U.S. Department of Labor

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

BRB No. 19-0468 BLA

JAMES W. PETRY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE S MINING, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 09/18/2020
	)	
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 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.

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

Sarah M. Hurley (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, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Theresa C. Timlin's Decision and Order Awarding Benefits (2018-BLA-05090) on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a claim filed on January 29, 2016.

After crediting Claimant with 15.84 years of underground coal mine employment,[1] the administrative law judge found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore found Claimant invoked 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). The administrative law judge further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the constitutionality and applicability of the Section 411(c)(4) presumption because it was enacted as part of the Affordable Care Act (ACA). It also argues the administrative law judge erred in crediting Claimant with at least fifteen years of underground coal mine employment and in finding he invoked the Section 411(c)(4) presumption. Employer also contends the administrative law judge 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, declined to file a substantive response in this appeal. In a footnote to her letter to the Board, however, she

[1] The Benefits Review Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 20.

[2] 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) (2018); *see* 20 C.F.R. §718.305.

urges the Board to reject Employer's challenge to the constitutionality and applicability of the Section 411(c)(4) presumption.[3]

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, 362 (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 19-22. Employer cites the district court's rationale in *Texas* 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). Moreover, the United States Court of Appeals for the Fourth Circuit 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

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

In calculating the length of Claimant's coal mine employment, the administrative law judge considered Claimant's employment history form, his hearing testimony, and his Social Security Administration (SSA) earnings statement. Decision and Order at 11; Director's Exhibits 3, 6, 7. Although the administrative law judge found Claimant was "largely consistent in his accounts of his coal mine employment," she found insufficient evidence to establish the specific beginning and ending dates of his coal mine employment. *Id.* at 12. She therefore found Claimant's SSA records were the most accurate evidence regarding the length of his coal mine employment. *Id.*

Because she could not ascertain the beginning and ending dates of Claimant's coal mine employment, the administrative law judge attempted to apply the calculation method at 20 C.F.R. §725.101(a)(32)(iii).[4] Decision and Order at 12. She divided Claimant's yearly earnings as reported in his SSA records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.[5] *Id*. at 12-14. For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings, she credited Claimant with a full year of coal mine employment. *Id*. For the years in which Claimant's earnings fell short, she credited him with a fractional year, calculated by dividing his annual earnings

[4] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[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.

by the Exhibit 610 average yearly earnings. *Id*. In applying this formula, the administrative law judge credited Claimant with 15.84 years of underground coal mine employment.[6] *Id.*

We agree with Employer that the administrative law judge applied an improper method of calculation in finding Claimant established at least fifteen years of coal mine employment. Employer's Brief at 5-10. To credit a miner with a year of coal mine employment, the administrative law judge 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 administrative law judge must then determine whether the miner worked for at least 125 working days within that one-year period.[7] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations.[8] *See Clark,* 22 BLR at 1-281.

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[6] Although the administrative law judge's calculations indicated Claimant should be credited with 0.79, 0.83, and 0.60 years of coal mine employment in 1970, 1972 and 1974 respectively, she credited Claimant with only 0.50 years of coal mine employment during these years since Claimant's SSA earnings statement indicated he only received earnings for two calendar quarters in each of these years. Decision and Order at 13 n. 23-25.

[7] 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).

[8] The method set forth at 20 C.F.R. §725.101(a)(32)(iii) – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of *days* that a miner worked in a given year, but does not establish that such employment occurred during a 365-day period. 20 C.F.R. §725.101(a)(32)(iii). The administrative law judge deviated from this formula by comparing Claimant's income to the yearly income of employees who worked for 125 days, rather than dividing Claimant's income by the daily average. Under the administrative law judge's method of calculation, Claimant can be said to have established at least 125 working days, but not that such work occurred during "a period of one calendar year . . . or partial periods totaling one year." 20 C.F.R. §725.101(a)(32).

In attempting to apply the regulatory formula, the administrative law judge failed to acknowledge the threshold inquiry of whether Claimant established a calendar year of employment prior to determining whether Claimant worked at least 125 days in that year.[9] *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281. Because the administrative law judge did not properly apply the formula at 20 C.F.R. §725.101(a)(32)(iii), we therefore vacate her finding that Claimant established 15.84 years of underground coal mine employment. *See* 30 U.S.C. §923(b); *Cox*, 602 F.3d at 285-87; *Mitchell*, 479 F.3d at 334-36. We also vacate her finding that Claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), and remand the case for reconsideration.

If the administrative law judge, on remand, again finds fifteen or more years of underground coal mine employment established, Claimant will be entitled to invoke the Section 411(c)(4) presumption.[10] If Claimant fails to establish at least fifteen years of underground coal mine employment, the administrative law judge must consider whether Claimant can establish entitlement under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption.[11]

[9] The administrative law judge accurately noted the Sixth Circuit held in *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 (6th Cir. 2019) that if the formula set out at Section 725.101(a)(32)(iii) yields at least 125 working days, a miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year. Decision and Order at 12-13. If the results yield less than 125 days, the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125. *Id*. But the Fourth Circuit, in which this case arises, has not adopted *Shepherd* or otherwise held that working 125 days establishes a year-long employment relationship. *See Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002) (recognizing the 2001 amendments to the regulations require a one year employment relationship during which miner worked 125 days to establish a year of employment).

[10] The administrative law judge found that all of Claimant's coal mine employment was performed underground. Decision and Order at 14. Because this finding is unchallenged, it is affirmed. *See Skrack*, 6 BLR at 1-711.

[11] We decline to address, at this time, Employer's challenge to the administrative law judge's determination that it failed to rebut the presumption. On remand, should the administrative law judge again find Claimant has invoked the Section 411(c)(4) presumption, Employer may challenge the administrative law judge's rebuttal findings.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge