U.S. Department of Labor

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

BRB No. 21-0195 BLA

GARY R. STINSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HAROLD KEENE COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 02/24/2022
CHARTIS CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Sarah Y. M. Himmel (Two Rivers Law Group P.C.), Christiansburg, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Granting Benefits (2018-BLA-05836)

rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on July 29, 2015.

The ALJ credited Claimant with at least fifteen years of employment in underground coal mines and surface coal mines in conditions substantially similar to underground mines, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in calculating the length of Claimant's coal mine employment. It further asserts she erred in finding it did not rebut the Section 411(c)(4) presumption.[2] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to Employer's appeal.

The Benefit Review 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.[3] 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 – Coal Mine Employment

Employer argues the ALJ erred in calculating Claimant's coal mine employment history and improperly shifted the burden of proof to Employer. Employer's Brief at 7-14. We agree. Claimant bears the burden of establishing 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 (1985). The Board will uphold an ALJ's

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7.

[3] The Board 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); Director's Exhibit 8, 10; Hearing Transcript at 19.

determination if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ noted the district director found Claimant "had [seventeen] years of coal mine employment." Decision and Order at 3. She found Employer did not submit evidence that would lead her "to believe that the Claimant was a miner for more or less than the [district director's] finding." *Id*. Thus, she found at least fifteen years of coal mine employment. *Id.*

Because the ALJ did not explain her method of calculating the length of Claimant's coal mine employment, and it appears she merely adopted the district director's finding, her conclusion with respect to the length of coal mine employment[4] does not satisfy the Administrative Procedure Act (APA).[5] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). By failing to substantively discuss and assess the relevant evidence, the ALJ improperly gave presumptive effect to the district director's finding of seventeen years of coal mine employment. *Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985). Further, the ALJ erred by requiring Employer to submit evidence with respect to the length of Claimant's coal mine employment, as Claimant bears the burden of proof on this issue. *Kephart*, 8 BLR at 1-186.

Based on the foregoing error, we vacate the ALJ's length of coal mine employment finding. Because we vacate the ALJ's finding that Claimant established at least fifteen

[4] With only one exception not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the [ALJ]." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an ALJ must proceed *de novo* and independently weigh the evidence to reach her own findings on each contested issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

[5] The APA requires every adjudicatory decision to include "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), as incorporated into the Act by 30 U.S.C. §932(a).

years of coal mine employment,[6] we must also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits, and we remand the case for further consideration of this issue.

Remand Instructions

The ALJ must reconsider the length of Claimant's coal mine employment, make appropriate findings,[7] and fully explain her findings in accordance with the APA. *See Muncy*, 25 BLR at 1-27; *Wojtowicz*, 12 BLR 1-162, 1-165.

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer is able to rebut it.[8] 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can

[6] Claimant testified he worked in underground coal mines and surface coal mines. Hearing Transcript at 13. When asked which of his coal mine jobs exposed him to dust, he testified, "[a]ll of the above. You were always in dust all the time. That's where I stayed, right in the dust where they kept me." *Id.* Based on this testimony, the ALJ found all of Claimant's employment was qualifying coal mine employment. Decision and Order at 4; *see* Hearing Transcript at 13. Because this finding is not challenged, we affirm it. *See Skrack*, 6 BLR at 1-711.

[7] The ALJ must determine whether the evidence establishes the beginning and ending dates of Claimant's coal mine employment and may determine the dates and length of coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32); *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of a miner's employment cannot be determined, an ALJ may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii); *see* Exhibit 610 of the Black Lung Benefits Act Procedure Manual. A copy of the BLS table must be made a part of the record if an ALJ uses this method to establish the length of a miner's coal mine employment. *Id.*; *Osborne*, 25 BLR at 1-204 n.12.

[8] Because we have vacated the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's argument the ALJ erred in finding the Section 411(c)(4) presumption unrebutted, as the length of coal mine employment finding may affect the ALJ's credibility findings and the burdens of proof may shift.

establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge