

BRB No. 13-0207 BLA

FEBEL CRUM)
)
 Claimant-Respondent)
)
 v.)
)
 CHAMPION COAL COMPANY)
 INCORPORATED, AS SUBCONTRACTOR)
 TO HUNTS BRANCH COAL COMPANY)
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE) DATE ISSUED: 02/27/2014
 INSURANCE MUTUAL, INCORPORATED)
)
 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 on Remand - 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 on Remand - Award of Benefits (2009-BLA-5070) of Administrative Law Judge Larry S. Merck (the administrative law judge) rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case, involving a miner’s claim filed on January 14, 2008, is before the Board for the second time.

In his initial decision, the administrative law judge determined that employer failed to establish extraordinary circumstances for the admission into the record of evidence from the Kentucky Department of Workers’ Claims (the Claim Forms) relevant to claimant’s employment, and determined that employer was the properly designated responsible operator herein. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),¹ the administrative law judge credited claimant with twenty-one years of underground coal mine employment, and 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). The administrative law judge further found that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption,² and awarded benefits.

Upon employer’s appeal, the Board vacated the administrative law judge’s finding that good cause did not exist to admit the Claim Forms into the record, as it appeared that

¹ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this miner’s claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

² Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

he based his finding upon an erroneous premise, *i.e.*, that employer was required to submit all documentary evidence regarding another potentially liable operator within ninety days after receiving notice of the claim. Consequently, the Board remanded the case for the administrative law judge to redetermine whether extraordinary circumstances were established to admit the Claim Forms into evidence pursuant to 20 C.F.R. §§725.414, 725.456. Because the administrative law judge's determination regarding the admissibility of the Claim Forms affected his findings on the responsible operator issue, the Board vacated those findings as well, and instructed the administrative law judge, on remand, to reassess all relevant evidence on the issue. Holding that the method of calculation was not reasonable, the Board also vacated the administrative law judge's finding of twenty-one years of coal mine employment. As the administrative law judge's finding of more than fifteen years of underground coal mine employment affected the applicability of amended Section 411(c)(4), the Board vacated his findings that invocation of the presumption thereunder was established and that employer failed to establish rebuttal, and remanded the case for further findings. *Crum v. Champion Coal Co.*, BRB No. 11-0190 BLA (Dec. 21, 2011)(unpub.).

On remand, the administrative law judge noted the Board's instructions and, upon review of the record, determined that extraordinary circumstances did not exist to justify the admission into evidence of the Claim Forms. The administrative law judge found that employer was the properly designated responsible operator, and credited claimant with 16.21 years of underground coal mine employment. As he previously found total respiratory disability established pursuant to Section 718.204(b), the administrative law judge concluded that claimant was entitled to invocation of the amended Section 411(c)(4) presumption, and found that employer failed to establish rebuttal. Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's evidentiary ruling and his finding that claimant is entitled to invocation of the amended Section 411(c)(4) presumption, arguing that the evidence is insufficient to establish at least fifteen years of qualifying coal mine employment. Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the presumption that claimant's disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. Lastly, employer challenges the commencement date set by the administrative law judge for the payment of benefits. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's evidentiary ruling, and to vacate his length of coal

mine employment determination as unexplained and arbitrary. Employer has filed a combined reply brief in support of its position.³

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).

Turning first to the evidentiary issue raised in this appeal, employer contends that the administrative law judge erred in finding that it did not establish extraordinary circumstances to overcome the untimely submission of the Claim Forms. In this regard, employer argues that even if it did not immediately request the records from the Kentucky Department of Workers' Claims, there was no urgency regarding a deadline for filing such evidence. Employer asserts that "only irrelevant, immaterial, or unduly repetitious evidence may be excluded," and maintains that the administrative law judge's exclusion of its highly relevant evidence pertaining to the liability of a more recent potentially liable operator is inconsistent with the Act, which "expresses a preference for accuracy over finality." Employer's Brief at 11-13. Employer's arguments are without merit.

As the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the Office of Administrative Law Judges, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director.⁵ 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). The regulations explicitly provide that, unless documentary evidence pertaining to the liability of a potentially

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2013). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.

⁵ [I]n a case in which the operator encounters particular difficulty in obtaining the necessary evidence, it may be able to establish the existence of "extraordinary circumstances" permitting the introduction of such evidence after the case is referred to the Office of Administrative Law Judges. 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000).

liable operator and/or the identification of a responsible operator is submitted to the district director, such evidence “*shall not* be admitted into the hearing record in the absence of extraordinary circumstances.” 20 C.F.R. §725.456(b)(1) (emphasis added). Under 20 C.F.R. §725.414(d), “no documentary evidence pertaining to liability shall be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director....” 20 C.F.R. §725.414(d). Furthermore, the district director sets a schedule for the parties to follow regarding the submission of additional evidence relevant either to claimant’s eligibility for benefits or to the liability of the designated responsible operator. *See* 20 C.F.R. §725.410. All documentary evidence regarding a more recent employer’s potential liability must be submitted pursuant to this schedule, *see* 20 C.F.R. §725.414, but the time for submission of additional evidence set forth in the schedule “may be extended, for good cause shown, by filing a request for an extension with the district director prior to the expiration of the time period.” 20 C.F.R. §725.423.

In this case, the administrative law judge determined that, after employer deposed claimant on March 18, 2008, employer allowed more than a calendar year to elapse before it requested the Claim Forms from the Kentucky Department of Workers’ Claims. Additionally, the administrative law judge noted that there is no evidence in the record to show that employer made any other attempt to obtain the records in a timely manner, or that the Kentucky Department of Workers’ Claims was uncooperative or resisted employer’s efforts to obtain the records. Decision and Order on Remand at 21-22. Thus, the administrative law judge acted within his discretion and rationally determined that employer’s failure to act in a timely manner or to request additional time from the district director in order to obtain the Claim Forms did not constitute extraordinary circumstances that justified the late submission of the evidence. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Accordingly, we affirm the administrative law judge’s evidentiary ruling.

Employer next challenges the administrative law judge’s determination that claimant established 16.21 years of coal mine employment and, thus, was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Specifically, employer asserts that the administrative law judge calculated the years of coal mine employment without reference to the actual evidence in the record. Employer argues that, for the years 1981 and 1984 through 1987, the administrative law judge erroneously resorted to Exhibit 610 of the Department of Labor’s “Average Earnings of Employees in Coal Mining” (Exhibit 610), to credit claimant with a year of coal mine employment when his wages exceeded the average earnings for 125 days. Employer also argues that the administrative law judge applied different and inconsistent methods of calculating the length of claimant’s coal mine employment, and that if the administrative law judge had applied a consistent method, specifically, comparison of claimant’s wages to the yearly wage base set forth in Exhibit

609 of the Department of Labor's "Wage Base History" (Exhibit 609), claimant would have been credited with only 13.76 years of coal mine employment. Employer agrees with the Director's position that the administrative law judge did not adequately explain why he applied different methods of calculation, and requests that the case be remanded for a proper calculation of claimant's length of coal mine employment. Employer's Brief at 13-15; Reply Brief at 3. Employer's arguments lack merit.

A review of the Decision and Order on Remand reveals that the administrative law judge set forth his findings of fact and conclusions of law, based on his assessment of the probative value of the relevant evidence of record. Decision and Order on Remand at 22-31. In determining the total length of claimant's coal mine employment, the administrative law judge noted that the district director credited claimant with at least twenty years of coal mine employment, and that claimant stated on his black lung claim form that he worked in or around coal mines for twenty-eight years. Decision and Order on Remand at 25. In considering whether claimant established at least fifteen years of qualifying coal mine employment, the administrative law judge reviewed claimant's application for benefits; claimant's employment history form; his Social Security Administration (SSA) earnings records; his W-2 forms; and claimant's testimony. Director's Exhibits 2, 3, 4, 5, 6, 20; Hearing Transcript at 19-44. 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 coal mine employment, and credited claimant with a total of twenty-four quarters or six years of employment for the years 1971 through 1977. Decision and Order at 26. The Board has held, and employer concedes, that this is a reasonable method of calculation. *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 two quarters of coal mine employment in 1971, two quarters in 1972, and four quarters in 1973, 1974, 1975, 1976, and 1977, for a total of six years. Correctly noting that after 1977 the SSA records do not break down claimant's yearly earnings into quarters, but reflect only an annual sum for each employer, the administrative law judge then considered claimant's employment from 1978 through 1997, when claimant's SSA earnings record ends.

For the years 1978 through 1980, 1982, 1983, 1988, and 1990⁶ through 1997, the administrative law judge determined that the evidence was insufficient to establish the

⁶ The administrative law judge noted that the record does not establish that claimant worked in coal mine employment in 1989. Decision and Order on Remand at 29 n. 15; Director's Exhibit 5.

beginning and ending dates of claimant's employment with various employers. Thus, for these years, the administrative law judge utilized the method of computation urged by employer, and 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.⁷ If claimant's yearly earnings met or exceeded the yearly wage base for each year, the administrative law judge credited claimant with one year of coal mine employment; otherwise, 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 a total of 5.29 years of coal mine employment for these years.⁸

For each of the years 1981, 1984, 1985, 1986 and 1987, the administrative law judge determined that claimant was continuously employed with a single employer for a full calendar year.⁹ Noting that, "[o]nce the length of any periods of the claimant's coal mine employment has been determined, the administrative law judge should then determine whether the claimant worked in or around coal mines at least 125 working days during each calendar year," Decision and Order on Remand at 24, the administrative law judge considered whether claimant's earnings for each of these years equaled or exceeded the average earnings of employees in coal mining for a 125-day period as set out in Exhibit 610.¹⁰ If claimant's earnings exceeded the industry average earnings for

⁷ Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, Wage Based History*, contains the Social Security Administration's wage base table, which reflects the maximum amount of yearly earnings by employees on which employers are required to pay social security tax. See <http://www.dol.gov/owcp/dcmwc/exh609.htm>.

⁸ The administrative law judge credited claimant with three years of coal mine employment for 1978, 1979, and 1980; 0.59 years for 1982; 0.3 years for 1983; 0.08 years for 1988; 0.22 years for 1990; 0.37 years for 1991; 0.12 years for 1992; 0.02 years for 1993; 0.07 years for 1994; 0.1 year for 1995; 0.2 years for 1996; and 0.22 years for 1997.

⁹ The administrative law judge found that claimant was employed by N&A Coal Company of Paintsville, Inc. throughout the calendar year beginning January 1, 1981 and ending December 31, 1981. The administrative law judge found that claimant was employed by Champion Coal Company, Inc., for at least throughout the four calendar years beginning January 1, 1984 and ending December 31, 1987. Decision and Order on Remand at 27, 28; Director's Exhibit 5.

¹⁰ Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, Average Earnings of Employees in Coal Mining*, contains the

125 days, he credited claimant with one year of coal mine employment, but if claimant's earnings were less than the industry average, he divided claimant's earnings by the industry average for 125 days to credit claimant with a portion of a year. Thus, the administrative law judge credited claimant with a total of 4.92 years of coal mine employment for these years.¹¹ Combining all calculations, the administrative law judge credited claimant with a total of 16.21 years of coal mine employment. Decision and Order on Remand at 22-31; Director's Exhibit 5.

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 and supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803, 1-805 (1985). We find no merit to employer's contention that the administrative law judge calculated years of coal mine employment without reference to the actual evidence in the record, as the administrative law judge permissibly relied 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. *Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984); Decision and Order at 25-26. Contrary to employer's argument, the administrative law judge was not required to apply the same method of calculation for years in which the beginning and ending dates of employment cannot be determined, and for those years in which claimant's employment spanned a full calendar year with one employer, consistent with the regulatory definition of a "year" and its calculation.¹² As the administrative law judge employed reasonable methods of computation and sufficiently explained their use, *see Tackett*, 6 BLR at 1-841, and substantial evidence supports his findings, we affirm his determination of 16.21 years of underground coal mine employment, and affirm his

coal mine industry's average daily earnings for each year and the average earnings for 125 days. *See* <http://www.dol.gov/owcp/dcmwc/exh610.htm>.

¹¹ The administrative law judge credited claimant with one year of employment for the years 1981, 1984, 1985, and 1986 and credited him with 0.92 years for 1987. Decision and Order at 27-28.

¹² Section 725.101(a)(32) defines a year as a period of one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 days. 20 C.F.R. §725.101(a)(32).

finding that claimant established invocation of the amended Section 411(c)(4) presumption.

Employer next challenges the administrative law judge's weighing of the evidence in finding that employer failed to rebut the amended Section 411(c)(4) presumption. Specifically, employer asserts that the administrative law judge erred in crediting the opinion of Dr. Rasmussen, and provided an invalid reason for discounting the contrary opinion of Dr. Dahhan. Employer's Brief at 16-20. Employer's arguments lack merit.

In evaluating the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge determined that Dr. Rasmussen diagnosed chronic obstructive pulmonary disease (COPD) and emphysema caused by coal dust exposure, and opined that claimant's disabling pulmonary impairment is due to the combined effects of coal dust exposure and rheumatoid lung disease. Decision and Order on Remand at 37; Director's Exhibit 10; Claimant's Exhibit 1. While Dr. Rasmussen was unable to separate the comparative contributions of each factor, he opined that coal dust exposure was a significant contributing cause of claimant's disabling lung disease. *Id.* The administrative law judge considered the discrepancy between his own finding of 16.21 years of coal mine employment and Dr. Rasmussen's reliance on a twenty-one year history of coal mine employment, and acted within his discretion in concluding that it did not affect the credibility of the opinion. *Id.*; see *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). Finding that Dr. Rasmussen based his opinion on claimant's physical examination, medical and employment histories, and objective test results, the administrative law judge permissibly found that the opinion was well-reasoned, well-documented, and entitled to full probative weight. Decision and Order on remand at 37; see *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

By contrast, the administrative law judge determined that Dr. Dahhan diagnosed a pulmonary impairment, but opined that it was due to rheumatoid arthritis, aggravated by claimant's cardiac condition. Decision and Order on Remand at 38; Employer's Exhibits 1, 3, 7. Dr. Dahhan explained that rheumatoid arthritis can affect the lungs, causing impairment in lung function and blood gas exchange mechanisms, and indicated that "[i]t appears that [claimant] has suffered an interstitial manifestation of rheumatoid arthritis." Employer's Exhibit 7. Dr. Dahhan concluded that there was "no evidence of pulmonary impairment and/or disability caused by, related to, contributed to or aggravated by inhalation of coal dust...[h]ence, no evidence of legal pneumoconiosis." *Id.* Noting that Dr. Dahhan reviewed Dr. Rasmussen's findings, but did not identify any flaws in his analysis, the administrative law judge determined that Dr. Dahhan failed to adequately explain how he eliminated claimant's significant coal dust exposure during 16.21 years of underground coal mine employment as a factor in claimant's pulmonary disease and disabling impairment. Thus, the administrative law judge acted within his discretion in

finding that the opinion of Dr. Dahhan was insufficiently reasoned and entitled to little weight. Decision and Order on Remand at 38; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

Lastly, employer contends that the administrative law judge's award of benefits commencing in January 2008 is not supported by substantial evidence and cannot be reconciled with Dr. Dahhan's opinion that, as of April 2009, claimant was not disabled from a respiratory standpoint. Employer's Brief at 20-21. We disagree. Because the administrative law judge did not credit any evidence establishing that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim, and found no credible evidence that reflected the date upon which claimant became totally disabled due to pneumoconiosis, we affirm the administrative law judge's finding that the record does not contain evidence establishing exactly when claimant became totally disabled due to pneumoconiosis. Decision and Order on Remand at 39. Thus, we affirm his determination that claimant is entitled to benefits as of January 2008, the month claimant filed his claim. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge