IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION

GLORIA L. NOWLIN, Plaintiff v. EASTERN ASSOCIATED COAL CORPORATION, Defendant	)	Civil Action No. 1:02 CV 51

BRIEF OF AMICUS CURIAE,
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

INTRODUCTION

Gloria Nowlin, the widow of coal miner Malcolm Nowlin, asks this Court to enforce U.S. Department of Labor ("DOL") Administrative Law Judge Clement J. Kichuk's May 14, 1999 final order awarding compensation under the Black Lung Benefits Act ("BLBA"), as amended (30 U.S.C. §§901-945). Pursuant to section 14(f) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), Mrs. Nowlin claims that she is entitled to twenty-percent additional compensation based on Eastern Associated Coal Corporation's ("EACC") failure to pay benefits covering eighteen of the twenty years that it took to litigate Malcolm Nowlin's BLBA claim to finality.[1] 33 U.S.C. §914(f), incorporated into the BLBA by 30 U.S.C. §932(a);

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[1] Where, as here, the miner filed his claim before January 1, 1982, the surviving spouse is entitled to derivative survivor's benefits based on the miner's claim if the miner was totally disabled due to pneumoconiosis arising out of coal mine employment at the time of death. If a miner files a claim on or after January 1, 1982, however, the miner must establish that he is totally disabled due to pneumoconiosis arising out his coal mine employment, and a survivor must establish that the miner died due to pneumoconiosis arising out of his coal mine employment in order to establish entitlement to benefits. 30 U.S.C. §§901, 921(a); 20 C.F.R.

20 C.F.R. §725.607. Mrs. Nowlin brings this action under LHWCA section 21(d). 33 U.S.C. §921(d), incorporated into the BLBA by 30 U.S.C. §932(a); 20 C.F.R. §725.604. EACC has filed a motion to dismiss, claiming that Mrs. Nowlin was required to obtain a supplementary default order from DOL before proceeding to district court under section 21(d).

This Court conducted a hearing to consider EACC's motion on November 25, 2002, and the next day, issued an order directing the parties to ascertain "the Department of Labor's interest, if any, in intervening or filing an *amicus* brief in the pending litigation." November 26, 2002 Order at 1. The order also stated that "[t]he issue of concern to the Court is whether a 20% penalty assessment imposed under Section 914(f) of the . . . BLBA . . . can be enforced under Section 21(d) of the BLBA when a claimant has not received a supplementary order declaring the amount of the default." *Id.* Although the parties have addressed additional issues in connection with the pending motion to dismiss, we will address only the question specified by the Court.

Having filed her action under section 21(d), Mrs. Nowlin was not required to apply to the DOL for a supplemental default order. ALJ Kichuk's May 14, 1999 decision and order awarding benefits became final after EACC failed to appeal the Benefits Review Board's June 22, 2000 affirmance of the ALJ's award.[2] Pursuant to section 21(d), the ALJ's decision, once final,

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§725.212(a)(3)(i), (ii); *see, e.g., Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 211 n. 1 (4th Cir. 1992) (widow automatically entitled based on miner's pre-January 1, 1982 claim); *see generally Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000) (setting forth elements of entitlement in widow's claim); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000) (setting forth elements of entitlement in miner's claim).

[2] ALJ Kichuk's decision became final on August 21, 2000, sixty days after issuance of the Board's decision. *See* 33 U.S.C. §921(c), incorporated into the BLBA by 30 U.S.C. §932(a) (party aggrieved by Board decision has sixty days to appeal to the Court of Appeals for the circuit in which the injury occurred).

entitled Mrs. Nowlin to "apply for the enforcement of" that order to this Court. We urge the Court to reject EACC's attempt to add a requirement for a supplementary default order onto sections 14(f) and 21(d), neither of which contain such a requirement.

We detail the basis for this position in the argument section below, after explaining the Director's interest as *amicus* in this case.

INTEREST OF AMICUS

The Secretary of Labor has designated the Director, Office of Workers' Compensation Programs ("OWCP"), the administrator of several workers' compensation programs falling within DOL's jurisdiction, including the LHWCA and the BLBA. 20 C.F.R. §701.202(a), (f). The Director therefore has a significant administrative interest in the issue posed by the Court.[3] *See Director, OWCP v. Newport News Shipbuilding*, 8 F.3d 175, 180 (4th Cir. 1993) (Director has standing under the LHWCA to petition for review of Benefits Review Board decision when Board's decision "adversely affect[s] the Director's legitimate administrative interests . . . . [such as] if a Board decision substantially augmented the nature of the administrative duties delegated to the Director, [or] increased the Director's necessary expenditure of administrative resources . . . .").[4]

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[3] The Director is also a statutory party to all claims-adjudication proceedings under the BLBA. 30 U.S.C. §932(k); 20 C.F.R. §725.360(a)(5). The Director's reasonable interpretation of the BLBA and its implementing regulations is entitled to deference. *Barnhart v. Walton*, 122 S. Ct. 1265, 1269 (2002); *United States v. Mead*, 533 U.S. 218, 227-29 (2001); *Sigma-Tau Pharmaceuticals, Inc. v. Schwetz*, 288 F.3d 141, 146 (4th Cir. 2002) (quoting *Pauley v. BethEnergy Mines Inc.*, 501 U.S. 680, 696 (1991)); *Betty B Coal Co. v. Stanley*, 194 F.3d 491, 498 (4th Cir. 1999) (citing *Pauley*).

[4] In *Newport News*, a case arising under the LHWCA, the Fourth Circuit held that the Director did not have standing to appeal because the Board's decision caused him no direct "administrative or economic injury." 8 F.3d at 181-82. The Supreme Court affirmed. *Director, OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 131-35 (1995). The Supreme Court also recognized, however, that under the BLBA, unlike the LHWCA, the Director has standing as a

Under EACC's theory, claimants seeking to enforce an employer's section 14(f) liability in a section 21(d) action would have to apply to the District Director – a subordinate of the Director – before filing an action in district court.[5] This procedure in a section 21(d) action would be contrary to the Director's longstanding policy and practice and would entail the additional expenditure of DOL administrative and fiscal resources. The procedure EACC suggests is neither required nor advisable, as explained in detail below.

ARGUMENT

A supplementary default order from the District Director is not a prerequisite to filing an action to enforce a BLBA award under section 21(d).

A. Statutory and Regulatory Background

Procedures governing claims filed under the BLBA are incorporated from the LHWCA, 33 U.S.C. §§919(a)-(c), 921(a)-(c) (except to the extent these provisions are overridden by superceding sections of the BLBA or by regulations promulgated by the Secretary). *See* 30 U.S.C. §932(a) (listing LHWCA provisions that are not incorporated into BLBA); *Director, OWCP v. National Mines Corp.*, 554 F.2d 1267, 1274 (4th Cir. 1977) (Secretary of Labor has authority to depart from incorporated LHWCA provisions by regulation). After a miner or his survivor files a BLBA claim, the District Director notifies the potentially liable parties, investigates the miner's health and employment history, and makes a preliminary determination with respect to the claimant's eligibility for benefits. The District Director also determines

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party in all claims proceedings and that this standing is granted by statute. 514 U.S. at 135; 30 U.S.C. §932(k).

[5] District Directors are the black lung program's initial adjudication officers. They investigate all claims and make preliminary determinations as to a claimant's eligibility for benefits and the identity of the potentially liable coal mine operator. They were formerly known as Deputy Commissioners. *See* 20 C.F.R. §725.101(a)(16). (The LHWCA still employs the term "Deputy Commissioner.")

which, if any, coal mine employer and insurance carrier should be held responsible for paying the claim. The liable coal mine employer is known as the responsible operator. 20 C.F.R. §§725.301-725.421. Any party dissatisfied with the District Director's determination may request a hearing before an ALJ. 20 C.F.R. §§725.450-725.479. Any party aggrieved by an ALJ's decision may appeal to the Department's Benefits Review Board, and then to the United States Court of Appeals for the circuit in which the miner was exposed to coal mine dust. 33 U.S.C. §921(a)-(c).

Filing an appeal does not, however, relieve the responsible operator of its obligation to pay benefits during the pendency of the appeal unless it obtains a stay of payment from the Benefits Review Board or Court of Appeals based on a showing of "irreparable injury." 33 U.S.C. §921(b)(3), (c), incorporated by 30 U.S.C. §932(a). Rather, upon the issuance of an effective award, the responsible operator is legally obligated to commence the payment of monthly benefits, and to pay the claimant any retroactive benefits ordered by the award (*i.e.*, benefits for periods of disability before issuance of the award). An ALJ's decision is effective when it is filed in the District Director's office in Washington, D.C., regardless of whether it is appealed. 20 C.F.R. §§725.478, 725.502(a)(2); *e.g., Daugherty v. Director, OWCP*, 897 F.2d 740, 742 (4th Cir. 1990).

If the responsible operator fails to pay benefits due during the pendency of an appeal, as EACC did here, there are two consequences. First, the Black Lung Disability Trust Fund is statutorily required to pay the claimant the benefits due.[6] 26 U.S.C. §9501(a), (b), (d)(1)(A)(ii).

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[6] The Black Lung Disability Trust Fund is funded by an excise tax on coal and repayable advances from the general treasury, and is jointly administered by the Secretaries of Labor, Treasury and Health and Human Services. The coal mine operator must reimburse the Trust Fund (with interest) if the award is ultimately affirmed, as the Benefits Review Board did here. 30 U.S.C. §934. EACC has reimbursed the Trust Fund for the interim benefits the Fund paid in

Second, the operator becomes liable to the claimant for an additional twenty-percent of the compensation it has failed to pay. 33 U.S.C. §914(f), incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.607. An employer's liability for the additional twenty-percent compensation under LHWCA section 14(f) arises automatically if the employer fails to make a payment within ten days of it being due. *Providence Washington Ins. Co. v. Director, OWCP*, 765 F.2d 1381, 1385 (9th Cir. 1985); *Tidelands Marine Service v. Patterson*, 719 F.2d 126, 128 n. 2 (5th Cir. 1983). Section 14(f) is, therefore, self-executing. *Id.*

A claimant need not wait until the responsible operator's appeal has been resolved to enforce the operator's liability. Rather, a claimant may immediately enforce the operator's liability under LHWCA section 18(a). 33 U.S.C. §918(a), incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.605. Section 18(a) provides that if an operator fails to make a payment within thirty days of it being due, the claimant may apply to the District Director who issued the "compensation order" for a "supplementary order" to declare the amount in default. The claimant has one year from the date of the default to apply to the District Director. After investigation and notice, the District Director (or ALJ, if a hearing is requested) may issue a supplementary order declaring the amount in default. The claimant may then file a certified copy of the District Director's (or ALJ's) default declaration with the appropriate federal district court. If the court determines that the default declaration is "in accordance with law," it must enter judgment for the amount declared in default. 33 U.S.C. §918(a).

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this case. If the award is ultimately reversed, the benefits paid the claimant by the Trust Fund become an overpayment subject to recovery from the claimant. 30 U.S.C. §§923(b) (incorporating the Social Security Act's overpayment provision, 42 U.S.C. §404). The claimant may be entitled to waiver of recovery of the overpayment if he is without fault for creation of the overpayment and the repayment would either defeat the purposes of the BLBA or be against equity and good conscience. 42 U.S.C. §404(b); 20 C.F.R. §725.542.

Mrs. Nowlin, however, did not choose to proceed under section 18(a) while EACC's successive appeals to the Benefits Review Board were pending. Rather, she chose to wait until the appeals were concluded. Her award became final on August 21, 2000, when EACC failed to petition for review of the Board's June 22, 2000 affirmance of ALJ Kichuk's May 14, 1999 benefit award. Mrs. Nowlin then filed this action under section 21(d) to enforce a final award.

Unlike section 18(a), section 21(d) does not mention a "supplementary order" and requires the "compensation order" to have "become final" before a claimant (or a District Director) may "apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred . . . ." 33 U.S.C. §921(d), incorporated into the BLBA by 30 U.S.C. §932(a); 20 C.F.R. §725.604. If the compensation order was "made and served in accordance with law," the court must enforce it. 33 U.S.C. §921(d); *e.g., Marshall v. Barnes & Tucker Co.*, 432 F. Supp. 935, 938 (W.D. Pa. 1977).

Sections 18(a) and 21(d) serve distinct roles. Section 18(a) permits enforcement of effective but not-yet-final awards, while section 21(d) permits the enforcement of final awards. *Kinder v. Coleman & Yates Coal Co.*, 974 F. Supp. 868, 871 (W.D. Va. 1997). Section 18(a) thus affords injured employees a mechanism for immediate enforcement of effective compensation awards even before they become final, to alleviate the severe financial hardships that could befall injured employees when employers fail to comply with a compensation award during the pendency of appeals. *Williams v. Jones*, 11 F.3d 247, 254 (1st Cir. 1993); *Tidelands*, 719 F.2d at 129. A successful plaintiff under section 18(a) obtains a money judgment against the employer from the district court. Section 21(d), by contrast, generally affords injured employees a mechanism by which to obtain an injunction ordering an employer to comply with a final compensation award. A successful plaintiff under section 21(d) obtains injunctive relief, which

subjects a non-complying employer to the risk of contempt proceedings. *Williams*, 11 F.3d at 255.

A claimant's failure to seek enforcement of a non-final award under section 18(a) does not preclude him from seeking enforcement of the award under section 21(d) once it becomes final. Rather, if the employee succeeds in defending his award to finality, the employee may then obtain an injunction under section 21(d) compelling the employer to pay any outstanding benefits. *Kinder*, 974 F. Supp. at 879 (" . . . an employee who effectively waives his section 918(a) rights would still have two years after an award becomes final to seek enforcement pursuant to section 921(d).").[7] A claimant may thus seek enforcement of an employer's section 14(f) liability under either section 18(a) or 21(d). *Reid v. Universal Maritime Service Corp.*, 41 F.3d 200, 202 (4th Cir. 1994).

B. Section 21(d)'s only procedural prerequisite is a final compensation order made and served in accordance with law.

EACC has confused the procedures required in section 18(a) and 21(d) actions. Section 18(a) expressly requires that a claimant apply to the District Director for a supplementary order of default before proceeding to district court. Section 21(d) does not. Courts have recognized this distinction. In *Cassell v. Taylor*, 243 F.2d 259, 260 (D.C. Cir. 1957), the court noted that "[s]ection 918 [*i.e.*, section 18(a)] instructs the court to enter judgment upon the filing of a supplementary order" whereas section 21(d), "on the other hand, enables the court . . . to 'enforce obedience to the *(original)* order'" (emphasis added). Similarly, in *Williams v. Jones*, 11 F.3d 247, 252-54 (1st Cir. 1993), the Court compared section 18's "bifurcated enforcement mechanism" with section 21(d)'s direct enforcement mechanism under which the district court is

[7] Section 21(d) does not contain a limitations period, but the Court in *Kinder* borrowed the most analogous state statute of limitations, which was two years. *Kinder*, 974 F. Supp. at 878-79.

the "*first* and *only* forum for a full hearing of . . . factual disputes . . . ." (Emphasis in original.) The First Circuit also characterized the District Director's default order in that case as "supererogatory,"[8] stating that "[u]nlike §918(a), §921(d) expressly reserves such matters for resolution by the district court." 11 F.3d at 253 n. 7.

EACC provides little explanation of its assertion that a supplemental default order is a prerequisite to a section 21(d) action. It suggests that section 21(d)'s requiring a final compensation order means that there must be an order specifically addressing section 14(f) liability. Motion to Dismiss at 13. This is incorrect. Section 14(f) liability arises automatically – without any requirement for a supplementary order – upon the employer's default. *Providence Washington Ins. Co.*, 765 F.2d at 1385; *Tidelands Marine Service*, 719 F.2d at 128. Section 14(f) "does not, itself, provide for the issuance of any order," and is "self-executing." *Id.* Indeed, section 14(f) is substantive and contains no procedural requirements; the procedural requirements for enforcement of the provision depend upon whether enforcement is sought under section 18(a) or 21(d). *Reid*, 41 F.3d at 202. Only when attempting to enforce an employer's section 14(f) liability under section 18(a) must a claimant apply to a District Director for a supplemental default order. When attempting to enforce an employer's section 14(f) liability under section 21(d), a claimant may proceed directly to federal district court provided the original compensation order has become final.

In its reply to Mrs. Nowlin's response to its motion to dismiss, EACC adds a second reason to support its assertion that a supplemental default order is necessary to this section 21(d) enforcement action. Specifically, EACC argues that a supplementary default order is necessary

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[8] "Supererogatory" means "observed or performed to an extent not enjoined or required" or "superfluous, nonessential." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY.

so that there will be a determination of the amount of "unpaid benefits" for which the additional twenty-percent compensation is due. Reply to Motion to Dismiss at 4. EACC does not cite any language in section 21(d) to support this contention; instead, it cites *Quintana v. Crescent Wharf and Warehouse Co.*, 18 BRBS 254 (Ben. Rev. Bd. 1986).

EACC's reasoning is faulty. Supplemental compensation orders are not necessary to establish the amount of "unpaid benefits" under section 14(f). There is no reason why this Court could not determine the amount of "unpaid benefits" based upon evidence adduced by the parties if the amount is in dispute.[9] *See Providence Washington Ins. Co.*, 765 F.2d at 1386 (in a case involving twenty-percent additional compensation under section 14(f), "computational problems . . . could be easily resolved at the enforcement stage in federal district court . . . ."). Nor does the Board's *Quintana* decision support EACC's position. In *Quintana*, the employer failed to pay certain medical benefits while its motion for reconsideration was pending with the ALJ. The claimant asked the ALJ to hold the employer liable for additional compensation under LHWCA section 14(f), but the ALJ refused. The Board affirmed, holding that the issue was not properly before the ALJ. Rather, the Board correctly held, "[i]f claimant desires to request additional compensation as set out in Section 14(f), he must first apply to the [district director]." 18 BRBS at 258. Because the claimant's award had not yet become final, his only option for enforcing the employer's section 14(f) liability was under section 18(a), which required him to apply to the District Director for a supplemental default order.

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[9] Here, there is only a $418.20 difference between the plaintiff's and defendant's representations as to the amount of "unpaid benefits" at issue under section 14(f). Mrs. Nowlin alleges that the amount of "unpaid benefits" is $127,322.40. Complaint at ¶38. EACC, while contending that the payments it failed to make during litigation are not "unpaid benefits," acknowledges that the amount it did not pay was $126,904.20. Answer at ¶38; Memorandum in Support of Motion to Dismiss at 1 n. 1.

Finally, EACC argues that the Fourth Circuit's decision in *Reid*, 41 F.3d 200, undermines Mrs. Nowlin's position because the claimant in that case applied to the district director for a supplemental default order. A claimant has the option, however, of seeking enforcement of an employer's liability for additional compensation under section 14(f) by proceeding under either section 18 or section 21. In *Reid*, the claimant elected to proceed under section 18 and, therefore, applied to the District Director for a supplemental default order in compliance with the requirements of that section. Nothing in *Reid* hints that a claimant proceeding under section 21(d) has to apply to the District Director for a default order. To the contrary, the district court in *Donovan v. McKee*, 669 F. Supp. 138, 140-41 (S.D. WV 1987), *aff'd.*, 845 F.2d 70 (4th Cir. 1988), ordered the defendant to pay the additional twenty-percent compensation under section 14(f) in a section 21(d) proceeding, despite the absence of any supplementary default order by the District Director.

Having filed this action under section 21(d), Mrs. Nowlin was not required to first apply to the District Director for a supplemental default order. ALJ Kichuk's May 14, 1999 decision and order awarding benefits, which became final following the Benefits Review Board's June 22, 2000 affirmance, entitled her to apply directly to this Court for the enforcement of that order under section 21(d). We urge the Court to reject EACC's attempt to engraft section 18(a)'s requirement for a supplementary default order onto sections 14(f) and 21(d), neither of which contain such a requirement.

CONCLUSION

The Director, OWCP, therefore respectfully urges the Court to reject EACC's contention that a section 21(d) action may not proceed absent a District Director's supplementary default order, and to deny EACC's motion to dismiss.

Respectfully submitted,

THOMAS E. JOHNSTON
United States Attorney
Northern District of West Virginia

BETSY STEINFELD JIVIDEN
Assistant United States Attorney
1100 Main Street, Suite 200
P.O. Box 591
Wheeling, WV 26003
(304) 234-7764

Of Counsel: HOWARD M. RADZELY
Acting Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

EDWARD WALDMAN
Counsel for Enforcement
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5671

Attorneys for the Director, Office
of Workers' Compensation Programs,
United States Department of Labor

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2003, a copy of the foregoing Brief of *Amicus Curiae* was mailed, postage prepaid, to the following:

Robert F. Cohen, Jr., Esq.
Cohen, Abate & Cohen, L.C.
P.O. Box 486
Morgantown, WV 26507-0846

William S. Mattingly, Esq.
Jackson Kelly PLLC
P.O. Box 619
Morgantown, WV 26507

BETSY STEINFELD JIVIDEN
Assistant U.S. Attorney