U.S. Department of Labor

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

BRB No. 24-0107 BLA

FREDERICK B. BATEMAN Claimant-Respondent v. BLUFF SPUR COAL CORPORATION and AIG Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 09/30/2024 DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits of Dana Rosen, Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

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

GRESH, Chief Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Dana Rosen's Decision and Order on Remand Awarding Benefits (2016-BLA-05994) rendered on a claim filed on May

28, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This claim is before the Benefits Review Board for a third time.[2]

In consideration of Employer's most recent appeal, a majority of the Board's three-member panel affirmed the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment.[3] *Bateman v. Bluff Spur Coal Corp.*, BRB No. 21-0501 BLA, slip op. at 6-10 (Apr. 12, 2023) (unpub.). However, it affirmed in part and vacated in part her finding Claimant established 21.01 years of coal mine employment, and therefore vacated her finding that Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4). *Id*. at 3-6. It further vacated her determination regarding Claimant's smoking history. *Id*. at 11. Thus, the Board vacated the award of benefits and remanded the case for further reconsideration.

On remand, the ALJ determined Claimant had 19.32 years of qualifying coal mine employment and thereby invoked the Section 411(c)(4) presumption. She further found Employer failed to rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and thus invoked the Section 411(c)(4) presumption. It further argues the ALJ erred in finding it failed to rebut the presumption. Neither Claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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[1] Claimant filed one prior claim but withdrew it. First Decision and Order at 4 n.9. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] We incorporate by reference the procedural history as set forth in the Board's second decision in this case. *Bateman v. Bluff Spur Coal Corp.*, BRB No. 21-0501 BLA, slip op. at 1-2 (Apr. 12, 2023) (unpub.).

[3] Administrative Appeals Judge Judith S. Boggs would have vacated the ALJ's total disability finding. *Bateman*, BRB No. 21-0501 BLA, slip op. at 13-15 (Boggs, J., concurring in part and dissenting in part).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the claimant establishes 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.

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.[5] 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).

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 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. *See 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 and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's coal mine employment with various employers from 1971 to 2007.[6] Decision and Order at 5-11. The Board previously affirmed the ALJ's finding Claimant established full years of coal mine employment in 1997, 1998, and 2001, and 5.26 years of coal mine employment between 2002 and 2007, for a total of 8.26 years. *Bateman*, BRB No. 21-0501 BLA, slip op. at 4-5. However, it vacated as inadequately explained her findings regarding Claimant's employment in the remaining years.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as 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 3; Hearing Transcript at 6.

[6] Relevant to this appeal, the ALJ determined Claimant's coal mine employment includes working for The Pittson Company in 1971; 3-D Coal Corp. from 1973 to 1976; Porter Coal Co. Inc. in 1974 and 1978; Baker Energy Corp. in 1975; United Castle Coal Company from 1976 to 1977; Metco Inc. in 1977; Buchanan & Sons Coal Company from 1977 to 1978; Elkins Energy Corporation and G B Corporation in 1979; Double O Coal Corporation in 1981; Minutemen Properties Inc. from 1981 to 1982; Center Coal Co. Inc. from 1982 to 1983; North Fork Mining Corporation in 1983; Grand Canyon Mining Company and North Fork Mining Corporation in 1993; Tanstafl Inc. in 1994; Glamorgan Coal Corporation from 1995 to 1996; Betty B Coal Company Inc. from 1996 to 1999; Brandon Enterprises in 1999; and El Paso Coal Holding LLC (El Paso Coal) from 2000 to 2002. Decision and Order at 5-12; Director's Exhibits 3; 5.

On remand, the ALJ reconsidered Claimant's coal mine employment from 1971 through 1996, 1999, 2000, and 2002. *Bateman*, BRB No. 21-0501 BLA, slip op. at 4-6; Decision and Order at 4-12. In doing so, she considered his employment history form (CM-911a) and Social Security Administration (SSA) earnings records, and permissibly relied on the 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 4.

For Claimant's pre-1978 coal mine employment, the ALJ credited him with one quarter-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) (pre-1978 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 6. Using this method, the ALJ credited Claimant with seventeen quarters, or 4.25 years, of coal mine employment before 1978.[7] Decision and Order at 6.

Employer argues that because the beginning and ending dates of Claimant's employment between 1971 and 1977 are unknown, the ALJ was required to calculate the length of his employment "by dividing his earnings as listed on the [SSA earnings records] by the average daily rate set forth in Exhibit 610 [of the *Office of Workers' Compensation Programs Coal Mine Procedure Manual*]" to determine the number of days he worked. It then suggests she should have divided the number of days worked by an estimated 286-day work year to determine the portion of the year Claimant should be credited with.[8]

[7] Claimant had significant earnings in the following quarters: he earned $1,765.50 in the third quarter of 1973, $2,172.40 in the fourth quarter of 1973, $2,259.90 in the first quarter 1974, $1,927.80 in the second quarter of 1974, $1,628.10 in the third quarter of 1974, $2,699.50 in the first quarter of 1975, $2,777.44 in the second quarter of 1975, $1,466.51 in the fourth quarter of 1975, $2,799.68 in the first quarter of 1986, $4,259.00 in the second quarter of 1976, $3,104.10 in the third quarter of 1976, $1,583.40 in the fourth quarter of 1976, $1,090.12 in the fourth quarter of 1976, $2,319.14 in first quarter of 1977, and $1,403.02 in the fourth quarter of 1977. Director's Exhibit 5.

[8] Employer points to Claimant's testimony that he worked five or six days a week, or 5.5 days on average, multiplied by 52 weeks in a year, to reach 286 as its estimated number of working days necessary to establish a full year of coal mine employment. Employer's Brief at 8.

Employer's Brief at 4-9. It contends this calculation results in 2.04 years of coal mine employment rather than the 4.25 years the ALJ found. *Id.* at 8.

Contrary to Employer's argument, the ALJ used a permissible method to calculate Claimant's pre-1978 employment and was not required to use its proposed method. *See Shrader*, 608 F.2d at 117 n.3; *Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432; *Tackett*, 6 BLR at 1-841; Decision and Order at 6. As it is rational and supported by substantial evidence, we affirm the ALJ's finding Claimant established 4.25 years of coal mine employment from 1971 through 1977.

Consequently, we need not address Employer's remaining arguments that Claimant should have been credited with 4.45 years of coal mine employment instead of 6.36 years in 1978, 1979, 1981 to 1983, 1993 to 1996, 1999, and 2000, or that he had only 0.1 years with El Paso Coal in 2002 rather than 0.45 years. Employer's Brief at 9-11. Even accepting these arguments, Claimant would still be credited with 17.06 years of coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984).

We therefore affirm the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment and invoked the Section 411(c)(4) presumption.[9] 20 C.F.R. §718.305(b)(1)(i); Decision and Order at 12.

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

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical 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 found Employer did not establish rebuttal by either method.

Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish Claimant does not have any of the diseases "recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate

[9] Employer does not contest that Claimant worked at an underground mine or in substantially similar conditions. The Board previously affirmed the ALJ's determination that Claimant established total respiratory or pulmonary disability and that determination constitutes law of the case. *Bateman*, BRB No. 21-0501 BLA, slip op. at 10.

matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §§718.305(d)(1)(i)(B), 718.201(a)(1).

We affirm the ALJ's finding that Employer failed to disprove clinical pneumoconiosis as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis.[10] *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of [Claimant's] 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)(ii); Decision and Order at 20-21.

Employer asserts the ALJ erred in weighing the opinions of Drs. Fino and McSharry. Employer's Brief at 16.

Dr. Fino opined Claimant has no respiratory impairment and is not disabled. Employer's Exhibit 9 at 8. Consequently, he did not offer an explanation for the cause of Claimant's disabling impairment or explain why it was not caused by clinical pneumoconiosis. *Id.* Thus the ALJ permissibly concluded Dr. Fino's opinion is contrary to the credible evidence of record which establishes total disability, and therefore is not sufficiently persuasive to rebut the presumption of disability causation. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. E. Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995); Decision and Order at 20-21.

With respect to Dr. McSharry, in his initial opinion the physician opined Claimant is totally disabled by his obstructive lung disease caused by smoking, but conceded that if Claimant had never smoked, he would consider Claimant totally disabled due to legal pneumoconiosis. Director's Exhibit 12 at 4. The ALJ found his opinion supports a finding of disability causation because Claimant never smoked. Decision and Order at 20. While Employer asserts that Dr. McSharry later changed his opinion by stating "there is no evidence of respiratory impairment from any cause," Employer's Exhibit 10 at 2, remand is unnecessary as Dr. McSharry's second opinion suffers from the same defects as Dr. Fino's opinion, which the ALJ permissibly discredited. *Toler*, 43 F.3d at 116 (ALJ "may

[10] Because Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis, we need not address its assertion of error with respect to the ALJ's legal pneumoconiosis finding. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-278 (1984); Employer's Brief at 14-16.

not credit a medical opinion" that pneumoconiosis did not cause the miner's total disability where the physician erroneously fails to diagnose "either or both of the predicates in the causal chain"; if "specific and persuasive" reasons exist for crediting such an opinion, it can be given, at most, "little weight"); *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 20-21. Because Dr. McSharry, like Dr. Fino, opined Claimant has no impairment and thus did not offer an explanation for the cause of Claimant's disability, it logically follows that his opinion is similarly insufficient to rebut the presumption of disability causation.[11] *Id.*

Thus we affirm the ALJ's finding Employer did not rebut the presumption that Claimant's total disability was caused by his clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 21. We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the ALJ's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring:

I concur in the majority decision including its rationale for affirming the ALJ's finding of greater than fifteen years of coal mine employment. I write separately to point out that under the proper definition of the term "year," the ALJ's calculations actually *undercount* Claimant's employment in various years by not crediting him with "a fractional

[11] Moreover, even in his initial opinion that Claimant is totally disabled, Dr. McSharry did not address whether it was caused by clinical pneumoconiosis. Director's Exhibit 12.

year based on the ratio of the actual number of days worked to 125."[12] 20 C.F.R. §725.101(a)(32)(i); *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019); *Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, slip op. at 8-13, 2023 WL 5348588, at *5-8 (July 14, 2023) (unpub.) (Buzzard, J., concurring and dissenting) (explaining why Board and Fourth Circuit precedent do not preclude application of *Shepherd's* interpretation of the "plain" and "unambiguous" language of the regulation). Thus, in addition to the reasons cited by the majority, Employer's arguments that the ALJ overcounted Claimant's employment, and that Claimant's fractional years should be based on a divisor of 286 work-days per year, are contrary to the regulation.

GREG J. BUZZARD
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the ALJ's finding Claimant has at least fifteen years of coal mine employment because the ALJ used a method of calculation in accord with Board precedent. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (pre-1978 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 v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984).

However, I continue to respectfully dissent from the majority's affirmance of the ALJ's determination that the evidence establishes total disability for the reasons set forth in my concurring and dissenting opinion in this case's prior appeal. *Bateman v. Bluff Spur Coal Corp.*, BRB No. 21-0501 BLA, slip op. at 13-15 (Apr. 12, 2023) (unpub.) (Boggs, J.,

[12] For example, the ALJ found Claimant had 104.46 days of coal mine employment in 1996 but credited him with only 0.40 years of coal mine employment. Decision and Order at 10. Under the regulation, the ALJ should have rounded the number of days to 105 (because even "part of a day" counts as one "working day"). 20 C.F.R. §725.101(a)(32). Then, importantly, the ALJ should have divided 105 working days by 125 to determine Claimant's fractional year of employment, which equals 0.84 years. 20 C.F.R. §725.101(a)(32)(i).

concurring and dissenting). Consequently, consideration of whether Employer has established rebuttal of the Section 411(c)(4) presumption is premature.

JUDITH S. BOGGS
Administrative Appeals Judge