U.S. Department of Labor

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

BRB No. 19-0063 BLA

MICHAEL H. HARDIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BROOKS RUN MINING COMPANY, LLC	)	
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 12/31/2019
	)	
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 in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Jeffrey S. Goldberg (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: BOGGS, Chief Administrative Law Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in a Subsequent Claim (2014-BLA-05334) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on December 18, 2012.[1]

The administrative law judge credited claimant with 20.30 years of underground coal mine employment and found he established a totally disabling respiratory impairment. Decision and Order at 4, 22-23. The administrative law judge therefore determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further found employer failed to rebut the presumption and awarded benefits. Decision and Order at 23, 30-31.

On appeal, employer challenges the administrative law judge's finding that claimant had fifteen years of underground coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding it did not rebut the presumption. Finally, employer challenges the constitutionality and applicability of the Section 411(c)(4) presumption and the Affordable Care Act (ACA).

[1] This is claimant's second claim. On March 3, 2011, the district director denied his prior claim, filed on September 16, 2010, as abandoned. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Section 411(c)(4) of the Black Lung Benefits Act provides a rebuttable presumption that a miner 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.

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's contention that the fifteen-year presumption is unconstitutional.[3]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim 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).

Constitutionality of the ACA and the Section 411(c)(4) Presumption

We first address employer's challenge to the constitutionality and applicability of the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. 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 ACA, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer asserts the district court in *Texas* ruled that the ACA individual mandate is unconstitutional and the remainder of the legislation is not severable. Employer's Brief at 29-30. The Director responds, and employer acknowledges, the district court stayed its ruling striking down the ACA, *Texas*, 352 F.Supp.3d at 690; thus, she argues the decision does not preclude application of the amendments to the Act found in the ACA. Director's Brief at 1-2. On appeal, the United States Court of Appeals for the Fifth Circuit held one aspect of the ACA (the individual mandate) is unconstitutional, but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down as inseverable from the mandate. *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at *27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting).[5] Moreover, as the Director also correctly points out, the United States Court of Appeals for the Fourth Circuit has held that the ACA amendments

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 22-23.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

[5] Furthermore, the Board has declined to hold cases in abeyance pending resolution of legal challenges to the Affordable Care Act. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

to the Act are severable because they have "a stand-alone quality" and are fully operative as a law. *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. Sebulius*, 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.

Length of Coal Mine Employment

Next, employer contends the administrative law judge erred in invoking the Section 411(c)(4) presumption because he improperly adopted the district director's calculation of claimant's years of coal mine employment. Employer argues the administrative law judge failed to consider the evidence and make specific findings regarding the length of claimant's coal mine employment, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). Employer's Brief at 5-11. We agree.

A claimant bears the burden of proof to establish the number of years he actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). The Board will uphold the administrative law judge's determination if it is based on a reasonable method of computation and is supported by substantial evidence in the record. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

The administrative law judge noted the district director's finding that claimant had 20.30 years of coal mine employment based on his Social Security Administration earnings record, which showed employment with various coal mine operators. Decision and Order at 3; Director's Exhibit 6. Citing Director's Exhibit 7, the administrative law judge further observed "the District Director awarded complete years of coal mine employment in 1979, 1980, 1981, 1982, 1983, 1985, 1987, 1988, 1989, 1991, 2005, 2006, 2007, and 2008; and partial years in 1976, 1977, 1978, 1984, 1986, 1990, 1992, 2010, and 2011."[6] Decision

[6] On the Coal Mine Employment Determination form, the district director divided claimant's yearly earnings as reported in his Social Security Administration (SSA) record by the coal mine industry's "yearly earnings standard" the Bureau of Labor Statistics publishes. Director's Exhibits 7, 37. These "yearly earnings" figures appear in the center column of Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual* and actually reflect 125 days of employment at the "average daily wage." It appears for each year in which claimant's earnings met or exceeded the average "yearly earnings," the district director credited clamant with a full year of coal mine employment. For the years in which claimant's earnings fell short, the district director credited him with a fractional

and Order at 3-4. After determining the record lacks contradictory evidence, the administrative law judge adopted the district director's calculation and concluded: "I accept that Claimant has 20.30 years of coal mine employment." *Id.* at 4.

As employer maintains, the administrative law judge's analysis does not accord with the regulations, which require him to consider the evidence and render his own findings. 20 C.F.R. §725.477(b). Consequently, we cannot affirm his determination of 20.30 years of coal mine employment. With only one exception not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an administrative law judge must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985). By omitting substantive consideration of the evidence, the administrative law judge essentially gave presumptive effect to the district director's finding of 20.30 years of coal mine employment, thereby failing to proceed *de novo*.

Accordingly, we vacate the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption and remand the case for reconsideration of this issue.[7] On remand, he must consider all relevant evidence *de novo* and render a finding as to the length of claimant's coal mine employment.[8] In accomplishing this task, he must identify the

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year. *Id.* This method fails to acknowledge the required threshold determination that claimant be 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). Proof 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. *See Clark*, 22 BLR at 1-281.

[7] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, employer's arguments pertaining to the administrative law judge's rebuttal findings.

[8] Claimant's SSA records are not the only record evidence relevant to the length of claimant's coal mine employment. For example, on claimant's employment history form (Department of Labor Form CM-911a), he reported working as a miner from 1976 to 1992 and then from 2005 to 2011. Director's Exhibit 4. An employment history letter from

employers for whom claimant performed the work of a coal miner, use a reasonable method of calculation to determine the length of such employment, and set forth the rationale underlying his findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *see also* 5 U.S.C. §557(c)(3).

If the administrative law judge finds claimant established at least fifteen years of qualifying coal mine employment, claimant will be entitled to invoke the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(i). If claimant does not establish at least fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has established entitlement under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption. 30 U.S.C. §901; *Kephart*, 8 BLR at 1-186; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Brooks Run Mining Company indicates claimant was employed from June 20, 2005 to July 7, 2008. Director's Exhibits 1, 29. A memo to the file reflects claimant worked for Harvest Time Coal Incorporated from January 2008 to June 2008, and was unemployed until October 11, 2010, when he worked for Doss Fork Coal Company Incorporated (Doss Fork Coal) until June 8, 2011. Director's Exhibit 8. The record also contains the Doss Fork Coal payroll register from 2010 and 2011. Director's Exhibit 19. It is the obligation of the administrative law judge to ascertain, to the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment. The administrative law judge lacks authority to make inferences from the SSA records (which do not provide beginning and ending dates of employment) when credible evidence of beginning and ending dates is in the record. *See* 20 C.F.R. §725.101(a)(32).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Claim 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.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge