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 # 207 February 2009

John M. Vittone
Chief Judge

Stephen L. Purcell
Associate Chief Judge for Longshore

Yelena Zaslavskaya
Senior Attorney

William S. Colwell
Associate Chief Judge for Black Lung

Seena Foster
Senior Attorney

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

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

***Cardillo v. Louisiana Ins. Guar. Assoc.*, ___F.3d ___, 2009 WL 368582 (5th Cir. 2009).**

The Fifth Circuit affirmed a district court's judgment[2] enforcing a 20% surcharge for late payment of an award pursuant to §14(f) of the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act") against the

[1] Citations are generally omitted with the exception of particularly noteworthy or recent decisions.

[2] The Court noted that an ALJ's order requiring LIGA to pay the additional amount constituted a "supplemental order of default." *See In re Comp. under the LHWCA (Abbott v. La. Ins. Gty. As'n)*, 889 F.2d 626, 630 (5th Cir. 1989). The Court observed that it is not proper to appeal final orders under §14(f) to the Benefits Review Board. Rather, a district court is the initial venue for review of the supplemental orders, with a subsequent appeal to the appropriate court of appeals. *See Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir. 1983). Such an order will be enforced pursuant to §18(a) if it is "in accordance with law," that is if all procedural requirements were met.

Louisiana Insurance Guaranty Association ("LIGA").[3] LIGA disputed that its payment of compensation was late on the ground that it had not received notice from the District Director, OWCP that settlement of the claim had been approved until after the expiration of the ten-day period.

Section 14(f) provides that a 20% additional amount will be assessed if compensation awarded is not paid "within ten days after it becomes due." The Fifth Circuit had previously interpreted as equivalent terms an order's becoming "effective" under §21(a) and its becoming "due" for purposes of §14(f). *Tidelands Marine Serv. v. Patterson,* 719 F.2d 126, 127 n.1 (5th Cir.1983). Section 21(a) provides that the order becomes "effective when filed in the office of the [District Director] as provided in section 919 …." Section 19(e), in turn, provides that a compensation order "shall be filed in the office of the [District Director], and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer …." Here, LIGA asserted that "filing" of compensation orders is not complete until the service of the order upon the parties by the District Director.

The Fifth Circuit held that "filing" a compensation order with the District Director, which starts the ten-day time period for payment under §14(f), does not include receipt of the order by the parties or the mailing of the order to the parties. Rather, "filing" occurs once the initial acts by the District Director have occurred -- such as the formal dating of the order and its filing in the office. In support of this interpretation the Court relied on the general definition of "filing" in *United States v. Lobardo*, 241 U.S. 73, 76 (1916); the language of 20 C.F.R. § 702.349; and its own analysis in *Grant v. Dir., OWCP,* 502 F.3d 361 (5th Cir.2007) (mere receipt of a compensation order by the District Director does not accomplish filing under §19(e)) and in *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217, 1220 (5th Cir. 1985)(the time for payment started running when the award was filed and not when the employer was served). The Court did recognize an apparent circuit split on this issue.[4]

---

[3] LIGA is a guaranty fund created by state law, which pays statutorily permitted claims when a private insurer becomes insolvent.

[4] *Compare Sea-Land Serv., Inc. v. Barry,* 41 F.3d 903, 908-09 (3d Cir.1994) (holding that filing and mailing are "two distinct procedures"), and *Jeffboat, Inc. v. Mann,* 875 F.2d 660, 662-63 & n.4 (7th Cir.1989) (finding the question "arguable" and noting that the statute "does not explicitly make mailing part of filing"), with *Nealon v. Cal. Stevedore & Ballast Co.,* 996 F.2d 966, 970-71 (9th Cir.1993) (holding that filing includes service on the parties). In *Nealon,* the Ninth Circuit found the statutory language "highly ambiguous," and rested its decision on analogous cases decided under the Black Lung Act and the LHWCA's purpose of delivering benefits to injured workers.

In any event, the District Director did in fact formally date, file, and send the order via certified mail, all on the same day. The Court could find no manner in which to make receipt of the order by a party a prerequisite to "filing." Finally, the Court rejected LIGA's equitable argument that the delay in delivery was caused by the OWCP's relocation due to Hurricane Katrina, stating that LIGA was aware of the settlement and of post-Katrina problems, yet was less than diligent in awaiting the mail.

The Court also discussed at some length the merits of LIGA's argument that a Louisiana statute bars liability for the late payment under §14(f). However, the Court reached no holding on the merits, as this issue has been raised for the first time on appeal. The Court noted that, if properly raised, this issue would give rise to the constitutional issues surrounding federal preemption.

[Topic 14.4 Compensation paid under award]

***Greenwich Terminals, LLC v. OWCP*, No. 07-4732, 2009 WL 323152 (3rd Cir. Feb. 10, 2009)(Unreported).**

In May of 2003, Claimant sustained serious, permanent injuries to his spine and neck while working for Employer, when a 200-pound flipper detached from a crane and crashed on top of him. Several months after the accident, Employer offered Claimant two positions with Employer: top pick operator and yard horse operator. Against his doctor's advice, Claimant accepted the former position. On his first day of work, he aggravated the nerves in his neck and was hospitalized.

Employer sought review of an ALJ's award of benefits, affirmed by the Board. First, the Court rejected Employer's contention that the ALJ committed an error of law by implicitly applying the "true-doubt rule" to resolve factual issues. The ALJ expressly rejected the rule, citing *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994), in which the Supreme Court has held that the rule violates the Administrative Procedures Act. Furthermore, the ALJ did not find the evidence to be in equipoise, but rather concluded that the evidence decisively favored Claimant's position.

The Court further concluded that the ALJ reasonably determined that both positions offered to Claimant exceeded his physical capabilities and could exacerbate his injuries. In this regard the ALJ properly credited Claimant's testimony and the opinion of his treating orthopedist, Dr. Lefkoe, which were supported by the fact that Claimant aggravated his neck while attempting to operate a top pick. The ALJ properly credited the opinion of Dr. Lefkoe over the opinion of another treating orthopedist, as the latter

opinion was based on physical restrictions imposed over two years earlier and failed to reflect the subsequent deterioration in Claimant's condition. The ALJ reasonably discredited a video demonstration of a top pick operator's duties, as both Claimant and Employer's manager testified that the video omitted several required physical maneuvers. The opinion of Employer's medical expert actually undermined Employer's position, as he initially concluded that Claimant could not perform the duties of a top pick operator and only reversed this opinion after reviewing the video demonstration discredited by the ALJ. Similarly, the ALJ properly rejected the opinions of two physical therapists, as one was based on the discredited video demonstration and the other was formulated without consulting Claimant's medical restrictions. Additionally, the ALJ's exclusion of a surveillance video, even if it was an error, was harmless, as the ALJ reasonably determined that Claimant's occasional use of his car or the stairs in his home had no bearing on his ability to perform the tasks that top pick operators must perform frequently.

The ALJ also properly concluded that Claimant diligently pursued alternative employment. Claimant attempted to work as a top pick operator and expressed interest in another position with Employer; and Employer's contention that he was offered more than two positions was unsubstantiated. Claimant also cooperated with a vocational rehabilitation specialist with the Department of Labor by unsuccessfully applying to six identified positions. Claimant appended his functional capacity evaluation to his job applications at the suggestion of the specialist in order to provide an accurate picture of his physical capabilities, not to sabotage his employment prospects. Additionally, Claimant's refusal to submit to a personal examination by Employer's vocational consultant did not prejudice Employer, as the ALJ determined that four of the positions she identified met his job restrictions, and Employer did not explain why such an examination was necessary or identify material information that such an examination would have produced, which could not be gleaned from Claimant's detailed medical records reviewed by the expert.

Finally, the ALJ's averaging of the salary ranges of the four suitable positions was a reasonable method for calculating Claimant's post-injury wage-earning capacity and was within the ALJ's "substantial discretion" on the issue. *See Avondale Indus., Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Shell Offshore Inc. v. Dir., OWCP*, 122 F.3d 312, 318 (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1988).

[Topic 8.2.4 8 Partial disability/Suitable alternate employment – Jobs in employer's facility; Topic 8.2.4.9 Diligent search and willingness to work; Topic 8.9 Wage-earning capacity]

***Stanhope v. United States Dep't of Labor*, No. 07-3560-ag., 2009 WL 393613 (Feb. 18, 2009)(Unreported).**

The Second Circuit reversed the Board's decision affirming an ALJ's dismissal of a claim for death benefits under §9 of the LHWCA. The Court stated merely that the ALJ's conclusions that Employer successfully rebutted the §20(a) presumption of causation were afflicted with the same problems that caused the Court to reverse in *Rainey v. Dir., OWCP*, 517 F.3d 632 (2nd Cir. 2008). Accordingly, the Court's decision in *Rainey* is summarized below.

***Rainey v. Dir., OWCP*, 517 F.3d 632 (2nd Cir. 2008).[5]**

Claimant sought benefits under the LHWCA based on his lung cancer allegedly caused by his exposure to asbestos in the course of his employment with Employer. Claimant had a history of smoking, and never developed symptoms of asbestosis. The Second Circuit reversed the Board's decision affirming an ALJ's finding that Employer rebutted the §20(a) presumption of causation.

The Court held that the two medical opinions cited by an ALJ did not constitute substantial evidence rebutting the §20(a) presumption of causation. The first medical opinion relied upon by the ALJ never endorsed the view that causation could not be found absent asbestosis symptoms. As for the role of smoking, this physician's opinion – i.e., that given Claimant's smoking history, it was more likely than not that he would have developed his lung cancer even in the absence of asbestos exposure -- did not negate a causal relationship between the lung caner and asbestos exposure. Concerning the proportional role of a work-related injury in a claimant's disability for purposes of §2(2) analysis, the Court observed:

> "Indeed, '[i]t is well-established under [the LHWCA] that an employment-related injury need not be the primary cause of an employee's total disability in order for a claimant to receive total disability compensation. If a work-related injury aggravates, exacerbates, accelerates, contributes to or combines with a *pre-existing* infirmity, disease or underlying condition, then the entire resulting disability may be a compensable injury under the Act.' *Bechtel Assocs., P.C. v. Sweeney,* 834 F.2d 1029, 1034 (D.C.Cir.1987); *see also Marinette Marine Corp. v. Office of Workers' Comp. Programs,* 431 F.3d 1032, 1035 (7th Cir.2005) ('[T]he aggravation rule does not require that a later injury

[5] This decision was not summarized in the February 2008 issue of the Longshore Newsletter.

> fundamentally alter a prior condition. It is enough that it produces or contributes to a worsening of symptoms.'); *Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs,* 137 F.3d 673, 676 (1st Cir.1998) (Lynch, J., dissenting) ('Under the 'aggravation rule,' even a small contribution by a work-related condition to the claimant's disability is sufficient to trigger full recovery under the LHWCA; primary causation need not be shown.')."

Accordingly, as a matter of law, this opinion could not be relied upon as evidence supporting rebuttal of the §20(a) presumption.

By contrast, the second medical opinion cited by the ALJ did offer some evidence disputing the causal nexus between Claimant's lung cancer and asbestos exposure based on the absence of asbestosis symptoms and substantial history of tobacco use. However, the ALJ explicitly discounted that aspect of the opinion, as derived from a false factual premise concerning the nature and extent of Claimant's asbestos exposure and as depending on discredited medical theories. Although an employer's burden in rebutting the §20(a) presumption is a burden of production, rather than a burden of persuasion (citations omitted), an employer cannot satisfy this burden simply by submitting any evidence whatsoever. Rather, the employer must introduce such relevant evidence as a reasonable mind might accept as adequate to support a finding that workplace conditions did not cause the injury. *See also* 5 U.S.C. §556(d).

[Topic 20.3.1 Employer has burden of rebuttal with substantial evidence – Failure to rebut]

B. Benefits Review Board

M.K. v. California United Terminals,[6] __ BRBS __, No. 08-0392 (Feb. 12 2009).

ILWU-PMA[7] appealed three separate ALJ orders approving settlement agreements under §8(i) of the Act. The Board held that, where ILWU-PMA has properly intervened, its §17 lien claims and claims for reimbursement of medical expenses under §7 must be resolved simultaneously with §8(i) settlement agreements entered into by claimants and their employers. The Board further held that a provision in a settlement application whereby Employer agrees to "pay, adjust or litigate" ILWU-PMA's lien does not adequately address the resolution of the lien claims. The Board's rationale is summarized below.

Because ILWU-PMA is, by virtue of its intervention in these cases, "a party to any claim" as contemplated by §8(i), claimant and employer cannot settle "any claim for compensation under [the Act]" pursuant to §8(i) without ILWU-PMA's participation and agreement. *See* 33 U.S.C. §908(i); 20 C.F.R. §§702.241-702.243.[8] The presence of the §17 statutory lien, and its requirement that the claimant "is legally obligated to repay [disability benefits paid on his/her behalf by a qualified trust fund] by reason of his entitlement to compensation under this chapter or under a settlement," 33 U.S.C. §917, mandates that the trust fund be involved in and agree to any settlement. The implementing regulation under §17 states that "[i]f the [ALJ] issues a compensation order in favor of the claimant, such order shall establish a lien in favor of the trust fund if it is determined that the trust fund has satisfied all of the requirements of the Act and regulations." 20 C.F.R. §702.162(f); *see also* 20 C.F.R. §702.162(b)(1); (d)-(g). Here, as the ALJs issued "compensation orders" in favor of the claimants, albeit in the form of approvals of §8(i) settlement agreements,[9] the ALJs were required

---

[6] For purposes of decision, the Board consolidated this case with *M.K. v. Maersk Pacific/APM Terminals Pacific Ltd.*, BRB No. 08-0450 and *R.B. v. Yusen Terminals, Inc.*, BRB 08-0606.

[7] The ILWU-PMA is a joint labor-management multi-employer trust fund established in compliance with §302(e) of the Labor-Management Relations Act and 29 U.S.C. §186(c). The ALJ's orders were appealed by ILWU-PMA Welfare Plan which pays medicals and benefits on behalf of its participants.

[8] *E.g.,* 20 C.F.R. §702.242(a) states that a settlement application "shall be in the form of a stipulation signed by *all parties*." (Emphasis supplied).

[9] An ALJ's approval of a §8(i) settlement agreement is a "compensation order(s) in favor of the claimant" within the meaning of §702.162(f). *See also* 33 U.S.C. §919(c); 20 C.F.R. §702.243; 20 C.F.R. §702.348.

under §702.162(f) to "establish a lien in favor of the trust fund" in these orders. Moreover, only after addressing ILWU-PMA's interests as they pertain to its §17 lien claims for disability benefits and §7 claims for medical reimbursement can an administrative law judge determine whether the amount of the settlement is "adequate," as is required for approval under §8(i). *See* 33 U.S.C. §908(i); 20 C.F.R. §702.243(f).

A §17 statutory lien can be satisfied only through reimbursement by the claimant from the disability benefits obtained under the Act, whether through settlement or adjudication. Furthermore, employers have no rights to or interests in the issues pertaining to a §17 lien. The Board noted that since the Act does not grant ILWU-PMA any avenue for enforcing a lien against a claimant who evades repaying ILWU-PMA, an adjudicator could find that the §17 lien can be paid by employer to ILWU-PMA from the disability compensation it owes to claimant under the Act.

As to the scope of a §17 lien, the Board observed that the plain language of §17 and its implementing regulation establishes that ILWU-PMA's §17 lien is limited to amounts it paid to the claimants for disability covered by the Act. *See* 33 U.S.C. §917; 20 C.F.R. §702.162(a), (g). Consequently, ILWU-PMA's §17 lien is limited to recovery of disability benefits provided to claimants, while its right to reimbursement for medical benefits falls outside the scope of the lien and is governed by §7 of the Act. Unlike §17, which imposes on claimant, not employer, the obligation to repay the trust fund out of compensation due under the Act, §7(a) renders employer liable for the reimbursement of the medical expenses, so long as claimant is otherwise entitled to medical benefits. ILWU-PMA was thus entitled to intervene and seek reimbursement from employer of medical expenses necessary for treatment of the work injuries. *See* 33 U.S.C. §919; *see also* 33 U.S.C. §907(d)(3). As a party-in-interest to the claims, and as its rights are derivative based on claimant's entitlement, ILWU-PMA's rights to reimbursement of medical costs must coincide with the determination of claimant's entitlement under §7. Thus, where ILWU-PMA has properly intervened, its §17 lien and §7 reimbursement claims must be resolved simultaneously with the claimants' claims.

Here, ALJs have not considered whether ILWU-PMA had satisfied all of the requirements of the Act and regulations, nor did they establish "a lien in favor of the trust fund."[10] Since ILWU-PMA was not a party to the settlements, the ALJs erred in approving them. The claimants and

[10] Here, ILWU-PMA has timely filed §17 lien applications with both the district director and the ALJs.

employers have, in effect, attempted to circumvent ILWU-PMA's lien by agreeing, as part of the settlement, that the employers would "pay, adjust or litigate" ILWU-PMA's interests.[11] This would compel ILWU-PMA to litigate independently the compensability of claimants' claims under the Act resulting in the bifurcation of proceedings.[12]

[Topic 17.1 Lien against assets – Generally]

II. Black Lung Benefits Act

A. U.S. Circuit Courts of Appeals

In *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, ___ F.3d ___, Case No. 08-3311 (6th Cir. Feb. 17, 2009), the court held that the three year statute of limitations at 20 C.F.R. § 725.308 does not begin to run based on a medical opinion of total disability due to pneumoconiosis submitted in a claim that is ultimately outweighed by other medical evidence in the claim. As a consequence, the favorable medical opinion from the miner's first claim (filed in 1988) was deemed a "misdiagnosis" such that it did not bar the filing of a subsequent claim in 1993 under 20 C.F.R. § 725.309. To this end, the court held that any suggestion to the contrary in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 607 (6th Cir. 2001) is *dicta* and is not binding.

With regard to the 1993 subsequent claim, Employer failed to file a controversion within the prescribed 30-day time period. As a result, the administrative law judge awarded benefits. The court upheld the finding that Employer failed to timely controvert the miner's 1993 claim such that the miner was entitled to benefits. Moreover, the court held that Employer's explanation that "notice of the initial award got 'lost-in-the-shuffle'" did not

[11] The Board noted that this language falls short of an actual acknowledgement by employer that it has an obligation to pay the liens.

[12] The Board observed that §702.162(c) provides that only the claimant may dispute "the right of the trust fund to the lien or the amount stated." Thus, employer does not have any right to challenge the propriety of the §17 liens raised by ILWU-PMA in these cases. With regard to medical benefits, while employer is liable to ILWU-PMA for any reimbursement, ILWU-PMA's rights rest on claimant's entitlement under §7, and claimant must establish the treatment is reasonable and necessary for the work injury in order to establish entitlement. The provision in the settlement agreement providing that employer will pay, adjust or litigate the claims against ILWU-PMA would require ILWU-PMA to prove entitlement. As ILWU-PMA's rights are derivative of claimant's rights, they cannot be litigated separately.

constitute "good cause" sufficient to waive the 30 day time deadline at 20 C.F.R. § 725.413(b) (1993). The court stated:

> To this day, Arch has offered little to support its good-cause argument—there are no affidavits or other evidence in the record that would provide some detail to the attorney's vague assertion of a personnel problem.
>
> . . .
>
> Here, without any evidence explaining why or how the purported personnel problems caused the missed deadline or any evidence of the counsel's diligence once the problem was identified, it cannot be said that the ALJ abused her discretion in denying Arch's request to file an untimely controversion.

Further, the court concluded that Employer was barred from re-litigating the issue of its untimely controversion on modification at 20 C.F.R. § 725.310 reasoning that "there would be little use in having a default provision (at § 725.413(b)) in the first place if everything could be reopened by a subsequent request for modification."

[**untimely controversion cannot be corrected on modification; statute of limitations at 20 C.F.R. § 725.308 in a subsequent claim**]

In *Energy West Mining Co. v. Director, OWCP [Oliver]*, ___ F.3d ___, Case No. 07-9588 (10th Cir. Feb. 20, 2009), the court held that the ten year rebuttable presumption at 20 C.F.R. § 718.203 does not apply to a diagnosis of legal pneumoconiosis; rather, a physician must state that the miner's chronic respiratory disease was caused, at least in part, from coal mine employment. The court stated:

> Though COPD is not one of the diseases doctors call pneumoconiosis, it can nevertheless qualify under the legal definition of the term if it arises out of coal mining employment. A longstanding interpretation of the BLBA recognizes that Congress intended to compensate miners for 'a broader class of lung diseases that are not pneumoconiosis as that term is used by the medical community.' (citations omitted).
>
> . . .

> Because COPD is most frequently caused by cigarette smoking and is commonly found among the general population, we have held that a miner whose claim to black lung benefits is based on COPD is not entitled to the ordinary rebuttable presumption that his or her disease arose out of coal mine employment provided he worked in the mines for at least ten years (under 20 C.F.R. § 718.203).

Slip op. at 4.

Next, the court addressed Employer's argument that its due process rights were violated because OWCP had destroyed the miner's prior (1980) claim. In considering the miner's 2002 subsequent claim, the court noted that OWCP had, in fact, destroyed the miner's 1980 claim "pursuant to its record-retention policy." As a result, the court stated that it knew "very little about the claim's adjudication aside from the fact that it was denied":

> The destruction of (the miner's) 1980 claim file threw a wrench into these procedures. Because OWCP destroyed it, the evidence associated with the prior claim was not made a part of the record as § 725.309(d)(1) requires.
>
> . . .
>
> Instead, (the miner) was forced to establish *all three* elements of his claim by new evidence rather than just one, while Energy West was forced to *defend* all three elements without the ability to counter or impeach new evidence with old.

Slip op. at 6-7.

Nevertheless, the court rejected Employer's argument that it be dismissed from the case on grounds that it "was unable to mount a meaningful defense to (the miner's) present claim." The court noted that there are some circumstances where an employer should be dismissed on due process grounds, such as when "the government entirely fails to give notice of a claim, or delays so excessively in providing notice that the party's ability to mount a defense is impaired . . .." However, in this case, the court concluded that OWCP did not act in bad faith when it destroyed the contents of the 1980 claim file; rather, "[t]he undisputed evidence is that OWCP destroyed the file because it thought it would no longer be useful after nineteen years gathering dust." The court concluded that "the 1980 claim file cannot be said to be . . . 'critical' to this adjudication." Indeed, Employer conceded in the subsequent claim that the miner had established coal

workers' pneumoconiosis in the prior claim, but had not demonstrated that he was totally disabled by the disease.

Turning to the limitations of action period set forth at 20 C.F.R. § 725.308, Employer posited that "materials in the 1980 claim file might reveal that (the miner) received a communication of total disability from a physician long ago, 'thereby rendering his current application untimely.'" The court disagreed:

> Because black lung is a progressive disease, miners are permitted to file successive claims; if a claimant is not found to be totally disabled at the time of their initial claim for benefits, he or she can re-file at a later time and demonstrate that the disease has advanced to the point of incapacity. For this reason, we have previously recognized that 'a final finding . . . that a claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary,' and resets the statute of limitations for filing a black lung claim. As our sister circuit has explained, a new limitations period begins after every denial of a black lung claim, 'provided the miner works in the coal mines for a substantial period of time after the denial and a new medical opinion of total disability due to pneumoconiosis is communicated [to him].' *Sharondale,* 42 F.3d at 996.

Slip op. at 20. From this, the court held that, despite destruction of the 1980 claim record, the miner's subsequent claim was timely filed as:

> . . . there can be no doubt that (the miner's) limitations period has reset. The denial of his previous claim invalidated whatever medical opinions formed the basis of that adjudication. More importantly, (the miner) continued to perform mining work for Energy West for thirteen years after the denial of his original claim—unquestionably a substantial period. And it is not disputed here that his present claim was filed within three years of a new disability diagnosis being communicated to him by Dr. Morgan. That is all the regulations require.

Slip op. at 20.

[**etiology of legal pneumoconiosis; destruction of claim record; statute of limitations at 20 C.F.R. § 725.308 in a subsequent claim**]

B. Benefits Review Board

By published decision in *V.B. v. Elm Grove Coal Co.*, ___ B.L.R. 1-___, BRB No. 08-0515 BLA (Feb. 27, 2009), the Board noted that, pursuant to the Fourth Circuit's decision in this claim in *Elm Grove Coal Co. v. Director, OWCP [Blake]*, 480 F.3d 278 (4th Cir. 2007), discovery of communications between a party's counsel and the party's testifying experts was permitted "and was necessary for a proper cross-examination" of the party's experts. Under the facts of the case, Employer maintained that "claimant's counsel had gone beyond merely providing drafting assistance to Drs. Lenkey and Cohen, such that the opinions expressed were those of claimant's attorney, and not of the physicians."

Claimant's counsel responded with an affidavit stating that, with regard to Dr. Lenkey, "he and his paralegal drafted a report that was consistent with Dr. Lenkey's views and submitted it to Dr. Lenkey, along with copies of all the relevant records so that Dr. Lenkey could review them again." Dr. Lenkey would then send a final report to counsel.

With regard to Dr. Cohen, Claimant's counsel explained that his office prepared a draft report "to summarize the record in the form that Dr. Cohen likes to use." From this, counsel stated that Dr. Cohen then "added to and revised the drafts to produce his opinion."

In regard to assisting both doctors, Claimant's counsel stated that "the summaries of the evidence and draft reports that he and his paralegal provided were based on his communications with the doctors, and that this assistance was provided to both reduce the time these two busy doctors had to spend on the case, and to reduce the miner's litigation costs." Counsel maintained in his affidavit that "the doctors' opinions expressed in the resulting reports 'were, in fact, the doctors' opinions of [the miner's] condition."

Employer argued that counsel's affidavit should not have been admitted under Illinois Rule of Professional Conduct 3.7, which governs a lawyer acting as a witness because, "by filing an affidavit, Mr. Johnson compromised his role as advocate, and, therefore, either his affidavit should have been stricken from the record, or Mr. Johnson should have been required to withdraw from the case." The Board disagreed to hold that the administrative law judge is "not bound by statutory rules of evidence or by technical or formal rules of procedure" except as provided by the Administrative Procedure Act and 20 C.F.R. Part 725. To this end, the judge "is granted broad discretion in resolving procedural issues, including the admission of hearsay evidence." The board reasoned that the APA does not

bar the consideration of hearsay evidence and "because Mr. Johnson was available for cross-examination, the administrative law judge found that his affidavit was admissible."

Moreover, the Board held that the judge properly noted that Illinois Rule of Professional Conduct 3.7 provides that an attorney need not withdraw if it would result in "substantial hardship on the client." In this vein, the judge concluded that "because of Mr. Johnson's longstanding association with the case, and his familiarity with the facts and its procedural posture, requiring him to withdraw at this stage of the litigation would result in a substantial hardship to claimant."

However, the Board held that the judge improperly denied Employer's request to "re-depose" Drs. Lenkey and Cohen in light of information contained in Mr. Johnson's affidavit and communications between counsel and the experts. In his denial of Employer's request, the judge stated that "[t]he issue of the mechanics of the drafting of the expert opinions is tangential to the issue of whether the reports are well reasoned, well documented, and credible." The judge then stated that "[b]oth Drs. Lenkey and Cohen have testified under oath and personally explained, in detail, the basis for their opinions" such that Employer "had ample opportunity to question both physicians, and the record will not be re-opened for cross-examination."

On this point, the Board concluded that the judge erred and remanded the claim to allow Employer the opportunity to cross-examine Drs. Lenkey and Cohen based on its access to communications between Claimant's counsel and the experts. Further, in reconsidering evidence on remand, the Board instructed that the judge "must qualify all of the evidence as 'reliable, probative, and substantial,' including Mr. Johnson's affidavit, before relying upon it, pursuant to the standard set forth in *United States Steel Mining Co. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 389 (4th Cir. 1999)."

[**discovery of communications between counsel and medical expert; cross-examination of expert based on communications**]

In *R.B. v. Southern Ohio Coal Co.*, BRB No. 08-0465 BLA, ALJ Case No. 2007-BLA-5136 (Feb. 19, 2009)(unpub.), the Board has scheduled oral argument in Pittsburgh, Pennsylvania on Tuesday, April 21, 2009 to hear the parties' positions on the following issues:

> Whether the authority of an administrative law judge under 20 C.F.R. § 725.456(e) to remand a claim to the district director for

a complete pulmonary evaluation pursuant to 20 C.F.R. § 725.406 may be exercised prior to the assembly of the evidentiary record at the formal hearing?

Whether the administrative law judge erred in issuing an Order of Remand without prior notice to the parties?

Whether the concession of the Director, Office of Workers' Compensation Programs, for the first time on appeal, that the pulmonary evaluations of (certain named coal miners) are incomplete, requires that liability for benefits in these cases be transferred to the Black Lung Disability Trust Fund?

[**oral argument scheduled by Board; authority of the ALJ**]