U.S. Department of Labor

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

BRB No. 19-0505 BLA

DAVID A. LUSK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JUDE ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 10/21/2020
	)	
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 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.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for Employer/Carrier.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2017-BLA-06208) 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 subsequent claim filed on February 11, 2016.[1]

The administrative law judge credited Claimant with 21.12 years of underground coal mine employment,[2] and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant established a change in an applicable condition of entitlement and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §725.309(c). She further found Employer did not rebut the presumption and awarded benefits.

[1] Claimant filed an initial claim for benefits on December 27, 1995. Director's Exhibit 1. The district director denied the claim on June 19, 1996 because Claimant failed to establish any element of entitlement. *Id.* Although Claimant filed a second claim, he withdrew it. Director's Exhibit 2. A withdrawn claim is considered "not to have been filed." 20 C.F.R. §725.306(b).

[2] The Benefits Review Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 18.

[3] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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) (2012); *see* 20 C.F.R. §718.305.

On appeal, Employer challenges the constitutionality of the Affordable Care Act (ACA) and the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in crediting Claimant with at least fifteen years of underground coal mine employment and therefore erred in determining that Claimant invoked the Section 411(c)(4) presumption. Employer also argues she erred in finding it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge properly credited Claimant with least fifteen years of underground coal mine employment. The Director also urges the Board to reject Employer's challenge to the constitutionality and applicability of the Section 411(c)(4) presumption.

The 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 evidence, and in accordance with applicable law. 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).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the ACA, Public Law No. 111-148, §1556 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 21-24. Employer cites the district court's rationale that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, 393, 400-03 (5th Cir. 2019) (King, J., dissenting), *cert. granted*, U.S. , No. 19-1019, 2020 WL 981805 (Mar. 2, 2020). Moreover, the United States Court of Appeals for the Fourth Circuit, whose law applies to this claim, has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject Employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

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

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mines, or "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(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 administrative law judge'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).

The regulations define "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.'"[4] 20 C.F.R. §725.101(a)(32); *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). Based on Claimant's application for benefits, employment history form, answers to interrogatories, and hearing testimony, the administrative law judge found that Claimant established "periods of largely uninterrupted coal mine employment [from] 1971 to 1995." Decision and Order at 8; Director's Exhibits 4, 5; Hearing Transcript at 14. Because this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Having found that Claimant "established periods of coal mine employment encompassing full calendar years and various partial calendar years totaling more than one year," the administrative law judge next determined whether Claimant worked for at least 125 days during each of these years. Decision and Order at 8. She compared Claimant's yearly income, as set forth in his Social Security Administration (SSA) earnings statement, with the mine industry's average yearly earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*[5] to find that Claimant worked at least 125 days during each of the following years: 1972 to 1983, 1986 to 1987, and 1991 to 1995. *Id*. at 8-10. She therefore credited Claimant with 19.0 years of coal mine employment. *Id*.; 20 C.F.R. §725.101(a)(32)(iii) (administrative law judge may compare

[4] If the threshold one-year period is met, "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).

[5] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

miner's earnings to "coal mine industry's average daily earnings for that year"). For the years in which Claimant worked less than 125 days (1971, 1984, 1985, 1988, 1990 and 1996), the administrative law judge credited him with a "fractional year based on the ratio of the actual number of days worked to 125." 20 C.F.R. §725.101(a)(32)(i); Decision and Order at 9-10. The administrative law judge credited Claimant with an additional 2.12 years of coal mine employment for a total of 21.12 years of underground coal mine employment.[6] *Id.* at 10.

Employer contends that the administrative law judge erred in using Exhibit 610 to calculate the length of Claimant's coal mine employment because she improperly relied on the industry average for 125 days, not the average for a whole year. We disagree. As the Director notes, the administrative law judge only addressed whether the evidence established 125 working days of coal mine employment *after having determined that Claimant established full calendar years of employment for each of those years*. Director's Brief at 2. This unequivocally satisfies the regulatory definition of "year." 20 C.F.R. §725.101(a)(32). As a result, we discern no error in the administrative law judge's method of calculation. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. We therefore affirm her finding that Claimant established at least fifteen years of underground coal mine employment.[7]

[6] The administrative law judge found that all of Claimant's coal mine employment took place underground. Decision and Order at 3. We affirm this finding as unchallenged. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[7] Employer suggests the administrative law judge should have applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine an estimated number of days of coal mine employment during each year. Employer's Brief at 5-10. However, because the 125-day average is simply the daily average multiplied by 125, using subparagraph (iii)'s formula to first determine the number of working days would result in the same outcome as the administrative law judge's method. In each of the years calculated, Claimant would be entitled to a full year when his wages exceeded those for 125 working days, or partial periods based on the ratio of days worked to 125. 20 C.F.R. §725.101(a)(32)(i). Moreover, even using this formula and adopting Employer's assumption of a 250 day work-year (which is contrary to the regulatory requirement of a 125 day work-year), the Director calculates that Claimant would be entitled to over seventeen years of underground coal mine employment. *See* Director's Brief at 2-3. Employer has not set forth how much coal mine employment the use of its advocated formula would establish, asserting only that Claimant "may have fewer than [fifteen] years of coal mine employment." Employer's Brief at 10.

We also affirm, as unchallenged, the administrative law judge's finding Claimant has a totally disabling respiratory or pulmonary impairment.[8] *Skrack*, 6 BLR at 1-711; Decision and Order at 25. Thus, we affirm her finding that Claimant invoked the Section 411(c)(4) presumption. *Id.*

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

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish that Claimant has neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer did not rebut the presumption by either method.

We affirm as unchallenged the administrative law judge's finding that Employer did not establish that Claimant does not have clinical pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-38. We therefore affirm her finding that Employer did not rebut the presumption by establishing Claimant does not have pneumoconiosis.[10] 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next considered whether Employer rebutted disability causation by establishing that "no part of the miner's respiratory or pulmonary total

[8] In light of our affirmance of the administrative law judge's finding of a totally disabling respiratory or pulmonary impairment, we also affirm her finding that Claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); *see Skrack*, 6 BLR at 1-711.

[9] "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). "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 tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that Claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not address Employer's contentions of error regarding the administrative law judge's finding that Employer did not disprove legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-21.

disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). She rationally discounted the opinions of Drs. Zaldivar and Basheda because they did not diagnose clinical pneumoconiosis, contrary to her finding that Employer failed to disprove the existence of the disease.[11] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 39-40; Director's Exhibit 21; Employer's Exhibit 1. Therefore, we affirm the administrative law judge's determination that Employer failed to rebut clinical pneumoconiosis as a cause of Claimant's total disability. *See* 20 C.F.R. §718.305(d)(1)(ii).

[11] The administrative law judge also considered the opinions of Drs. Shamma-Othman, Raj and Green. Drs. Shamma-Othman and Raj opined that Claimant's totally disabling pulmonary impairment is due to clinical and legal pneumoconiosis. Director's Exhibit 23; Claimant's Exhibit 2. Although Dr. Green also diagnosed clinical and legal pneumoconiosis, he did not directly address the cause of Claimant's totally disabling pulmonary impairment. Claimant's Exhibit 5. Consequently, the opinions of Drs. Shamma-Othman, Raj and Green do not assist Employer in establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis." 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge