U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0106 BLA

TAMARA MULLINS (o/b/o SILAS MULLINS, deceased)	)	
Claimant-Respondent	)	
v.	)	
H & G MINING COMPANY	)	
	)	DATE ISSUED: 01/20/2016
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

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

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

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, BUZZARD and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5215) 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 September 27, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited the miner with at least fifteen years of qualifying coal mine employment,[3] and found that the evidence established that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that the miner invoked the rebuttable presumption set forth at Section 411(c)(4). Consequently, the administrative law judge also found that the miner established that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting the miner with fifteen years of qualifying coal mine employment, and therefore erred in

[1] The miner filed previous claims in 1988, 1992, and 2002. An administrative law judge denied the miner's most recent prior claim because the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Upon review of the miner's appeal, the Board affirmed the administrative law judge's denial of benefits. *Mullins v. H & G Mining Co.*, BRB No. 06-0246 BLA (Dec. 15, 2006) (unpub.). On June 5, 2009, an administrative law judge denied the miner's request for modification.

[2] Section 411(c)(4) of the Act 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); *see* 20 C.F.R. §718.305.

[3] The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

finding that the miner invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that the element of disability causation could be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). Additionally, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant[4] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, arguing that the administrative law judge properly relied upon the miner's invocation of the Section 411(c)(4) presumption to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In two separate reply briefs, employer reiterates its previous contentions.

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 argues that the administrative law judge erred in finding that the miner established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer specifically contends that the administrative law judge failed to adequately explain his basis for crediting the miner with eighteen years and eight months of coal mine employment.

The miner 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 provide 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. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc).

In determining the length of the miner's coal mine employment, the administrative law judge noted that the district director, in his Proposed Decision and Order, found that the miner's Social Security Administration (SSA) earnings records established eighteen

[4] The miner died on June 3, 2012. Claimant's Exhibit 4. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

years and eight months of coal mine employment. Decision and Order at 5; Director's Exhibit 30. The administrative law judge accepted that the district director's determination "was correct," noting that it was corroborated by the miner's testimony. *Id.* at 6. The administrative law judge, therefore, credited the miner with eighteen years and eight months of coal mine employment. *Id.*

In accepting the district director's conclusion that the miner's SSA earnings records documented eighteen years and eight months of coal mine employment, the administrative law judge did not explain how those records supported such a calculation.[5] Moreover, the administrative law judge failed to explain how the miner's testimony corroborated the district director's conclusion. We, therefore, agree with employer that the administrative law judge's analysis does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that every adjudicatory decision include 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Therefore, we must vacate the administrative law judge's finding of eighteen years and eight months of qualifying coal mine employment, and remand the case for him to reconsider the length of the miner's coal mine employment, and to fully explain his weighing of the evidence in making his findings.[6] *Wojtowicz*, 12 BLR at 1-165. Because we vacate the administrative law judge's finding of more than fifteen years of qualifying coal mine employment, we also vacate his finding that the miner invoked the Section 411(c)(4) presumption,[7] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305, and his finding that

[5] Although the district director found that the miner's Social Security Administration earnings records established eighteen years and eight months of coal mine employment, he did not provide any explanation for that finding in his Proposed Decision and Order. Director's Exhibit 30.

[6] We reject employer's argument that the administrative law judge, on remand, must apply the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the length of the miner's coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). Because the use of the formula is discretionary, the administrative law judge, on remand, may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record as a whole. *See Muncy*, 25 BLR at 1-27.

[7] Although we vacate the administrative law judge's finding that the miner

the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). However, for the reasons set forth below, we reject employer's argument that the administrative law judge erred in using the Section 411(c)(4) presumption to find a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, the miner must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). The miner's prior claim was denied because he did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, the miner had to submit new evidence establishing that his total disability was due to pneumoconiosis. 20 C.F.R. §725.309(c)(1), (3).

Employer argues that the administrative law judge erred in failing to consider whether the miner affirmatively established that his total disability was due to pneumoconiosis based on the new evidence, and thus demonstrated a change in the applicable condition of entitlement under 20 C.F.R. §725.309(c)(1). Contrary to employer's contention, because the administrative law judge found that the miner invoked the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, the miner satisfied his initial burden to demonstrate a change in the applicable condition of entitlement at 20 C.F.R. §725.309.[8] *See E. Assoc. Coal Corp. v.*

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established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, employer has not challenged the administrative law judge's determination that the miner's surface coal mine employment occurred in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4); Decision and Order at 6-7. This finding is, therefore, affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] Employer contends that principles of res judicata preclude consideration of the miner's subsequent claim. Employer also contends that the administrative law judge

Director, OWCP [*Toler*], 805 F.3d 502, 511-14, BLR (4th Cir. 2015) (holding that utilizing the Section 411(c)(4) presumption to show a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c) does not contravene the Act or the implementing regulations); *Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, 795, 25 BLR 2-285, 2-292 (7th Cir. 2013). Accordingly, we reject employer's allegation of error. On remand, should the administrative law judge find that the miner has invoked the Section 411(c)(4) presumption, the miner will have established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).

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. Because the miner invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner did not have either legal or clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the x-ray evidence.

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erred in not requiring the miner to prove that his type of pneumoconiosis was a progressive form of the disease. The Fourth Circuit, however, has addressed and rejected these arguments in *Eastern Associated Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14, BLR (4th Cir. 2015). For the reasons set forth in *Toler*, we reject employer's contentions in this case.

[9] "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

The administrative law judge found that the x-ray evidence was insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis.[10] Decision and Order at 9. Because this finding is not challenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer also submitted the opinions of Drs. Jarboe and Rosenberg in support of its burden to disprove the existence of clinical pneumoconiosis. Although Drs. Jarboe and Rosenberg opined that the miner did not suffer from clinical pneumoconiosis, Employer's Exhibits 1-3, the administrative law judge permissibly found that the x-rays that Drs. Jarboe and Rosenberg relied upon as negative for clinical pneumoconiosis were inconclusive for the existence of the disease, thus calling into question the reliability of their opinions that the miner did not have clinical pneumoconiosis.[11] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 10. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence did not rebut the presumption of clinical pneumoconiosis.

Employer argues that the administrative law judge overlooked biopsy evidence of the miner's lung that did not disclose pneumoconiosis. Employer refers to 1988 biopsy slides of the miner's lung that were interpreted by Drs. Caffrey and Hutchins as negative

[10] The administrative law judge considered interpretations of five x-rays. Because all of the physicians who interpreted the miner's x-rays are dually qualified as B readers and Board-certified radiologists, the administrative law judge found that their radiological qualifications were equal. Decision and Order at 9. While three of the x-rays (December 30, 2010, May 26, 2011, and May 16, 2012) were read as both positive and negative for pneumoconiosis, the miner's remaining two x-rays (January 5, 2012 and February 15, 2012) were read solely as positive for pneumoconiosis. Director's Exhibit 11-13; Claimant's Exhibits 1-3, 5; Employer's Exhibits 1, 2. The administrative law judge, therefore, found that the x-ray evidence did not assist employer in establishing that the miner did not have clinical pneumoconiosis. Decision and Order at 9. The administrative law judge found that, even if weighed most favorably to employer, the x-ray evidence was, at best, "at equipoise." *Id.*

[11] Dr. Jarboe based his opinion, that the miner did not suffer from clinical pneumoconiosis, in part on Dr. Halbert's negative interpretation of the May 26, 2011 x-ray. Employer's Exhibit 1. Dr. Rosenberg based his opinion, that the miner did not suffer from clinical pneumoconiosis, in part on Dr. West's negative interpretation of the May 16, 2012 x-ray. However, Dr. Alexander, an equally qualified physician, read each of these x-rays as positive for pneumoconiosis. Claimant's Exhibits 1, 5.

for pneumoconiosis in reports that were submitted in the miner's 1992 claim. Contrary to employer's contention, the administrative law judge took into account the previous evidence. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 285, 24 BLR 2-269, 2-284 (4th Cir. 2010). The administrative law judge referred to the biopsy evidence submitted in the previous claims. Noting that the medical evidence generated in the miner's prior claims "predate[d] evidence submitted in this claim by several years," the administrative law judge accorded greater weight to the evidence developed in the current claim, finding that it provided "a more accurate depiction" of the miner's condition. Decision and Order at 3. Moreover, given the administrative law judge's determination that the current x-ray and medical opinion evidence does not carry employer's burden to disprove clinical pneumoconiosis, employer does not explain how the 1988 biopsy evidence supports its rebuttal burden. *See* 20 C.F.R. §718.106(c) ("A negative biopsy is not conclusive evidence that a miner does not have pneumoconiosis."). We therefore reject employer's argument that the administrative law judge did not adequately consider the biopsy evidence from the prior denied claims. *See Cox*, 602 F.3d at 285, 24 BLR at 2-284. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have clinical pneumoconiosis.[12]

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer specifically contends that the opinions of Drs. Jarboe and Rosenberg are sufficient to establish this second means of rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Jarboe and Rosenberg, that the miner's pulmonary impairment did not arise out of his coal mine employment, because neither physician diagnosed the miner with clinical pneumoconiosis and there are not "specific and persuasive reasons" for thinking that the doctors' views of disability causation are independent of their views regarding the existence of pneumoconiosis. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505, BLR (4th Cir. 2015). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis.

[12] Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Thus, we need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to disprove legal pneumoconiosis. Employer's Brief at 24-26; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

In summary, if the administrative law judge, on remand, credits the miner with at least fifteen years of qualifying coal mine employment, the miner is entitled to invocation of the Section 411(c)(4) presumption. In that case, in light of our affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the presumption, the miner will be entitled to benefits. However, if the administrative law judge credits the miner with less than fifteen years of qualifying coal mine employment and, therefore, determines that the miner did not invoke the Section 411(c)(4) presumption, he must address whether the miner established a change in the applicable condition of entitlement under 20 C.F.R. §725.309, and 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge