BRB No. 14-0010 BLA

WILLIAM D. STILTNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A & K TRANSPORTATION, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 08/29/2014
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

Paul E. Jones and E. Shane Branham (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Rebecca J. Fiebig (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-BLA-5546) of Administrative Law Judge John P. Sellers, III (the administrative law judge), rendered on claimant's request for modification of the denial of a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[1] The administrative law judge credited claimant with no more than sixteen years of coal mine employment,[2] with only seven years and ten months in qualifying coal mine employment, *i.e.*, underground coal mine employment or employment in conditions substantially similar to those in underground coal mining.[3] Thus, the administrative law judge determined that claimant was not entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] The administrative law judge further found that the evidence was

[1] Claimant filed his claim for benefits on July 7, 2008, which was denied by the district director on August 12, 2009. Director's Exhibits 2, 59. Claimant subsequently requested modification, which was denied by the district director on December 1, 2010. Director's Exhibits 61, 104. Upon claimant's request for a hearing, the case was transferred to the Office of Administrative Law Judges. Director's Exhibits 105, 108. On December 27, 2011, Administrative Law Judge Larry S. Merck issued an Order of Remand for the district director to obtain a complete pulmonary evaluation of claimant. Director's Exhibit 111 at 199. Following submission of a supplemental pulmonary evaluation, the case was resubmitted to the OALJ on March 19, 2012, and was subsequently assigned to Administrative Law Judge John P. Sellers, III. Director's Exhibit 112.

[2] Employer stipulated to sixteen years of coal mine employment, but contested the issue of whether this employment was performed underground or on the surface in conditions substantially similar to those in underground coal mine employment. Hearing Transcript at 11.

[3] The total length of underground coal mine employment credited to claimant by the administrative law judge equals seven years and ten months, Decision and Order at 7-9, but in addition to stating the correct total, the administrative law judge incorrectly stated that claimant's underground coal mine employment totaled either seven years and five months, Decision and Order at 9, or seven years and eight months, Decision and Order at 9, 32.

[4] Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, amended Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable

insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, and concluded that modification pursuant to 20 C.F.R. §725.310 was not appropriate. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that claimant's work as a truck driver could not be credited as coal mine employment, and maintains that he is entitled to the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Claimant also contends that the administrative law judge erred in finding that the evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202, and a basis for modification at Section 725.310. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to remand the case for the administrative law judge to reassess the evidence relevant to the length of claimant's coal mine employment.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial 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).

Claimant challenges the administrative law judge's finding that claimant's work as a truck driver did not constitute covered coal mine employment, and asserts that he is entitled to invocation of the amended Section 411(c)(4) presumption. Claimant's Brief at 2. The Director agrees that claimant's work as a trucker hauling coal constituted coal mine employment, and asserts that the administrative law judge erred in calculating claimant's underground coal mine employment by failing to credit all of claimant's self-employment work; by failing to properly use the Average Earnings of Employees in Coal Mining at Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine*

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surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Hearing Transcript at 12; Director's Exhibit 3.

(BLBA) Procedure Manual (Exhibit 610); and by failing to consider all evidence of record. Director's Brief at 2-4. We agree that not all of the administrative law judge's methods of calculating years of coal mine employment can be upheld.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method or methods and is supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In addressing the issue of whether claimant established at least fifteen years of qualifying coal mine employment, the administrative law judge reviewed claimant's employment history form, his testimony at deposition and at the hearing, his tax records, and his Social Security Administration (SSA) earnings records. Decision and Order at 3-5; Director's Exhibits 3, 6, 8, 42; Employer's Exhibit 2; Hearing Transcript at 14-37. The administrative law judge noted that claimant maintained that he worked in the coal mining industry for forty-three years, from 1965 or 1966 to 2007, and that twenty-three years of his coal mine employment were spent underground. The administrative law judge also noted claimant's testimony that "he worked full time and regular, without any time off as he moved between companies." Decision and Order at 4-5; Hearing Transcript at 15, 27; Director's Exhibit 3. After observing that claimant listed two general types of coal mine employment, that of an underground miner and that of a truck driver loading coal at various mine sites for delivery elsewhere, the administrative law judge separately addressed the length of claimant's underground coal mine employment and the length and nature of his trucking employment. Decision and Order at 3-9.

Relying on claimant's SSA earnings records, which he determined were more credible than claimant's testimony or the estimated dates on claimant's employment history form, the administrative law judge identified the number of quarters in each year in which claimant's SSA earnings statement indicated that he earned at least $50.00 from underground coal mine employment. Decision and Order at 7-8. The Board has held that this is a reasonable method of calculation, and no party asserts otherwise. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Based on the SSA earnings records, the administrative law judge credited claimant with seventeen quarters of coal mine employment from 1968 through 1972 with Pikeville Coal Company/Chisholm Mine, one quarter in 1974 with Crescent Coal Company, one quarter in 1975 with Collins & Stiltner Coal Company, and two quarters

in 1975 with LTV Steel Company, Inc.,[6] for a total finding of five years and three months of underground employment. We affirm this finding, as supported by substantial evidence.

The administrative law judge next considered claimant's asserted underground self-employment work with Stiltner & Salyers from 1976 through 1980, and with Taylor Hill Coal Company from 1986 through 1989. Director's Exhibits 3, 5. Noting that the SSA records do not show any employment or any earnings for this period, the administrative law judge declined to credit claimant with any coal mine employment for these companies. Decision and Order at 8. As the Director correctly notes, however, the SSA earnings records reflect self-employment income for the years 1976, 1977, 1986, 1988, and 1989. Director's Exhibit 8-6. As the administrative law judge did not consider this relevant evidence, and a supporting affidavit related to claimant's employment during this time period,[7] we must vacate his findings with respect to these companies, and remand the case for further findings. On remand, the administrative law judge must review claimant's self-employment income, as set out in the SSA records for the relevant years, and claimant's affidavit contained in Director's Exhibit 75, and determine whether this evidence affects his calculation of the length of claimant's qualifying coal mine employment.

The administrative law judge next considered claimant's underground employment with Thermo Coal Corporation (Thermo Coal) from 1982 through 1984, and with Jimco Incorporated (Jimco Inc.) from 1990 through 1992, as reflected in the SSA

[6] Claimant's employment history form indicates underground coal mine work as an equipment operator for Republic Steel Coal Company (Republic Steel) for one quarter in 1975, Director's Exhibit 3, and claimant's SSA records indicate earnings in 1975 with LTV Steel Company, Inc. (LTV Steel) for two quarters, but report no income from Republic Steel for 1975. Director's Exhibit 8. Allowing that Republic Steel and LTV Steel may be "one and the same," the administrative law judge credited claimant with two quarters of employment. Decision and Order at 8.

[7] Claimant testified that he submitted affidavits from other miners to the Department of Labor to establish length of coal mine employment because there was an issue regarding the accuracy of the SSA earnings records. Hearing Transcript at 15, 20, 36-37. The administrative law judge correctly stated that he could not locate any affidavits from other miners in the record. Decision and Order at 4 at n. 3. The record contains, however, a notarized affidavit from claimant, witnessed by five people, regarding his underground coal mine employment with Thermo Coal Corporation, Stiltner & Salyers Coal, and Taylor Hill Coal Company, the inclusive dates of which differ slightly from his employment history form. Director's Exhibits 3, 75.

earnings record. The administrative law judge compared claimant's yearly income from the SSA records with "the average annual wages for a coal miner" as reported "according to Exhibit 610."[8] Decision and Order at 8. Despite stating that he was using the figures from Exhibit 610, the administrative law judge actually compared claimant's total yearly earnings with the SSA wage base table, found in Exhibit 609, to determine whether claimant's wages met or exceeded the yearly wage base. Finding that claimant's yearly earnings did not meet or exceed the yearly wage base for each year, the administrative law judge divided claimant's earnings by the wage base to credit claimant with a portion of a year. Applying this method, the administrative law judge credited claimant with one and one-half years of coal mine employment with Thermo Coal from 1982 through 1984, and one year and one month of coal mine employment with Jimco Inc. from 1990 through 1992, bringing the total of claimant's underground coal mine employment to seven years and ten months. Decision and Order at 8-9. As the table rates applied by the administrative law judge do not match the table rates shown at Exhibit 610,[9] however, substantial evidence does not support his findings, and we must vacate his determination with respect to these years of employment. Consequently, on remand, the administrative law judge must recalculate claimant's qualifying employment at Thermo Coal and Jimco Inc. Additionally, the Director correctly notes that claimant listed employment at "Jimco Iron & Metal" on his employment history form from 1989 through 1994. Director's Exhibit 3. The SSA records, however, reflect earnings from "Jimco Inc." from 1990 through 1992, which the administrative law judge credited as underground coal mine

[8] The Department of Labor uses the tables identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.* The table at Exhibit 609, entitled *Wage Based History*, contains the average annual wage base by year. The table at Exhibit 610, entitled *Average Earnings of Employees in Coal Mining*, contains, by year, the average daily earnings and the earnings for miners who worked 125 days at a mine site.

[9] We acknowledge that, in the context of determining the employer with which the miner had the most recent periods of cumulative employment of not less than one calendar year, the Board has held that an administrative law judge's application of the tables at Exhibit 610 did not constitute a reasonable method of computation, as they reflected only 125 days of earnings. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003). Under the facts of this case, however, particularly in view of claimant's testimony that he worked underground continuously from 1965 to 1989, with the exception of some trucking employment in 1966, and that he "worked full time and regular, without any time off as he moved between companies," Hearing Transcript at 26-27, utilization of the tables at Exhibit 610, in the administrative law judge's discretion, would constitute a reasonable method of calculating the length of claimant's coal mine employment, consistent with 20 C.F.R. §725.101(a)(32).

employment, and earnings from "Jasper Iron & Metal" from 1993 through 1994, which the administrative law judge did not credit or discuss. Director's Exhibit 8. As "Jimco Inc." and "Jasper Iron & Metal" share the same mailing address and cover the same years of employment as claimant's asserted employment with "Jimco Iron & Metal," the administrative law judge, on remand, must determine whether claimant's earnings from Jasper Iron & Metal may be credited as qualifying coal mine employment.

With respect to claimant's work as a truck driver, the administrative law judge did not credit claimant with any years of coal mine employment, finding that claimant failed to prove that his work of loading and transporting coal from both underground and surface mines constituted coal mine employment. Acknowledging that the loading and transporting of coal could, in some instances, constitute the work of a coal miner under 30 U.S.C. §902(d), the administrative law judge indicated that the coal must be in some stage of preparation rather than in the stream of commerce. Because the administrative law judge could not determine the status of the coal in this case, he found that claimant failed to prove that his trucking work was covered coal mine employment. The administrative law judge further determined that, based on claimant's testimony, claimant failed to demonstrate that his trucking employment was performed in conditions substantially similar to those in an underground mine as required to invoke the presumption at amended Section 411(c)(4). Decision and Order at 6, 9, 30-32.

The regulation at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), includes special provisions for coal mine transportation workers. 20 C.F.R. §725.202(b). Transportation workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility, and if their work is integral to the extraction or preparation of coal.[10] 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted: 1) by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) by evidence which demonstrates that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

[10] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a miner's duties must meet situs and function requirements. Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility. The function requirement mandates that the duties performed be integral to the extraction or preparation of coal. *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

In this case, the administrative law judge focused on the status of the coal that was being hauled rather than the specific job that claimant performed in and around the coal mine facilities. While the administrative law judge correctly noted that the transportation of coal that has entered the stream of commerce does not constitute the work of a miner under the Act, as it is not an integral step in the extraction or preparation of coal, *see Hanna v. Director, OWCP*, 860 F.2d 88, 93, 12 BLR 2-15, 2-23 (3d Cir. 1988), *citing Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987)(noting that Stroh would not be a miner if he merely worked to deliver completely processed coal to the ultimate consumer); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984), the loading and removal of coal from the tipple has been held to be a "necessary part of the preparation of coal for transport into the stream of commerce." *Hanna*, 860 F.2d at 93, 12 BLR at 2-23; *see Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780, 18 BLR 2-35, 2-38-9 (4th Cir. 1993)(delivery of empty railroad cars to a preparation facility to be loaded with processed coal held to be integral to the process of loading coal at the preparation facility). Consequently, we vacate the administrative law judge's finding that claimant's work hauling coal did not qualify as coal mine employment.[11] On remand, the administrative law judge must reconsider claimant's transportation employment in light of the situs and function requirements as set out in *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989), and Section 725.202(b), including application of the rebuttable presumption at Section 725.202(b)(1), that claimant was exposed to coal dust during his employment. *See* 20 C.F.R. §725.202(b)(1). The administrative law judge must further determine whether employer met its burden pursuant at Section 725.202(b)(2) to rebut the presumption by proving that claimant was not regularly exposed to coal dust during his trucking employment, or that he did not work regularly in or around a coal mine. *See* 20 C.F.R. §725.202(b)(2).

Because the administrative law judge's findings regarding the length of claimant's coal mine employment affected his weighing of the evidence on the issue of

[11] Claimant asserted that he loaded and hauled coal for Mullins Trucking, Belcher & Collins Trucking, S & S Trucking, Stiltner Trucking, and A & K Transportation, Inc. Director's Exhibit 3. Additionally, claimant indicated that he worked as an equipment operator from 1975 through 1976 for "Ratliff Brothers Coal," which the administrative law judge determined was a trucking company, as it was designated as "Ratliff Trucking Company" in the SSA records. Decision and Order at 8; Director's Exhibits 3, 8. On remand, the administrative law judge must also determine whether claimant's work at Ratliff Trucking Company constituted qualifying coal mine employment.

pneumoconiosis, we must also vacate his findings at Section 718.202 for a reassessment of this evidence on remand.[12]

To summarize, the administrative law judge must, on remand, reevaluate all relevant evidence, select a reasonable method or methods by which to calculate the length of claimant's underground coal mine employment, and explain the bases for his findings in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). The administrative law judge must also reconsider claimant's work loading and hauling coal, including claimant's testimony that he hauled coal from both underground and surface mines,[13] Hearing Transcript at 28-29, and determine if that employment, as described by claimant, meets the definition of a miner pursuant to Section 725.202(b). If the administrative law judge finds that claimant has established at least fifteen years of qualifying coal mine employment, he must determine whether claimant is entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). If claimant is unable to establish that he had at least fifteen years of qualifying coal mine employment, the administrative law judge must render findings as to whether claimant established entitlement pursuant to 20 C.F.R. Part 718 of the regulations without benefit of the presumption.

[12] In view of our disposition of this case, we need not address claimant's contention that the administrative law judge erred in his analysis of the medical opinion evidence in finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a).

[13] Although claimant bears the burden of establishing that he worked for at least fifteen years in an underground coal mine or in conditions that were substantially similar, *see* 30 U.S.C. §921(c)(4), if claimant performed surface work at an underground mine site, claimant does not have to establish the comparability of the conditions, as the regulatory definition of an underground coal mine encompasses not only the underground mine shaft, but also all land, buildings and equipment. 20 C.F.R. §725.101(a)(30); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-23 (2011).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge