U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 23-0280 BLA

LARRY E. STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MISTY BEC COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 08/22/2024
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Michael A. Pusateri (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2021-BLA-05703) rendered on a subsequent claim filed on August 27, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901–944 (2018) (Act).[1]

The ALJ found Claimant established 15.02 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant established a change in an applicable condition of entitlement and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[2] The ALJ further found Employer failed to rebut the presumption and thus awarded benefits.

On appeal, Employer challenges the ALJ's determination that Claimant had more than fifteen years of coal mine employment and thus invoked the Section 411(c)(4) presumption. It also contends the ALJ erred in weighing the evidence regarding legal

[1] Claimant filed a prior claim on May 30, 2014, which the district director denied on November 22, 2016, as Claimant failed to establish total disability. Director's Exhibit 1. When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless she finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). As Claimant's prior claim was denied for a failure to establish total disability, Claimant was required to submit new evidence establishing a totally disabling respiratory or pulmonary impairment for review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305.

pneumoconiosis.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). Claimant bears the burden to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's employment history and description of coal mine work in his application for benefits, Social Security Earnings Statement (SSES), hearing testimony, interrogatory responses from a prior claim, and an e-mail exchange between the carrier and the claims examiner. Decision and Order at 5-9; Director's Exhibits 3-5, 7-9; Hearing Transcript at 19-24.

The ALJ found the SSES reflects Claimant had earnings from coal mine operators every calendar year between 1973 and 1990, except 1983. Decision and Order at 6-8; Director's Exhibits 8, 9. Claimant claimed sixteen years of coal mine employment on his application but acknowledged at the hearing that he could not remember the exact length. Decision and Order at 6; Hearing Transcript at 19. Further, Claimant testified some coal

[3] Employer does not challenge the ALJ's finding that Claimant established total disability; we therefore affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 11-16.

[4] We will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 35.

companies paid him in cash or "under the table" for two or three years; thus, his SSES did not reflect some of his employment. Decision and Order at 6; Hearing Transcript at 19-20.

The ALJ used multiple methods in determining the length of Claimant's coal mine employment. First, she noted Claimant testified his coal mine employment ended in 1990 when working for Employer, which was consistent with the email exchange between the carrier's representative and the claims examiner indicating Claimant's last date of exposure was July 17, 1990. Decision and Order at 6; Director's Exhibit 7. Based on this exchange, the ALJ credited Claimant with 0.58 years (seven months) for the year 1990. *Id.*

The ALJ found the record insufficient to identify the specific beginning and ending dates of Claimant's remaining periods of coal mine employment, and thus attempted to calculate the length of coal mine employment using the formula at 20 C.F.R. §725.101(a)(32)(iii).[5] Decision and Order at 6-8. For each year in which Claimant's earnings met or exceeded the yearly earnings for 125 days of employment in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*, the ALJ credited him with a full year of employment.[6] Decision and Order at 7-8. For those years in which Claimant's earnings fell short – 1973, 1977, 1978, 1982, 1985 to 1987 – she credited him with a fractional year of employment, using 125 days as the divisor. *Id.* Based on this calculation, she concluded Claimant established 12.44 years of coal mine employment for 1973 through 1989. Decision and Order at 8.

Finally, the ALJ credited Claimant with two years of coal mine employment for the time Claimant was paid "under the table," based on his uncontradicted hearing testimony and supported by the limited earnings in certain years on his SSES. Decision and Order at

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[5] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.*

[6] Exhibit 610, entitled "Average Wage Base," contains the average daily earnings of employees in coal mining and the earnings for those who worked 125 days during a year.

6, 8; Director's Exhibit 7; Hearing Transcript at 20. In total, the ALJ found Claimant established 15.02 years of coal mine employment, which she determined was all qualifying.[7] Decision and Order at 8-9.

Employer alleges the ALJ erred in her calculation of Claimant's length of coal mine employment. Employer's Brief at 9-16 (unpaginated). Specifically, Employer contends the ALJ did not explain why she credited Claimant with an entire seven months of coal mine employment in 1990 when she credited evidence that stated Claimant worked only through July 17, 1990. *Id.* at 9-10. It further challenges the ALJ's calculation of a year based on 125 workdays and notes a mathematical error in using this calculation for the year 1985. *Id.* at 9, 14-16. Finally, it contends the ALJ failed to explain her crediting of Claimant's testimony regarding "under the table" employment when such findings are contradicted by other evidence. *Id.* at 10-14. Employer's contentions have merit.

To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell,* 479 F.3d 321, 334-36 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, then the ALJ must determine whether the miner worked for at least 125 working days within that one-year period.[8] 20 C.F.R. §725.101(a)(32); *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine

[7] While Employer generally contends Claimant did not indicate whether his "under the table" employment was qualifying, as the ALJ found it was, Claimant testified that all his coal mine employment was underground. Employer's Brief at 12-13 (unpaginated); Decision and Order at 8-9; Hearing Transcript at 20. Thus, we affirm the ALJ's finding that all of Claimant's coal mine employment is qualifying as supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 8-9.

[8] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

employment as defined in the regulations.[9] *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281.

The ALJ failed to address the threshold inquiry as to whether Claimant was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(ii)-(iii). Rather than making the required two-step finding, the ALJ erroneously relied solely on a finding of 125 days of employment to credit one year of employment. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281; Decision and Order at 6-8. We therefore vacate the ALJ's finding that Claimant established 12.44 years of coal mine employment for the years 1973 through 1989 based on the earnings provided in Claimant's SSES.[10] Decision and Order at 6-8.

Next, we agree with Employer's argument that it is unclear why, given the ALJ's specific finding that Claimant's last day of coal mine employment was July 17, 1990, she afforded him a full seven months of work in 1990. Employer's Brief at 9-10 (unpaginated); Decision and Order at 6, 8. Because the ALJ failed to explain her finding that Claimant established 0.58 years of coal mine employment in the year 1990, we must vacate it. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Finally, Employer alleges the ALJ erred in crediting Claimant's testimony that he was paid in cash for some coal mine employment and thus in awarding him two "extra" years of coal mine employment beyond those reflected on his SSES. Employer's Brief at 10 (unpaginated); Decision and Order at 8. It contends the ALJ failed to explain why Claimant's testimony regarding his undocumented work was "credible" given other evidence in the record contradicted it and did not explain how she calculated the length of this work. Employer's Brief at 10-13 (unpaginated).

It is the role of the ALJ, as the trier-of-fact, to determine both the credibility of the evidence and the inferences to be drawn from it. *Westmoreland Coal Co. v. Stallard*, 876

[9] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of days that a miner worked in a given year, but it does not establish such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii).

[10] Employer also correctly notes that the ALJ committed a mathematical error when she awarded Claimant 0.65 years of coal mine employment in 1985. Employer's Brief at 4 (unpaginated); Decision and Order at 8. Dividing Claimant's $9,263.25 in earnings in 1985 with the yearly average she relied upon from Exhibit 610 ($15,250.00) results in 0.61 years.

F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history despite alleged inconsistencies that the employer identified); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

In support of her findings, the ALJ noted limited earnings in the years 1973 and 1982 through 1985 although Claimant testified the longest period he was off work was in 1980 for approximately five or six weeks due to an injury. Decision and Order at 8; Hearing Transcript at 43. She further noted he listed, in an interrogatory response in his prior claim, employment with Burnt Poplar in 1974 which was not reflected on his SSES. Decision and Order at 8; Director's Exhibit 1. Based on the foregoing, the ALJ concluded the SSES underestimates Claimant's coal mine employment and thus credited Claimant's testimony that he was paid in cash for "two or three years," concluding this work consisted of two years in 1973 and between 1982 and 1985. Decision and Order at 8.

While a miner's uncorroborated testimony may be used to establish the length of his employment if found credible, the ALJ must address any contradictory evidence. *See Tackett*, 12 BLR at 1-14 (1988); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-45 (1984) (ALJ may rely on lay testimony regarding a miner's coal mine employment where it is uncontradicted and credible); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984). The ALJ must also determine if the evidence submitted is reliable, probative, and substantial so that she may conclude the facts are more probable than non-existent. *See U.S. Steel Mining, Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 389 (4th Cir. 1999).

The ALJ notes Claimant's interrogatory response that he worked for Burnt Poplar in 1974, which is not reflected on his SSES, yet she credited Claimant with a year of coal mine employment in 1974 based on his earnings on his SSES in 1974 with J&M Coal Company. Decision and Order at 7-8; Director's Exhibits 1, 9. It therefore is unclear what the ALJ found regarding Claimant's employment in 1974 in determining there were two years of coal mine employment not reflected on his SSES.[11] As there are conflicts in the evidence which the ALJ has not resolved as the Administrative Procedure Act (APA)

[11] However, contrary to Employer's argument, Claimant did not concede to thirteen years of coal mine employment. Employer's Brief at 13 (unpaginated). As the ALJ noted, while Claimant testified he was relying on the district director's calculation, he explained he was doing so because he had no employment documentation of his own, but believed he worked longer than fifteen years. Decision and Order at 6; Hearing Transcript at 9, 19-20; Claimant's Response at 4-5.

requires,[12] we also vacate her finding that Claimant established two years of coal mine employment which are not reflected on his SSES. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-40 (4th Cir. 1997) (ALJ must consider and address evidence which detracts from or supports the credibility of evidence).

Thus, we vacate the ALJ's finding that Claimant established 15.02 years of coal mine employment. Decision and Order at 8. Consequently, we also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits.[13] 30 U.S.C. §921(c)(4); Decision and Order at 16.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment taking into consideration the relevant evidence and using any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. In doing so, she must determine whether the record contains sufficient evidence to establish the beginning and ending dates of Claimant's coal mine employment. If she is unable to make such a determination from the evidence, the ALJ may, in her discretion, apply the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine calendar years of coal mine employment. If the threshold finding of a calendar year is established, then she is to consider whether Claimant worked for 125 days during each one-year period.

As we have affirmed the ALJ's findings that all of Claimant's coal mine employment was underground and that Claimant has established total disability, if the ALJ again finds fifteen or more years of coal mine employment established, Claimant will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. The burden would then shift to Employer to rebut the Section 411(c)(4) presumption by establishing Claimant has neither clinical or legal pneumoconiosis, or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ would have to consider whether Employer disproved the

[12] The Administrative Procedure Act provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[13] We decline to address, as premature, Employer's arguments regarding the ALJ's weighing of the evidence regarding legal pneumoconiosis, as the burden may change depending on the ALJ's determinations regarding Claimant's length of coal mine employment. Employer's Brief at 16-18 (unpaginated); 20 C.F.R. §718.201(b).

existence of legal pneumoconiosis by establishing Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8. If the ALJ determines Employer has disproven pneumoconiosis, it will have rebutted the Section 411(c)(4) presumption and the ALJ need not reach the issue of disability causation. If the ALJ finds Employer has not disproven pneumoconiosis, she must determine whether Employer has established that no part of Claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

However, if Claimant fails to establish at least fifteen years of coal mine employment, the ALJ must consider whether Claimant can establish entitlement under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption.

When weighing the medical opinion evidence, the ALJ must consider the physicians' qualifications, explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses and medical conclusions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530 (4th Cir. 1998); *Akers*, 131 F.3d at 439. In doing so, she must set forth her findings in detail, including the underlying rationale, as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge