U.S. Department of Labor

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

BRB No. 20-0531 BLA

PAUL EDWARD FIELDS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 12/29/2021
	)	
SUNCOKE ENERGY	)	
	)	
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 on Modification of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for Claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for Employer and its carrier.

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

PER CURIAM:

Employer and its carrier (Employer) appeal Administrative Law Judge (ALJ) Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits on Modification (2019-BLA-05142) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent claim filed on April 14, 2014.[1]

In his March 2, 2018 Decision and Order Denying Benefits, ALJ Steven B. Berlin (Judge Berlin) found Claimant established a totally disabling respiratory impairment and, thus, a change in an applicable condition of entitlement.[2] 20 C.F.R. §§718.204(b)(2), 725.309. Judge Berlin also found Claimant established "a little more than [six and a half] years of coal mine employment." He therefore found Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2018); Director's Exhibit 60. He further found Claimant did not establish pneumoconiosis and denied benefits. 20 C.F.R. §718.202(a).

Claimant requested modification of that denial on May 2, 2018, and submitted additional evidence. Director's Exhibit 73. In his August 24, 2020 Decision and Order

[1] This is Claimant's second claim for benefits. ALJ Rudolf L. Jansen (Judge Jansen) denied Claimant's first claim, filed on February 12, 2001, because he did not establish any element of entitlement. Director's Exhibit 1 at 54. The Benefits Review Board affirmed Judge Jansen's denial of benefits. *Fields v. Shamrock Coal Co.*, BRB No. 03-0847 BLA (Aug. 11, 2004) (unpub.). Claimant took no further action until filing the current claim. Director's Exhibit 3.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds "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). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing one of these elements in order to obtain review of the merits of his current claim. Director's Exhibit 1.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

that is the subject of this appeal, ALJ Peter B. Silvain, Jr. (the ALJ) found Claimant established 15.13 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Therefore, he found Claimant invoked the Section 411(c)(4) presumption. He also found Employer did not rebut the presumption, thus entitling Claimant to benefits. The ALJ also found Claimant separately established entitlement to benefits by operation of the irrebuttable presumption of total disability due to complicated pneumoconiosis at Section 411(c)(3) of the Act.[4] 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Finally, the ALJ determined modification rendered justice under the Act and awarded benefits. 20 C.F.R. §725.310.

On appeal,[5] Employer challenges the constitutionality of the Section 411(c)(4) presumption. On the merits, Employer contends the ALJ erred in finding Claimant established fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption. It also argues the ALJ erred in finding Claimant established complicated pneumoconiosis and invoked the Section 411(c)(3) presumption.[6] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The 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.[7] 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).

[4] He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b).

[5] Employer filed its Petition for Review and brief on January 8, 2021, requesting that the Board accept the filing of these pleadings out of time. Employer represented that the late filing of its pleadings was an oversight as a consequence of the due date not being placed on its calendar. By Order, the Board accepted Employer's late-filed brief as part of the record and allowed response briefs to be filed within thirty days from its receipt. *Fields v. Shamrock Coal Co., Inc.*, BRB No. 20-0531 BLA (June 3, 2021) (Order) (unpub.).

[6] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. 20 C.F.R. §718.204(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9, 22-23.

[7] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See*

Modification – Legal Standard

Employer argues the ALJ did not perform the proper legal analysis because he failed to "expressly find" Judge Berlin made a mistake in a determination of fact. Employer's Brief at 8-10. We reject Employer's argument.

First, the ALJ specifically identified Judge Berlin's mistake in a determination of fact:

> Although I have considered the evidence submitted in the Claimant's prior claim, because pneumoconiosis is a progressive disease, I give the most probative weight to the evidence and medical opinions submitted in conjunction with this claim. . . . I find that the Employer has failed to rebut the presumption of legal pneumoconiosis. Judge Berlin previously concluded that, although the Claimant is totally disabled, he failed to establish that he has pneumoconiosis. However, I have found that the evidence establishes that the Claimant worked for at least fifteen years as a coal miner, thereby allowing him to invoke the regulatory presumption at 20 C.F.R. § 718.305. Moreover, the evidence establishes that the Claimant suffers from clinical and legal pneumoconiosis. For purposes of modification under 20 C.F.R. § 725.310, I find that this constitutes a mistake in a determination of fact in the previous denial. Therefore, I have reviewed the entire record de novo to determine his entitlement to benefits prior to February 2019.

Decision and Order at 36.

Furthermore, the ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). When a request for modification is filed, "any mistake may be corrected [by the ALJ], including the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497 (4th Cir. 1999); *see Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 954 (6th Cir. 1999); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993). Moreover, an ALJ has the authority "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *Stanley*, 194 F.3d at 497. Any "mistake may be corrected [by the ALJ], including the

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Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1 at 625, 630; 4; 6; 8.

ultimate issue of benefits eligibility." *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993); *see King v. Jericol Mining, Inc.*, 246 F.3d 822, 825 (6th Cir. 2001). The ALJ is granted "broad discretion" in making such findings; "[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence." *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994). We therefore reject Employer's arguments and hold the ALJ acted within his discretion in reviewing all the evidence of record to find Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310; *see O'Keeffe,* 404 U.S. at 256; *King*, 246 F.3d at 825; Decision and Order at 38, 39.

Constitutionality of 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 5-6. 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's arguments with respect to the constitutionality of the ACA and the severability of its amendments to the Black Lung Benefits Act are now moot. *California v. Texas*, 593 U.S. , 141 S. Ct. 2104, 2120 (2021).

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 in "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing 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 ALJ's determination 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).

In calculating the length of Claimant's coal mine employment, the ALJ considered his Form CM-911 Claim for Benefits, Employment History form, Social Security Administration (SSA) earnings records, employment application, state tax returns from 1981 and 1982, hearing testimony, and affidavits. Director's Exhibits 3; 4; 6-8; 49 at 32, 38, 40; Claimant's Exhibit 5. He found this evidence established 15.13 years of coal mine employment from 1976 to 1992. Decision and Order at 8-9.

Employer initially argues Claimant stipulated to eight and a half years of coal mine employment at the March 12, 2003 hearing before Judge Jansen in his first claim. Employer's Brief at 7. Employer's argument fails for two reasons.

First, the record in the prior claim reflects the parties' understanding that Claimant stipulated to *at least* eight and a half years of coal mine employment. At the hearing, Judge Jansen stated Claimant's stipulation was to eight and a half years "plus any additional time that he may [testify] to," and that the issues to be resolved included "partial resolution of the length of coal mine employment." Director's Exhibit 1 at 165-66. In his Decision and Order – Denying Benefits, Judge Jansen accepted the parties' stipulation to at least eight and a half years of coal mine employment, and then addressed Claimant's allegation that he had additional coal mine employment. *Id*. at 45.

Second, even had Claimant stipulated to *only* eight and a half years in his initial claim, he would not be bound by that stipulation in his subsequent claim as "fundamental fairness and due process would require relief from even a formal stipulation made prior to the change in law [under Section 411(c)(4)]." *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-64-65 (2012). Because the change in law at Section 411(c)(4) altered the legal significance of stipulations concerning the length of coal mine employment, neither party is bound by the 2003 stipulation.

Employer next argues the ALJ erred in finding Claimant worked for Mary Bell Trucking (Mary Bell) and Cardinal Resources, Incorporated (Cardinal)[8] from 1976 through 1986 because "nothing reliably documents any coal mine employment between 1983 and 1987," when Claimant began working for Shamrock Coal Company, Incorporated (Shamrock Coal). Employer's Brief at 8-9. Its arguments have no merit.

For the years 1976 to 1986, the ALJ relied on Claimant's testimony from the September 24, 2019 hearing and other documents in the record. The ALJ noted Claimant testified that his employment with Mary Bell and Cardinal was not listed on his SSA earnings records because they paid him by personal check or in cash. Decision and Order at 7; Hearing Transcript at 22; Director's Exhibits 1 at 173, 180; 49 at 32, 38. He also noted Claimant testified he never stopped working from 1982 to 1987.[9] Decision and Order

[8] Claimant testified that Cardinal Resources, Incorporated (Cardinal) owned Carol Coal Company (Carol Coal), American Coal Company (American Coal), and Joc Coal Company. Decision and Order at 5; Hearing Transcript at 22; Director's Exhibit 1 at 178. The ALJ accepted Claimant's employment with Carol Coal and American Coal as employment with Cardinal. Decision and Order at 5. Employer states Carol Coal became Cardinal and Cardinal later became American Coal, but it raises no issue with the ALJ's discussion of them as one entity, i.e., Cardinal. Employer's Brief at 7-8.

[9] We reject Employer's assertion that the ALJ erred in crediting Claimant's most recent hearing testimony and Employment History form because he alleges in both that "[he] continued working at American Coal from 1983 to 1987." Employer's Brief at 8.

at 7; Hearing Transcript at 19, 22, 29. He found John Patrick Roberts's affidavit[10] and Claimant's employment application[11] corroborated Claimant's credible testimony that he worked in coal mine employment for Mary Bell from 1976 to 1981 and from 1983 to 1985.[12] Decision and Order at 7; Hearing Transcript at 20-21, 22, 29. He also found Jerry Caldwell's affidavit and Claimant's Employment History form[13] corroborated Claimant's credible testimony that he worked in coal mine employment for Cardinal from 1979 to 1986.[14] Decision and Order at 7. Thus he permissibly found Claimant's testimony and supporting evidence established he worked for Mary Bell and Cardinal from 1976 through

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While the ALJ acknowledged Claimant estimated he worked for Mary Bell Trucking (Mary Bell) until 1987 and his Employment History form alleged he worked for American Coal in 1987, he found Claimant's employment with Mary Bell and Cardinal, which owned American Coal, ended in 1986. Decision and Order at 7.

[10] John Patrick Roberts is the son of Mary Bell's owner. Decision and Order at 5.

[11] Claimant's employment application stated he worked for Mary Bell from 1983 to 1985. Decision and Order at 7; Director's Exhibit 6 at 12.

[12] Employer states the ALJ's determination that Claimant's work for Mary Bell qualified as coal mine employment is an "affront" to Judge Berlin's prior decision. Employer, however, does not identify any error or raise any specific challenge to that finding; we therefore affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order at 5. Notably, the ALJ credited evidence that Claimant's job required him to transport equipment to, from, and between coal mines which regularly exposed him to coal mine dust. Decision and Order at 5.

[13] The ALJ noted Claimant's Employment History form indicated he continued to work from 1983 through 1986 for American Coal, which Cardinal owned. Decision and Order at 7; Director's Exhibit 4.

[14] The ALJ also considered the affidavits of Earl Anthony Roberts and Joe Morgan, Jr., Claimant's work colleagues, about his employment with Cardinal. Decision and Order at 7 n.12. He found Claimant's testimony as corroborated by the affidavit of his former employer Jerry Caldwell more credible. *Id*.

1986[15] for a total of ten years of coal mine employment.[16] *Id.*;[17] *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility); Decision and Order at 7.

Employer further argues the ALJ ignored the "information [it] freely provided" showing Claimant worked for Shamrock Coal for five years and three months, or 5.25 years. Employer's Brief at 10. The ALJ, however, credited Claimant with only 5.13 years of coal mine employment with Shamrock from 1987 to 1992.[18] *Id*. at 9. Because the ALJ

[15] We note the ALJ's finding is consistent with Claimant's testimony in the prior hearing that he went "back and forth" between Mary Bell and other employers, and that he went back to Mary Bell after working for Cardinal. Director's Exhibit 1 at 176, 183.

[16] Employer also argues the ALJ erred in finding Claimant worked in coal mine employment for Cardinal from 1979 to 1982 based in part on Jerry Caldwell's affidavit because the ALJ failed to consider Claimant's prior testimony from the March 12, 2003 hearing that he worked for Carol Coal from 1981 to 1984. Employer's Brief at 8; Director's Exhibit 1 at 184. As discussed, the ALJ accepted Claimant's employment with both Carol Coal and American Coal as employment with Cardinal. Decision and Order at 5. The ALJ permissibly found Claimant's September 24, 2019 hearing testimony that he worked in coal mine employment for Cardinal from 1979 to 1986 credible and corroborated by Jerry Caldwell's affidavit and Claimant's Employment History form. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order at 7. Because Claimant's prior testimony that he worked for Carol Coal from 1981 to 1984 is consistent with the ALJ's finding that Claimant worked for Cardinal during those years, Employer has not shown how the error to which it points could have made any difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[17] We note that 1976 through 1986 encompasses eleven calendar years. Any potential error by the ALJ in crediting Claimant with only ten years of coal mine employment during this period is harmless, as he nevertheless found Claimant entitled to the Section 411(c)(4) presumption. *See Larioni*, 6 BLR at 1-1278.

[18] The ALJ noted Claimant's SSA earnings records show he worked for Shamrock Coal from 1987 through 1992. Decision and Order at 8. As the evidence did not identify the beginning and ending dates of Claimant's coal mine employment with Shamrock Coal,

credited Claimant with less coal mine employment with Shamrock Coal than Employer acknowledged that its evidence showed, Employer has not explained why the alleged error requires remand.[19] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As it is supported by substantial evidence, we affirm the ALJ's finding that Claimant established 15.13 years of coal mine employment. *Muncy*, 25 BLR at 1-27. We therefore affirm his determination that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Further, because Employer does not challenge the ALJ's finding that it did not rebut the presumed facts of legal pneumoconiosis and disability causation, we affirm the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 36-37, 39.

Because we affirm the ALJ's award of benefits pursuant to Section 411(c)(4), we need not address Employer's challenge to his finding that Claimant also established

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the ALJ permissibly applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to calculate its length. *Id*. Thus, he prepared a chart comparing Claimant's yearly earnings as set forth in his SSA earnings records to the average yearly earnings for miners who worked 125 days during a year as set out in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Decision and Order at 8-9. He permissibly found Claimant established four years of coal mine employment for the years 1988, 1989, 1990, and 1991 as he worked at least 125 days in each of those years for Shamrock Coal. *Id*. For the years 1987 and 1992, the ALJ calculated fractional years of coal mine employment based on the ratio of days worked to the yearly wages set forth in Exhibit 610 for miners who worked at least 125 days. *Id*. He reasonably credited Claimant with a total of 1.13 years of coal mine employment for the years 1987 and 1992. *Id.*; *see Shepherd*, 915 F.3d at 401.

[19] Employer asserts the evidence allows for an accurate determination of the starting and ending dates for Claimant's coal mine employment with Shamrock Coal, without pointing to any specific error in the ALJ's finding that he could not determine the dates. Employer's Brief at 10. The Board must limit its review to contentions of error the parties specifically raise. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus, we affirm the ALJ's determination that the beginning and ending dates of Claimant's employment with Shamrock Coal cannot be determined. Decision and Order at 8.

entitlement to benefits by invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3). Employer's Brief at 11-20.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge