



**RECENT SIGNIFICANT BLACK LUNG BENEFITS ACT DECISIONS  
September 2015**

*Stephen R. Henley*  
Chief Judge

*William S. Colwell*  
Associate Chief Judge for Black Lung

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**A. Circuit Courts of Appeals**

In [\*West Virginia CWP Fund v. Mullins\*, Fed. Appx. \\_\\_\\_\\_\\_, 2015 WL \\_\\_\\_\\_\\_ \(4<sup>th</sup> Cir. Sept. 10, 2015\) \(unpub.\)](#), the ALJ, in a decision on remand from the Benefits Review Board, awarded benefits based on a finding that Claimant established total disability due to legal pneumoconiosis.<sup>1</sup> The Board subsequently affirmed the award.<sup>2</sup> On appeal, however, the Fourth Circuit concluded that the ALJ's

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<sup>1</sup> In its Decision and Order remanding the matter to the ALJ, the Board affirmed the ALJ's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). However, because Claimant conceded that he did not work for at least 15 years in qualifying coal mine employment (CME), the 15-year presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4), was inapplicable.

<sup>2</sup> According to the Board:

Dr. Gaziano based his diagnosis of legal pneumoconiosis on claimant's [CME] and smoking histories, a medical history, a physical examination, and the results of a pulmonary function study. Director's Exhibit 12. The [ALJ] found that Gaziano's opinion, that claimant's COPD was due in part to his coal mine dust exposure, was well-reasoned, noting that it was 'supported by the results of his own objective testing, and accounts for [c]laimant's coal dust exposure, without ignoring his significant smoking history.' Decision and Order on Remand at 10. We conclude that substantial evidence in the record supports the [ALJ's] determination that Dr. Gaziano's diagnosis of legal pneumoconiosis was reasoned.

[\*Mullins v. Pen Coal Corp.\*, BRB No. 14-0035 BLA, slip op. at 4-5 \(July 28, 2014\) \(unpub.\)](#). The Board also affirmed the ALJ's decision to accord less weight to the opinions of Employer's physicians, Drs. Repsher and Dahhan, at legal pneumoconiosis. Finally, at disability causation, the Board held:

The [ALJ] rationally discounted the disability causation opinions of Drs. Repsher and Dahhan because the physicians did not diagnose legal pneumoconiosis. [citations omitted]. Moreover, as the [ALJ] rationally relied on the well-reasoned and well-documented opinion of Dr. Gaziano to find that claimant established the existence of legal pneumoconiosis, he permissibly found that Dr. Gaziano's opinion supported a finding that claimant is totally disabled due to legal pneumoconiosis. [citation omitted]. Consequently, we affirm the [ALJ's] finding that the evidence

decision awarding benefits was not supported by substantial evidence. Therefore, the court granted Employer's petition for review and reversed the award.

Specifically, the court concluded "that substantial evidence does not support the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion," which the ALJ relied upon in finding that Claimant had legal pneumoconiosis and was totally disabled due to the disease. In support of its conclusion, the court noted the following:

Dr. Gaziano's diagnosis of legal pneumoconiosis was based entirely on [Claimant's] history of coal dust exposure. Dr. Gaziano offered no objective medical evidence to support the conclusion that [Claimant's] [COPD] arose out of his [CME] or was aggravated by coal dust exposure, and Dr. Gaziano confirmed at deposition that [Claimant's] symptoms were not specific to any respiratory disease. Dr. Gaziano also admitted that it was possible that [Claimant's] COPD could have been caused entirely by cigarette smoking, without any aggravation by coal dust. Thus, Dr. Gaziano essentially presented only the possibility that [Claimant's] COPD was caused by coal dust exposure, which we have deemed insufficient to support an award of benefits.

The court further noted that "Dr. Gaziano's reliance on an overestimate of the length of [Claimant's] coal mining career by five years" was problematic, as (1) the ALJ failed to explain how this discrepancy did not make a difference in this case, and (2) "[t]his discrepancy [did] not bolster the ALJ's decision to accord full probative weight to Dr. Gaziano's opinion, especially when the sole basis for Dr. Gaziano's diagnosis of legal pneumoconiosis was [Claimant's] exposure to coal dust."

The court concluded that Dr. Gaziano's opinion "is simply insufficient to satisfy [Claimant's] burden of demonstrating his entitlement to benefits." Finding no remaining evidence supporting entitlement, the court reversed the award of benefits.

**[Medical reports: Undocumented and unreasoned opinion, little or no probative weight]**

**B. Benefits Review Board**

In [\*Johnson v. MOR Coal Inc., c/o Hughes Group, Inc., BRB No. 15-0014 BLA \(Sept. 16, 2015\) \(unpub.\)\*](#), which involved a survivor's claim arising out of the Sixth Circuit, the ALJ awarded derivative benefits pursuant to amended Section 932(l), 30 U.S.C. §932(l).

Employer appealed the award. Before the Board, Employer argued that (1) it should be dismissed as the responsible operator (RO) because it did not receive proper notice and service of the claim, (2) it is not the RO liable for the payment of benefits, and (3) the ALJ erred in applying Section 932(l) to the present claim. Claimant and the Director responded in support of the award, though the

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established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Slip op. at 6-7.

Director requested that the case be remanded to the ALJ for consideration of Employer's argument that it is not the properly designated RO.

At the outset, the Board addressed Employer's assertion that it should be dismissed as the RO "because it did not receive proper notice and service of this claim . . . ." The crux of Employer's argument was that, because the District Director failed to issue a Notice of Claim, Employer's due process rights were violated and liability should be transferred to the Black Lung Disability Trust Fund. The Board agreed with Employer that the District Director failed to issue a formal Notice of Claim. However, it concluded that, because "the Proposed Decision and Order constituted actual notice of the claim, and afforded employer a fair opportunity to defend against it, employer was not deprived of due process by the district director's declination to issue a formal Notice of Claim."

Employer additionally argued that, even if its due process rights were not violated, the District Director violated 20 C.F.R. §§725.407<sup>3</sup> and 725.418(d)<sup>4</sup> by failing to notify Employer of the claim prior to issuing the Proposed Decision and Order. The Board rejected this argument as well:

The version of the regulation at 20 C.F.R. §725.418 in effect when the district director acted contains an exception that specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order 'at any time during the adjudication' if the district director determined that its issuance would 'expedite the adjudication of the claim.' 20 C.F.R. §725.418(a)(2); see *Sextet Mining Corp. v. Whitfield*, 604 Fed. Appx. 442, (6th Cir. Mar. 12, 2015); Director's Brief at 2 n.2 [footnote omitted]. Moreover, . . . the Department of Labor recently promulgated regulations implementing amended Section 932(l). Those regulations make clear that a district director who determines that the claimant is a survivor entitled to benefits under Section 932(l) may issue a proposed decision and order at any time during adjudication of the claim, and may designate the responsible operator in the proposed decision and order, without first notifying the responsible operator of its potential liability. 20 C.F.R. §725.418(a)(3). Thus, contrary to employer's contention, the district director's issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim, was appropriate and consistent with both the former and current regulations.

However, the Board agreed that the ALJ, "[i]n declining to address employer's arguments regarding its responsible operator status," deprived Employer of the opportunity to challenge its designation as the RO. Therefore, while the Board rejected Employer's argument that it must be

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<sup>3</sup> According to Section 725.407, "upon receipt of the miner's employment history, and the identification of the potentially liable responsible operators, the district director 'shall notify each such operator of the existence of the claim.'" 725.407(a), (b). In addition, "[t]he district director may not notify . . . operators of their potential liability after a case has been referred to the Office of Administrative Law Judges." 20 C.F.R. §725.407(d).

<sup>4</sup> According to the regulation at Section 725.418(d) in effect at the time in question, "[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to [Section] 725.407 . . . ." 20 C.F.R. §725.418(d).

dismissed from the present action, the Board nonetheless concluded that it must “vacate the [ALJ’s] determination that employer is responsible for the payment of survivor’s benefits, and remand this case for further consideration of any arguments, and evidence, employer submits with respect to its [RO] status.”

Finally, the Board rejected Employer’s arguments concerning the ALJ’s application of Section 932(l) to the present claim. Therefore, the Board affirmed the ALJ’s finding that Claimant is automatically entitled to survivor’s benefits pursuant to that provision. However, because it vacated the ALJ’s determination that Employer is liable for the payment of Claimant’s survivor benefits, the Board remanded the matter “for further consideration of employer’s arguments regarding its [RO] status.”

**[Due process rights of the employer violated; Trust Fund held liable for payment of benefits: Delay in notice of claim] [Standards of entitlement: The survivor’s claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and the miner was determined eligible to receive benefits at the time of his or her death]**