U.S. Department of Labor

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

BRB No. 22-0230 BLA

KEVIN MARK GRAHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHIEF MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 7/13/2023
	)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits on Modification (2020-BLA-05041) 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 September 2, 2014.[1]

In a May 29, 2018 Decision and Order Denying Benefits, ALJ Scott R. Morris found Claimant established 14.77 years of coal mine employment and therefore could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018); Director's Exhibit 90 at 9. He further found Claimant failed to establish pneumoconiosis and thus failed to establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §§718.202(a), 725.309; Director's Exhibit 90 at 26. Thus, he denied benefits. Director's Exhibit 90 at 26-27.

Claimant timely requested modification. Director's Exhibits 92, 93. In her December 30, 2021 Decision and Order on Modification that is the subject of this appeal, ALJ Theresa C. Timlin (the ALJ) found Claimant established 15.06 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, and therefore invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.204(b)(2). She also

[1] Claimant filed his initial claim for benefits on August 4, 2009, which ALJ Michael P. Lesniak denied on May 30, 2012, because Claimant did not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a); Director's Exhibit 1 at 16.

[2] 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] 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 she finds "one of the applicable conditions of entitlement. . . has changed since the date upon which the order denying the prior claim becomes 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 failed to establish the existence of pneumoconiosis in his prior claim, he had to submit evidence establishing this element in order to obtain review of the merits of his current claim. Director's Exhibit 1.

found Employer did not rebut the presumption. Finally, she determined that granting modification would render justice under the Act and awarded benefits. 20 C.F.R. §725.310.

On appeal, 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 she erred in finding it failed to rebut the presumption.[4] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed 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.[5] 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, 362 (1965).

In considering whether to grant modification of the prior denial of Claimant's subsequent claim, the ALJ was required to determine whether the denial contained a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in this subsequent claim, is sufficient to establish a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 143 (1998). In reviewing the record on modification, the ALJ has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement. *See Jessee v. Director, OWCP*, 5 F.3d 723, 724-25 (4th Cir. 1993). Thus, the ALJ is authorized "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).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order on Modification at 16-17.

[5] 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); Hearing Transcript at 22.

Invocation of the Section 411(c)(4) Presumption – Coal Mine Employment

Employer argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment. Employer's Brief at 10-13.

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" coal mine employment. 20 C.F.R. §713.305(b)(1)(i). 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 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).

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, the ALJ must then determine whether the miner worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32). Where a miner establishes he was engaged in coal mine employment for a period of one calendar year or partial periods totaling one year, "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).

Employer argues the ALJ improperly presumed that Claimant had a calendar year relationship with an operator if he had coal-mine-related earnings in any given calendar year. Employer's Brief at 10-13. We agree.

In calculating the length of Claimant's coal mine employment, the ALJ considered his employment history form, Social Security Administration (SSA) earnings record, W-2 records, paystubs, responses to interrogatories, human resource (HR) records, and sworn testimony. Director's Exhibits 1, 4, 7-16, 19, 55, 82, 112; Hearing Transcript at 27, 32. She found Claimant's employment history forms, interrogatories, and sworn testimony not credible with respect to the total number of years worked. Decision and Order on Modification at 12. Instead, she found his SSA earnings record, W-2 records, and HR records credible on the length of coal mine employment. *Id*. at 13. Specifically, she found the SSA earnings record is the "only document worthy of normal weight to document Claimant's entire coal mine employment." *Id.*

The ALJ next ascertained Claimant's coal mine employment from 1981 to 2002. Decision and Order on Modification at 13. Although the SSA record reflects various periods of "self-employment" during these years, the ALJ found these periods of self-employment constitute coal mine employment. *Id*. at 10 n.9, 14 n.10. She based this finding on Claimant's testimony that he worked for "punch-hole" mines that paid him in cash and that he would report these cash earnings to the federal government "as income derived from self-employment." *Id*. at 4; *see* Director's Exhibit 82 at 18. This finding is affirmed as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The ALJ next found the SSA record reflects Claimant had "substantial income derived from coal mining" for the following years and coal mine operators: 1981 (M&G Coal); 1982 (Kanawha Coal); 1984 (True Energy); 1985 (True Energy and self-employment); 1986 (True Energy, self-employment, and Pride Coal); 1987 (Pride Coal); 1990 (self-employment); 1991 (E&A Coal); 1992 (E&A Coal); 1993 (E&A Coal, Ridgeway Development Corporation, Noseman Branch Mining); 1994 (Central Coal Sales and Management); 1995 (Central Coal Sales and Management); 1996 (Chief Mining, KC Mining, New Hope Mining); 1997 (Chief Mining, KC Mining); 1998 (Chief Mining, KC Mining, Camp Creek Service Center); 1999 (Camp Creek Service Center, Mahon Enterprises; Island Fork Construction); 2000 (Camp Creek Service Center, Island Fork Construction); 2001 (Camp Creek Service Center, Island Fork Construction); 2002 (Camp Creek Service Center, Cale Yarborough Energy).[6] Decision and Order on Modification at 10-11, 13.

Because Claimant had "substantial" coal mine-related earnings in those years as reflected in the SSA record, the ALJ found Claimant "held employer-employee relationships with coal mine operators for a full calendar year" for the years 1981 and 1982, 1984 to 1987, and 1990 to 2002. Decision and Order on Modification at 13. She thus presumed he spent 125 working days in coal mining for those years. *Id*. Having found she could not ascertain the starting and ending dates of his employment, she applied the calculation method at 20 C.F.R. §725.101(a)(32)(iii) to ascertain the number of days

[6] Employer does not dispute that Claimant worked as a coal miner for M&G Coal, Kanawha Coal, True Energy, Pride Coal, E&A Coal, Ridgeway Development Corporation, Noseman Branch Mining, Central Coal Sales and Management, Chief Mining, KC Mining, New Hope Mining, Camp Creek Service Center, Mahon Enterprises, Island Fork Construction, and Cale Yarborough Energy. Thus we also affirm this finding. *Skrack*, 6 BLR at 1-711.

Claimant worked in a given calendar year.[7] *Id.* Specifically, she compared the SSA-reported earnings with the coal mine industry's average daily earnings during the relevant calendar year as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id.* For each year in which Claimant had at least 125 days or more of employment, she credited him with a full year of coal mine employment. *Id.* For the years in which he had less than 125 days, she credited him with a fractional year by dividing the number of days he worked by 125. *Id.* Based on the foregoing method, the ALJ credited Claimant with 15.06 years of coal mine employment.[8]

In making this finding, the ALJ did not explain how Claimant established the threshold one-year employment relationship with coal mine operators for the years 1981 and 1982, 1984 to 1987, and 1990 to 2002 based exclusively on the fact that he had "substantial earnings" in those years. Decision and Order on Modification at 13. Further, the SSA record reflects that in 1981 Claimant worked for Mercer Grocery, in 1990 he worked for Saunders Contracting, in 1993 he worked for Douglas W. Cruise/Mountain State Erectors, and in 2002 he worked for Southern Safety Construction. Director's Exhibit 7. The ALJ did not find that work for any of these companies constitutes coal mine employment and, absent such a finding, Claimant could therefore not have been employed by a coal mine operator for a calendar year in those years.

Because the ALJ did not adequately explain her length of coal mine employment finding or address relevant evidence, her Decision and Order on Modification does not comport with the Administrative Procedure Act (APA),[9] 5 U.S.C. §557(c)(3)(A), as

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[7] If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may divide the miner's annual earnings by the average daily earnings for a coal miner as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.* 20 C.F.R. §725.101(a)(32)(iii).

[8] The ALJ noted the record contains a workers' compensation statement indicating "Claimant did not work for 280 days (between December 18, 2000 and September 23, 2001) while receiving workers' compensation benefits." Decision and Order on Modification at 15-16. The ALJ found this workers' compensation statement not credible because it is contradicted by other evidence of record. *Id.* This finding is also affirmed as unchallenged. *Skrack*, 6 BLR at 1-711.

[9] The Administrative Procedure Act (APA) 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 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).

Further, separate from the above calculation, the ALJ noted that in an August 27, 2009 letter, Kenneth Calloway, a mine manager of Chief Mining, stated Claimant worked for this entity from October 29, 1996 to July 15, 1998 for a total of twenty-one months. Decision and Order on Modification at 12-13; Director's Exhibit 1. She also noted Stanley Sexton, a mine foreman from E&A Coal, signed a statement indicating Claimant worked for this operator for twenty-four and one-half months, although he "did not provide Claimant's employment dates." Decision and Order on Modification at 12-13; *see* Director's Exhibit 112. As she found this evidence credible, the ALJ concluded Claimant established forty-five-and-one half months, or three years and nine and one-half months, of coal mine employment with Chief Mining and E&A Coal "through the direct evidence of record." Decision and Order on Modification at 13. But the ALJ did not reconcile these findings with the above stated calculation method; on remand she must do so. *See Addison*, 831 F.3d at 252-53; *Wojtowicz*, 12 BLR at 1-165.

We therefore vacate the ALJ's finding that Claimant established 15.06 years of coal mine employment. *See* 30 U.S.C. §923(b); *Mitchell*, 479 F.3d at 334-36. Consequently, we must vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits. 30 U.S.C. §921(c)(4).

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. She must determine whether the record 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 she must explain her findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165. If the ALJ finds Claimant established fifteen or more years of underground coal mine employment and invokes the Section 411(c)(4) presumption, she should address whether Employer has rebutted the presumption.[10] If Claimant does not invoke the presumption on remand, the ALJ must consider whether Claimant can establish entitlement to benefits

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incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[10] We decline to address, as premature, Employer's arguments that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Employer's Brief at 13-19.

under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c), 718.205.

Accordingly, the ALJ's Decision and Order Awarding Benefits on Modification is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge