U.S. Department of Labor

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

BRB No. 19-0403 BLA

DEBORAH WILSON (o/b/o and Survivor of GENELL P. HESS)	)	
Claimant-Respondent	)	
v.	)	
BEATRICE POCAHONTAS COMPANY	)	
	)	DATE ISSUED: 08/20/2020
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 Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Evan B. Smith, Appalachian Citizens' Law Center, Whitesburg, Kentucky, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge Morris D. Davis's Decision and Order Awarding Benefits (2016-BLA-05693) filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim[1] filed on December 2, 2013.[2]

The administrative law judge credited the Miner with fifteen years, seven months, and twenty-one days of coal mine employment and found the evidence established a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the rebuttable presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012). He further found Employer did not rebut the presumption and awarded benefits.

[1] The Miner, Roy Hess, died on September 28, 2013, and the Miner's widow, Genell P. Hess, thereafter filed this survivor's claim. Director's Exhibit 3. The widow died on May 5, 2019, four days before the administrative law judge issued his Decision and Order Awarding Benefits in her survivor's claim. Claimant's Response Brief at n.1. In Claimant's response brief on appeal before the Board, Claimant's counsel indicates Ms. Deborah Wilson, the daughter of both the Miner and his widow, requests to be added as an interested party and intends to pursue the survivor's claim on behalf of the widow. This request is granted and the caption is amended accordingly. See 20 C.F.R. §725.360(b).

[2] This case involves Claimant's request for modification of a district director's denial of benefits. Director's Exhibit 23. In cases involving a request for modification of a district director's decision, the administrative law judge proceeds de novo and "the modification finding is subsumed in the administrative law judge's findings on the issues of entitlement." *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Motichak v. BethEnergy Mines, Inc*., 17 BLR 1-14, 1-19 (1992).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305. Section 422(*l*) of the Act provides that 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. 30 U.S.C. §932(*l*) (2012). Because the Miner's two lifetime claims for benefits were denied and those decisions are final, Claimant is not entitled to survivor's benefits pursuant to Section 422(*l*).

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption.[4] Alternatively, it contends the administrative law judge improperly invoked the presumption based on erroneously finding the Miner had at least fifteen years of qualifying coal mine employment.[5] Both Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the award of benefits.

The Benefits 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.[6] 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).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 6-7. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer alternatively urges the Board to hold this appeal in abeyance pending resolution of the legal arguments in *Texas*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit,

[4] Although Employer also challenges the constitutionality of Section 422(*l*), Petition for Review at 1, as discussed above, the administrative law judge did not award survivor's benefits based on the automatic entitlement provision. 30 U.S.C. §932(*l*).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding the Miner was totally disabled. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27-29.

[6] Because the Miner's last coal mine employment occurred in Virginia, Hearing Transcript at 35, the Board 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).

within whose jurisdiction this claim arises, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the Board has declined to hold cases in abeyance pending resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case, and deny its request to hold this case in abeyance.

Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mines, 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 the Miner 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 based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27.

We reject Employer's argument the administrative law judge erred in calculating the Miner's coal mine employment. Employer's Brief at 7-15. The administrative law judge considered the Miner's Social Security Administration (SSA) earnings records, his personnel records from Employer, and testimony from the Miner's widow and daughter. Decision and Order at 7-10; Director's Exhibits 6, 7; Employer's Exhibit 15; Hearing Transcript at 19-45.

1956 to 1964

Based on the Miner's SSA records, the administrative law judge permissibly credited him with a full quarter of coal mine employment for each quarter in which he earned at least $50.00 from coal mine operators for the years from 1956 to 1964. *See Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (crediting a miner with a full quarter of coal mine employment when the miner earned $50.00 or more during that time period is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant"); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Using this method, the administrative law judge credited the Miner with twenty-one quarters, or 5.25 years, of coal mine employment from 1956 to 1964. Decision and Order at 7-8. As this finding is supported by substantial evidence, we affirm it. *See Westmoreland Coal Co. v.*

Stallard, 876 F.3d 663, 668 (4th Cir. 2017); *Muncy*, 25 BLR at 1-27; Decision and Order at 7-8.

1965 to 1976

The administrative law judge then calculated the Miner's coal mine employment with Employer from 1965 to 1976. Decision and Order at 8-10. He indicated he would credit the Miner with a year of coal mine employment if the record established "an employment relationship lasting 365 days, of which at least 125 days were spent working and being exposed to coal mine dust." *Id*. at 8-9. He found the evidence established the Miner worked for Employer "from January 4, 1965 until sometime after the second quarter of 1976." *Id*. at 10. He further found the Miner had at least 125 working days in each year from 1965 to 1973, and the year 1975. *Id*. at 8-10. Thus he credited the Miner with ten years of coal mine employment for the years 1965 to 1973, and 1975. *Id*. For the year 1974, he found the Miner "was off due to injury from April 19, 1974 to August 1, 1974, and again from August 9, 1974 to December 10, 1974." *Id*. Therefore he credited the Miner "with [four] months and 17 days of coal mine employment" in this year. *Id*. Finally, he credited the Miner with one week of coal mine employment in 1976 based on the credible testimony of the Miner's daughter. *Id*.

We reject Employer's argument that the administrative law judge erred in crediting the Miner with a year of coal mine employment if the evidence established a calendar year relationship and 125 working days in the calendar year with a coal mine company. Employer's Brief at 8-12. There is no merit to Employer's argument that the regulation at 20 C.F.R. §725.101(a)(32) only applies to the responsible operator issue and cannot be used to calculate a Miner's coal mine employment. The regulation at 20 CFR §718.301 specifies that the "length of a miner's coal mine work history must be computed as provided by [20 CFR §725.101(a)(32)]" for purposes of invoking the Section 411(c)(4) presumption.

Section 725.101(a)(32) defines 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). 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). If the requirement of a calendar-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 is entitled to credit for one full year of coal mine employment. *Id*. Contrary to Employer's argument, the administrative law judge based his calculation for the years 1965 to 1976 on a reasonable method of computation. *See Daniels Co. v.*

Mitchell, 479 F.3d 321, 334-36 (4th Cir. 2007); *Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003).

Employer asserts the administrative law judge erred in finding the Miner's employment relationship with it lasted through the second quarter of 1976. Employer's Brief at 9-15. This argument has no merit. The administrative law judge acknowledged the Miner's employment records indicate the Miner stopped working on "July 22, 1975, when he was off because of an old injury." Decision and Order at 9; *see* Director's Exhibit 6. He noted, however, the Miner's daughter testified he subsequently returned to work for Employer "for a brief period in 1976."[7] Decision and Order at 9, *citing* Hearing Transcript at 37-40. The administrative law judge further noted the Miner's SSA records reflect "earnings of $240.80 in the first quarter and $54.87 in the second quarter of 1976."[8] *Id*. Contrary to Employer's argument, the administrative law judge permissibly found the Miner's daughter's testimony "was credible, and corroborated by [the Miner's] Social Security earnings report."[9] *Id*.; *see Stallard*, 876 F.3d at 670; *Mabe v. Bishop Coal Co.*, 9

[7] Specifically, the administrative law judge noted the Miner's daughter testified he "stopped working in 1976" as she "remembered that she was in eleventh grade and had a science project she was supposed to do, but her father was hurt the summer of 1975 and was out of work." Decision and Order a 9, *citing* Hearing Transcript at 37-40. She indicated her "father was upset that they had no income, and that the churches were paying their electric bill and bringing them food. She remembered her father saying that he was going back to work. He went back, not for long, and tried to work for a brief period in 1976." *Id*. She further "stated that it was after Christmas of that year; he went back to work in the beginning of 1976. She did not know the dates he worked, but she remembered that he returned for a brief period of time, probably days, or maybe a week or two." *Id*.

[8] The administrative law judge acknowledged Employer's argument that the Miner's earnings in 1976 could be attributed to pay for holidays. Decision and Order at 9. Specifically, the Miner was "entitled to receive pay for nine holidays between July 22, 1975 and the end of the second quarter of 1976" under the National Bituminous Coal Wage Agreement of 1974. *Id*., *citing* Employer's Exhibit 15. The administrative law judge noted, however, that under this agreement, payment for "sickness or injury was dependent on continued employment." *Id*. Based on the Miner's earnings, the administrative law judge rationally found this employment agreement buttressed finding the Miner worked for Employer through the second quarter of 1976. *Consolidation Coal Co. v. Held*, 314 F.3d 184, 187-78 (4th Cir. 2002); Decision and Order at 9-10.

[9] As we affirm the administrative law judge's finding the Miner's daughter's testimony was credible, we also affirm his finding that the testimony establishes the Miner worked for Employer for one week in 1976 as Employer does not specifically dispute the

BLR 1-67 (1986). Because it is supported by substantial evidence, we affirm the administrative law judge's finding the Miner was employed by Employer through each calendar year from 1965 to 1975.[10] *See Stallard*, 876 F.3d at 670; Decision and Order at 8-10.

Employer does not challenge the administrative law judge's finding that the record establishes the Miner had at least 125 working days for each year from 1965 to 1973, and the year 1975. Decision and Order at 8-10. Thus we affirm his finding that the Miner had ten years of coal mine employment for the years 1965 to 1973, and the year 1975. *See Daniels*, 479 F.3d at 334-36; *Shepherd*, 915 F.3d at 406-07; *Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, Employer does not specifically challenge the administrative law judge's finding the Miner had four months and 17 days of coal mine employment in 1974. Decision and Order at 9-10. Thus this finding is also affirmed. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack*, 6 BLR at 1-711.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant established at least fifteen years of coal mine employment. Further, because it is unchallenged on appeal, we affirm his finding that all the Miner's employment occurred in underground coal mines. *See Skrack*, 6 BLR at 1-711; Decision and Order at 10. We also affirm his determination that Claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. 20 C.F.R. §718.305(b)(1). Because Employer has not challenged the administrative law judge's determination that it did not rebut the presumption, we affirm his finding and the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 29-40.

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calculation. *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Skrack*, 6 BLR at 1-711; Decision and Order at 9-10.

[10] Although the Miner took time off for injuries at various times from 1965 to 1976, the administrative law judge correctly noted in "determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." 20 CFR §725.101(a)(32); *see* Decision and Order at 8-9.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge