U.S. Department of Labor

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

BRB No. 23-0244 BLA

DANIEL J. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MEPCO, LIMITED LIABILITY COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 02/07/2024
	)	
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 Remand 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.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Eirik Cheverud (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

BOGGS and JONES, Administrative Appeals Judges:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Awarding Benefits on Remand (2018-BLA-05865) 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 subsequent miner's claim filed on May 20, 2016,[1] and is before the Benefits Review Board for the second time.[2]

In his initial Decision and Order Awarding Benefits, the ALJ credited Claimant with sixteen years of underground coal mine employment and found he has a totally disabling pulmonary or respiratory impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked 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), and established a change in an applicable condition of entitlement.[4] 20 C.F.R. §725.309(c). The ALJ further found Employer failed to rebut the presumption and awarded benefits.

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[1] Claimant filed two prior claims for benefits. Director's Exhibits 1, 2. Claimant filed his most recent prior claim on December 18, 2013. Director's Exhibits 1, 2. The district director denied it on August 7, 2014, because Claimant failed to establish total disability. Director's Exhibit 1.

[2] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Lewis v. MEPCO, LLC*, BRB No. 21-0227 BLA (June 22, 2022) (unpub.).

[3] Section 411(c)(4) 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.

[4] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must deny the subsequent claim unless he finds "one of the applicable conditions of entitlement . . . has changed since the date upon which

Considering Employer's appeal, the Board affirmed the ALJ's finding that Claimant established the presence of a totally disabling pulmonary or respiratory impairment.[5] *Lewis v. MEPCO, LLC*, BRB No. 21-0227 BLA, slip op. at 7 (June 22, 2022) (unpub.). However, the Board held the ALJ erred in summarily stating that Claimant established sixteen years of underground coal mine employment based upon "a totality of the evidence" without adequately explaining the basis for it. *Id.* at 8. Thus, the Board vacated the ALJ's conclusion that Claimant invoked the Section 411(c)(4) presumption and the award of benefits, and remanded the case for further consideration.[6] *Id.* at 8-9.

On remand, the ALJ found Claimant established nineteen years of underground coal mine employment and thus invoked the Section 411(c)(4) presumption.[7] 30 U.S.C. §921(c)(4) (2018). He 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 coal mine employment to invoke the Section 411(c)(4) presumption. It further argues the ALJ erred in considering Dr. Hornsby's opinion relevant to whether it rebutted the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the ALJ's calculation of the length of Claimant's coal mine employment

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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 the district director denied Claimant's prior claim for failure to establish total disability, Claimant needed to submit new evidence establishing total disability to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; Director's Exhibits 1, 2.

[5] Because Claimant established total disability, the element of entitlement denied in his prior claim, he established a change in applicable condition of entitlement. 20 C.F.R. §725.309(c).

[6] The Board held that the ALJ erred in considering Dr. Hornsby's medical opinion and instructed the ALJ to not consider Dr. Hornsby's opinion on remand. *Lewis*, BRB No. 21-0227 BLA, slip op. at 4 n.6, 9 n.14.

[7] Although the ALJ was not required to do so, as the Board's previous affirmance of his total disability determination constituted the law of the case, the ALJ again found that Claimant is totally disabled. *See Lewis*, BRB No. 21-0227 BLA, slip op. at 7; Decision and Order on Remand at 18-24.

and direct the ALJ to comply with the Board's prior remand instruction to not consider Dr. Hornsby's medical opinion.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[8] 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

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 Board will uphold an ALJ's determination if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt*, 7 BLR at 1-710-11.

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, or 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); *Clark*, 22 BLR at 1-280. If the miner's employment "lasted for a calendar year or partial periods totaling a 365-day period amounting to one year," the regulations presume, in the absence of contrary evidence, "that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii). The regulations further provide that an ALJ may rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f 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 . . . ." 20 C.F.R. §725.101(a)(32)(iii).

The ALJ considered Claimant's CM-911 Claim for Benefits form, his CM-911a Employment History form, his hearing testimony, his Social Security Administration (SSA) earnings records, and the Director's determination of the length of his coal mine employment. Decision and Order on Remand at 4-6. Initially, the ALJ found Claimant failed to establish the specific beginning and ending dates of his coal mine employment.

[8] 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); Director's Exhibit 7.

Id. at 5. Crediting Claimant with "full years of coal mine employment for each year in which his [SSA earnings] records show substantial earnings with the coal mine employer," the ALJ determined he had nineteen years of qualifying coal mine employment.[9] *Id.* at 5.

We agree with Employer and the Director that the ALJ did not adequately explain his calculation of the length of Claimant's coal mine employment. Director's Brief at 2-4; Employer's Brief at 5-7. The ALJ failed to define what constituted "substantial earnings" from Claimant's SSA earnings records and did not explain how he determined that "substantial earnings" established the threshold one-year employment relationship between Claimant and the coal mine operators. Decision and Order on Remand at 5. As we are unable to discern the reasoning behind the ALJ's length of coal mine employment calculation, his finding does not comply with the Board's remand instructions or the requirements of the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); *see also Lewis*, BRB No. 21-0227 BLA, slip op. at 8-9.

We therefore vacate the ALJ's finding that Claimant established nineteen years of coal mine employment. Decision and Order on Remand at 5. Consequently, we must 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 on Remand at 6, 8, 27.

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. He must determine whether the 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), and must explain his findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165.

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[9] The Board previously affirmed the ALJ's finding that all of Claimant's coal mine employment was qualifying. *Lewis*, BRB No. 21-0227 BLA, slip op. at 8 n.11.

[10] The Administrative Procedure Act requires 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).

If the ALJ finds Claimant established fifteen or more years of underground coal mine employment and thus invokes the Section 411(c)(4) presumption, he 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. §§718.3, 718.202, 718.203, 718.204. As the Board previously instructed, the ALJ must not consider Dr. Hornsby's medical opinion on the issues of rebuttal or whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *Lewis*, BRB No. 21-0227 BLA, slip op. at 9 n.14.

Accordingly, we vacate the ALJ's Decision and Order Awarding Benefits on Remand and remand the case for further consideration in accordance with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

GRESH, Chief Administrative Appeals Judge, concurring:

I concur with vacating the ALJ's finding that Claimant established nineteen years of qualifying coal mine employment and therefore his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b). I therefore concur with again remanding the case for reconsideration of those issues.

However, I write separately to express my view that, in this case arising within the jurisdiction of the Fourth Circuit, due to the Board's previous remand of this case and the ALJ's failure to follow the Board's instructions and repetition of errors, "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537 (4th Cir. 1998) ("Finding the ALJ made several errors of law including failing to consider all of the relevant evidence and to adequately explain his rationale for crediting certain evidence, we conclude that review of this claim requires a fresh look at the evidence."); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). While the ALJ's integrity or impartiality is not in question, such circumstances in cases arising within the Fourth Circuit's jurisdiction

require a "fresh look" at the evidence in view of the Board's previous remand instructions and the ALJ's failure to follow them as directed when weighing the evidence on remand.

Thus, I would direct the case be reassigned to a different ALJ on remand. I otherwise concur in the majority opinion in all other respects.

DANIEL T. GRESH, Chief
Administrative Appeals Judge