U.S. Department of Labor

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

BRB No. 18-0437 BLA

ROBERT MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRAMLINE INCORPORATED	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 08/29/2019
	)	
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 Dana Rosen, Administrative Law Judge, United States Department of Labor.

G. Todd Houck, Mullens, West Virginia, for claimant.

Andrea Berg and Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05091) of Administrative Law Judge Dana Rosen, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on August 2, 2013.

The administrative law judge credited claimant with 17.75 years of coal mine employment in conditions substantially similar to those in an underground mine and found he has a totally disabling respiratory or pulmonary impairment. She therefore found claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further determined employer did not rebut the presumption and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding employer did not rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30

[1] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

[2] Although the administrative law judge noted employer conceded total disability, she addressed the relevant evidence and found claimant established this element of entitlement. Decision and Order at 3, 24-26; Hearing Transcript at 6. As employer has not challenged her determination on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 24-26.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Presumption - Length of Coal Mine Employment

Claimant bears the burden of establishing the length of coal mine employment. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of calculation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

In calculating the length of claimant's coal mine employment, the administrative law judge considered his employment history summaries, Social Security Administration (SSA) earnings records, hearing testimony, paystubs, and multiple coal truck driver questionnaires with various employers. Decision and Order at 4-5; Director's Exhibits 3-11; Hearing Transcript at 12-26. She determined that in the absence of documentary evidence supporting claimant's "written submissions and testimony," his SSA records are the most accurate evidence of his coal mine employment. Decision and Order at 5. She also found that because she could not ascertain the beginning and ending dates of claimant's employment, she would apply the computation method at 20 C.F.R. §725.101(a)(32)(iii).[4] *Id*. at 5-6. She divided the 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 6. For each year in which claimant's earnings met or exceeded the average yearly earnings, she credited clamant with a full year of coal mine employment.

[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.

Id. For the years in which claimant's earnings fell short, she credited him with a fractional year, calculated by dividing his annual earnings by the average yearly earnings. *Id*. The administrative law judge concluded, "the objective evidence establishes [c]laimant has 17.75 years of coal mine employment from 1979 to 2013." *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. To credit claimant with a year of coal mine employment, the administrative law judge must first determine whether claimant 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 determine whether claimant worked as a miner for at least 125 working days within that one-year period.[6] 20 C.F.R. §725.101(a)(32). However, 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 does not satisfy the requirement that such employment occur during a 365-day period and thus, in itself, does not establish one full year of coal mine employment as defined in the regulations.[7] *See Clark*, 22 BLR at 1-281.

[6] 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).

[7] As indicated *supra*, the administrative law judge acknowledged that the regulations provide an optional method for calculating a miner's employment "where 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[.]" 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 5-6. As a practical matter, the method provided – "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). As employer asserts, the administrative deviated slightly 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. *See* Decision and Order at 5-6; Employer's Brief at 5-7. The result, however, is essentially the same. Under both the administrative law judge's calculation and the regulatory formula, claimant can be said to have established at least 125 working days, but

As employer asserts, in applying 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 that claimant worked at least 125 days in that year. Decision and Order at 5-6; Employer's Brief at 6-7. The result is that claimant was credited with full years of coal mine employment simply because he established 125 working days during part of those years. *See Mitchell*, 479 F.3d at 334-36; *Clark*, 22 BLR at 1-281. Employer is also correct that the administrative law judge erred in omitting from consideration its October 3, 2013 letter reporting claimant worked as a full-time coal truck driver for employer from September 26, 2011 to June 19, 2013, rather than the two full calendar years she credited to claimant.[8] *See* 30 U.S.C. §923(b); *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285-87 (4th Cir. 2010); Decision and Order at 4-6; Director's Exhibit 20.

Because the administrative law judge did not properly apply the formula at 20 C.F.R. §725.101(a)(32)(iii) and did not consider all relevant evidence, we vacate her finding claimant had 17.75 years of qualifying coal mine employment. *See* 30 U.S.C. §923(b); *Cox*, 602 F.3d at 285-87; *Mitchell*, 479 F.3d at 334-36; Decision and Order at 6. We, therefore, must also vacate her finding that claimant invoked the Section 411(c)(4) presumption.[9] 30 U.S.C. §921(c)(4).

---

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).

[8] The only reference the administrative law judge made to employer's letter was in summarizing the materials Dr. Basheda reviewed in his medical opinion. Decision and Order at 20; Employer's Exhibit 1. Although she rationally found claimant's Social Security Administration (SSA) records more reliable than his testimony and his unsupported written submissions, she did not render a finding that the SSA records are entitled to greater weight than other types of evidence relevant to claimant's coal mine employment, including employer's letter. *See Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984).

[9] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, 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 that claimant has invoked the Section 411(c)(4) presumption and that employer has failed to rebut it, employer may challenge such findings in a future appellate proceeding.

On remand, the administrative law judge may use any reasonable method of computation in determining the length of claimant's coal mine employment.[10] *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. The administrative law judge must consider all relevant evidence, however, and explain her 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). *See* 30 U.S.C. §923(b); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If she again finds fifteen or more years of qualifying employment established, claimant will be entitled to invocation of the Section 411(c)(4) presumption. If claimant fails to establish at least fifteen years of qualifying coal mine employment, the administrative law judge must consider whether claimant can establish entitlement under 20 C.F.R. Parts 718 and 725, without the benefit of the Section 411(c)(4) presumption.

[10] The administrative law judge may determine the dates and length of claimant's coal mine employment "by any credible evidence." 20 C.F.R. §725.101(a)(32)(ii). As the administrative law judge noted, if the beginning and ending dates of claimant's employment cannot be determined, the administrative law judge may use, but is not required to use, the income-based formula set forth in 20 C.F.R. §725.101(a)(32)(iii). *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); Decision and Order at 5-6. In considering whether the starting and ending dates of claimant's work for employer can be ascertained, the administrative law judge must consider employer's October 3, 2013 letter, in addition to all other relevant evidence. Director's Exhibit 20.

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

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge