U.S. Department of Labor

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

BRB No. 20-0156 BLA

ERMINE H. HAYES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COWIN & COMPANY, INCORPORATED	)	
	)	DATE ISSUED: 05/20/2021
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge Lee J. Romero, Jr.'s Decision and Order on Remand (2017-BLA-05412) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's

subsequent claim filed on January 23, 2015.[1] 20 C.F.R. §725.309. This case is before the Benefits Review Board for the second time.

In his initial decision, the administrative law judge credited Claimant with fifteen years of underground coal mine employment and found him totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the 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 administrative law judge further found Employer did not rebut the presumption and awarded benefits. Employer appealed. The Board affirmed as unchallenged on appeal the administrative law judge's findings that Claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The Board also affirmed the administrative law judge's finding that Employer failed to rebut the Section 411(c)(4) presumption. However, because the administrative law judge did not fully address discrepancies in the employment records when calculating the length of Claimant's coal mine employment, the Board vacated his finding that Claimant had fifteen years of qualifying coal mine employment. *Hayes v. Cowin & Co., Inc.*, BRB No. 18-0273 BLA (June 28, 2019) (unpub.). The Board remanded the case for the administrative law judge to reconsider this issue and to redetermine whether Claimant is entitled to the Section 411(c)(4) presumption.[3] *Id.* at 9.

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[1] This is Claimant's fourth claim for benefits. On December 14, 2005, Administrative Law Judge Edward Terhune Miller denied his most recent prior claim, filed on October 17, 2002, because he failed to establish pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. Claimant took no further action until filing the present subsequent claim. Director's Exhibit 5. He died on February 5, 2019, and his widow is now pursuing his claim. *See* Decision and Order on Remand at 2 n.1.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had 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.

[3] The Board held that the parties' stipulation in Claimant's 2005 claim that he had twelve to fifteen years of coal mine employment was not binding due to the change in law at Section 411(c)(4). *See Hayes v. Cowin & Co., Inc.*, BRB No. 18-0273 BLA, slip op. at 4 (June 28, 2019) (unpub.). Thus, on remand, the administrative law judge did not consider the prior stipulation. *See* Decision and Order on Remand at 3 n.3.

On remand, the administrative law judge found Claimant's Social Security Administration (SSA) earnings records and employee attendance records provide the most reliable evidence as to the length of his coal mine employment. *See* Decision and Order on Remand at 11. He concluded Claimant established 17.55 years of qualifying coal mine employment, thereby entitling him to the Section 411(c)(4) presumption. Accordingly, he again awarded benefits. *Id.* at 17-18.

On appeal, Employer challenges the administrative law judge's finding that Claimant established at least fifteen years of qualifying coal mine employment. Claimant responds in support of the administrative law judge's determination of the length of coal mine employment and therefore the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359 (1965).

To invoke the Section 411(c)(4) presumption, a claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). A claimant bears the burden of establishing the length of a miner's 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); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). The Board will uphold an administrative law judge's length of coal mine employment 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).

Claimant alleged at least seventeen years of coal mine employment, while the district director found 12 years and nine months of qualifying coal mine employment. *See* Decision and Order on Remand at 4.

In calculating the length of Claimant's coal mine employment, the administrative law judge concluded Claimant's SSA earnings records, Director's Exhibit 12, and his employee attendance records, Director's Exhibit 1, provide the most accurate account of the length of his coal mine employment. *See* Decision and Order on Remand at 11. He

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit as Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 201 (1989) (en banc); Director's Exhibit 6.

clarified that he relied primarily on the employee attendance records but looked to the SSA records to calculate the length of coal mine employment for periods where the Claimant worked only parts of a year in qualifying employment.[5] *See id.* at 11-12. He also relied on a letter Claimant submitted listing his coal mining jobs, Director's Exhibit 9, as well as a chart of Claimant's coal mine projects taken from Employer's company records, Director's Exhibit 3; Director's Exhibit 7 (prior claim), which he found generally corroborate the information in the employee attendance records. Decision and Order on Remand at 9-11.

Reviewing the above evidence, the administrative law judge used four different methods to calculate the number of years of Claimant's coal mine employment. For the years 1966, 1971, 1972, 1976, 1979 and 1985, where Claimant's employee attendance records established he worked for Employer in qualifying coal mine employment for the full calendar year, the administrative law judge credited him with six years of coal mine employment. Decision and Order on Remand at 12-13.

Next, for the years where Claimant's attendance records indicated he worked in mines for partial periods of a calendar year, the administrative law judge applied 20 C.F.R. §725.101(a)(32)(iii),[6] apparently pursuant to *Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019),[7] and credited Claimant with a year of coal mine employment where his

[5] Claimant worked steadily for Employer from 1955 to 1986, but not all of his work was coal mine employment. *See* Director's Exhibit 1.

[6] 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 average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[7] In *Shepherd*, the United States Court of Appeals for the Sixth Circuit interpreted Section 725.101(a)(32) of the regulations to conclude 125 working days is sufficient to credit a miner with a full year of coal mine employment. *Shepherd v. Incoal, Inc*., 915 F.3d 392, 401 (6th Cir. 2019).

earnings indicated he worked for at least 125 days in a year. He thus found Claimant worked for full years of coal mine employment in 1958, 1965, 1975, 1977, 1978, 1980, 1982, 1984, and 1986 because Claimant's earnings exceeded the industry average earnings for 125 days. Decision and Order on Remand at 14-17.

Third, if the Claimant earned less than the industry average for 125 days in a given year, the administrative law judge divided Claimant's earnings by the industry average for 125 days to credit him with a portion of a year. Decision and Order on Remand at 13. Using this method, he credited Claimant with a total of 1.97 years of coal mine employment for his work in 1959, 1967, 1973, and 1983. *Id.* at 14-17.

Fourth, for those years in which Claimant's attendance records indicated he was working in coal mine employment but his earnings are not reported or his SSA earnings records provide quarterly earnings, the administrative law judge relied on the attendance records and credited Claimant with the actual months worked in qualifying coal mine employment in each year. Decision and Order on Remand at 13-14. Applying this method, the administrative law judge credited Claimant with .33 year from September 1964 to December 1964 and .25 year from October 1970 to December 1970.[8] *Id.* at 14-15. He concluded the Claimant established a total of 17.55 years of qualifying coal mine employment, thereby entitling him to the Section 411(c)(4) presumption. *Id.* at 17.

On appeal, Employer assigns error to the administrative law judge's reliance on the average earnings statistics for calculating the length of a portion of Claimant's coal mine employment, and thus challenges the administrative law judge's second and third methods of calculation. Employer contends the use of the average earnings is irrational because Claimant was a construction worker earning more than the average extraction worker; this method, Employer avers, erroneously inflates the length of coal mine employment calculation.

Because Claimant performed his coal mine employment in Alabama, the law of the United States Court of Appeals for the Eleventh Circuit controls in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6. Since the Eleventh Circuit has not adopted the Sixth Circuit's view that 125 working days equals one calendar year of coal mine employment, *see Shepherd*, 915 F.3d 392, we agree with Employer that the administrative law judge's calculation of the length of the Claimant's

[8] We note the administrative law judge's decision contains a typographical error as Claimant's attendance records indicate he worked from September 1964, not August 1964, to December 1964. *See* Decision and Order on Remand at 14; Director's Exhibit 1.

coal mine employment with respect to the second and third methods listed above cannot be affirmed.

The regulation at 20 C.F.R. §725.101(a)(32)(i) requires that to credit a miner with a year of coal mine employment, the administrative law judge must first determine whether he engaged in coal mine employment for a period of one calendar year, 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-calendar-year period is met, then the administrative law judge must determine whether the miner worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32). Proof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish the threshold of one year of coal mine employment.[9] *See Clark*, 22 BLR at 1-281; *see also Mitchell*, 479 F.3d at 334-36. Here, when applying the second and third methods to calculate Claimant's length of coal mine employment, the administrative law judge did not address whether Claimant met the threshold requirement of one calendar year before applying Exhibit 610 and the 125-day divisor. We therefore vacate the administrative law judge's finding that Claimant established 17.55 years of qualifying coal mine employment. *See Mitchell*, 479 F.3d at 334-36; Decision and Order on Remand at 17. Consequently we must vacate his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). We affirm, however, his crediting Claimant with six years of coal mine employment for the years 1966, 1971, 1972, 1976, 1979, and 1985 where the administrative law judge found the evidence established Claimant worked in coal mine employment for the full calendar year. We also affirm the administrative law judge's crediting Claimant with a total of .58 years of coal mine employment for the periods from September-December 1964 and from October-December 1970, where Claimant's attendance records indicate he worked in coal mine employment.

"To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment must be ascertained." 20 C.F.R. §725.101(a)(32)(ii). Moreover,

[9] The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a) (32); *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 evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it must be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

"[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." *Id.*; *see Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016) (noting the preference for the use of direct evidence is consistent with this provision). In this case, the administrative law judge relied on income-based evidence, in conjunction with Exhibit 610, to calculate certain periods of Claimant's employment despite recognizing evidence containing specific beginning and ending months and years as being most probative. He thus failed to consider to what extent the beginning and ending dates of Claimant's employment could be determined from the employee attendance records and the letter Claimant submitted listing his coal mine projects and the dates he worked on them. The administrative law judge should have considered whether the beginning and ending dates of Claimant's employment could be ascertained from this evidence and, if so, calculated the length of coal mine employment accordingly. Only if the beginning and ending dates could not be ascertained should he have looked to the average earnings statistics.

On remand, the administrative law judge must determine the length of Claimant's coal mine employment for the years in which the evidence indicates Claimant worked in coal mine employment for partial periods in a calendar year; these partial periods should be added together to determine how many additional "calendar years" of coal mine employment should be credited to Claimant in addition to the six full years. *See generally Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186.[10] If the administrative law judge finds Claimant established fifteen or more years of qualifying employment and thus invokes the Section 411(c)(4) presumption, he may reinstate the award of benefits. If Claimant does not invoke the presumption on remand, the administrative law judge must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

Finally, on January 21, 2020, Claimant's counsel filed an itemized petition requesting a fee of $10,403.89 for legal services performed in the prior appeal, BRB No. 18-0273 BLA. *See* 20 C.F.R. §802.203. Employer filed a motion to hold the fee petition in abeyance during the pendency of this appeal. Because we are vacating the administrative law judge's findings on the length of Claimant's coal mine employment, we deny the fee petition at this time. If, on remand, Claimant succeeds in obtaining benefits, Claimant's counsel may refile the fee petition. 20 C.F.R. §802.203(c).

[10] We note that once the calendar year of coal mine employment is established, it is presumed that the miner spent at least 125 working days in such employment.

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order on Remand and remand the case for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge