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 # 239
December 2011-January 2012

Stephen L. Purcell
Chief Judge

Paul C. Johnson, Jr.
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

NOTICE: On December 30, 2011, the U.S. Department of Labor published in the Federal Register new regulations implementing the amendment to the LHWCA included in the American Recovery and Reinvestment Act of 2009. The 2009 amendment to the LHWCA expanded the group of recreational-vessel repairers, and employees who dismantle those vessels for repair, that are excluded from LHWCA coverage. The DOL regulations implement the amendment by clarifying the definition of "recreational vessel", and specifying when the amendment applies. The effective date of these regulations is January 30, 2012. For more information visit:

http://www.dol.gov/owcp/dlhwc/lsnewregulation.htm

[Topic 1.11.12 "Employee" exclusions -- Recreational vessel construction/repair]

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

***Fisher v. Halliburton, et al.*, __ F.3d __, 2012 WL 90136 (5th Cir. 2012).**

The Fifth Circuit held that the Defense Base Act ("DBA") barred state tort claims, including intentional tort and fraud claims, brought by family members of defendants' employees injured or killed as a result of an attack on fuel convoy by Iraqi insurgents. The court therefore vacated the district court's denial of defendants' motion for summary decision on this issue.

The court stated that the DBA, like the LHWCA, includes a provision making an employer's liability exclusive for injuries covered under the DBA. 42 U.S.C. § 1651(c); 33 U.S.C.A. § 905(a). Here, the court initially determined that plaintiffs' injuries fell within the scope of the DBA as they were "caused by the willful act of a third person directed against [plaintiffs] because of their employment." 33 U.S.C. § 902(2). In order to satisfy the "because of" requirement of § 2(2), there must be a credible causal nexus between the employment and the third party's act. Here, the only plausible inference is that plaintiffs were attacked because of their employment; indeed, this is "the quintessential case of a compensable injury arising from a third party's assault." *Id.* at *8. The court rejected a test that would require evaluation of the attackers' subjective motivation (e.g., whether plaintiffs were attacked not because they drove fuel trucks for employer, but because they were Americans or were mistaken for military personnel). Rather, in assault cases, the clearest ground of compensability is a showing that the probability of assault was augmented because of the character of claimant's job or the work environment. The court rejected plaintiffs' assertion that the injuries were not "caused by" the insurgent attacks for purposes of § 2(2), but were caused by employer's failure to halt convoy operations once it was aware of attacks on other convoys. The court reasoned that even if KBR's actions or inactions were a cause of the injuries, the insurgents' actions constituted a direct cause. The court further concluded that the DBA also bars intentional tort claims premised on employer being "substantially certain" that the employee would be assaulted because of his employment. The court relied on the statutory language and noted that such a probabilistic standard would entail uncertainty. The facts of this case did not require the court to determine whether the DBA extends to injuries caused by an employer's intentional assault with a specific desire to injure an employee. Finally, the court concluded that plaintiffs' fraud claims were also precluded by the DBA. The court observed that "[i]t is a

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

generally accepted proposition of workers' compensation law that an employer's deceit that precedes and helps produce an otherwise compensable injury merges into that injury for purposes of compensation coverage. There may be an exception to this rule when an employer deceives his employees with the specific intent and desire to cause the injury for which the employee seeks to recover, but … this case does not present those facts." *Id.* at *13 (citations omitted).

[Topic 60.2 Defense Base Act (Exclusivity of remedy); Topic 5.1.1 EXCLUSIVITY OF REMEDY - Exclusive Remedy; Topic 2.2.10 Employee's Intentional Conduct / Willful Act of 3rd Person]

B. U.S. District Courts

***L-3 Communications v. Dir., OWCP, et al.*, 2011 WL 6046440 (E.D.Va. 2011).[2]**

The court affirmed in part and vacated in part the BRB decision affirming an ALJ's decision awarding benefits to claimant. The Board initially concluded that the ALJ acted within his discretion in including claimant's post-injury wages with employer in Iraq into his average weekly wage ("AWW") calculation under § 10(c). The ALJ relied on claimant's earnings over a period of 15 weeks that he was paid by employer. The court rejected employer's assertion that the AWW should have been determined based on claimant's earnings during the 16 days that he worked for employer in Iraq prior to his injury. The court distinguished the cases relied upon by employer on the ground that they involved employees that applied for disability years after a workplace accident.[3] In order for the AWW determination to reflect claimant's WEC at the time of the injury under § 10(c), AWW calculation under § 10(c) may require consideration of post-injury earnings. Slip op. at *8-9 (citing decisions by 4th and 7th Circuits). The court agreed with the 7th Circuit's conclusion that where an employee's earnings in the year preceding the injury are not a fair and reasonable approximation of claimant's earning capacity because such employees' annual earnings would have substantially increased but for the disabling injury, it is appropriate to look at post-injury earnings. In this case,

> "the [claimant] was employed to work overseas in what was essentially a war zone. He was paid substantially higher wages than he had earned stateside, and he was employed under a one

[2] Only the Westlaw citation is currently available.

[3] The court also noted that these cases involved interpretation of § 10(i).

> year contract reflecting this arrangement. [Claimant] was injured after being in Iraq for only a few weeks. Despite his injury, the [claimant] continued to be sent out on missions and utilized for several months before he was finally sent back to the United States for medical treatment. But for his injury, the evidence suggests that he would have fulfilled his one year contract and continued to work as he had up to the time of his return to the United States. Solely relying on [claimant]'s pre-injury wages fails to realistically reflect his annual earning capacity. Under these circumstances, consideration of all of [claimant]'s earnings in Iraq, both pre-injury and post-injury, is consistent with the language of § 10(c) and its purposes, and most accurately reflects his annual earning capacity at the time of injury."

Slip op. at *9. Thus, "the ALJ acted within his discretion when he considered the exceptional circumstances involving [claimant]'s one-year employment contract and the dangerous environment in which he worked, and factored in [claimant]'s higher than stateside post-injury wages in the [AWW] calculation." *Id.* (citing BRB decisions).

The court further affirmed the ALJ's disqualification of interpreter positions as SAE, as supported by substantial evidence. The BRB, however, vacated the ALJ's calculation of claimant's post-injury WEC. While the ALJ identified cashier and photographer positions as SAE, the ALJ did not include the higher-paying photographer position in the WEC calculation, without an explanation. Unless an explanation is provided for relying on the lower-paying position, the best way to determine the WEC is to average the salaries.

[Topic 10.4.5 DETERMINATION OF PAY - SECTION 10 (C) - Calculation of Average Weekly Wage Under Section 10(c); Topic 8.9.1 WAGE-EARNING CAPACITY – Generally]

***Tarver v. Serv. Employees Int'l*, 2011 WL 6957591 (S.D.Tex. 2011).**[4]

The court upheld the BRB's decision affirming denial of benefits under the DBA as claimant failed to establish that his knee injury, hypertension, hepatitis C, and depression and stress were attributable to his employment with employer in Kuwait and Iraq. As to the alleged knee injury, the ALJ properly discredited claimant's testimony that he repeatedly injured his knee while working for employer, where claimant did not mention the injuries at several doctor's appointments and did not report them to employer until

[4] Only the Westlaw citation is currently available.

after his employment ended. The ALJ also properly found that claimant failed to make out a prima facie case of causation with respect to his claim that he contracted hepatitis C through a cut on his skin when he allegedly came in contact with human blood during his employment. The ALJ properly found that there was no competent evidence of work-relatedness; this finding was supported by a physician's testimony (rejecting claimant's theories of transmission and pointing to claimant's past intravenous drug use as the most likely cause), as well as by the ALJ's finding that claimant's testimony lacked credibility. Nor did the ALJ err in rejecting claimant's assertion that his depression and stress arose from discovering blood in his bed during his employment. The ALJ's found that claimant did not have any mental disorder related to his employment, but rather that his stress or mental issues were attributable to his diagnosis of and treatment for hepatitis C, and this conclusion was supported by a physician's testimony. Finally, claimant failed to show work-relatedness of his hypertension, where medical records showed elevated blood pressure prior to claimant's deployment.

[Topic 20.2.1 Presumptions -- 20(a) Claim Comes Within Provisions of the LHWCA – "Prima Facie Case;" Topic 2.2.18 Representative Injuries/Diseases (hepatitis C)]

[***Ed. Note*:** The following two decisions are included for informational purposes only]

***Guidry v. Chevron USA, Inc.*, 2011 WL 6815626 (W.D.La. 2011).**

Branden Guidry sustained a back injury while employed by KCS during his assignment to a Chevron structure located on the Outer Continental Shelf, and underwent a back surgery as a result. Mr. Guidry and his wife, individually and on behalf of their minor children, filed suit for damages. The claims against Chevron and Danos & Curole Marine Contractors, LLC were settled, with the defendants agreeing to pay the plaintiffs $975,000. Claimant also brought a claim under the LHWCA, and a settlement of the claim was approved under 8(i), with Liberty Mutual agreeing to pay Mr. Guidry $50,000 and to waive its intervention and any lien it might have had. Part of the consideration for all of the settlements was that the plaintiffs would be responsible for protecting Medicare's interests under the Medicare Secondary Payer Statute ("MSP"). A Medicare set-aside ("MSA") was prepared by an MSA vendor in the amount of $77,204.16, including the cost of future psychological treatment. Citing the delay and uncertainty associated with obtaining approval from Centers for Medicare and Medicaid Services ("CMS"), the parties sought a declaratory judgment in the district court, seeking (1) approval of the settlement, (2) a declaration that the

interests of Medicare are adequately protected by setting aside a sum of money determined by the court to fund Mr. Guidry's future medical expenses, and (3) an order setting that amount aside. The court conducted an evidentiary hearing, affording CMS an opportunity to participate. CMS, however, declined to be involved in the parties' determination of whether a set aside is needed, and further noted that the current case did not meet the criteria for the limited cases for which CMS would review the MSA. The court concluded that the proposed MSA amount reasonably and fairly takes Medicare's interests into account in that the figures are based on reasonably foreseeable medical needs. Further, since CMS provides no other procedure by which to determine the adequacy of protecting Medicare's interests in conjunction with the settlement of third-party claims, and since there is a strong public interest in resolving lawsuits through settlement, the court found that Medicare's interests had been adequately protected within the meaning of the MSP. The court noted the absence of evidence that conditional payments had been made to Mr. Guidry by Medicare and stated that Mr. Guidry would be obligated to reimburse Medicare for any such payments made prior to the settlement and for any medical expenses submitted to Medicare prior to the date of this order.

[Topic 8.10.5 SECTION 8(i) SETTLEMENTS – Approval (Medicare Set-Aside)]

***Solis v. The Home Insur. Co., et al.*, 2012 WL 254234 (D.N.H. 2012)(unpub.)**

The Home Insurance Company ("Home") was declared insolvent in 2003 by the New Hampshire Superior court, which ordered its liquidation and appointed the New Hampshire Commissioner of Insurance as liquidator. During the subsequent insolvency proceeding, the U.S. Department of Labor ("DOL") filed a proof of claim seeking over $2.6 million in assessments allegedly owed by Home to the Special Fund, established under Section 44 of the LHWCA and administered by the DOL. Applying state law—which establishes the priority in which payments from the assets of liquidated insurers are to be made—the Liquidator assigned DOL's claim to priority Class III. Home's assets, however, were thought to be insufficient to cover Class III claims. The DOL brought this suit against Home and the liquidator, seeking a declaration that the LHWCA preempts the state's priority-setting statute. The court rejected this argument, stating that the DOL has not shown a clear and manifest Congressional intent to preempt the state priority law in either § 44 of the LHWCA, or in the Assessment Provision of sub-section 44(c)(2).

C. Benefits Review Board

***Gelinas v. Electric Boat Corp.*, __ BRBS __ (2011).**

The Board vacated the ALJ's "summary conclusion" that claimant, a security guard at employer's submarine production facility, did not meet the status requirement for coverage under the Act, on the ground that the ALJ's decision did not fully address the evidence in light of the relevant case precedent and thus did not satisfy the requirements of the Administrative Procedure Act ("APA").

Claimant is primarily assigned to the entry gates and he also performs security rounds of the facility. He is also required to respond to medical incidents at the facility and has obtained the required emergency medical technician ("EMT") certificate. Claimant sought benefits for work-related hearing loss. The parties agreed to try separately the issue of coverage. After the issue was briefed, the ALJ held a teleconference with the parties, informing them that he intended to deny the claim based on his determination that claimant's duties as a security guard/EMT are not integral to the shipbuilding process and did not subject him to traditional maritime hazards. The ALJ then issued a decision and order, incorporating by reference the transcript of the teleconference, and stating his conclusion on the coverage issue. On appeal, claimant challenged the ALJ's conclusion that his duties are not covered under the Act.

The Board first affirmed the ALJ's determination, not challenged on appeal, that claimant is not excluded under § 2(3)(A), as he has EMT duties and thus is not exclusively a security guard; the BRB noted that this conclusion is also supported by the fact that claimant is not confined to an office. However, the Board stated that it could not affirm the ALJ's "summary conclusion that claimant was not engaged in 'maritime employment,'" as the ALJ "did not fully address the evidence of record nor apply that evidence to the case precedent addressing the issue before him." Slip op. at 3. The Board elaborated that

> "[w]e cannot affirm the [ALJ's] decision since it does not satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §554, and is thus unreviewable. Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of 'findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record.' 5 U.S.C. §557(c)(3)(A).

> An [ALJ] thus must adequately detail the rationale behind his decision and specify the evidence upon which he relied."

Id. at 3 (citations omitted).

Specifically, the Board observed that the ALJ did not cite case precedent relevant to security guards in his decision and did not discuss the evidence concerning claimant's job duties. The BRB summarized the relevant precedent, including decisions by the 2nd and 5th Circuits as well as the BRB. The Board observed that, in summarily determining that claimant's duties did not expose him to traditional maritime hazards, the ALJ seemingly relied on the discredited "support services" rationale, previously applied by the Board, to find that claimant's work was not integral to shipbuilding. The BRB noted that, during the teleconference, the ALJ distinguished a more recent BRB decision on that ground that claimant in that case worked as a security guard and watchman on submarines; the BRB rejected this analysis, as the ALJ "did not discuss evidence that claimant worked throughout employer's submarine-building facility, and there is no requirement that an employee work on a vessel in order to be covered by the Act." *Id.* at 5, n.6. The Board instructed the ALJ to determine on remand "if claimant's work is integral to the shipbuilding process;" the ALJ "should discuss the evidence relevant to the status issue, make appropriate findings based on the relevant law and evidence, and give a written explanation of the reasons and basis for his findings of fact and conclusions of law." *Id.* at 4.

[Topic 19.4 FORMAL HEARINGS COMPLY WITH APA; Topic 19.3.5 ALJ Must Detail the Rationale Behind His Decision and Specify Evidence Relied Upon; Topic 1.11.7 "Employee" exclusions -- Clerical/secretarial/security/data processing employees; Topic 1.7.1 STATUS -- "Maritime Worker" ("Maritime Employment")]

***Lamon v. A-Z Corp.*, __ BRBS __ (2011).**

The Board affirmed the ALJ's award of temporary total disability ("TTD") benefits to claimant based on medical opinions that claimant's work as a welder aggravated the symptoms of his non-work-related chronic obstructive pulmonary disease ("COPD") and that claimant should not return to his usual work as exposure to welding fumes would increase the risk of aggravating his COPD symptoms.

Claimant asserted that his disabling COPD was caused or aggravated by his occupational exposure to irritants such as welding fumes and smoke. The Board initially affirmed the ALJ's finding that claimant's COPD is related to his work for employer. The Board stated that under the aggravation rule,

where an employment-related injury aggravates, accelerates or combines with an underlying condition, employer is liable for the entire resultant disability. It also is well established that a claimant is entitled to benefits where his work-related condition subsides when he is removed from work, but would recur if he were to return to work. As it was undisputed that claimant has a disabling COPD due to his cigarette smoking and not caused by his employment, "[t]he question of invocation of the [§] 20(a) presumption, therefore, turns on whether claimant's disabling COPD or its symptoms could have been aggravated by his working conditions with employer." Slip op. at 3. The ALJ properly found that claimant's testimony regarding his work environment, in conjunction with Dr. Tudor's opinion that claimant's exposures could temporarily exacerbate his COPD, entitled claimant to the § 20(a) presumption. Further, the ALJ properly found that the opinions of Drs. Tudor and Gerardi, *i.e.*, that claimant's COPD was caused by his cigarette smoking and that his occupational exposures did not permanently worsen his COPD, were insufficient to rebut the § 20(a) presumption. The courts have held that a disabling work-related aggravation of a pre-existing condition is compensable regardless of whether the employment exposure actually altered the underlying disease process or whether it merely induced the manifestation of symptoms. Here, neither physician opined that claimant's working conditions did not aggravate his COPD symptoms, and, in fact, stated that it did.

Next, the Board affirmed the ALJ's determination that claimant was totally disabled due to the work-related aggravation of his symptoms. Employer asserted that any temporary work-related exacerbations did not cause claimant's current total disability, and that claimant did not establish that his totally disabling COPD was the natural and unavoidable progression of those exacerbations. The BRB stated that in order to establish a *prima facie* case of total disability, claimant must prove that he is unable to perform his usual work due to the injury. The fact that a claimant's symptoms may be alleviated by a departure from the workplace does not support a finding that the work-related aspect of the condition has resolved (the BRB's contrary holding in a prior case was reversed by the DC Circuit). Further, the ALJ correctly recognized that "the severity of claimant's underlying disease and the likelihood that it would have disabled claimant by itself are not determinative of whether claimant is disabled by his work exposures." Slip op. 5 (citing 9th Cir. decision). "Medical opinions that a claimant's return to work is contraindicated due to the likely exacerbation of an underlying condition will support a *prima facie* case of total disability, even if the underlying disease is not permanently worsened by the exposures." *Id.* (citations omitted). The ALJ properly found that claimant's inability to return to his usual work was due to his work injury based on medical opinions that claimant should not return to his job as exposure to

welding fumes would increase the risk of aggravating his symptoms. Thus, substantial evidence established that claimant's workplace exposures were "a cause" of his present inability to work. Slip op. at 5 (citing 5th Cir. decision). As employer did not present any evidence of suitable alternate employment, the ALJ's award of TTD compensation was affirmed.

[Topic 20.2.1 Presumptions -- 20(a) Claim Comes Within Provisions of the LHWCA – "Prima Facie Case;" Topic 20.2.4 ALJ's Proper Invocation of Section 20(a); Topic 20.3.1 EMPLOYER HAS BURDEN OF REBUTTAL WITH SUBSTANTIAL EVIDENCE -- Failure to Rebut; Topic 8.2.3 TOTAL DISABILITY Defined; Employee's *Prima Facie* Case]

***Collins v. Electric Boat Corp.*, __ BRBS __ (2011).**

The Board affirmed the ALJ's award of PTD benefits due to work-related bilateral knee injury, rejecting employer's challenges to two separate evidentiary rulings by the ALJ.

First, employer challenged the ALJ's decision to exclude from the record a letter from Dr. Garrahan on the basis that employer's attempt to admit this exhibit into evidence was not in compliance with the ALJ's prehearing order that discovery be completed 15 days prior to the hearing date; and also noting that claimant's attorney was not provided with the proposed exhibit until just eight days before the hearing. The Board stated that an ALJ has the discretion to exclude even relevant and material evidence for failure to comply with the terms of her pre-hearing order. Moreover, a party seeking to admit evidence must exercise due diligence in developing its claim prior to the hearing. Here, "[t]he [ALJ] excluded evidence obtained by employer on an *ex parte* basis and thereafter provided to claimant's counsel after the deadline for conducting discovery had passed. Employer has not demonstrated that it exercised due diligence in developing its evidence, or that the [ALJ]'s decision to exclude Dr. Garrahan's report is arbitrary, capricious or an abuse of discretion." Slip op. at 5 (footnote omitted).

The Board further rejected employer's assertion that the ALJ erred in allowing claimant to testify, over employer's objection, regarding his hearing loss in order to defeat employer's attempt to establish the availability of suitable alternate employment ("SAE"). Claimant's hearing loss is a pre-existing physical impairment that may be considered in addressing availability of SAE. Claimant's testimony therefore constituted relevant and material testimony that should be received into evidence. *See* 20 C.F.R. §702.338. Employer had actual or constructive notice of claimant's hearing

impairment, based on his prior successful hearing loss claim. Moreover, employer had the opportunity during discovery to inquire about the existence of any medical conditions that might affect claimant's ability to work. Contrary to employer's assertion, claimant's attorney was not raising a new issue, but merely presenting testimony relevant to a disputed issue of SAE. The Board also rejected employer's assertion that, since claimant previously received compensation from employer for his hearing loss, the ALJ's consideration of his hearing loss in addressing SAE represented a double recovery for the hearing loss.

[Topic 27.1 POWERS OF ADMINISTRATIVE LAW JUDGES -- PROCEDURAL POWERS GENERALLY; Topic 27.1.1 POWERS OF ADMINISTRATIVE LAW JUDGES -- ALJ Can Exclude Evidence Offered in Violation of Order; Topic 8.2.4 Partial Disability/Suitable Alternate Employment; Topic 19.3.6.1 Issues at hearing]

II. Black Lung Benefits Act

Benefits Review Board

In *Duke v. Cowin & Co.,* ___ B.L.R. ___, BRB No. 10-0679 BLA (Jan. 27, 2012) (pub.), Employer argued that Claimant's counsel was not entitled to an award of attorney's fees since Claimant was granted benefits under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Under the facts of the case, Employer petitioned for modification of the award of benefits in the miner's claim and opposed entitlement in the survivor's claim. Both claims were forwarded to the Administrative Law Judge for adjudication. The judge determined that reopening the miner's claim based on Employer's modification petition would not render justice under the Act and, as a result, Claimant was awarded survivor's benefits based on the existing award of benefits in the miner's lifetime claim. Employer asserted that Claimant's award stemmed from a "fortuitous legislative event" and no fees should be payable to her counsel. The Board disagreed:

> Claimant's counsel is entitled to attorney fees payable by employer for the successful prosecution of a claim. (citations omitted). 'Successful prosecution' of a claim requires success in establishing, or preserving, claimant's entitlement to benefits. (citations omitted).
>
> . . .
>
> Contrary to employer's contention, the administrative law judge properly concluded that the work performed by claimant's counsel in defending the modification request was reasonable and necessary to uphold the award of benefits in the miner's claim, and that fact that 'a fortuitous legislative event' later changed claimant's burden of proof in the survivor's claim has no bearing on whether services were necessary at the time they were rendered.

Slip op. at 3-4. As a result, the Board affirmed the Administrative Law Judge's award of attorney's fees and costs.

[**representative's fees and costs**]

In *Mullins v. ANR Coal Co.*, ___ B.L.R. 1-___, BRB No. 11-0251 BLA (Jan. 11, 2012)(pub.), the Board affirmed the Administrative Law Judge's determination that Claimant was automatically entitled to benefits under Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Under the facts of the claim, the District Director denied benefits for failure to demonstrate death causation prior to enactment of the PPACA. Then, after enactment of the PPACA, the widow filed a petition for modification and her claim was awarded in accordance with the PPACA. On appeal, the Board rejected Employer's argument "that the operative date of filing (for purposes of the PPACA) is that of the miner's claim, rather than that of the survivor's claim." Employer also argued that, since the widow's claim was originally denied prior to passage of the PPACA, it was improper to award benefits to her in the wake of the PPACA. The Board dismissed this argument stating:

> Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922 as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a), permits the reopening and readjudication of a denied survivor's claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. (citations omitted). The language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was receiving benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. (citations omitted). Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

Slip op. at 4.

[**automatic entitlement under PPACA in a survivor's claim on modification**]

In *Richards v. Union Carbide Corp.*, ___ B.L.R. 1-___, BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012)(en banc)(pub.)(J. McGranery, concurring and dissenting, and J. Boggs, dissenting), after hearing oral argument from the parties, the Board affirmed the Administrative Law Judge's application of the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010) to a subsequent survivor's claim. Here, the widow's first claim for survivor's benefits was denied by an Administrative Law Judge in 2006. Subsequently, the widow filed a second claim in 2009, which remained pending after passage of the PPACA on March 23, 2010. Employer argued:

> . . . that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(l) renders meaningless the time limitations set by Congress in Section 1556 of the PPACA; nullifies the prior final decision denying entitlement; and ignores the governing language of 20 C.F.R. § 725.2 and the applicable provisions at Section 725.309(d)(3).

Slip op. at 5.

The Board disagreed and adopted the positions of the Director, OWCP and Claimant; *to wit*:

> By restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a 'change,' establishing a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. Thus, as correctly noted by the Director, the principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death is not due to pneumoconiosis. (citation omitted). Accordingly, we hold that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA.

Slip op. at 6. With regard to the onset date for commencement of benefits in a subsequent survivor's claim awarded under the PPACA, the Board again adopted the position of the Director, OWCP:

> . . . derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final.

Slip op. at 7. In this regard, the Board noted that the survivor's prior claim was denied by the Administrative Law Judge in May 2006. Pursuant to 20 C.F.R. § 725.479(a), this denial became final "at the expiration of the thirtieth day after it was filed in the office of the district director", which was June 2006. Thus, the onset date for the payment of benefits was July 2006.

[**automatic entitlement under PPACA in a subsequent survivor's claim and onset date for commencement of benefits**]

In *Dotson v. McCoy Elkhorn Coal Corp.*, ___ B.L.R. 1-__, BRB No. 10-0706 BLA (Nov. 16, 2011)(en banc)(pub.), the Board affirmed the Administrative Law Judge's determination that the onset date for the payment of benefits in an originally filed survivor's claim under the automatic entitlement provisions of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010) is the month of the miner's death. The Board adopted the position of the Director, OWCP and Claimant to reject Employer's argument that "benefits should be payable from the date of filing of claimant's survivor's claim, but in no event prior to January 1, 2005, the operative filing date for claims under the Section 1556 amendments." The Board stated:

> Notably, Section 1556, which reinstates derivative payment of survivor's benefits pursuant to Section 932(l), for claims filed after January 1, 2005 and pending on or after enactment, is silent as to the commencement date for the payment of those benefits. Pub. L. No. 111-148, § 1556 (2010). Congress is presumed to know the law when it passes legislation and it gave no indication from the language of Section 1556 that it intended to change the established rule entitling survivors to receive benefits from the date of the miner's death. (citation omitted). Such an interpretation is consistent with, and supported by, the decision to choose 'Continuation of Benefits' as the heading for Section 1556(b), suggesting an intent by Congress to provide benefits continuously to eligible miner's families after the miner, who had been receiving benefits, dies. (citation omitted). We are not persuaded by employer's argument that such an interpretation provides a 'windfall' to claimant, as the Act

> contains no time limit for the filing of a claim by a survivor of a miner.

Slip op. at 6.

[**originally filed survivor's claim, onset date for automatic entitlement under the PPACA**]

In *Muncy v. Elkay Mining Co.*, ___ B.L.R. 1-___, BRB No. 11-0187 BLA (Nov. 30, 2011)(pub.), the Board addressed analysis of a miner's claim under the 15 year presumption of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). Initially, the Board addressed applicability of the rebuttal provisions to Employer and noted:

> Employer contends that, because amended Section 411(c)(4) provides 'the Secretary' can rebut the presumption by making certain showings, but does not refer to coal mine operators, the rebuttable presumption of Section 411(c)(4) does not apply to responsible operators. (citation omitted). The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, ___ B.L.R. 1-__, BRB No. 11-0154 BLA (Oct. 28, 2011). We, therefore, reject it here for the same reasons set forth in *Owens*.

Slip op. at 4.

The Board then addressed the Administrative Law Judge's calculation of the length of Claimant's coal mine employment. Here, the Board noted that employment was calculated based on "an employment history form, employment records from claimant's former employers, and Social Security Administration (SSA) earnings records." Claimant maintained that the Administrative Law Judge erred because he "should have applied a formula set forth at 20 C.F.R. § 725.101(a)(32)(iii)" to calculate the length of the miner's employment, which would have produced a greater length of employment. The Board rejected Claimant's argument and stated:

> In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. (citation omitted). Contrary to claimant's contention, the administrative law judge was not required to use the calculation method set forth in Section 725.101(a)(32)(iii). The regulation provides only that an administrative law judge 'may' use such method.

Slip op. at 6.

Next, the Board addressed the Administrative Law Judge's determination regarding whether the miner's aboveground coal mine employment was "qualifying" for purposes of invoking the 15 year presumption. Citing to *Alexander v. Freeman United Coal Mining Co.*, 2 B.L.R. 1-497 (1979)(Smith, Chairman, dissenting), the Board held that, if aboveground employment occurs at an underground mine, then the miner is "not required to show comparability of environmental conditions in order to take advantage of [the Section 411(c)(4)] presumption." Such employment would be "qualifying" for purposes of invocation of the presumption. As a result, the Board remanded the claim and directed that the Administrative Law Judge determine whether Claimant's aboveground employment occurred at an underground mine.

[**the 15 year presumption; rebuttal applicable to responsible operators; methods of calculating length of coal mine employment; aboveground employment at an underground mine constitutes "qualifying" employment**]