U.S. Department of Labor

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

BRB No. 19-0479 BLA

CLARK D. CASSADY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HANOVER RESOURCES, LLC	)	
	)	
and	)	DATE ISSUED: 09/18/2020
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY, aka ENCOVA INSURANCE	)	
	)	
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 Larry A. Temin, 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.

Cynthia Liao (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: ROLFE, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Larry A. Temin's Decision and Order Awarding Benefits (2017-BLA-05769) rendered on a claim filed on April 22, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant established 16.34 years of underground coal mine employment and is totally disabled, and thus invoked the presumption that Claimant is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.204(b)(2). He further found the presumption unrebutted and awarded benefits.

On appeal, Employer challenges the constitutionality of the Section 411(c)(4) presumption. Alternatively, Employer contends the administrative law judge erred in finding Claimant established at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding the presumption unrebutted. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject Employer's arguments regarding the constitutionality of the Section 411(c)(4) presumption. She asserts, however, that the administrative law judge erred in calculating the length of Claimant's coal mine employment. She also urges the Benefits Review Board to affirm the administrative law judge's discrediting of Dr. Rosenberg's opinion relevant to the issue of legal pneumoconiosis on rebuttal.[2]

[1] Under Section 411(c)(4) of the Act, Claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes 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); 20 C.F.R. §718.305.

[2] We affirm, as unchallenged, the administrative law judge's finding that Claimant established a totally disabling respiratory or pulmonary impairment. 20 C.F.R.

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 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 Affordable Care Act (ACA), Public Law No. 111-148, §1556 (2010), which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 26. 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 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 (5th Cir. 2019) (King, J., dissenting). Moreover, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held the ACA amendments to the 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 – Length of Coal Mine Employment

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 length of coal mine employment determination if based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Claimant alleged twenty-five to thirty years of coal mine employment on his application form, and the district director credited him with thirteen years of coal mine

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§718.204(b)(2); Decision and Order at 21; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

employment. Decision and Order at 4; Director's Exhibits 2, 70. The administrative law judge noted that the parties could not reach a stipulation on the length of Claimant's coal mine employment. Decision and Order at 4. He also noted Claimant testified he had twenty years of coal mine employment and was paid in cash under the table for three to ten of those years. *Id.*; Hearing Transcript at 18.

In calculating the length of Claimant's coal mine employment, the administrative law judge considered Claimant's Social Security Administration (SSA) earnings records, employment history form and hearing testimony. Decision and Order at 4; Director's Exhibits 4, 6; Hearing Transcript at 18-28. He credited Claimant's testimony that all his coal mine work was underground. Decision and Order at 5-6; Hearing Transcript at 26. He found Claimant's SSA records to be the most probative regarding the number of years Claimant worked because they are "more detailed." Decision and Order at 4.

Reviewing Claimant's SSA records, the administrative law judge used two different methods to calculate the number of years of Claimant's coal mine employment. For the years 1988, 1991, 1993, and 1994, when Claimant had only one employer each year, the administrative law judge found it reasonable to assume Claimant worked for a full calendar year and credited him with four years of coal mine employment. Decision and Order at 4-5.

For the years when Claimant was either "employed for part of the year or worked for multiple coal employers" (1981 through 1987, 1989, 1990, 1992, 1995 through 1997, 2005, and 2006), the administrative law judge indicated he could not determine the beginning and ending dates of Claimant's coal mine employment and therefore applied the formula at 20 C.F.R. §725.101(a)(32)(iii).[3] Decision and Order at 5. He divided Claimant's yearly earnings as reported in his SSA records by the coal mine industry's average daily earnings as reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. *Id*. For each year in which the calculation yielded at least 125 working days, he credited Clamant with a full year of coal mine employment. *Id*. For the

[3] 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*.

years in which the calculation showed less than 125 working days in the calendar year, he credited Claimant with a fractional year, based on the ratio of working days to 125. *Id*. The administrative law judge specifically noted that, while "not controlling law in the jurisdiction applicable to this claim," the United States Court of Appeals for the Sixth Circuit in *Shepherd v. Incoal, Inc*., 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019), "prescribe[d] calculation of the duration of coal mine employment in this manner." *Id.* at 5 n.19. Relying on the 125-day divisor, the administrative law judge found Claimant established 12.34 years of coal mine employment under the second method of calculation. Decision and Order at 5. Adding 12.34 years to the four years he found established in 1988, 1991, 1993, and 1994, he concluded Claimant established a total of 16.34 years of underground coal mine employment. *Id.*

Employer objects to the administrative law judge's second method of calculation. Although Employer agrees the administrative law judge may use the formula at 20 C.F.R. §725.3101(a)(32)(iii),[4] it argues he erred in using 125 days as a divisor for finding Claimant worked one calendar year in coal mine employment.[5] Employer's Brief at 7-9, *citing Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2017); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The Director asserts the administrative law judge erred in relying "solely on *Shepherd*'s (erroneous) interpretation of [20 C.F.R.] § 725.101(a)(32)" to conclude 125 days is sufficient to credit Claimant with a full year of coal mine employment, without first considering whether evidence in the record supports an inference that he worked for a full calendar year. Director's Brief at 4.

Because Claimant's last coal mine employment occurred in West Virginia, we apply the law of the United States Court of Appeals for the Fourth Circuit in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 35. Thus, we agree with the Director's argument that the administrative law judge erred in relying on *Shepherd* to the extent that the Fourth Circuit has not adopted the view that 125 working days equals one calendar year of coal mine employment.

[4] Employer misstates that the administrative law judge divided Claimant's yearly earnings by the coal mine industry's average *yearly* earnings as reported in Exhibit 610. Employer's Brief at 6 (emphasis added); Decision and Order at 5. As we note *supra*, the administrative law judge divided Claimant's yearly earnings as reflected in his SSA records by the coal mine industry's average *daily* earnings as reported in Exhibit 610.

[5] We affirm, as unchallenged, the administrative law judge's finding that all of Claimant's coal mine employment was underground and his crediting of Claimant with four years of coal mine employment for the years 1988, 1991, 1993, and 1994. Decision and Order at 4; *see Skrack*, 6 BLR at 1-711.

The regulation at 20 C.F.R. §725.101(a)(32)(i) requires that to credit a miner with a year of coal mine employment, the administrative law judge must first determine whether he or she engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year.[6] 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-280. If the threshold one-year period is met, then the administrative law judge must determine whether the miner worked for at least 125 working days within that one year period. 20 C.F.R. §725.101(a)(32). Proof that a miner's earnings exceeded the average 125-day earnings as reported by BLS for a given year does not, in itself, establish the threshold one year of coal mine employment.[7] *See Clark*, 22 BLR at 1-281. Here, the administrative law judge did not consider the threshold requirement of one calendar year before applying Exhibit 610 and the 125-day divisor. We therefore vacate the administrative law judge's finding that Claimant established 16.34 years of underground coal mine employment. *See* 30 U.S.C. §923(b); *Mitchell*, 479 F.3d at 334-36; Decision and Order at 5. Consequently we must vacate his finding that Claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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

In the interest of judicial economy, we address Employer's arguments regarding rebuttal. In order to rebut the Section 411(c)(4) presumption, Employer must establish Claimant has neither legal nor clinical pneumoconiosis,[8] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.]

[6] The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 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.'" 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).

[7] The Sixth Circuit specifically held in *Shepherd* that "regardless of the actual duration of employment for the year," if the calculation at 20 C.F.R. §725.101(a)(32)(iii) yields 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." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 402 6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019).

[8] "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).

§718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found Employer failed to establish rebuttal under either method.

We affirm, as unchallenged, the administrative law judge's finding that Employer did not disprove Claimant has clinical pneumoconiosis. Decision and Order at 24; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). 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 contention that the administrative law judge erred in finding it did not disprove legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's Brief at 10-26.

With regard to the administrative law judge's consideration of the second method of rebuttal - disability causation - Employer does not raise any specific argument, other than to assert Claimant does not have legal pneumoconiosis. The administrative law judge specifically found the opinions of Employer's experts, Drs. Zaldivar and Rosenberg, not credible on the cause of Claimant's disabling respiratory impairment because neither physician diagnosed clinical or legal pneumoconiosis, contrary to his finding that Employer did not disprove either form of the disease. Decision and Order at 29; *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015). Because Employer does not challenge the administrative law judge's finding that it did not establish no part of Claimant's respiratory disability was caused by *clinical* pneumoconiosis, we affirm it. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 29; *see Skrack*, 6 BLR at 1-711. Thus, we affirm the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305; Decision and Order at 30.

Remand Instructions

On remand, the administrative law judge must determine the length of Claimant's coal mine employment taking into consideration the relevant evidence[9] and using any

[9] The Director asserts the administrative law judge should consider Claimant's hearing testimony in conjunction with his SSA records to determine if Claimant established calendar years of coal mine employment. Director's Brief at 4. She notes the Claimant's SSA earnings records may understate Claimant's earnings based on his "testimony that he was frequently paid in cash under the table before he was officially put on the payroll for many of his employers." *Id.*, *citing* Hearing Transcript at 18, 22-23, 31, 34. Further, the Director notes Claimant testified that "although he worked for many different companies, he had very few periods when he was not working … and he only drew unemployment

reasonable method of computation. *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. He must determine whether the record evidence shows Claimant worked a calendar year or partial periods totaling a calendar year before applying the formula at 20 C.F.R. §725.101(a)(32)(i). He must also explain his findings in accordance with the Administrative Procedure Act.[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge finds Claimant established fifteen or more years of qualifying employment and invokes the Section 411(c)(4) presumption, he may reinstate the award of benefits. If Claimant does not invoke the presumption on remand, the administrative law judge must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

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 consideration consistent with this opinion.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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benefits once or twice in his life." Director's Brief at 4, *citing* Hearing Transcript at 30-31.

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "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).