U.S. Department of Labor

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

BRB No. 24-0315 BLA

DONALD G. NELSON Claimant-Respondent v. LOWLANDS COAL CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 10/30/2024 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits (2023-BLA-05713) rendered on a claim filed on October 28, 2021,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 16.025 years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), and thus invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding that Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and that it failed to rebut the presumption.[3] Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs, declined to file one.

The Benefits 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.[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, 361-62 (1965).

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[1] Claimant filed a prior claim, but he withdrew it. Director's Exhibits 1; 54. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306.

[2] Section 411(c)(4) 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23-33.

[4] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his last coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 11.

Invocation of the Section 411(c)(4) Presumption – 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 "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). 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 Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The ALJ considered Claimant's application for benefits, employment history form, hearing testimony, and Social Security Administration (SSA) earnings records. Decision and Order at 5-6; Director's Exhibits 3; 4; 6; 7; Hearing Tr. at 11, 21. The ALJ observed Claimant alleged thirty years of coal mine employment on his application for benefits, twenty-three years on his employment history form, and eighteen years in his hearing testimony. Decision and Order at 5; Director's Exhibits 3; 4; Hearing Tr. at 11, 21. Because he found Claimant's estimations of the length of his coal mine employment were inconsistent, he permissibly relied upon Claimant's SSA earnings records as the most probative evidence. *See Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (ALJ may credit SSA earnings records over a miner's testimony and other sworn statements); Decision and Order at 5; Director's Exhibits 7; 8.

For Claimant's pre-1978 coal mine employment, the ALJ permissibly credited him with a quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 from coal mine operators. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"); *Tackett*, 6 BLR at 1-841 n.2; Decision and Order at 5. Using this method, the ALJ credited Claimant with fourteen quarters, or 3.5 years, of coal mine employment before 1978. Decision and Order at 5.

For Claimant's coal mine employment from 1978 to 1995, the ALJ credited Claimant with a full year of coal mine employment "for any year in which the SSA records reflect substantial earnings." *Id.* at 5. Using this method, the ALJ credited Claimant with

a full year of coal mine employment for the years 1978 through 1982, and 1985 through 1995, for a total of sixteen years.[5] *Id.* at 5-6.

The ALJ found, however, that "the years 1983, 1996, and 1997 show earnings suggesting partial years of coal mine employment," and applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine Claimant's number of working days in each of those calendar years. Decision and Order at 6. He divided the yearly earnings from coal mine employers reflected in Claimant's SSA earnings records by the coal mine industry's daily average earnings, reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*, to determine the number of Claimant's working days. *Id.* Then he divided the number of working days he had calculated for each year of Claimant's employment by 250 days, which represents fifty weeks of five working days, to credit Claimant with fractional years of employment. *Id.* He thus found Claimant had 0.025 years of coal mine employment in the years of 1983, 1996, and 1997, combined. *Id.*

Employer argues the ALJ used an irrational method and did not adequately explain his decision to credit Claimant with a full year of qualifying coal mine employment because he had "substantial earnings" in the years 1978 to 1982 and 1985 to 1995. Employer's Brief at 8-10. We agree.

We are unable to discern if the ALJ considered whether he could determine the beginning and end dates of Claimant's employment for the years 1978 through 1997, how he determined what "substantial earnings" are and how those earnings equate to full years of coal mine employment, or how he determined Claimant had only partial years of coal mine employment in 1983, 1996, and 1997. Because the ALJ has not adequately explained his method of calculating the length of Claimant's coal mine employment, his finding does not comport with the Administrative Procedure Act (APA),[6] 5 U.S.C. §557(c)(3)(A), as

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[5] Specifically, the ALJ found the SSA earnings records show "substantial earnings" with Westmoreland Coal in 1978; Carbon Fuel Co. from 1979 to 1982; U.S. Steel Mining Co. in 1982; Sharp, Inc. from 1985 to 1986; Glenville Company in 1987; Metec Inc. in 1988; Lowlands Coal Corporation in 1989; WY & WV Inc. from 1990 to 1992; WY & WV Inc., W R Williams, and West Milford Mining Co. in 1993; and WA & WV Inc. from 1994 to 1995. Decision and Order at 5-6.

[6] The Administrative Procedure Act requires that every adjudicatory decision 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

incorporated into the Act by 30 U.S.C. §932(a), and thus we cannot affirm it. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Based on the foregoing error, the law requires we vacate the ALJ's finding that Claimant had 16.025 years of qualifying coal mine employment and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1)(i). We remand the case for further consideration of this issue. Consequently, we decline to address, as premature, Employer's argument that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 10-18.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment using any reasonable method of computation and taking into consideration all relevant evidence. *See Muncy*, 25 BLR at 1-27. Importantly, the ALJ must explain his method of calculation and set forth his findings in detail, including the underlying rationale for his decision as the APA requires. *See Wojtowicz*, 12 BLR at 1-165.

If Claimant establishes fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. The ALJ must then consider whether Employer rebutted the presumption. 20 C.F.R. §718.305(d)(1). If Claimant does not establish fifteen years of qualifying coal mine employment, the ALJ must consider if he has established the elements of entitlement under C.F.R. Part 718 by a preponderance of the evidence, taking into account that Claimant has established he is totally disabled. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge