U.S. Department of Labor

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

BRB No. 22-0156 BLA

TEDDY E. VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROCKHOUSE CREEK DEVELOPMENT CORPORATION	)	
	)	
	)	DATE ISSUED: 8/31/2023
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Administrative Law Judge Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer and its Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2020-BLA-05427) rendered on a claim filed on March 19, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant established 15.5 years of underground coal mine employment and a totally disabling respiratory impairment.[1] 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] He concluded Employer did not rebut the presumption and therefore awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant invoked the Section 411(c)(4) presumption by establishing 15.5 years of coal mine employment. Thus, it contends remand is required because the ALJ did not consider whether the medical evidence supports an award of benefits if the presumption is not invoked.[3] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, declined to file a response.

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

[1] The parties stipulated that Claimant had at least 9.31 years of coal mine employment. Hearing Transcript at 10.

[2] 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.

[3] We affirm, as unchallenged on appeal, the ALJ's findings that all of Claimant's coal mine employment was underground and that Claimant is totally disabled. 20 C.F.R. §§718.204(b)(2), 718.305; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 13, 25.

accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & 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 initially establish he worked at least fifteen years in underground coal mines or in "substantially similar" surface coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). Claimant bears the burden 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 dates and length of employment may be established by any credible evidence, and the Board will uphold an ALJ's determination based on a reasonable method of calculation that is supported by substantial evidence. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011).

In addressing the length of Claimant's coal mine employment, the ALJ considered Claimant's testimony and Social Security Administration (SSA) earnings statement.[5] Decision and Order at 11-12; Hearing Transcript at 19-28; Director's Exhibit 5. The ALJ summarized Claimant's testimony regarding his coal mining work[6] from 1979 to 2014 for Chapmanville Construction Company, Inc.; Stonco, Inc.; Kirk Enterprises, Inc.; Belo Mine Services; and Rockhouse Creek Development Corp.[7] Decision and Order at 11. Because

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5; Hearing Transcript at 36.

[5] Although the ALJ does not cite to Claimant's SSA earnings statement, there is no other evidence in the record reflecting Claimant's yearly income. Decision and Order at 12; *see* Director's Exhibit 5.

[6] Claimant also testified regarding his employment from 1975 to 1977 with Guyan International, Inc., where he worked in a machine shop repairing cable reels used in coal mines. Hearing Transcript at 16-18; Director's Exhibit 6. The ALJ found this employment did not constitute coal mine employment, as Claimant did not demonstrate he spent a "significant portion" of his work at a coal mine site because the shop was ten miles from the nearest coal mine. Decision and Order at 9. Claimant does not contest this finding; thus, it is affirmed. *See Skrack*, 6 BLR at 1-711; Claimant's Response.

[7] Claimant confirmed he worked for each employer during the years noted on his SSA earnings statement. Hearing Transcript at 19-28. The records reflect earnings from Chapmanville Construction Company, Inc. (Chapmanville Construction) in 1979 through

the ALJ found Claimant "established periods of coal mine employment encompassing full calendar years and various partial calendar years totaling more than one year," the ALJ stated he next had to consider whether Claimant worked at least 125 days during these periods. *Id.* at 11. He then applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii),[8] dividing Claimant's yearly earnings by the coal mine daily average wage, as well as comparing Claimant's earnings to the industry's average yearly earnings for 125 days of employment. *Id*. at 11-12. For each year in which Claimant's earnings met or exceeded the average yearly earnings for 125 days, he credited Claimant with a full year of coal mine employment. *Id*. For the years in which Claimant's earnings fell short of those average yearly earnings, he credited Claimant with a fractional year, using the average yearly earnings as the divisor. *Id*. Applying this formula, the ALJ credited Claimant with 15.5 years of coal mine employment. *Id.* at 12. Thus, under the ALJ's method of calculation, Claimant established a year of coal mine employment if he established at least 125 working days.

We agree with Employer that the ALJ applied an improper method of calculation in finding the evidence establishes 15.5 years of coal mine employment. Employer's Brief at 3-6. 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. §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, then the ALJ must determine whether the miner worked for at least 125 working days within that one-year

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1983, Stonco, Inc. (Stonco) in 1990 and 1991, Kirk Enterprises, Inc. in 1992, Belo Mine Services (Belo) in 2004, and Rockhouse Creek Development Corp. from 2004 through 2014. Decision and Order at 3; Director's Exhibit 5.

[8] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> 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 daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.*

period.[9] 20 C.F.R. §725.101(a)(32); *Clark*, 22 BLR at 1-280; *Mitchell*, 479 F.3d at 334-36; *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment). 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.[10] *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281.

Initially, the ALJ did not specify whether he could ascertain the beginning and ending dates of Claimant's coal mine employment prior to applying the formula. 20 C.F.R. §725.101(a)(32)(ii)-(iii); Decision and Order at 11-12. In addition, while the ALJ acknowledged the threshold calendar year requirement and purported to find "calendar years or partial years consisting of a calendar year," he did not explain this finding. Decision and Order at 11. Insofar as the ALJ found Claimant's testimony established continuous employment relationships with each employer, the ALJ did not explain how Claimant's testimony supported his finding and thus his finding does not comply with the Administrative Procedure Act (APA).[11] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's Brief at 4-5. Claimant testified he was unsure whether he worked entire years

[9] 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).

[10] 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).

[11] 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).

in some instances due to layoffs and seemed to acknowledge his earnings in certain years did not reflect an entire year of employment.[12]

Rather than making the required two-step finding, the ALJ erroneously relied solely on a finding of 125 days of employment to find a year of employment. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281; Decision and Order at 11-12. We therefore vacate the ALJ's finding that Claimant established 15.5 years of coal mine employment. Decision and Order at 12. Consequently, we also vacate his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4); Decision and Order at 25.

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, he must determine whether the record contains sufficient evidence to establish the beginning and ending dates of Claimant's coal mine employment. If he is unable to make such a determination from the evidence, the ALJ *may*, in his discretion, apply the formula at 20 C.F.R. §725.101(a)(32)(iii), using the daily wage from Exhibit 610 to determine calendar years of coal mine employment.[13] If the threshold finding of a calendar year is established, then he is to consider whether Claimant worked for 125 days during each one-year period.

[12] Claimant testified that he did not know if his earnings of $13,000 in 1980 for Chapmanville Construction reflected a full year of coal mine employment because "back then" he would sometimes work for a coal company for a few months and then get laid off for a month. Decision and Order at 11; Hearing Transcript at 20. Claimant believed the $19,608 he earned in 1990 from Stonco reflected an entire year of earnings but did not know how many months he worked in 1991, when he earned $8,484. Hearing Transcript at 23. Similarly, Claimant indicated he did not know how many months he worked in 2004 for Belo. Hearing Transcript at 26-27.

[13] We decline to instruct the ALJ to apply the method of calculation used by Employer to determine a calendar year of coal mine employment. Employer's Brief at 5-6. Any reasonable method of computation will be upheld if it is supported by substantial evidence and in accordance with the law. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Mitchell, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75. The ALJ must explain his findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

As we have affirmed the ALJ's findings that all of Claimant's coal mine employment was underground and that Claimant has established total disability, if the ALJ again finds fifteen or more years of coal mine employment established, Claimant will have invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. Then, because Employer has not contested the ALJ's findings that it failed to rebut the presumption, the award of benefits may be reinstated. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983). However, if Claimant fails to establish at least fifteen years of underground coal mine employment, the ALJ must consider whether Claimant can establish entitlement under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Awarding Benefits, and we remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge