BRB No. 13-0147 BLA

CRANDALL L. WALLS Claimant-Respondent v. COVE COAL COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/31/2014 DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5696) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 involves a subsequent claim filed on March 24, 2010.[1]

Applying amended Section 411(c)(4),[2] 30 U.S.C. §921(c)(4), the administrative law judge credited claimant with 15.55 years of underground coal mine employment.[3] The administrative law judge further found that the evidence established that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption.[4] Accordingly, the administrative law judge awarded benefits.

[1] Claimant's initial claim, filed on February 23, 2007, was finally denied because the evidence did not establish that claimant suffered from a totally disabling pulmonary impairment. Director's Exhibit 1.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge did not make a finding pursuant to 20 C.F.R. §725.309(c). On appeal, employer does not challenge this aspect of the administrative law judge's decision.

On appeal, employer contends that the administrative law judge erred in crediting claimant with fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Programs, has not filed a response brief.[5]

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. 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).

Invocation of the Section 411(c)(4) Presumption

Employer challenges the administrative law judge's finding that claimant has at least fifteen years of qualifying coal mine employment. Employer specifically contends that the administrative law judge erred in failing to adequately explain how he determined that claimant had 15.55 years of qualifying coal mine employment.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act nor the regulations provides specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In this case, the administrative law judge noted that the district director, in his February 10, 2011 Proposed Decision and Order, credited claimant with 15.55 years of coal mine employment based upon claimant's Social Security records. Decision and Order at 3; Director's Exhibit 35. After rejecting employer's argument that the evidence established only 12.36 years of coal mine employment, the administrative law judge summarily concluded that claimant had "engaged in coal mine employment for at least

[5] Because employer does not challenge the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) (2013), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

15.55 years."[6] Decision and Order at 4. Although the administrative law judge presumably relied upon claimant's Social Security records to credit claimant with 15.55 years of coal mine employment, the administrative law judge failed to explain how the records support such a calculation. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), which provides that every adjudicatory decision must be accompanied by 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding of 15.55 years of coal mine employment, and remand the case for the administrative law judge to reconsider the length of claimant's coal mine employment, and to explain fully his weighing and crediting of the evidence in making his finding. *Wojtowicz*, 12 BLR at 1-165. Because we have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, we also vacate his finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge, on remand, again finds the Section 411(c)(4) presumption invoked. The Department of Labor's regulations provide that if claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 5-8.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[7] In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Fino and Castle. Drs. Fino and Castle diagnosed claimant

[6] Based upon claimant's uncontradicted testimony, the administrative law judge found that all of claimant's coal mine employment was underground. Decision and Order at 4.

[7] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2) (2013).

with disabling obstructive pulmonary disease (emphysema) due to cigarette smoking.[8] Director's Exhibit 14; Employer's Exhibit 4. Moreover, Drs. Fino and Castle each opined that claimant's emphysema was not due to his coal mine dust exposure. *Id.*

Citing *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004), the administrative law judge noted that a finding that pulmonary function studies show reversibility after the administration of a bronchodilator does not necessarily preclude the existence of legal pneumoconiosis. Decision and Order at 8. The administrative law judge, however, did not cite to any evidence that either Dr. Fino or Dr. Castle relied, in part, on the reversibility of claimant's impairment after bronchodilator administration, in excluding coal mine dust exposure as a cause of claimant's obstructive impairment. In fact, the administrative law judge did not cite to any evidence that either physician interpreted claimant's pulmonary function study results as supporting a finding of reversibility. Consequently, the administrative law judge erred in his consideration of the opinions of Drs. Fino and Castle.

The administrative law judge further noted that "[b]oth Drs. Fino and Castle assert that a reduced ratio of the FEV1 to FVC is not typical of significant coal dust related obstruction and is more consistent with a cigarette smoking induced lung disease." Decision and Order at 8. Again, however, the administrative law judge failed to explain why this fact undermines the opinions of Drs. Fino and Castle that claimant's disabling obstructive pulmonary impairment is not related to his coal mine dust exposure. *Wojtowicz*, 12 BLR at 1-165. Because the administrative law judge has not adequately explained his basis for discounting the opinions of Drs. Fino and Castle, as to the cause of claimant's disabling obstructive pulmonary impairment, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption.

On remand, if the administrative law judge finds that claimant has invoked the Section 411(c)(4) presumption, he must reconsider whether employer has established rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). However, if the administrative law judge, on remand, credits claimant with less than fifteen years of qualifying coal mine employment, and, therefore, determines that claimant is not entitled to invoke the Section 411(c)(4) presumption, he must address whether claimant has satisfied his burden to establish all elements of entitlement under 20 C.F.R. Part 718. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[8] Dr. Castle also opined that that there was an "asthmatic component" to claimant's obstructive lung disease. Employer's Exhibit 4.

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 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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JUDITH S. BOGGS
Administrative Appeals Judge