414 limiting the admission of x-ray readings, pulmonary function studies, blood gas studies, and medical reports. The Board further determined that "good cause" was not established solely on grounds that "the excess evidence was relevant." The Board noted that Employer "did not explain why the admitted evidence of record was insufficient to distinguish IPS from coal workers' pneumoconiosis, or indicate how (additional medical evidence) would assist the physicians."

CT-scans not limited by 20 C.F.R. § 725.414 (2001). The Board held that the evidentiary limitations at 20 C.F.R. § 725.414 (2001) do not contain any restrictions on "other

medical evidence" submitted under 20 C.F.R. § 718.107 (2001). In particular, it noted that there are no limitations on the submission of CT-scans as part of a party's affirmative case. However, the Board stated that "[i]f a party submits other medical evidence pursuant to Section 718.107, Section 725.414 provides that the opposing party may submit one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. § 725.414(a)(2)(ii) and (a)(3)(ii) (2001).

Treatment records not limited by 20 C.F.R. § 725.414 (2001). Treatment records, containing multiple pulmonary function and blood gas studies that exceed the limitations at § 725.414, are properly admitted. This is so regardless of whether the records are offered by a claimant or an employer.

Exclusion of state claim medical evidence proper. The Board held that state claim medical evidence is properly excluded if it contains testing that exceeds the evidentiary limitations at § 725.414. In so holding, the Board noted that such records (1) "do not fall within the exception for hospitalization or treatment records," and (2) "they are not covered by the exception for prior federal black claim evidence" at 20 C.F.R. § 725.309(d)(1) (2001).

Requiring exchange of evidence more than 20 days prior to the hearing proper. The Board concluded that it was proper for the ALJ to "rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i)" more than 20 days in advance of the hearing. The ALJ also properly found "good cause" to allow Claimant to submit his evidence less than 20 days prior to the hearing "because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided." The Board noted that the ALJ left the record open for 45 days for Employer to respond and he "admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence."

Denying substitution of medical opinion evidence at hearing proper. Once Employer designated two medical reports in support of its affirmative case, the ALJ did not abuse his discretion in refusing to permit Employer to withdraw one of the reports at the hearing and substitute the report of another physician. In this vein, the ALJ "reasonably considered claimant's objection that he had relied on employer's prior designation of its two medical reports in developing his medical evidence."

Granting substitution of x-ray interpretation proper. The Board held that the ALJ properly allowed Employer to substitute Dr. Wiot's reading of an October 2002 x-ray study for that of Dr. Bellotte. In a footnote, the Board noted that "Claimant does not argue that he uniquely relied on Dr. Bellott's reading in developing his rebuttal of the October 2, 2002 x-ray."

ALJ not required to retain proffered exhibits that are not admitted. The Board held that an ALJ is not required to "retain the large number of excluded exhibits with the record."

Citing to 20 C.F.R. §§ 725.456(b)(1) and 725.464 (2001) as well as 29 C.F.R. §§ 18.47 and 18.52(a) (2001), the Board concluded that the "procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence."

Change in applicable condition of entitlement under 20 C.F.R. § 725.309 (2001). In determining whether was a change in an applicable condition of entitlement, the ALJ properly found that "claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment." As a result, Claimant was required to submit new evidence establishing that he is totally disabled.

Medical data underlying a medical report must be admissible. The ALJ properly declined to consider one of two reports admitted as part of Employer's affirmative case. In particular, Dr. Bellotte issued a medical opinion based, in part, on his interpretation of a chest x-ray study. Because Employer opted not to utilize Dr. Bellotte's x-ray reading as one of the two permitted in its affirmative case, it was permissible not to consider Dr. Bellotte's medical opinion regarding the existence of pneumoconiosis. The ALJ found that the opinion was "inextricably tied to [Dr. Bellotte's] chest x-ray interpretation, which was previously excluded from the record." The Board concluded that any chest x-ray referenced in a medical report must be admissible. The Board further noted that "[t]he same restriction applies to a physician's testimony."

The Board then noted that "[t]he regulations do not specify what is to be done with a medical report or testimony that references an inadmissible x-ray." However, it stated that "[r]eview of Dr. Bellotte's opinion reflects that his opinion regarding the absence of coal workers' pneumoconiosis was closely linked to his reading of the July 19, 2001 x-ray" such that the ALJ properly declined to consider it. In this vein, the Board held that the Seventh Circuit's holding in *Peabody Coal Co. v. Durbin*, 165 F.3d 1126 (7th Cir. 1999), requiring that an ALJ consider an expert medical opinion even if it was based on evidence outside the record, was inapplicable to claims arising under the amended regulations. In so holding, the Board noted that the *Durbin* court "emphasized the absence of any regulation imposing limits on expert testimony in black lung claims" in rendering its opinion at the time.

[**validity and application of 20 C.F.R. § 725.414 (2001); subsequent claims**]