U.S. Department of Labor

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

BRB Nos. 21-0596 BLA
and 21-0597 BLA

JOYCE A. ROLLISON (o/b/o and Widow of WENDELL ROLLISON)	)	
Claimant-Respondent	)	
v.	)	
U.S. STEEL CORPORATION c/o HEALTHSMART CASULATY CLAIM SOLUTIONS	)	
and	)	DATE ISSUED: 01/11/2023
UNITED STATES STEEL CORPORATION c/o SMART CASUALTY CLAIMS	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Awarding Benefits 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.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge, and ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge (ALJ) Drew A. Swank's Decisions and Orders Awarding Benefits (20-BLA-05651 and 20-BLA-05981) rendered on claims 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 April 12, 2018,[1] and a survivor's claim filed on May 1, 2020.[2]

The ALJ found the Miner had 15.001 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he determined Claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] The ALJ further found Employer did not rebut the presumption and awarded benefits in the miner's claim. Because the Miner was entitled to benefits at the time of his death, the ALJ concluded Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).[4]

[1] The Miner filed two prior claims in 1981 and 1991, but the records for those claims are unavailable. Miner's Claim (MC) Director's Exhibits 1-3.

[2] The Miner died on July 23, 2019, while his claim was pending before the district director. MC Director's Exhibit 13; Widow's Claim (WC) Director's Exhibit 6. Claimant, the Miner's widow, is pursuing his claim on his behalf, as well as her own survivor's claim. MC Director's Exhibit 13; WC Director's Exhibit 3. Because both of the Miner's prior claims records are unavailable, the ALJ did not consider them and required Claimant to establish each element of entitlement in the Miner's claim. MC Decision and Order at 3-27.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] Under Section 422(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without

On appeal, Employer argues the ALJ erred in finding Claimant established fifteen years of qualifying coal mine employment, and thus also erred in his determination that Claimant invoked the Section 411(c)(4) presumption.[5] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc*., 380 U.S. 359, 361-62 (1965).

Miner's Claim -Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden to establish the number of years the Miner worked in qualifying coal mine employment. *See 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); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

Qualifying Coal Mine Employment

Initially, we reject Employer's assertion that the ALJ erred in finding all of the Miner's coal mine employment was qualifying. Employer's Brief at 7-8. In addressing

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having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[5] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established the Miner had a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24.

[6] The Board will apply the law of the United States Court of Appeals for the Third Circuit because the Miner performed his last coal mine employment in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 7.

the nature of the Miner's coal mine employment, the ALJ considered the Miner's CM-911a Employment History form on which the Miner described each period of coal mine employment as "underground."[7] Miner's Claim (MC) Decision and Order at 8; MC Director's Exhibit 7. Contrary to Employer's assertion, the ALJ acted within his discretion in crediting the Miner's uncontradicted statements as sufficient to establish all his coal mine employment was qualifying. 30 U.S.C. §921(c)(4); *Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3d Cir. 1979); *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting miner's uncorroborated testimony that employer characterized as "hazy and contradictory"); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (ALJ may rely on miner's testimony especially if the testimony is not contradicted by any documentation of record). We therefore affirm his finding.

Length of Coal Mine Employment

The ALJ considered Claimant's hearing testimony, the CM-911 Claim for Benefits form, the CM-911a Employment History form, the CM-913 Description of Coal Mine Work and Other Employment form, the district director's findings, and Social Security Administration (SSA) earnings records. MC Decision and Order at 4-7; MC Director's Exhibits 6-10, 42, 53; Hearing Transcript at 19-20. He found the Miner and Claimant provided varying accounts as to the length of his coal mine employment and therefore looked to the Miner's wages in coal mine employment to assess the length of his employment. MC Decision and Order at 5. He observed the Miner's SSA earnings record documented earnings with a coal mine operator for each of the following twenty-six years 1943-1945, 1948-1963, 1972-1978. MC Decision and Order at 6-7. Because the beginning and ending dates of the Miner's employment were not ascertainable, the ALJ calculated the length of his employment in these years with reference to the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) and the average daily earnings in anthracite coal mining set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, using a 250-work-day year divisor.[8] *Id*. He calculated the Miner had 15.001 years of coal mine employment. *Id*. at 7.

[7] The Miner certified the information he provided on his CM-911a Employment History form was "true and correct to the best of [his] knowledge and belief." MC Director's Exhibit 7 at 2.

[8] The ALJ explained he believes using 250 days as a divisor "is a reasonable method of computation" because, presuming a 50-week work year and a five-day work week, a miner whose earnings equal 250 days of average daily earnings from coal mine employment will usually have worked for a full calendar year. Decision and Order at 5.

We reject Employer's assertion that the ALJ erred in using a divisor of 250 working days per year. Employer's Brief at 9.[9] It is the role of the ALJ, as the trier-of-fact, to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Here, the ALJ used a reasonable method of computation when relying on 250 days as a divisor. *See Muncy*, 25 BLR at 1-27.

We however agree with Employer that the ALJ erred in dividing the Miner's yearly earnings by the average daily earnings of anthracite coal miners.[10] Employer's Brief at 9-10. In determining to divide by average earnings in anthracite mining, rather than bituminous mining, the ALJ stated:

> The average daily earnings for anthracite coal miner's is marginally less than the average daily earnings for bituminous. The record does not include evidence as to which category the miner's coal mine employment falls under. Thus, in an effort to create a broader window for compliance with the requisite showing of 15 years of coal mine employment, the undersigned will use the average daily earnings for anthracite miners.

MC Decision and Order at 5 n.5. As Employer correctly states, using the average earnings for anthracite miners resulted in the Miner being credited with more coal mine employment than he would have been had the ALJ used the average earnings for bituminous miners in his calculation instead. Employer's Brief at 9. This is critical given Claimant would not have established the requisite fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.[11] Though the Act is remedial in nature and must be liberally construed, the ALJ did not adequately explain why he used the average earnings for anthracite miners as the Administrative Procedure Act (the APA) requires.[12] 5 U.S.C.

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[9] Employer argues the ALJ should have used a 365-day divisor, which would have resulted in less than fifteen years of coal mine employment. Employer's Brief at 9.

[10] Exhibit 610 has two columns for years prior to 1961. One column contains average earnings for miners involved in bituminous coal mining, while the other contains the average earnings for miners involved in anthracite coal mining.

[11] Changing the ALJ's calculation to divide by earnings in bituminous mining, rather than anthracite mining, yields 13.8 years of coal mine employment. *See* Exhibit 610.

[12] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material

§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).

We further agree with Employer that the ALJ failed to adequately explain his determination to include the Miner's 1978 earnings with Marathon Oil in his length of coal mine employment calculation. Employer's Brief at 10. Although Employer submitted evidence that Claimant did not work for Employer after January 17, 1977 due to a back injury and that his 1978 earnings reflect disability payments, the ALJ failed to address this evidence and did not explain his inclusion of the Miner's 1978 earnings in calculating his length of coal mine employment. MC Decision and Order at 4-7; Employer's Exhibits 7-9; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). Because the ALJ failed to weigh all the relevant evidence and adequately explain his length of coal mine employment calculation, we must vacate his findings that Claimant established the Miner had at least fifteen years in underground coal mine employment and invoked the Section 411(c)(4) presumption. Thus, we vacate the ALJ's award of benefits in the miner's claim. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR 1-998.[13]

Survivor's Claim – Derivative Entitlement

Because we have vacated the award of benefits in the miner's claim, we vacate the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Widow's Claim Decision and Order at 3.

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).

[13] Our dissenting colleague ignores Board and Third Circuit precedent in his calculation of the length of coal mine employment, citing a Sixth Circuit case whose approach has not been adopted by any other Circuit, and whose interpretation of the pertinent DOL regulation is contrary to DOL's published contemporaneous preamble explanation of it. *See* 65 Fed. Reg. 79,920, 79,959-60 (December 20, 2000); *Director, OWCP v. Gardner*, 882 F.2d 67, 71 (3d. Cir.1989) (holding that the term "one year" in 20 C.F.R. §725.493 means "a period spanning 365 days"); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003) (revised definition of year requires 365-day employment relationship).

Remand Instructions

On remand, the ALJ must reconsider the length of the Miner's coal mine employment. In so doing, he may utilize any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432. However, he must address all relevant evidence and explain all material findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR 1-998. Further, if he relies on Exhibit 610, he should attach the exhibit to his Decision and Order. 20 C.F.R. §725.101(a)(32)(iii).

If the ALJ finds Claimant established the Miner had at least fifteen years of qualifying coal mine employment, she will have invoked the Section 411(c)(4) presumption. Therefore, as Employer does not challenge the ALJ's finding that Employer did not rebut the presumption, the ALJ may reinstate the awards of benefits in the miner's and survivor's claims if he finds Claimant has established the Miner had at least fifteen years of coal mine employment. However, if the ALJ finds Claimant has established less than fifteen years of coal mine employment, then he must consider entitlement under 20 C.F.R. Part 718 in both the miner's and survivor's claims. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.205.

Accordingly, the ALJ's Decision and Order Awarding Benefits in the miner's claim is affirmed in part and vacated in part, his Decision and Order Awarding Benefits in the survivor's claim is vacated, and the cases are remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to vacate the award of benefits. For the reasons set forth in *Smith v. Heritage Coal Company*, BRB Nos. 20-0147 BLA and 20-0148 BLA, 2022 WL 2788452, at *17 (June 29, 2022) (unpub.) (Buzzard, J., concurring and dissenting), I would hold that the Sixth Circuit's interpretation of the regulatory

definition of the term "year" can and should be applied to all claims under the Act, including those arising in the Third Circuit.[14] *See Shepherd v. Incoal, Inc.*, 915 F.3d 392 (6th Cir. 2019).

Under *Shepherd*, a miner who works 125 days in a given year is entitled to credit for one full year of coal mine employment, without having to also establish a 365-day employment relationship with his employer. *See also Landes v. OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) (125 working days equals "one year of work" under the prior definition of "year" for invoking statutory presumptions at 20 C.F.R. §718.201(b) (2000)). Applying *Shepherd* to this present claim, the Miner should be credited with one year of coal mine employment during each year he worked at least 125 days, or a fraction thereof based on a 125-day work year, not 250 working days per year as the ALJ required.

Proper application of the regulation yields more than fifteen years of coal mine employment between 1943 and 1976.[15] Thus, contrary to the majority's holding, any error the ALJ may have made in basing his findings on Exhibit 610's anthracite wage data, or in

[14] Although my dissent in *Smith* specifically addressed why *Shepherd* is not inconsistent with Fourth Circuit and Board precedent, my analysis applies with equal force to claims arising in the Third Circuit's jurisdiction. Namely, the Third Circuit's holding that miners must establish a 365-day employment relationship to be credited with one year of employment predated the effective date of the current regulation as revised in 2001. *See Director, OWCP v. Gardner,* 882 F.2d 67, 71 (3d. Cir.1989) (holding that the term "one year" in 20 C.F .R. §725.493 means "a period spanning 365 days"). Therefore, *Gardner*, like the Fourth Circuit and Board decisions discussed in *Smith*, did not address the newer provisions *Shepherd* interpreted as providing independent methods for establishing one year of coal mine employment based on 125 working days, without having to also establish a 365-day employment relationship. *Shepherd*, 915 F.3d at 402; *see Daniels Co. v. Mitchell*, 479 F.3d 321, 329-331 (4th Cir 2007) (prior definition of year for determining responsible operator requires 365-day employment relationship); *Armco v. Martin*, 277 F.3d 468, 474-475 (4th Cir. 2002) (same); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003) (dicta suggests revised definition of year requires 365-day employment relationship).

[15] Using Exhibit 610's average daily earnings of bituminous miners in the 20 C.F.R. §725.101(a)(32)(iii) formula yields 18.29 years of coal mine employment between 1943 and 1976. *See* Director's Exhibit 10; Exhibit 610. Using Exhibit 610's average daily earnings of anthracite miners in the 20 C.F.R. §725.101(a)(32)(iii) formula yields 19.67 years of coal mine employment between 1943 and 1976. *See* Director's Exhibit 10; Exhibit 610.

considering any disability monies the Miner received in 1977 and 1978, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As Employer raises no other challenge to the ALJ's award of benefits in the Miner's claim, I would affirm it and the derivative award in the survivor's claim. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

GREG J. BUZZARD
Administrative Appeals Judge