U.S. Department of Labor

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

BRB No. 20-0252 BLA

KENNETH R. THOMPSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAUREL RUN RECLAMATION COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	DATE ISSUED: 04/19/2021
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer and its Carrier.

Before: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Drew A. Swank's Decision and Order Denying Benefits (2019-BLA-05721) rendered on a claim filed on May 7, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with 14.17 years of coal mine employment and thus found he could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant established a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), but did not establish clinical or legal pneumoconiosis, and thus denied benefits. 20 C.F.R. §718.202(a).

On appeal, Claimant contends the administrative law judge erred in finding less than fifteen years of coal mine employment established and therefore erred in finding he did not invoke the Section 411(c)(4) presumption. Alternatively, he argues the administrative law judge erred in finding he did not establish legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief.

The Benefit Review 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.[2] 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).

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 coal mines or "substantially similar" surface coal mine

[1] Under Section 411(c)(4), Claimant is entitled to a rebuttable presumption that he 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.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant performed his coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

conditions. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of his 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 the administrative law judge'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, 1-26 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In calculating the length coal mine employment, the administrative law judge considered Claimant's employment history form (CM-911a), Social Security Administration (SSA) earnings records, and hearing testimony. Decision and Order at 5; Director's Exhibits 3, 8, 36; Hearing Transcript at 9-14, 17-21. He summarily found Claimant established "full years of coal mine employment for the years 1979-1986 and 1996-2002 based on the substantial earnings reflected on [the SSA records] for these years, which is supported by Claimant's testimony." Decision and Order at 5. He next stated he would calculate partial years of employment by applying the formula at 20 C.F.R. §725.101(a)(32)(iii).[3] *Id*. He summarily found Claimant's yearly earnings establish he worked in coal mine employment for five months in 1985, four months in 1991, and five months in 1992. *Id*. Based on these findings, he determined Claimant established 14.17 years of coal mine employment. *Id*.

We agree with Claimant's argument that the administrative law judge has not adequately explained his length of coal mine employment determination. Claimant's Brief at 4-6. As Claimant asserts, if the record establishes "full years" of employment for the years 1979 to 1986 and 1996 to 2002, as the administrative law judge determined, that finding equates to fifteen years of coal mine employment. *Id*. Thus Claimant would have established fifteen years of coal mine employment even before taking into account the additional thirteen months of coal mine employment the administrative law judge found

[3] The regulation at 20 C.F.R. §725.101(a)(32)(iii) provides, in pertinent part:

> 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).

established for partial years in 1985, 1991 and 1992.[4] *Id*. Consequently we are unable to ascertain the administrative law judge's basis for finding 14.17 years of coal mine employment established. In light of the foregoing, we conclude the administrative law judge's decision does not comply with the Administrative Procedure Act, which 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).

Notwithstanding that the administrative law judge's specific findings equate to fifteen years of coal mine employment, we decline to reverse his conclusion. The record contains conflicting evidence on the issue.[5] Director's Exhibit 6; Hearing Transcript at 10-15, 18-22. The administrative law judge is tasked with evaluating the credibility of the evidence and resolving any conflict. *Balsavage v. Director, OWCP*, 295 F.3d 390, 396 (3d Cir. 2002); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill gaps in the administrative law judge's opinion). Furthermore, the administrative law judge has not explained how Claimant's "substantial earnings" as reflected in his SSA records, considered in conjunction with his hearing testimony, establish "full years" of employment for 1979 to 1986 and 1996 to 2002.[6] Decision and Order at 5; *see Wojtowicz*, 12 BLR at 1-165. Nor has he set forth his specific calculations for the partial years of coal mine employment for 1985, 1991, and 1992 based on his application of the formula at 20 C.F.R. §725.101(a)(32)(iii). *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 5.

[4] The administrative law judge's calculation is also internally inconsistent, as he first credited Claimant with a whole year of coal mine employment in 1985, then indicated he would credit Claimant with only five months for 1985. Decision and Order at 5.

[5] Employer notes in its Response Brief that the record contains conflicting evidence in the form of documentary and testimonial evidence that may undermine finding a full year of employment for both 1980 and 1997. Employer's Brief at 4-6. The administrative law judge should address Employer's argument on remand.

[6] 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).

Based on the foregoing errors, we vacate the administrative law judge's finding of 14.17 years of coal mine employment and remand this case for reconsideration of this issue. Thus, we further vacate his finding that Claimant failed to invoke the Section 411(c)(4) presumption and the denial of benefits.

Entitlement under 20 C.F.R. Part 718 - Legal Pneumoconiosis

In the interest of judicial economy and in the event the administrative law judge finds on remand that Claimant has less than fifteen years of coal mine employment, we will address Claimant's contention that the administrative law judge erred in finding he does not have legal pneumoconiosis. To establish legal pneumoconiosis, Claimant must prove he has a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b). Claimant argues the administrative law judge erred in discrediting Dr. Zlupko's diagnosis of legal pneumoconiosis. Claimant's Brief at 9-11. Claimant's argument has merit.

Dr. Zlupko diagnosed Claimant with severe chronic obstructive pulmonary disease. Director's Exhibit 14. He based his diagnosis on Claimant's pulmonary function and arterial blood studies. *Id.* Dr. Zlupko opined Claimant's pulmonary function impairment was due to a combination of coal mine dust exposure and cigarette smoking. *Id.* In a supplemental report, Dr. Zlupko explained "the 14.04 years of proven coal dust exposure significantly contributed to [Claimant's] severe impairment." Director's Exhibit 17.

The administrative law judge discredited Dr. Zlupko's opinion because the physician "was unable to differentiate the effects of cigarette smoking and coal mine dust exposure, [and] therefore [Dr. Zlupko] conclude[ed] that both must be responsible for the miner's impairment." Decision and Order at 15-16. The administrative law judge went on to note "[t]he logical conclusion from this inability to differentiate between the two etiologies is that coal mine dust, alone, and cigarette smoking, alone, or both combined could be responsible for the miner's impairment." *Id*.

Contrary to the administrative law judge's analysis, Claimant can establish legal pneumoconiosis if he proves through credible medical evidence that coal mine dust exposure significantly contributed to a pulmonary or respiratory impairment caused by cigarette smoking. 20 C.F.R. §718.201(a)(2), (b). Claimant is not "required to demonstrate that coal [mine] dust was the only cause of his current respiratory problems." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576 (6th Cir. 2000); *see also Consol. Coal Co. v. Swiger*, 98 F. App'x. 227, 237–38 (4th Cir. 2004) (same). Dr. Zlupko specifically stated Claimant's years of coal mine dust exposure "significantly contributed" to his pulmonary impairment. Director's Exhibit 17. Such a statement may support a finding of legal pneumoconiosis.

Consol. Coal Co. v. Williams, 453 F.3d 609, 622 (4th Cir. 2006), *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 (7th Cir. 2001); *Cornett*, 227 F.3d at 576.

The administrative law judge further erred in finding Dr. Zlupko's failure to apportion the effects of coal mine dust and cigarette smoking as etiologies of Claimant's obstructive lung disease renders his opinion entitled to less weight. *See J.O.* [*Obush*] *v. Helen Mining Co*., 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom*. *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248 (3d Cir. 2011); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003) (physician need not specifically apportion extent to which various causal factors contribute to a respiratory or pulmonary impairment); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000) (concluding that the risk of clinically significant airways obstruction and chronic bronchitis associated with coal mine dust exposure is additive with cigarette smoking); Claimant's Brief at 7-9. We therefore vacate the administrative law judge's discrediting of Dr. Zlupko's opinion[7] and his finding Claimant did not establish legal pneumoconiosis.[8]

Remand Instructions

On remand, the administrative law judge must reconsider his calculation of the length of Claimant's coal mine employment.[9] He must consider and weigh all relevant

[7] The administrative law judge weighed Dr. Basheda's opinion that Claimant does not have legal pneumoconiosis. Employer's Exhibits 2, 3. He rejected the opinion because he found the doctor's conclusions inconsistent with the regulations and the preamble to the 2001 regulatory revisions, as well as inadequately explained. Decision and Order at 16-18. We affirm this finding as unchallenged. *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 257 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, if the administrative law judge finds on remand that Claimant has invoked the Section 411(c)(4) presumption, he may conclude Dr. Basheda's opinion is inadequate to rebut the presumption of legal pneumoconiosis.

[8] In doing so, we make no judgment as to the adequacy of Dr. Zlupko's opinion. Determining whether a medical report is documented and reasoned is initially a task for the administrative law judge. *See Kertesz*, 788 F.2d at 163.

[9] The administrative law judge should first determine whether the evidence establishes the beginning and ending dates of Claimant's coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). He may determine the dates and length of coal mine employment by any credible evidence,

evidence and adequately explain his findings. *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); *Wojtowicz*, 12 BLR at 1-165. If Claimant establishes at least fifteen years of coal mine employment, he will be entitled to the Section 411(c)(4) presumption.[10] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1). The administrative law judge must then consider whether Employer can rebut the presumption by establishing Claimant has neither legal nor clinical pneumoconiosis, or that "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).

If the administrative law judge finds Claimant has not established at least fifteen years of coal mine employment, then Claimant will not be entitled to the Section 411(c)(4) presumption. The administrative law judge should then reconsider whether Claimant has established legal pneumoconiosis and total disability due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.204(c). In reconsidering the medical opinions, the administrative law judge should take into account the physicians' qualifications, the explanations of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses, and he must explain his findings. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986).

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including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. *Id*. Where the beginning and ending dates of Claimant's employment cannot be determined, the administrative law judge may divide Claimant's yearly reported income from his work as a miner by the coal mine industry's average daily earnings for that year, as reported by the BLS. 20 C.F.R. §725.101(a)(32)(iii).

[10] We affirm, as unchallenged, the administrative law judge's finding that Claimant established total disability and all of his coal mine employment occurred in underground coal mines. *See Skrack*, 6 BLR at 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 5, 25.

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

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge