U.S. Department of Labor

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

BRB No. 19-0517 BLA

EARL L. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
S & J MINING COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/18/2020
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Andrea L. Berg and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer/Carrier.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Drew A. Swank's Decision and Order Awarding Benefits (2018-BLA-06049) 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 miner's subsequent claim filed on September 30, 2016.[1]

The administrative law judge found Claimant[2] had fifteen years of underground coal mine employment, and a totally disabling respiratory or pulmonary impairment. He therefore found 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).[3] The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the administrative law judge erred in finding Claimant established at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.[4]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial

[1] The district director denied Claimant's prior claim, filed on December 26, 2013, because Claimant failed to establish pneumoconiosis. Decision and Order at 2, *citing* Director's Exhibit 1. Claimant did not take any further action on his December 26, 2013 claim. Director's Exhibit 3.

[2] Claimant's surviving widow testified at the formal hearing, held on May 14, 2019, that the miner died on October 12, 2018. Hearing Transcript at 11. Claimant's widow is pursuing this claim on his behalf.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is 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. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17-24.

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 Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption

Length of Qualifying Coal Mine Employment

Employer challenges the administrative law judge's finding that Claimant worked for at least fifteen years in qualifying coal mine employment. Employer argues the administrative law judge failed to consider the evidence and make specific findings regarding the length of Claimant's coal mine employment, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 4-8. Employer's argument has merit.

A claimant bears the burden of proof to establish the number of years he actually 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 the administrative law judge's determination if it is based on a reasonable method of computation and supported by substantial evidence in the record. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Initially, the administrative law judge correctly noted, "In determining length of employment in the coal mines, it is proper to consider evidence from a variety of sources, including affidavits of co-workers, Social Security records, sworn testimony, written statements of the miner (including the Form CM-911a), records of the employer, and pension records." Decision and Order at 4. He further noted the regulations provide, "[i]n determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id.*, *quoting* 20 C.F.R. §725.101(a)(32). The administrative law judge observed Claimant alleged fifteen years of coal mine employment on his application for benefits, and the district director found fifteen years of coal mine employment. Decision and Order at 4. Without further analysis, however, he concluded: "Based upon the totality of the evidence, the undersigned finds that Claimant had 15 years of coal mine employment." *Id.*

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

The APA requires the administrative law judge consider all relevant evidence in the record and set forth his "findings and conclusions and the reasons or basis therefor, on all the material 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because we cannot discern the basis for the administrative law judge's finding Claimant established fifteen years of coal mine employment,[6] we must vacate that determination and remand the case for reconsideration of this issue.

Because we have vacated the administrative law judge's finding Claimant had at least fifteen years of qualifying coal mine employment, we must further vacate his determination Claimant invoked the Section 411(c)(4) presumption.[7] Decision and Order at 7, 24. On remand, the administrative law judge must consider all relevant evidence *de novo* and render findings as to the length and nature of Claimant's coal mine employment in accordance with our instructions above. *See Wojtowicz*, 12 BLR at 1-165; *see also* 5 U.S.C. §557(c)(3). He may rely on any credible evidence, and we will uphold any reasonable method of computation that is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). If, on remand, Claimant establishes at least fifteen years of qualifying employment, he will have invoked the Section 411(c)(4) presumption.[8] The administrative law judge must then determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii). If Claimant is unable to invoke the presumption, the administrative law judge must address whether Claimant established all the elements of entitlement under 20 C.F.R. Part 718 by a preponderance of

[6] To the extent the administrative law judge intended to adopt the district director's finding of fifteen years, this was improper. With only one exception not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an administrative law judge must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

[7] Because we have vacated the administrative law judge's finding that Claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, Employer's arguments pertaining to the administrative law judge's rebuttal findings.

[8] The administrative law judge found all of Claimant's coal mine employment was underground. We affirm this determination as it is unchallenged on appeal. *See Skrack*, 6 BLR at 1-711; Decision and Order at 6.

the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The administrative law judge must explain the bases for his findings on remand in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge