U.S. Department of Labor

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

BRB Nos. 18-0319 BLA
and 18-0320 BLA

GEORGIA SHORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISON BROTHERS, INCORPORATED	)	
	)	DATE ISSUED: 05/06/2019
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 of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-05995, 2014-BLA-05236) of Associate Chief Administrative Law Judge Paul R. Almanza, awarding benefits on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on September 8, 2010, and a survivor's

claim filed on September 11, 2013.[1]

After crediting the miner with 16.6 years of qualifying coal mine employment,[2] the administrative law judge found that he had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Claimant therefore invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not rebut the presumption, and awarded benefits in the miner's claim. The administrative law judge further found that claimant is entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act.[4] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues that the administrative law judge erred in finding that the miner had fifteen years of coal mine employment, and therefore erred in finding the Section 411(c)(4) presumption invoked. Neither claimant[5] nor the Director, Office of

[1] Employer's appeal in the miner's claim was assigned BRB No. 18-0319 BLA, and its appeal in the survivor's claim was assigned BRB No. 18-0320 BLA. By Order dated April 25, 2018, the Board consolidated these appeals for purposes of decision only.

[2] The record reflects that the miner's last coal mine employment was in Kentucky. Decision and Order at 15 n.12; Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] Claimant is the surviving spouse of the miner, who died on September 2, 2013. Director's Exhibit 17.

Workers' Compensation Programs, has filed a response brief.[6]

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. 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).

The Miner's Claim

Claimant bears the burden of proof to establish the number of years the miner actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an administrative law judge's determination based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Under the applicable regulations, the administrative law judge must first determine the beginning and ending dates of all periods of coal mine employment to the extent the evidence permits. 20 C.F.R. §725.101(a)(32)(ii); *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 400-02, 407 (6th Cir. 2019). The administrative law judge must weigh all relevant evidence, which may include "earnings statements, pay stubs, specific remembrances, or other indicia of reliability." *Id.* The administrative law judge should give effect to all provisions and options set forth in 20 C.F.R. § 725.101(a)(32) when calculating the miner's coal mine employment. *Id*.

For the period from 1960 to 1977, the administrative law judge considered the relevant evidence – the miner's and claimant's testimony, information they listed on employment history forms (CM-911a), and the miner's Social Security Administration earnings statements – and determined that it does not establish the beginning and ending dates of the miner's coal mine employment for these years. Decision and Order at 12. He permissibly found the miner's Social Security Administration (SSA) earnings records to be "the most probative evidence concerning the length of his coal mine employment because they are more detailed than the employment histories submitted by the [m]iner and [c]laimant, and because they provide more specific dates than the testimony of [c]laimant

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and the [m]iner."[7] *Id.*; *see Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003) (crediting of SSA records over the miner's statements is permissible).

Thus, having been unable to determine the beginning and ending dates of the miner's coal mine employment, the administrative law judge permissibly credited him for each quarter in which he had earnings from coal mine operators that exceeded $50.00 as reflected in the SSA earnings statement prior to 1978.[8] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd*, 915 F.3d at 405-06 (administrative law judge may apply the *Tackett* method unless the beginning and ending dates of the miner's coal mine employment reveal "the miner was not employed by a coal mining company for a full calendar quarter"); Decision and Order at 14. Using this method,[9] the administrative law judge found that the miner's coal mine employment earnings exceeded $50.00 for fifty quarters, or 12.5 years.[10] Director's Exhibit 4. We thus affirm the administrative law

[7] The administrative law judge noted that the miner's CM-911a identifies broad time periods such as the "1960s," "1980s," and "1990s," while claimant's CM-911a is not completed but states "See Miner's File." Decision and Order at 16; Director's Exhibits 1, 2. He also noted that the miner testified as to his uncertainty regarding aspects of his coal mine employment, including dates of employment with various employers, and that claimant testified she did not know how long the miner worked in coal mine employment. *Id*. at 4-8.

[8] The Board found this method of calculation reasonable and consistent with Social Security Administration regulations. *Combs v. Director, OWCP*, 2 BLR 1-904, 1-906 (1980).

[9] We reject employer's contention that it is unreasonable to credit the miner with an entire quarter of employment where his "earnings varied from quarter to quarter" and where the miner "had variable earnings in multiple quarters with the same employer." Employer's Brief at 10. Employer fails to cite any case law to support its position or identify the specific quarters it believes should be disallowed.

[10] In *Shepherd*, the Sixth Circuit stated, "as quarterly income approaches th[e] floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406 (6th Cir. 2019). Here, the administrative law judge credited the miner with a full quarter of coal mine employment for the third quarter of 1962 during which the miner earned $67.20. Decision and Order at 8-10; Director's Exhibit 4. Error, if any, in crediting the miner with a full 0.25 years of employment during this quarter is harmless because, as discussed below, the evidence still

judge's finding that the miner had 12.5 years of coal mine employment before 1978. *Muncy*, 25 BLR at 1-27; Decision and Order at 14.

We also reject employer's argument that the administrative law judge erred in calculating the miner's post-1977 coal mine employment. Employer's Brief at 10-11. Where the miner's hourly rate of pay was known, the administrative law judge used it to calculate the length of his employment. Relying on the miner's uncontradicted testimony that he earned $15.00 per hour while working for Ison Coal Company in 1998 and 1999, and for Ison Brothers from 2005 to 2007, the administrative law judge found that he worked a total of 201 days for these coal companies.[11] Decision and Order at 15. For the miner's remaining post-1977 coal mine employment, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[12] and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, credited the miner with an additional 825 days of coal mine employment, for a total of 1,026 days. Decision and Order at 15. He specifically credited the miner with 220.4 days in 1978, 263 days in 1979, 178 days in 1986, 4.125 days in 1998, 65 days in 1999, 35.4 days in 2002, 35 days in 2003, 80 days in 2004, 83.5 days in 2005, 46.4 days in 2006, and 15 days in 2007.[13] *Id.*

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establishes greater than 15 years of coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11] The administrative law judge divided the miner's annual earnings from Ison Coal Company and Ison Brothers by the miner's $15.00 hourly pay rate, and then divided the total by eight hours to determine the number of eight-hour days the miner worked. Decision and Order at 15 n.9.

[12] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry 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.*

[13] The administrative law judge found that the miner "had additional coal mine employment as part of his self-employment" from 1974 to 2004. Decision and Order at 11, 15. However, he concluded that the details of the miner's self-employment were "too unclear" to allow him to make a reasoned finding regarding the length of that employment. *Id.*

Using an estimated 250-day work year as a devisor,[14] the administrative law judge found that the miner had 4.1 years of coal mine employment after 1977. Decision and Order at 15. We reject employer's argument that the administrative law judge "should have . . . credited [the miner] with at most 3.71 years of coal mine employment" during this time period. Employer's Brief at 9. Employer has not established that its method – which is based on 260 work days per year and assumes that a miner must work 5-days per week for all 52 weeks of the year to be credited with one year of employment – renders the administrative law judge's reliance on a slightly lower estimate of 250 work days per year unreasonable. *See Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); *Muncy*, 25 BLR at 1-27. Moreover, by requiring claimant to establish 250 or 260 working days, both employer and the administrative law *undercount* the miner's years of employment. In *Shepherd*, the Sixth Circuit held that a miner need not establish a full calendar year relationship under the regulatory criteria at 20 C.F.R. §725.101(a)(32)(i)-(iii). Rather, to be credited with a full year of employment, a miner need only establish 125 working days during a calendar year, regardless of the duration of his actual employment relationship. *Shepherd*, 915 F.3d at 401-402. Thus, if the miner had greater than 125 working days during a calendar year, he is entitled to credit for a full year of coal mine employment; if he had less than 125 working days, he is entitled to a fraction of the year "based on the ratio of the actual number of days worked to 125."[15] *Id.* at 402. The administrative law judge's error in this case is harmless, however, as he nevertheless found that the miner had at least fifteen years of coal mine employment. *See Larioni*, 6 BLR at 1-1278.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the miner established at least 15 years of coal mine employment.

[14] The administrative law judge explained that he used 250 days as a divisor because a miner whose earnings equal 250 days of average daily earnings from coal mine employment will very likely have worked in coal mine employment for a full calendar year. Decision and Order at 13. He arrived at 250 work days as follows: 365 days per year, minus 104 weekend days, minus an estimated 10 days of vacation and 9 federal holidays, plus an estimated 8 days of overtime.

[15] Thus, under *Shepherd*, the miner is entitled to a full year of coal mine employment for the years 1978, 1979 and 1986 (for which the administrative law judge found more than 125 working days); 0.03 of a year in 1998 (4.125 working days/125), 0.52 of a year in 1999 (65/125), 0.28 of a year in 2002 (35.4/125), 0.28 of a year in 2003 (35/125), 0.64 of a year in 2004 (80/125), 0.67 of a year in 2005 (83.5/125), 0.37 of a year in 2006 (46.4/125), and 0.12 of a year in 2007 (15/125), for a total of 5.91 years of coal mine employment for these years. Using the proper divisor of 125 and employer's estimates for the number of days the miner worked yields 5.44 years of coal mine employment between 1978 and 2007.

Further, because it is unchallenged on appeal, we affirm his finding that all of the miner's coal mine employment occurred in conditions substantially similar to those in underground mines and therefore is qualifying for the purpose of invoking the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 25-26.

In light of our affirmance of the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that the Section 411(c)(4) presumption was invoked. Moreover, we affirm his finding that employer failed to rebut the presumption as unchallenged on appeal. *Skrack*, 6 BLR at 1-711. We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish her entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order at 31-32. Because we have affirmed the award of benefits in the miner's claim, we also affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge