BRB No. 11-0191 BLA

FEBEL CRUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHAMPION COAL COMPANY INCORPORATED, AS SUBCONTRACTOR TO HUNTS BRANCH COAL COMPANY	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 12/21/2011
	)	
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 – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer and its carrier (collectively "employer") appeal the Decision and Order – Award of Benefits (2009-BLA-5070) of Administrative Law Judge Larry S. Merck rendered on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited claimant with twenty-one years of coal mine employment; determined that employer is the properly designated responsible operator herein; and adjudicated this claim, filed on January 14, 2008, pursuant to the regulatory provisions at 20 C.F.R. Part 718.[2] Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found invocation of the rebuttable presumption of total disability due to pneumoconiosis established thereunder, based on his finding that the evidence was sufficient to establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b).[3] The administrative law judge further determined that employer had successfully rebutted the presumption of clinical pneumoconiosis, but found that the medical opinion evidence was insufficient to rebut

[1] Congress recently 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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[2] At the hearing, employer withdrew the issues of timeliness, miner status, post-1969 employment, insurance, and dependency. Hearing Transcript at 16-18; 44.

[3] The amendments to the Act were enacted after the hearing in this case was held, on January 4, 2010. By Order dated April 28, 2010, the administrative law judge granted employer's motion to withdraw its stipulation of twenty-one years of coal mine employment, and granted the parties forty-five days to submit one supplemental medical report in response to the change in the law.

the presumption that claimant had legal pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. Accordingly, benefits were awarded.

On appeal, employer challenges its designation as the responsible operator in this case, and contends that the administrative law judge erred: in calculating the length of claimant's coal mine employment; in finding invocation established under amended Section 411(c)(4); and in finding that employer failed to rebut the presumption that claimant had legal pneumoconiosis. Lastly, employer maintains that the administrative law judge failed to provide any analysis of the date of onset of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503. Claimant responds to the substantive issues, arguing in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that employer was properly designated the responsible operator herein. Employer has replied, in support of its position, to the response briefs filed by claimant and the Director.

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.[4] 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).

Employer first contends that the administrative law judge erred in finding it to be the properly designated responsible operator herein, asserting that M&MB Coal Company (M&MB) employed claimant, for a period of at least one year, more recently than did employer. Employer argues that the administrative law judge erred in finding that it failed to establish extraordinary circumstances for the admission into the record of its proffered evidence from the Kentucky Department of Worker's Claims (Claim Forms), relevant to claimant's employment with M&MB. Employer's Brief at 9-13; Employer's Reply Brief at 1-5. Alternatively, employer maintains that, even if its proffered evidence is not admitted, the evidence in the record as a whole is sufficient to establish that it was not claimant's most recent employer for a period of at least one year. Upon review of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's findings on the responsible operator issue cannot be affirmed.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last 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 20.

If a miner worked for more than one coal mine operator during his career, the responsible operator is the most recent coal mine operator to employ the miner, provided that the operator qualifies as a "potentially liable operator."[5] 20 C.F.R. §725.495. From a procedural standpoint, after a claim is filed and upon receipt of the miner's employment history, the district director has the duty to investigate whether any operator may be held liable for the payment of benefits as a responsible operator pursuant to 20 C.F.R. §§725.407(a), 725.494. The district director must issue a Notice of Claim to each potentially liable operator he identifies, requesting that each operator either accept or contest liability for benefits. 20 C.F.R. §725.407(b), (c). If an operator contests its identification as a potentially liable operator, it may, within 90 days of notification, submit documentary evidence to support its position. 20 C.F.R. §725.408(b)(1). The district director then makes preliminary findings, contained in the Schedule for Admission of Evidence, as to the miner's entitlement and the identity of the responsible operator. 20 C.F.R. §725.410(a). The designated responsible operator may submit evidence to prove that it is not the potentially liable operator that most recently employed the claimant. 20 C.F.R. §725.414(b).

The record reflects that claimant worked for several different coal companies from 1971 through 1997. Director's Exhibit 5. Claimant's work history form indicates, in pertinent part, that he worked for employer from July 1983 to March 1988, and for M&MB from January 1991 through October 1992. Director's Exhibit 3. The district director identified employer as the only potentially liable operator, stating that, while claimant was employed by other companies after he worked for employer, "[d]ue to low wages, it does not appear that claimant worked a full year for any of those companies." Director's Exhibit 12. Following the district director's issuance of a Notice of Claim pursuant to 20 C.F.R. §725.407, Director's Exhibit 13, employer responded, denying liability and asserting that it was not the operator that most recently employed claimant for a period of one year. Employer also requested an extension of time to "obtain additional information and present proof on the responsible operator issue." Director's Exhibits 14, 16. Upon receiving an extension, employer took claimant's deposition on April 2, 2008, during which employer learned of claimant's work-related injuries at M&MB, requested copies of the workers' compensation claim forms, and elicited

[5] In order for an operator to qualify as a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator or its successor; the operator or successor must have been in business after June 30, 1973; the operator or successor must have employed the miner for a cumulative period of not less than one year; the employment must have occurred after December 31, 1969; and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e). Employer does not dispute that it satisfies the criteria as a potentially liable operator.

claimant's testimony that his work with M&MB was "solid work," rather than occasional work. Director's Exhibits 17, 18, and 20 at 9, 26. The district director issued his Schedule for the Submission of Additional Evidence on May 8, 2008, denying benefits and naming employer as the responsible operator. Director's Exhibit 23. Employer responded to the scheduling order in an amended response, attaching claimant's deposition, requesting that notices of claim be sent to Apollo Coal Company[6] and M&MB, and asserting that claimant worked for M&MB from 1991 through 1992, earning a total of $25,325.00.[7] Director's Exhibit 25. The district director responded that the information was insufficient to name either company as the responsible operator, and indicated that he would reconsider the issue if employer provided documentation as to claimant's exact dates of employment with the companies. Director's Exhibit 26. On August 7, 2008, the district director issued his Proposed Decision and Order denying benefits and designating employer as the responsible operator, Director's Exhibit 27, and the case was forwarded to the Office of Administrative Law Judges on October 28, 2008, pursuant to claimant's request for a hearing. Director's Exhibits 28, 31. On April 13, 2009, three days prior to the hearing in this case, employer filed a Motion for Remand for further consideration of the responsible operator issue, stating that "despite a diligent search, employer could not locate employment records for [M&MB,]" but that collateral records "have now been discovered which document that period of employment." Employer attached the Claim Forms, which it sought to admit into the record at the hearing. Employer's Exhibit 2; Hearing Transcript at 10. The administrative law judge denied employer's motion to remand, and upon the Director's objection to the admission of the Claim Forms into the record as untimely pursuant to 20 C.F.R. §725.408, requested that the parties address the issue in their closing briefs. Hearing Transcript at 11.

Regarding the admission of the Claim Forms into the record, the administrative law judge noted employer's argument, that it had proven "extraordinary circumstances" justifying their admission pursuant to 20 C.F.R. §725.456(b)(1),[8] and the Director's argument, that extraordinary circumstances had not been established because employer failed to submit the evidence in accordance with 20 C.F.R. §725.408, *i.e.* "within 90 days

[6] On appeal, employer does not contend that the evidence is sufficient to prove that claimant worked for Apollo Coal Company for one year. Director's Exhibit 25.

[7] The Social Security Administration earnings records show that M&MB Coal is also referenced as "Marvin R. Biliter, Jr." Director's Exhibit 4.

[8] Section 725.456(b)(1) provides, in part, that documentary evidence pertaining to the liability of a potentially liable operator and/or the identification of a responsible operator which was not submitted to the district director shall not be admitted into the hearing record in the absence of extraordinary circumstances. 20 C.F.R. §725.456.

of the date on which it receive[d] notification under 20 C.F.R. §725.407." Decision and Order at 6-7. After reviewing the record, the administrative law judge determined that "except for the apparent one-time request made by employer to obtain the documents in Employer's Exhibit 2 after the deposition of claimant . . . there is no evidence in the file to indicate that employer made any other attempt to obtain Employer's Exhibit 2 in a timely manner." Decision and Order at 8-9. The administrative law judge, therefore, denied admission of the Claim Forms, finding that employer failed to establish "extraordinary circumstances to overcome the untimely submission of the records from the Kentucky Department of Workers' Claims." Decision and Order at 7.

We cannot affirm the administrative law judge's exclusion of the Claim Forms from the record, as it appears that he based his finding, that extraordinary circumstances were not shown for their admission, upon an erroneous premise, *i.e.*, that employer was required to submit all documentary evidence on the responsible operator issue within ninety days after receiving notice of the claim pursuant to Section 725.408, as asserted by the Director. As employer correctly notes, however, the ninety-day time limit referred to in Section 725.408(b)(1) is applicable only to the submission of evidence, generally within the control of an operator, which establishes that the operator is not a potentially liable operator in the claim. By contrast, documentary evidence submitted to demonstrate a more recent employer's potential liability is governed by 20 C.F.R. §725.414. *See* 20 C.F.R. §§725.408, 725.414; 65 Fed. Reg. 80009 (Dec. 20, 2000). Because employer was not contesting its status as a potentially liable operator, the ninety-day time limit is not applicable to the submission of its documentary evidence regarding another operator. Further, the district director bears the initial burden of investigation, identification and notification of all potentially liable operators pursuant to 20 C.F.R. §§725.407, 725.494. *See Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995). Despite the district director's receipt of claimant's employment history, listing employment with M&MB from January 1991 to October 1992, Director's Exhibit 3; Social Security Administration records showing employment with M&MB in 1991 and 1992, Director's Exhibit 5; and claimant's deposition testimony regarding his employment for a year with M&MB and a related workers' compensation claim, Director's Exhibit 20, the district director undertook no investigation and denied employer's request to notify M&MB of the claim, Director's Exhibit 25. Instead, the district director shifted the burden to employer to obtain documentation of the beginning and ending dates of claimant's employment with M&MB, evidence that was not within employer's control. Director's Exhibit 26. In view of the foregoing, we vacate the administrative law judge's finding that good cause did not exist to admit Employer's Exhibit 2 into the record, and remand this case for further consideration of the issue. On remand, if the administrative law judge finds that extraordinary circumstances have been established to admit the Claim Forms into evidence pursuant to 20 C.F.R. §§725.414, 725.456, the administrative law judge should consider how claimant's disability leave affects his length of coal mine employment with M&MB. *Compare Kentland Elkhorn*

Coal Corp. v. Director, OWCP [*Hall*], 287 F.3d 555, 22 BLR 2-351 (6th Cir. 2002), and *Boyd v. Island Creek Coal Co.*, 8 BLR 1-458 (1986). Because the administrative law judge's determination regarding the admissibility of Employer's Exhibit 2 affects his findings on the responsible operator issue, we vacate those findings as well, and instruct the administrative law judge, on remand, to reassess all relevant evidence on the issue.

We next address employer's contention that the administrative law judge erred in invoking the Section 411(c)(4) presumption. In this regard, employer contends that the administrative law judge's finding of approximately twenty-one years of coal mine employment is unsupported by the evidence, arguing that the administrative law judge's method of comparing earnings, rather than referencing the actual record evidence, is irrational. Employer also challenges the administrative law judge's finding that claimant was totally disabled from a respiratory impairment, and argues that this case should be held in abeyance pending resolution of legal challenges to the Patient Protection and Affordable Care Act (PPACA) in federal court. Employer's Brief at 13-19. Some of employer's arguments have merit.

In calculating the length of claimant's coal mine employment, the administrative law judge noted that the district director credited claimant with "at least 21.06 years" of coal mine employment, and that claimant's employment history form reflected coal mine employment "from 1971 through 1998." Decision and Order at 11; Director's Exhibits 3, 27. The administrative law judge determined that claimant's SSA records, which reflect work from 1966 to 1997, were "the most reliable," as they are "largely consistent with claimant's testimony and [his work] history forms." Decision and Order at 11-12. Using claimant's yearly income from the SSA records, the administrative law judge calculated the length of claimant's coal mine employment, based on the average "yearly" earnings for miners for 125 days, as reported by the Bureau of Labor Statistics in Exhibit 610.[9] Thus, the administrative law judge divided claimant's yearly earnings for each year by the industry average "yearly" earnings for 125 days, and added each proportional amount together to total the number of years of coal mine employment from 1971 to 1997.

[9] In finding that claimant worked less than one calendar year for M&MB, the administrative law judge relied on the Bureau of Labor Statistics wage base history table at Exhibit 609 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, http://www.dol.gov/owcp/dcmwc/exh609.htm, rather than the average coal mine earnings table at Exhibit 610, http://www.dol.gov/owcp/dcmwc/exh610.htm. In calculating claimant's overall length of coal mine employment, the administrative law judge relied on the average coal mine earnings table at Exhibit 610, but did not apply the correct formula, *i.e.*, divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, *see* 20 C.F.R. §725.101(a)(32)(iii).

Accordingly, the administrative law judge credited claimant with "approximately 21 years of underground coal mine employment." Decision and Order at 12-13.

We agree with employer that the administrative law judge's method of calculating years of coal mine employment cannot be upheld. To be credited with a year of coal mine employment, claimant must prove that he worked in or around a coal mine over a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32). If the beginning and ending dates of the miner's employment cannot be ascertained, the administrative law judge may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii). The dates and length of employment may be established by any credible evidence, and any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Vickery v. Director,* OWCP, 8 BLR 1-430 (1986). In the instant case, the administrative law judge erroneously credited claimant with 365 days of employment if his income exceeded the industry average for just 125 days of work. *See Clark v. Barnwell Coal Co*., 22 BLR 1-277, 1-281 (2003). Additionally, the administrative law judge failed to take note of whether claimant's employment, as set out in the SSA earnings record, spanned the whole year, or just quarters within a year; in some instances, the administrative law judge credited claimant with more days of employment than would be possible if claimant had worked every day within the quarters specified. Because we find that the method employed by the administrative law judge is not reasonable, we vacate his finding of approximately twenty-one years of qualifying coal mine employment. As the administrative law judge's finding of greater than fifteen years of underground coal mine employment affects the applicability of amended Section 411(c)(4), we also vacate his findings that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis thereunder, and that employer failed to establish rebuttal, and we remand this case for further findings. Lastly, as we did in *Mathews v. United Pocahontas Coal Co*., 24 BLR 1-193, 1-299 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 20111), we decline to hold this case in abeyance pending resolution of legal challenges to the constitutionality of the PPACA.

Accordingly, the administrative law judge's the Decision and Order – Award of Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge