U.S. Department of Labor

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

BRB No. 19-0362 BLA

EVETTE E. HAGY (Widow of JERRY R. HAGY) Claimant-Petitioner v. WELLMORE COAL COMPANY, c/o WELLMORE ENERGY and SECURITY INSURANCE COMPANY OF HARTFORD Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/12/2020 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Evette E. Hagy, Davenport, Virginia.

James M. Poerio (Poerio & Walter, Inc.), Pittsburgh, Pennsylvania, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order on Remand Denying Benefits (2014-BLA-05898) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on October 29, 2013, and is before the Benefits Review Board for the second time.

In his initial Decision and Order Awarding Benefits, the administrative law judge determined claimant could not invoke the rebuttable presumption of death due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[1] because the miner had less than the required fifteen years of qualifying coal mine employment. He further found, however, claimant established legal pneumoconiosis and death due to pneumoconiosis. Thus, he awarded benefits.

On review of employer's appeal, the Board vacated the administrative law judge's length of coal mine employment determination and his findings that claimant established legal pneumoconiosis and death due to pneumoconiosis. *Hagy v. Wellmore Coal Co.*, BRB No. 17-0363 BLA, slip op. at 4-5, 7-9 (Apr. 26, 2018) (unpub.). The Board therefore vacated the award of benefits and instructed the administrative law judge to reconsider on remand whether claimant can establish fifteen years of qualifying coal mine employment. *Id*. at 9. The Board further instructed the administrative law judge that if claimant satisfied that burden, to consider whether the miner had a totally disabling respiratory or pulmonary impairment, thereby invoking the Section 411(c)(4) presumption. *Id*. If invoked, the Board instructed him to consider whether employer rebutted the presumption. *Id*. Finally, the Board directed that in the event claimant did not invoke the presumption, the administrative law judge must reconsider whether claimant established legal pneumoconiosis and death due to legal pneumoconiosis. *Id*.

On remand, the administrative law judge again found claimant could not invoke the Section 411(c)(4) presumption because the miner had less than fifteen years of qualifying coal mine employment. He also determined claimant failed to establish legal

[1] Under Section 411(c)(4) of the Act, a miner's death is presumed to be due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

pneumoconiosis and, thus, she could not establish the miner's death was due to pneumoconiosis. He therefore denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs, did not file a response brief.

When a claimant files an appeal without the assistance of counsel, the Board considers whether the decision and order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 (1965).

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

Claimant has the burden to establish the number of years the miner 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). To invoke the Section 411(c)(4) presumption, claimant must prove the miner had at least fifteen years of coal mine employment, either underground or on the surface in conditions substantially similar to those underground. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. The Board will uphold an administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

In determining whether the miner had sufficient qualifying coal mine employment to invoke the presumption, the administrative law judge considered the miner's Social Security Administration (SSA) earnings records and a letter from one of miner's employers. Decision and Order on Remand at 4-5; Director's Exhibits 7, 9. Relying on the miner's SSA earnings records to determine the length of his coal mine employment between 1969 and 1974, the administrative law judge permissibly credited the miner with

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1 at 511, 5, 14 at 39.

a full quarter of a year for each quarter in which he had at least $50.00 in earnings,[3] for a total of two years of coal mine employment.[4] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *Combs v. Director, OWCP*, 2 BLR 1-904, 1-905 (1980). Decision and Order on Remand at 4; Director's Exhibit 7. He also permissibly found the miner worked 1.75 years for Rapoca Energy Company from December 9, 1987, to September 9, 1989, based on a letter from the company. *Muncy*, 25 BLR at 1-27; Decision and Order on Remand at 5; Director's Exhibit 9.

To calculate the miner's coal mine employment between 1979 and 1987, the administrative law judge stated "I have divided the total yearly coal mine employment earnings[5] by the yearly average wage in Exhibit 610."[6] Decision and Order on Remand at 4. Using this method, the administrative law judge determined the miner had full years of coal mine employment in 1979 and 1980, 0.81 years in 1981, 0.52 years in 1982 and 1983, full years in 1984, 1985, and 1986, and 0.13 years in 1987, for a total of 6.98 years. *Id*. at 4-5. He added this figure to the 3.75 years he credited to the miner for 1969 to 1974, and December 1987 to September 1989, and found claimant established a total of 10.73 years of qualifying coal mine employment. *Id*. at 5.

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[3] Prior to 1978, the Social Security Administration (SSA) reported annual earnings on a quarterly basis.

[4] We note the administrative law judge failed to recognize one quarter of coal mine employment with Jama Coal Corporation in 1966. Director's Exhibit 7. This error is harmless, however, because an additional 0.25 years of coal mine employment does not aid claimant in establishing fifteen years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] The record reflects the miner worked for Clevinger Coal Corporation (Clevinger) in 1979 and 1980, earning $4,830.75 and $13,009.50, respectively. In 1981, the miner worked for Clevinger, Peggy-O Coal Company, H&E Coal Company, and Eastern Energy Corporation (Eastern Energy), earning a total of $9,828.87. From 1982 through 1985, the miner worked exclusively for Eastern Energy, with earnings of $6,631.26 in 1982, $7,177.50 in 1983, $18,907.50 in 1984, and $26,584.93 in 1985. In 1986, the miner worked for Eastern Energy and Poplar Creek Coal Company, earning a total of $15,862.64. Finally, the miner worked for Bless Coal Corporation in 1987 and earned $2,110. Director's Exhibit 7.

[6] Exhibit 610 appears in the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* and sets forth the average daily and annual wages of coal miners from 1920 to the current year.

The administrative law judge's determination the miner had 6.98 years of coal mine employment between 1979 and 1987 does not reflect a reasonable method of calculation, as he did not first determine whether the miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year before dividing the miner's yearly coal mine earnings by the yearly average wage. 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). Only if the threshold one-year period is met can the miner be credited with a full year of coal mine employment for each calendar year in which he engaged in coal mine employment for at least 125 working days. 20 C.F.R. §725.101(a)(32). Because the administrative law judge used the average annual earnings figure from Exhibit 610 as the divisor in his calculation of the miner's coal mine employment between 1979 and 1987,[7] he credited the miner for full and fractional years of coal mine employment based on a 125-day "year," regardless of whether the threshold 365-day calendar year was established. This error does not require remand, however, as the method of calculation the administrative law judge used likely resulted in an overstatement of the miner's coal mine employment, but still did not establish the fifteen years necessary to invoke the Section 411(c)(4) presumption.[8] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i); *see Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016);

[7] The average annual wage of coal miners reported in Exhibit 610 is calculated by multiplying the average daily wage by 125.

[8] The administrative law judge's calculation includes additional errors inflating the length of claimant's coal mine employment between 1979 and 1987. Contrary to the administrative law judge's summary of the miner's SSA records, the miner earned $15,692.30 from Jewell Coal & Coke Company (Jewell) in 1979, rather than from Clevinger, which paid the miner $4,830.75 that year. Decision and Order on Remand at 4; Director's Exhibit 7. He permissibly determined in his initial Decision and Order that the miner's work for Jewell was not coal mine employment, as there is uncontradicted evidence the miner worked for Jewell at a coke plant and coke oven workers are not miners under the Act. 20 C.F.R. 725.101(a)(19); Decision and Order Awarding Benefits at 4; Director's Exhibit 8. In addition, the administrative law judge reported claimant's 1986 earnings as $15,862.64 when the miner's SSA records reflect $15,862.19, a difference of $0.45. Decision and Order on Remand at 4; Director's Exhibit 7. These errors are also harmless, as they would not change the administrative law judge's finding claimant did not establish fifteen years of qualifying coal mine employment. *See Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); *Larioni*, 6 BLR at 1-1278. Further, because a reduction in the length of the miner's coal mine employment would not affect the administrative law judge's findings regarding the credibility of the medical opinion evidence (see discussion *infra*), these errors are harmless in that regard as well.

Larioni v. Director, OWCP, 6 BLR 1-1276, 1-1278 (1984); Decision and Order on Remand at 5. Accordingly, we affirm the administrative law judge's finding claimant is unable to invoke the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-27.

Part 718 Entitlement

In a survivor's claim where no statutory presumptions are invoked, the claimant must establish the miner had pneumoconiosis[9] arising out of coal mine employment and his death was due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.205(b)(1), (2). A miner's death will be considered due to pneumoconiosis if pneumoconiosis or complications of pneumoconiosis are direct causes of his death, or if pneumoconiosis was a substantially contributing cause of his death. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190 (4th Cir. 2000); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992).

To establish legal pneumoconiosis,[10] claimant must demonstrate the miner had a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). In determining whether the miner had legal pneumoconiosis, the administrative law judge considered Dr. Forehand's medical opinion.

In his initial opinion dated March 13, 1995, Dr. Forehand diagnosed the miner with chronic bronchitis, cor pulmonale, and "coal workers pneumoconiosis" based on his twenty years of underground coal mine employment, twenty-five years of cigarette smoking, pulmonary function study results, and electrocardiogram results. Director's Exhibit 14 at 42. In a letter dated July 26, 1995, Dr. Forehand amended his opinion based on the

[9] Clinical pneumoconiosis consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissues to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. 718.201(a)(1). Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. 718.201(a)(2).

[10] In his initial Decision and Order Awarding Benefits, the administrative law judge determined claimant did not establish clinical pneumoconiosis because the x-ray evidence is uniformly negative and none of the physicians of record diagnosed the disease. Decision and Order Awarding Benefits at 9, 16. Because these findings were not disturbed on appeal, he did not address clinical pneumoconiosis on remand.

understanding the miner had five years of coal mine employment rather than twenty years. Director's Exhibit 14 at 56. He stated there was evidence of chronic bronchitis and cor pulmonale due to cigarette smoking, but that he would "remove the diagnosis of coal workers' pneumoconiosis because of insufficient evidence of a significant amount of time in underground coal mining." *Id.* In a later opinion dated November 12, 1998, Dr. Forehand diagnosed the miner with chronic bronchitis caused by nineteen years in underground coal mine employment and twenty-five years of cigarette smoking. Director's Exhibit 13 at 54, 57.

Based on the discrepancy between the miner's 10.73 years of coal mine employment and the histories of nineteen and twenty years Dr. Forehand considered, the administrative law judge found his opinions insufficiently reliable to establish legal pneumoconiosis. Decision and Order on Remand at 5-6. The administrative law judge observed that Dr. Forehand stated five years of coal mine employment is insufficient to diagnose the miner with legal pneumoconiosis but did not identify the length of coal mine employment necessary to diagnose legal pneumoconiosis. *Id*. at 6; Director's Exhibit 14 at 36. Thus, the administrative law judge could not determine whether Dr. Forehand would diagnose pneumoconiosis based on 10.73 years of coal mine employment. Decision and Order on Remand at 6. Accordingly, the administrative law judge permissibly discredited Dr. Forehand's opinion the miner had legal pneumoconiosis as it was based on an inaccurate understanding of the miner's coal mine employment history. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (an administrative law judge has the discretion, as fact-finder, to weigh the credibility of the experts, and to determine the persuasiveness of their opinions). Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(4).

In light of our affirmance of the administrative law judge's finding claimant failed to establish pneumoconiosis pursuant to 20 C.F.R. 718.202(a), an essential element of entitlement, we affirm the administrative law judge's denial of benefits in this survivor's claim under 20 C.F.R. Part 718. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge