U.S. Department of Labor

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

BRB No. 21-0607 BLA

MICHAEL R. ADDAIR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN SOUTH MINING COMPANY, LLC	)	
	)	
	)	DATE ISSUED: 04/05/2023
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 Awarding Benefits of Carrie Bland, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

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

PER CURIAM:

Employer appeals Associate Chief Administrative Law Judge (ALJ) Carrie Bland's Decision and Order Awarding Benefits (2017-BLA-06115) rendered on a claim filed on

August 11, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with 16.47 years of underground coal mine employment or surface coal mine employment in conditions substantially similar to those in an underground mine, and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, she found Claimant invoked 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). She further found Employer did not 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 necessary to invoke the Section 411(c)(4) presumption, and that it did not rebut the presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. Employer filed a reply brief reiterating its arguments.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (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 coal mines, or "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4) (2018); 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.

[1] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 12.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 36.

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 on the length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In calculating the length of Claimant's coal mine employment, the ALJ considered his Social Security Administration (SSA) earnings records, application for benefits, employment history forms, and hearing testimony. Decision and Order at 4-6; Director's Exhibits 2, 4-7. She found nothing in the record indicates the beginning or ending dates of Claimant's coal mine employment. Decision and Order at 5.

Because she could not ascertain the beginning and ending dates of Claimant's coal mine employment, the ALJ attempted to apply the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[4] Decision and Order at 4-6. She divided Claimant's yearly earnings as reported in his SSA records by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id*. If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id*. If Claimant had less than 125 working days, the ALJ credited him with a fractional portion of a year based on the ratio of the actual number of days worked to 125. 20 C.F.R. §725.101(a)(32)(i); Decision and Order at 4-6. Based on this method of calculation, she found Claimant had a total of 15.22 years of employment from 1978 to 2014. *Id.* She further found, based on Claimant's testimony, that he had an additional 1.25 years of coal mine employment with Employer from 2015 to 2016,[5] for a total of 16.47 years of coal mine employment from 1978 to 2016. *Id*.

We agree with Employer that the ALJ applied an improper method of calculation in finding the evidence establishes at least fifteen years of coal mine employment. Employer's Brief at 10-12. To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R.

[4] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. 20 C.F.R. §725.101(a)(32)(iii).

[5] Because this finding is unchallenged on appeal, we affirm it. *See Skrack*, 6 BLR at 1-711.

§725.101(a)(32)(i); *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). *If the threshold one-year period is met*, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period.[6] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations.[7] *See Clark*, 22 BLR at 1-281.

In attempting to apply the formula at 20 C.F.R. §725.101(a)(32)(iii), the ALJ failed to acknowledge the threshold inquiry of whether the record establishes a calendar year of employment prior to determining whether Claimant worked at least 125 days in that year. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281. We therefore vacate the ALJ's finding that Claimant established 16.47 years of coal mine employment.[8] *See* 30 U.S.C. §923(b); *Mitchell*, 479 F.3d at 334-36; Decision and Order at 4-6. Consequently, we must vacate her finding that Claimant invoked the Section 411(c)(4) presumption[9] and the award of benefits. 30 U.S.C. §921(c)(4) (2018).

[6] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

[7] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of *days* that a miner worked in a given year, but it does not establish such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii). Under the ALJ's method of calculation, the evidence can be said to have established at least 125 working days, but not that such work occurred during "a period of one calendar year . . . or partial periods totaling one year." 20 C.F.R. §725.101(a)(32).

[8] The ALJ found Claimant's coal mine employment was entirely performed underground or in surface coal mine employment in conditions substantially similar to those in an underground mine. Decision and Order at 6. Because this finding is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[9] We decline to address, as premature, Employer's arguments that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 13-30.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment taking into consideration the relevant evidence and using any reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. In doing so, she should consider all of the SSA records and the parties' arguments regarding whether Claimant has established he was engaged in coal mine employment with each employer. Director's Exhibits 6, 7; Employer's Brief at 7-10; Claimant's Brief at 3-5; Employer's Reply at 3-8. She must determine whether the record evidence shows Claimant worked a calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(iii). She must also explain her findings in accordance with the Administrative Procedure Act.[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the ALJ finds Claimant established fifteen or more years of coal mine employment and invokes the Section 411(c)(4) presumption, she should address whether Employer has rebutted the presumption. If Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c), 718.205.

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "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).

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

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge