U.S. Department of Labor

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

BRB No. 19-0018 BLA

ERNEST L. NELSON, JR.,	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAY, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 11/25/2019
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Andrea Berg and Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2017-BLA-05680) of Administrative Law Judge Drew A. Swank, rendered on a subsequent claim filed on September 18, 2014,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 15.08 years of underground coal mine employment and found total disability established based on the new evidence.[2] 20 C.F.R. §718.204(b). Thus, he found that claimant established a change in an applicable condition of entitlement,[3] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption and awarded benefits, commencing in August 2014.

On appeal, employer contends the Section 411(c)(4) presumption is invalid. Employer also challenges the administrative law judge's finding that claimant established fifteen years of underground coal mine employment and thereby invoked the Section 411(c)(4) presumption. Employer further contends the administrative law judge erred in finding it did not rebut the presumption. Additionally, employer argues the administrative

[1] Claimant filed an initial claim on March 23, 2009, which the district director denied on November 18, 2009, for failing to establish any element of entitlement. Employer's Exhibit 1.

[2] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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) (2012); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Claimant's prior claim was denied because he failed to establish any element of entitlement. Employer's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(c)(3), (4).

law judge misstated the filing date of the claim and therefore erred in determining the commencement date for benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits 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 Associates, Inc.*, 380 U.S. 359, 362 (1965).

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

We reject employer's assertion that the Section 411(c)(4) presumption is invalid because it is an amendment to the Act contained in the Affordable Care Act (ACA). Employer's Brief at 33. Employer observes that in *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir. Jan. 7, 2019), a federal district court ruled the ACA individual mandate unconstitutional and that the remainder of the legislation was not severable. Employer's Brief at 34. Contrary to employer's argument, the district court stayed its ruling striking down the ACA and, thus, the decision does not preclude application of the amendments to the Act found in the ACA. Thus, we reject employer's assertion that the Section 411(c)(4) presumption is not applicable to this claim.

Invocation – Length of Coal Mine Employment

Because claimant established a totally disabling respiratory impairment, he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof 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 administrative law judge's determination on length of coal mine employment if it is

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability and a change in an applicable condition of entitlement. 20 C.F.R. §§718.204(b)(2), 725.309; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 18.

[5] Because claimant's most recent coal mine employment occurred in West Virginia, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

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 twenty-eight years of underground coal mine employment on his application for benefits. Director's Exhibit 3. He alleged twenty-eight to thirty years at the hearing. Hearing Transcript at 22. The district director credited claimant with a total of 15.08 years of underground coal mine employment.[6] Without discussing the evidence in any detail, the administrative law judge summarily accepted the district director's calculation "as supported by the Social Security [Administration (SSA)] Earnings records and [claimant's] recounting of his employment." Decision and Order at 5.

We agree with employer that the administrative law judge's adoption of the district director's calculation cannot be affirmed. Employer's Brief at 4. 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). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry for the calendar year "[i]f 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 . . . ." 20 C.F.R. §725.101(a)(32)(iii). Thus, "to the extent the evidence permits," the fact-finder must first attempt to ascertain "the beginning and ending dates of all periods of coal mine employment . . . ." 20 C.F.R. §725.101(a)(32)(ii). The dates and length of employment "may be established by any

[6] The district director did not explain how he arrived at this calculation. The record contains a document headed "Coal Mine Employment Determination" which lists years, and appears to contain a column of claimant's reported Social Security Administration (SSA) Earnings Record as well as a column headed "Yearly Earnings Standard," and then a column with a calculation of "CME [coal mine employment] Credited." That exhibit shows an ending "TOTAL" of 15.08 years in the "CME Credited" column. Employer's Exhibit 12. The regulation at 20 C.F.R. §725.101(a)(32)(iii) sets forth a formula which may be used when the beginning and ending dates of a miner's employment cannot be ascertained or a miner's works lasts less than a calendar year. Under that formula, the miner's yearly income from work as a miner is divided by the coal mine industry's *average daily earnings* for that year, as the Bureau of Labor Statistics (BLS) reports. 20 C.F.R. §725.101(a)(32)(iii) (emphasis added). A copy of the BLS table must be made a part of the record if the adjudication officer uses this method to establish the length of the miner's coal mine employment. *Id*.

credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." *Id*.

Here, evidence exists which, if credited, could establish the beginning and ending dates of certain periods of employment.[7] *See Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016) (recognizing the preference for the use of direct evidence to compute the length of coal mine employment); Director's Exhibit 6 (Letter from Lightning Contract Services); Director's Exhibit 7 (Letter from Employer). The record also contains evidence of earnings with Pelaez Medical Corp., Wilco of Logan, Inc., and Mulimar, Inc., which claimant identifies as coal mine employment. Director's Exhibits 4, 8, 45. The administrative law judge did not consider the evidence when he summarily adopted the district director's conclusions. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984): Decision and Order at 5. Further, the administrative law judge failed to set forth a reasoned explanation for his determination of 15.08 years of coal mine employment, as the Administrative Procedure Act requires.[8] *Muncy*, 25 BLR 1-at 1-27; *Wojtowicz*, 12 BLR at 1-165. Thus, we must vacate the administrative law judge's finding of 15.08 years of qualifying coal mine employment, and his determination that claimant invoked the Section 411(c)(4) presumption and we vacate the award of benefits.[9]

On remand, the administrative law judge is instructed to evaluate the record evidence and determine the length of claimant's coal mine employment based on a reasonable method of calculation. If the record does not contain sufficient evidence of the beginning and ending dates of claimant's employment, the administrative law judge may calculate the length of his coal mine employment utilizing the method at 20 C.F.R.

[7] "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).

[8] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, at this time, employer's arguments regarding rebuttal of the presumption. The administrative law judge may consider employer's arguments regarding rebuttal on remand.

§725.101(a)(32)(iii), or employing some other reasonable method. *See Muncy*, 25 BLR 1-at 1-27. If claimant establishes at least fifteen years of qualifying employment, he invokes the Section 411(c)(4) presumption and the administrative law judge may reinstate the award of benefits[10] if employer does not rebut the presumption. If claimant is unable to invoke the presumption, the administrative law judge must address whether claimant established all the elements of entitlement under 20 C.F.R. Part 718, by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The administrative law judge must explain the bases for his findings on remand in accordance with the APA. *See Wojtowicz,* 12 BLR at 1-165.

[10] The administrative law judge found that benefits should begin the month during which the claim was filed, which he indicated was August 2014. Decision and Order at 63. Employer notes correctly that while claimant signed his application in August 2014, the claim was not filed with the district director until September 2014, based on the date-stamp on the application. 20 C.F.R. §725.303(a)(1) ("A claim shall be considered filed on the day it is received by the office in which it is first filed."); Director's Exhibit 3; Employer's Brief at 35. Thus, the administrative law judge must reconsider on remand the commencement date for benefits if awarded.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge