U.S. Department of Labor

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

BRB No. 23-0287 BLA

ERMINE H. HAYES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COWIN & COMPANY, INCORPORATED	)	DATE ISSUED: 03/11/2024
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for Employer.

Ann Marie Scarpino (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.

PER CURIAM:

Claimant[1] appeals Administrative Law Judge (ALJ) Carrie Bland's Decision and Order on Remand Denying Benefits (2017-BLA-05412) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's subsequent claim filed on January 23, 2015,[2] and is before the Benefits Review Board for the third time.

This case was initially before ALJ Lee J. Romero, Jr., who credited Claimant with fifteen years of underground coal mine employment and found him totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore concluded Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] Further, he determined Employer did not rebut the presumption and awarded benefits. Employer appealed. The Board affirmed, as unchallenged on appeal, ALJ Romero's conclusions that Claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[4] In addition, the Board affirmed his conclusion that Employer

[1] The Benefits Review Board previously noted that Claimant died on February 5, 2019, and his widow, Wynona Hayes, was pursuing his claim. *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA, slip op. at 2 n.1 (May 20, 2021) (unpub.). His widow subsequently died on April 18, 2022, and his son, Jeffrey Hayes, is now pursuing his claim. Claimant's Brief at 1 n.1.

[2] This is Claimant's fourth claim for benefits. On December 14, 2005, Administrative Law Judge (ALJ) Edward Terhune Miller denied his prior claim, filed on October 17, 2002, because he failed to establish pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. Claimant took no further action until filing the current subsequent claim. Director's Exhibit 5.

[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 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 also deny the subsequent claim unless they find that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White*

failed to rebut the Section 411(c)(4) presumption. Nevertheless, because ALJ Romero did not fully address discrepancies in Claimant's employment records when calculating the length of his coal mine employment, the Board vacated his finding that Claimant had fifteen years of qualifying coal mine employment. *Hayes v. Cowin & Co., Inc.*, BRB No. 18-0273 BLA (June 28, 2019) (unpub.). Thus, the Board remanded the case for ALJ Romero to reconsider this issue and to redetermine whether Claimant is entitled to the Section 411(c)(4) presumption. *Id*. at 9.

On remand, ALJ Romero found Claimant's Social Security Administration (SSA) earnings records and employee attendance records provide the most reliable evidence as to the length of his coal mine employment. *See* 2019 Decision and Order on Remand at 11. He concluded Claimant established 17.55 years of qualifying coal mine employment, again invoking the Section 411(c)(4) presumption. Consequently, he awarded benefits. *Id*. at 17-18.

Employer appealed to the Board for a second time, challenging ALJ Romero's finding that Claimant established at least fifteen years of qualifying coal mine employment. The Board again vacated ALJ Romero's length of coal mine employment determination and his finding that Claimant invoked the Section 411(c)(4) presumption. *Hayes v. Cowin & Co., Inc.*, BRB No. 20-0156 BLA (May 20, 2021) (unpub.). Specifically, the Board held ALJ Romero erred in not addressing whether Claimant met the threshold requirement of one calendar year before applying Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* and the 125-day divisor when calculating the length of Claimant's coal mine employment for those years where the evidence showed he worked in coal mine employment for only partial periods of a calendar year. Thus, the Board remanded the case for ALJ Romero to calculate the length of Claimant's coal mine employment for the calendar years where he worked for only a portion of the year. *Id*. at 7. The Board further instructed him to reconsider the applicability of the Section 411(c)(4) presumption. *Id*.

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's prior claim was denied for failure to establish pneumoconiosis or a totally disabling respiratory impairment, he had to submit new evidence establishing at least one of these elements to warrant a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3; 20 C.F.R. §725.309(c); Director's Exhibit 3.

On remand, the case was reassigned to ALJ Carrie Bland (the ALJ).[5] She found the record establishes 13.76 years of coal mine employment and thus determined Claimant is not entitled to invoke the Section 411(c)(4) presumption. Additionally, the ALJ concluded Claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, and denied benefits.[6]

On appeal, Claimant argues the ALJ erred in calculating his length of coal mine employment and in concluding he is not entitled to invoke the Section 411(c)(4) presumption. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), asserts the Board should affirm the ALJ's length of coal mine employment finding.

The 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.[7] 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).

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the length of 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 and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

In calculating Claimant's length of coal mine employment,[8] the ALJ indicated she considered "direct evidence" in the form of Claimant's handwritten account of his coal

[5] ALJ Romero retired from the Office of Administrative Law Judges. 2023 Decision and Order on Remand at 3 n.3.

[6] We affirm, as unchallenged on appeal, the ALJ's conclusion that Claimant failed to establish pneumoconiosis at 20 C.F.R. §718.202. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 2023 Decision and Order on Remand at 8.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as Claimant performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[8] The Board previously affirmed ALJ Romero's determination that Claimant established six years of coal mine employment during 1966, 1971, 1972, 1976, 1979 and

mine employment history, a typed version of his account, his employment attendance records, and a July 14, 1987 letter from Employer stating the dates and projects Claimant worked on and explaining which projects were coal and non-coal mine work related. 2023 Decision and Order on Remand at 3-5; *see* Director's Exhibits 1-3, 9, 11. Giving more weight to Employer's records and Claimant's handwritten account, the ALJ found Claimant established 13.76 years of coal mine employment. Decision and Order on Remand at 5. Consequently, she concluded Claimant cannot invoke the Section 411(c)(4) presumption. *Id*.

Citing *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 403 (6th Cir. 2019), Claimant argues that each year of coal mine employment when he worked for at least 125 days "should be considered a year for the purposes of calculating the length of coal mine employment" as this approach is consistent with the regulations. Claimant's Brief at 3, *citing* 20 C.F.R. §725.101(a)(32). Claimant thus asserts the record establishes over eighteen years of underground employment, and therefore he should be entitled to invoke the Section 411(c)(4) presumption. *Id*. at 4. Employer responds, contending the ALJ correctly found Claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the presumption. Employer's Brief at 3-5. The Director asserts the Board need not address Claimant's arguments because it previously held that *Shepherd* is not controlling in the Eleventh Circuit and "that finding has become the law of the case." Director's Brief at 2. We agree with Employer's and the Director's assertions.

In the current case, the Board previously rejected a portion of ALJ Romero's calculations because the "Eleventh Circuit has not adopted the Sixth Circuit's view that 125 working days equals one calendar year of coal mine employment . . . ." *Hayes*, BRB No. 20-0156 BLA at 5-6. Further, the Board has consistently declined to apply *Shepherd* to cases arising outside of the Sixth Circuit. *See Mims v. Drummond Co., Inc*., BRB No. 21-0314 BLA, slip op. at 3-6 (Sept. 24, 2023) (unpub.) (ALJ erred in applying regulatory interpretation of *Shepherd* in case arising out of Eleventh Circuit). Because Claimant has not shown the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

1985, and an additional 0.58 years between September to December 1964 and October to December 1970, for a total of 6.58 years of qualifying coal mine employment. *Hayes*, BRB No. 20-0156 BLA, slip op. at 6; 2023 Decision and Order on Remand at 2-3.

As Claimant raises no further error regarding the ALJ's calculation, we affirm the ALJ's finding of 13.76 years of coal mine employment and her conclusion that Claimant cannot invoke the Section 411(c)(4) presumption.

Because we have affirmed, as unchallenged, the ALJ's determination that Claimant failed to establish pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, *see supra* note 6, we also affirm the denial of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Accordingly, the ALJ's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge