U.S. Department of Labor

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

BRB No. 22-0212 BLA

ARTHUR P. BLEVINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED: 05/08/2023
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	DECISION and ORDER on
Party-in-Interest	)	RECONSIDERATION

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for Employer.

David Casserly (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, BUZZARD and JONES, Administrative Appeals Judges.

GRESH, Chief Administrative Appeals Judge, and JONES, Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration and suggestion for rehearing en banc of the Benefit Review Board's decision in *Blevins v. Clinchfield Coal Co.*, BRB No. 22-0212 BLA (May 8, 2023) (unpub.), vacating the denial of benefits in this subsequent claim. For the reasons stated below, we grant Employer's motion and vacate, in part, the Board's prior decision.

In its motion, Employer contends that the Board erred in reversing Administrative Law Judge (ALJ) Carrie Bland's finding that Claimant established less than fifteen years of coal mine employment. Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting the Board should reject Employer's motion, as Employer forfeited its arguments by raising them for the first time on appeal.

In its decision, after considering Claimant's pro se appeal, the Board held that substantial evidence did not support the ALJ's subtraction of 165 working days, when Claimant was on strike and therefore not working, to find less than fifteen years of coal mine employment established because "there is no documentary evidence or sworn witness testimony to support when the strike occurred or for how long it extended." *Blevins*, slip op. at 5. Thus, the Board reversed the ALJ's subtraction and held Claimant established fifteen years of qualifying coal mine employment. *Id.* The Board vacated the ALJ's determination that Claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iv) and remanded the case for reconsideration of that issue. *Id.* at 7-8. The Board directed the ALJ to reconsider the opinions of Drs. Forehand and Fino on remand and determine whether they provided a reasoned opinion that Claimant has an impairment that precludes the performance of his usual coal mine employment regardless of the objective testing. *Id.* at 7-9.

However, as Employer notes in its motion, contrary to the Board's statement that "there is no documentary evidence or sworn witness testimony to support when the strike occurred or for how long it extended," the record contains Director's Exhibit 31, a November 21, 2017 document from Pittson Coal Management Company setting out the dates of Claimant's employment with Employer between 1978 and 1994, and which may indicate a period that Claimant was not performing any job for Employer due to a "STRIKE" between April 5, 1989, and February 2, 1990. *See* Director's Exhibit 31.

The Director argues, and our dissenting colleague agrees, that Employer forfeited its argument in its motion that Director's Exhibit 31 establishes Claimant was engaged in a strike from April 5, 1989, to February 2, 1990, because Employer never timely raised the

argument before the ALJ or on appeal to the Board. Nevertheless, an ALJ must consider all the relevant evidence in reaching his determinations, *see McCune v. Cent. Appalachian Coal Co.*, 6 BLR, 1-996, 1-998 (1984), and whether or not Director's Exhibit 31 affirmatively establishes Claimant was engaged in a strike from April 5, 1989, to February 2, 1990, it is not for the Board to make factual findings in the first instance. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (it is the ALJ's function as trier of fact is to weigh the evidence); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).[1] Moreover, as the ALJ denied benefits and Employer did not appeal, it was not required to file a cross-appeal to the Board to make such an argument supporting the denial of benefits. 20 C.F.R §802.212(b); *see Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370 (4th Cir. 1994). Thus, regardless of whether or not Employer is raising an untimely argument or defense, Employer's motion, in any event, points out a mistake by the Board regarding our characterization of the record and that the ALJ did not consider all of the relevant evidence on the length of Claimant's coal mine employment.

As the Board mischaracterized the record in indicating that there is no documentary evidence to support when the strike occurred or for how long it extended, and as the ALJ did not consider all of the relevant evidence on the length of Claimant's coal mine employment, we vacate our prior holding that Claimant established fifteen years of qualifying coal mine employment, vacate the ALJ's length of coal mine employment determination and remand the case for her to consider how many years of coal mine employment Claimant established based on all relevant evidence of record. *See McCune*, 6 BLR at 1-998 (fact finder's failure to discuss relevant evidence requires remand); Director's Exhibit 31. Our holding on reconsideration does not disturb our previous

[1] Our dissenting colleague asserts that even if the ALJ were to determine on remand that Claimant was on strike during parts of 1989 and 1990, application of the controlling regulations "in conjunction with the ALJ's permissible factual findings" that she already made in her original Decision and Order establishes Claimant had greater than fifteen years of coal mine employment. But the ALJ did not consider all of the relevant evidence when making her original factual findings and it is for the ALJ, not the Board, to engage in the initial consideration of evidence and make factual findings in the first instance. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Thus, "the proper course for the Board is to remand the case to the ALJ rather than attempt to fill the gaps in the ALJ's opinion." *Director, OWCP v. Rowe*, 710 F.2d 251, 254-55 (6th Cir. 1983); *see also McCune*, 6 BLR at 1-998.

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remand instructions concerning reconsideration of the medical opinions of total disability at 20 C.F.R. §718.204(b)(2)(iv).

Accordingly, employer's motion for reconsideration is granted,[2] the Board's May 8, 2023 Decision and Order is vacated, in part, and we remand the case to the ALJ to reconsider how many years of coal mine employment Claimant established based on all relevant evidence of record. In all other respects, we affirm the Board's prior decision.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to grant Employer's motion for reconsideration. In her Decision and Order, the ALJ found Claimant established 15.08 years of coal mine employment during calendar years 1978-1994. However, she subtracted from that amount 165 working days, or .63 year (based on a 260-day work year), to account for the days Claimant was allegedly on strike and therefore not actually engaged in coal mine work during parts of 1989 and 1990.[3] She thus determined Claimant had 14.45 years of coal mine employment.

On Claimant's appeal, Employer conceded that he "can be credited" with up to 14.45 years of coal mine employment between August 28, 1978 and August 26, 1994, as

[2] As a majority of the panel has voted to grant Employer's motion for reconsideration, it is not necessary to address Employer's suggestion for rehearing en banc. *See* Motion for Reconsideration at 4.

[3] Specifically, the ALJ found Claimant's coal mine employment spans seventeen calendar years, from 1978 to 1994. Relying on Employer's statement of the dates he was

found by the ALJ. Employer's Brief at 3-4. It thus urged affirmance of her finding that Claimant cannot be credited for the .63 year he was allegedly on strike. *Id.*

This panel disagreed, holding that the ALJ erred in subtracting those weeks from Claimant's coal mine employment because although the record reflects there was a strike at Employer's mine, there is no evidence he participated in it or otherwise stopped working because of it, or even the dates the strike occurred apart from Employer's counsel's

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employed, she found Claimant entitled to credit for nine full years of coal mine employment in 1983-1988 and 1991-1993.

For the remaining eight calendar years, the ALJ found Claimant entitled to credit for only partial years of coal mine employment based on an assumption that to be credited with a full year, he would have to work 260 days per year (52 weeks x 5 days per week). Thus, she credited him with a total of 5.45 years as follows: .35 year in 1978 (90 working days / 260 working days per year); .65 year in 1979 (170 working days / 260); .39 year in 1980 (102 working days / 260); .95 year in 1981 (247 working days / 260); .99 year in 1982 (257 working days / 260); 1.37 years in 1989 and 1990 (2 full years of employment – 33 weeks on strike / 52 work-weeks in a year); and .75 year in 1994 (170 working days / 227).

Although the ALJ did not set forth with any specificity her method by which she calculated Claimant's working days, it is clear from her findings that she assumed he worked five days per week during each week he was employed. For example, in 1978 she found he established 90 working days, a figure that can be reached by counting the total number of weeks he was employed according to Employer's records (August 28 – December 31, 1978, or 18 weeks), and then multiplying that number by 5 days per week to determine the number of working days he established during that period (90, as found by the ALJ).

For 1994, the ALJ appears to have based her calculation on a 227 work-day year, because 170 working days represents .75 of 227. Had the ALJ used a 260-day work year, she would have credited Claimant with .65 of a year, which could ultimately have affected her overall finding of 15.08 years (i.e., 15.08 years - .10 year = 14.98 years). Employer, however, has not raised any arguments with respect to that finding, either on Claimant's appeal or in its motion for reconsideration. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Rather, Employer conceded that, aside from Claimant's alleged striking time in 1989 and 1990, Claimant "can be credited" with up to 14.45 years for his remaining coal mine employment (a concession that encompasses the ALJ's finding of .75 year in 1994). Employer's Brief at 3-4.

unsubstantiated reference at the hearing to his own "recollection and notes" indicating it lasted from April 5, 1989 to February 2, 1990.

Applying the ALJ's remaining length of coal mine employment findings of 15.08 years, we held Claimant established greater than fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Employer now alleges this panel erred in finding no evidence that Claimant participated in the strike or when it occurred. It points to Director's Exhibit 31, a 2017 document signed by an Employee Benefits Administrator on Employer's behalf, which identifies Claimant's various job "Classifications," "Employment Dates" and "Termination Dates" between August 28, 1978 and August 26, 1994.

Relevant to this appeal, that document identifies employment as a "Roof Bolter/Shearer Operator/Belt Maintenance" at the "McClure #1" mine from January 7, 1982 to August 26, 1994. Within that timeframe, however, it identifies an intervening period that lists Claimant's job Classification as "STRIKE," with an Employment Date of April 5, 1989 and Termination Date of February 2, 1990, i.e., the same dates identified by Employer's counsel at the hearing. Employer thus contends the ALJ properly excluded this period from Claimant's coal mine employment because he was not actually working during that time.

The majority of this panel agrees that we erred in our initial decision by overlooking Director's Exhibit 31. However, it stops short of reinstating the ALJ's finding of less than fifteen years of coal mine employment, opting instead to remand the claim for her to reconsider all the evidence and make a new determination. I see things differently.

As an initial matter, Employer, at no point during the proceedings before the ALJ or the initial appeal before the Board, identified or relied upon Director's Exhibit 31 as evidence that Claimant participated in a strike on the dates in question. While cross-examining Claimant, Employer's counsel merely referenced these dates as being in his "recollection and notes" – and even then, as the Board previously held, Claimant agreed a strike had taken place at Employer's premises but stopped short of testifying that he participated in it or ceased working because of it. Hearing Transcript at 22.

In its closing brief to the ALJ, Employer didn't identify any exhibits by number, but summarized, in very general terms, the contents of a separate document, Director's Exhibit 7, as credibly establishing Claimant "was employed by [Employer] from August 28, 1978 through August 26, 1994." Employer's Revised Closing Argument at 4. That document, a 2007 statement signed by a different Employee Benefits Administrator on Employer's behalf, is nearly identical to Director's Exhibit 31 in that it shows a continuous period of

employment with Employer as a "Roof Bolter/Shearer Operator/Belt Maintenance" at the "McClure #1" mine from August 12, 1980 to August 26, 1994 – but without any reference to an intervening strike.

Notably, the ALJ specifically found Director's Exhibit 7 "the most reliable and precise information in the record" regarding "the amount of time that Claimant was employed in coal mine employment." Decision and Order at 9. The only aspect of the record Employer (and then the ALJ) identified as establishing the dates of a strike was Claimant's testimony which, as the Board previously held, hinged upon Employer's counsel's unsubstantiated reference to his own recollection and notes rather than the evidence in this claim.

Given Employer's complete lack of reliance on Director's Exhibit 31 until the filing of this motion for reconsideration – and that exhibit's conflict with a similar employment record already credited by the ALJ (Director's Exhibit 7) – I agree with the Director that Employer forfeited its argument that Director's Exhibit 31 credibly establishes Claimant was engaged in a strike from April 5, 1989 to February 2, 1990. *See Edd Potter Coal Co., Inc. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 208 (4th Cir. 2022) (Board's limited scope of review "reinforces the requirement of issue exhaustion in front of an ALJ"); *Joseph Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021) (issues lacking developed factual and legal arguments are forfeited before the Board); *see also Fort Bend Cnty. v. Davis*, 587 U.S. , 139 S. Ct. 1843, 1849 (2019) (courts "must enforce" regulatory claims processing rules "if a party properly raises it") (quotations omitted).

When a represented party "overlooks" and thus fails to rely on its own evidence, as Employer concedes happened in this case, it does not automatically follow that the party is entitled to have the case remanded for consideration of that evidence. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("in the first instance and on appeal," the principle of party presentation dictates that courts "rely on the parties to frame the issues for decision"); Employer's Motion for Reconsideration at 3.

Moreover, Director's Exhibit 31, even if fully credited by the ALJ on remand, has no bearing upon this panel's holding that Claimant established two full years of coal mine employment in 1989 and 1990. Rather, the issue can – in fact must – be resolved by straightforward application of the controlling regulations in conjunction with the ALJ's permissible factual findings.

The regulations define the term "year" 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). A "working day," in turn, is defined as "any day or part of a day for which a miner received pay for work as a miner[.]" *Id*. Once it is established that the miner "worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i).

The Board has interpreted these provisions as establishing a "two-step analysis" – one that entitles a miner to credit for a full year of coal mine employment only if he meets two criteria: 1) he has a 365-day employment relationship with a coal mine operator, i.e., he was "employed" by that operator for an entire calendar year; and 2) within that calendar-year period, he "actually worked as a miner for 125 days." *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-282 (2003); *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); *but see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) (the "plain" and "unambiguous" language of the *current* regulation "permits a one-year employment finding" based on 125 working days "without a 365-day [employment relationship] requirement").[4]

The regulation also sets forth an important presumption that governs the resolution of this case: "If the evidence establishes that the miner's employment lasted for a calendar year . . . , *it must be presumed*, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

In other words, under the two-step inquiry the Board discussed in *Clark*, once an ALJ determines that a 365-day employment relationship is established, the miner is presumed to have worked 125 days during that period, thus entitling him to credit for one full year of coal mine employment "for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i). The presumption of 125 working days applies unless "evidence to the contrary" shows the miner "had fewer than 125 working days" – and even then, he is

[4] There is some disagreement at the Board as to whether a miner must establish a 365-day employment relationship to be credited with one year of coal mine employment (per *Clark*) or can establish one year based solely on 125 working days (per *Shepherd*). *See Baldwin v. Island Creek Kentucky Mining*, BRB No. 21-0547 BLA, 2023 WL 5348588, at *5-8 (DOL Ben. Rev. Bd. July 14, 2023) (Buzzard, J., concurring and dissenting) (concluding the Sixth Circuit's analysis in *Shepherd* is persuasive and should apply in all claims under the Act). That dispute is irrelevant to the arguments at hand, however, as Claimant has established both a 365-day employment relationship *and* 125 working days during each of 1989 and 1990.

entitled to credit for "a fractional year based on the ratio of the actual number of days worked to 125." *Id*.

Applying this legal framework to the ALJ's findings demonstrates Claimant is entitled to credit for greater than fifteen years of coal mine employment *even if* he was on strike during parts of 1989 and 1990.[5]

The ALJ specifically found Claimant established a 365-day employment relationship with Employer in each of 1989 and 1990. This finding was based on Director's Exhibit 7, which contains Employer's own statement that Claimant was continuously employed as a "Roof Bolter/Shearer Operator/Belt Maintenance" from January 7, 1982 to August 26, 1994. While Employer now points to its subsequent statement in Director's Exhibit 31 to support its argument that Claimant was on strike from April 5, 1989 to February 2, 1990, it does not allege that the strike severed the 365-day employment relationship between Claimant and Employer for purposes of the two-step inquiry under *Clark*. Nor has Employer identified any facts or presented any argument that would permit such a finding. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (lawfully striking workers "remain employees" under the National Labor Relations Act); 29 U.S.C. §152(3).[6]

Employer's arguments, rather, relate to the second step of the *Clark* inquiry: Having established a 365-day employment relationship with Employer in each of 1989 and 1990,

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[5] Given the Board's prior disposition that *none* of the time Claimant was allegedly on strike should be excluded from the ALJ's coal mine employment calculation, it was unnecessary at that time to discuss the error relating to *how* the ALJ deducted that time.

[6] Under Section 2(3) of the National Labor Relations Act, 29 U.S.C. §152(3), the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . ." In *Mackay Radio*, the Supreme Court explained that the "plain meaning" of the statute "is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the [NLRA]." 304 U.S. at 347; *see also NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256–57 (1939) (lawfully striking workers remain employees, while those engaged in unlawful activities are "outside the protection of the statute").

While the ALJ relied on the Board's conclusion in *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-13 (1988) (en banc) that "time spent by [a miner] in a voluntary union strike does not constitute coal mine employment," the ALJ overlooked that the Board did *not* hold that a strike severs the employment relationship between a miner and an operator.

did Claimant have at least 125 working days during those calendar years? If so, he is entitled to credit for one year of coal mine employment in each of those years.

The ALJ found Claimant established two full calendar-year employment relationships with Employer in 1989 and 1990. Decision and Order at 9. Within those years, she found he was entitled to credit for working as a coal miner during all but 165 working days of strike time (33 calendar weeks of strike x 5 working days per week) from July 5, 1989 to December 31, 1989 and January 1, 1990 to February 21, 1990. Rather than comparing Claimant's actual number of working days to a 125 work-day year as the regulation requires, the ALJ simply deducted the entirety of the striking days (i.e., non-working-days) from Claimant's overall 15.08 years of coal mine employment. In so doing, she based her finding on an incorrect assumption that anything short of 260 working days cannot equal one year of coal mine employment under the Act.

Under the proper regulatory inquiry, the ALJ's dispositive findings that Claimant established 134 working days in 1989 and 223 working days in 1990,[7] in conjunction with her finding that Claimant and Employer had a 365-day employment relationship during each of those calendar years, establishes two full years of coal mine employment "for all purposes under the Act." 20 C.F.R. §725.101(a)(32)(i).

It is immaterial whether this panel erred in holding the record lacks evidence to establish when and if Claimant was on strike during parts of 1989 and 1990. Even if Claimant was on strike, he established two full years of coal mine employment that, when added to the remaining 13.08 years found by the ALJ and unchallenged before the Board, equals greater than fifteen years of coal mine employment. *See Shinseki v. Sanders*, 556

Rather, its analysis hinged on a determination that a day spent on strike is not a "working day" because the miner "receives no pay." That holding simply reinforces that Employer's arguments in this case relate to the number of *working days* Claimant had in 1989 and 1990, not whether the 365-day employment relationship was severed. A working day, after all, is simply "any day or part of a day for which a miner received pay for work as a miner[.]" 20 C.F.R. §725.101(a)(32).

[7] Per the ALJ's findings, working five days per week from January 1, 1989 until July 4, 1989 (the day the ALJ found Claimant joined the strike following injury leave) equals 134 working days (26 full weeks x 5 working days + 1 partial week of 4 working days); and, working five days per week from February 22, 1990 (the day the strike ended) through December 31, 1990 equals 223 working days (44 weeks x 5 working days + 2 partial weeks with a total of 3 working days).

U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").

Thus, I would deny Employer's motion for reconsideration.

GREG J. BUZZARD
Administrative Appeals Judge