U.S. Department of Labor

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

BRB No. 19-0050 BLA

SHERMAN REAGAN, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 12/18/2019
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Sherman Reagan, Jr., Oneida, Tennessee.

Kathleen H. Kim (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: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2015-BLA-05910) of Administrative Law Judge Carrie Bland on a subsequent claim[1] filed on September 12, 2014, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

[1] Claimant filed three previous claims, each of which was finally denied. Director's Exhibits 1-3. On September 4, 2013, Administrative Law Judge Daniel F. Solomon denied

After crediting claimant with at least eleven years of coal mine employment,[2] the administrative law judge found the record contains no evidence of complicated pneumoconiosis and therefore he did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). Because claimant did not have at least fifteen years of coal mine employment, she found he did not invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012).

Turning to whether claimant is entitled to benefits under 20 C.F.R. Part 718, the administrative law judge found he did not establish clinical pneumoconiosis but did establish legal pneumoconiosis in the form of chronic obstructive pulmonary disease and asthma due in part to coal mine dust exposure.[4] 20 C.F.R. §718.202(a)(4). She also found claimant established total disability based on the parties' stipulation. 20 C.F.R. §718.204(b)(2). Finally, she found claimant did not establish that his total disability is due to pneumoconiosis and thus denied benefits. 20 C.F.R. §718.204(c).

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the denial of benefits.[5]

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claimant's most recent prior claim, filed on July 18, 2011, finding claimant established total disability, but failed to establish pneumoconiosis. Director's Exhibit 3.

[2] The record reflects that claimant's last coal mine employment occurred in Tennessee. Decision and Order at 2; June 25, 2013 Hearing Transcript at 27; Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption of total disability 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) (2012); 20 C.F.R. §718.305.

[4] Because claimant established legal pneumoconiosis, the administrative law judge found he established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c); Decision and Order at 13.

[5] Because the district director did not identify a responsible operator, the Black Lung Disability Trust Fund assumed potential liability for the payment of benefits in this claim.

In an appeal filed without the assistance of counsel, the Board considers whether the administrative law judge's decision is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). We must affirm the Decision and Order Denying Benefits 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 (1965).

Section 411(c)(4) Presumption – Length of Coal Mine Employment

Because claimant established a totally disabling respiratory impairment, he is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of underground or substantially similar surface coal mine employment.[6] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof 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 determination on length of coal mine employment based on a reasonable method and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge found affidavits from claimant, his wife, father, mother, and brother establish the years he worked as a coal miner.[7] Decision and Order at 5-6; Director's Exhibit 7. Based on this evidence, she first found claimant began working with his father "in 1949 until about March of 1951," then started working "for the Strunk Coal Company" before he quit "around June 1956." *Id.* She concluded this evidence established seven years of coal mine employment for the years 1949 to June 1956. Decision and Order at 6.

[6] The administrative law judge correctly found claimant did not establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(3) of the Act because there is no evidence of complicated pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304; Decision and Order at 9.

[7] The administrative law judge found the affidavits from claimant's family corroborated his own affidavit. Decision and Order at 5-6. She permissibly found these affidavits are "the most probative evidence concerning the length of his coal mine employment because they are more detailed than both [his employment history form CM-911a] and his testimony at the September 2016 hearing." *Id.*; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). She also permissibly found his Social Security Administration earnings records are not probative because claimant testified he was paid in cash when he worked in coal mines. *Rowe*, 710 F.2d at 255; Decision and Order at 5-6.

She next found claimant returned to coal mining in May 1957, working for his father at Flat Creek Coal until April 1958. Decision and Order at 5-6; Director's Exhibit 7. She thus credited claimant with one year of coal mine employment between 1957 and 1958. Decision and Order at 6.

The administrative law judge next noted claimant returned to Flat Creek Coal in July 1959 and worked "off and on" until June 1962. Decision and Order at 5-6; Director's Exhibit 7. Starting in July 1962 she found "he worked at other jobs but did work off and on for the West & Reagan Coal Company from 1962 to 1965." *Id*. Claimant's father corroborated that claimant returned to Flat Creek Coal in 1959 and worked "at least half the time" for three years. Exhibit 7. His mother confirmed that he worked "at least half the time" for West & Reagan Coal Company from 1962 to 1965 and his father specified that he would "leave and go work at various places and return and work for the coal company for approximately six months." *Id*. Based on the statements from claimant and his parents, the administrative law judge credited claimant with three years of coal mine employment, which she stated was "half the time" from July 1959 to 1965. *Id*.

In light of the foregoing, the administrative law judge found a total of eleven years of coal mine employment from 1949 to 1965: seven years from 1949 to June 1956, one year from May 1957 to April 1958, and three years from July 1959 to 1965. *Id*. Because the administrative law judge did not adequately explain her findings, we cannot affirm her determination claimant had eleven years of coal mine employment.

First, the administrative law judge found claimant worked seven years as a coal miner from 1949 to June 1956. Decision and Order at 5-6. This period, however, encompasses seven and a half years (1949, 1950, 1951, 1952, 1953, 1954, 1955, and the first half of 1956). In light of her finding that claimant worked from 1949 through June 1956, the administrative law judge did not explain why claimant is not entitled to credit for seven and a half years of coal mine employment.

Second, the administrative law judge credited claimant with three years of employment, which she stated was "half the time" from July 1959 through 1965. This period, however, encompasses six and a half years (the second half of 1959, 1960, 1961, 1962, 1963, 1964, and 1965). Half of that is three years and one quarter. In light of her finding claimant worked half of these years, the administrative law judge did not explain why he is not entitled to credit for three years and one quarter.

Because the administrative law judge's calculations for the periods from 1949 to June 1956 and July 1959 to 1965 are not adequately explained, her length of coal mine employment finding does not comport with the Administrative Procedure Act (APA), which requires a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C.

§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Finally, the administrative law judge erred by not considering and weighing all relevant evidence. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 5-6. Claimant's mother indicated he "worked at a deep mine shoveling coal onto cars inside the mines for Herstle Chitwood on W & O West's property at West Brimstone during 1967 thru 1968." Director's Exhibit 7 at 9 (unpaginated). Claimant's co-worker Avery Strunk signed an affidavit indicating he "personally" knew and "worked with claimant in underground coal mines" at Strunk Coal Company from December 1945 to March 1948.[8] *Id.* at 11 (unpaginated). The administrative law judge did not discuss this evidence when calculating claimant's coal mine employment.

In light of these errors, we must vacate the administrative law judge's findings that claimant established only eleven years of coal mine employment. Because this evidence, if credited, could establish greater than fifteen years of coal mine employment, we also vacate her finding claimant did not invoke the Section 411(c)(4) presumption. Consequently, we also vacate the denial of benefits.

Remand Instructions

On remand, the administrative law judge must reconsider the length of claimant's coal mine employment. She must consider and weigh all relevant evidence and adequately explain her findings. *Shepherd*, 915 F.3d at 406-07; *Wojtowicz*, 12 BLR at 1-165. If she finds claimant had at least fifteen years of coal mine employment, she must address whether that employment was in underground coal mines or in conditions substantially similar to those in an underground mine. If claimant establishes at least fifteen years of qualifying coal mine employment, he will be entitled to the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1). She must then consider whether the Director can rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability

[8] The administrative law judge indicated "[s]ome sworn affidavits in the record are not considered as a part of this opinion due to being irrelevant, unreliable, or not probative to the calculation of [c]laimant's coal mine employment." Decision and Order at 5 n. 1. She did not indicate which affidavits she was referring to or explain her basis for finding them "irrelevant, unreliable, or not probative." *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). Because claimant may be entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we decline to address, as premature, the administrative law judge's finding claimant failed to establish disability causation. 20 C.F.R. §718.204(c).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge