U.S. Department of Labor

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

BRB No. 19-0054 BLA

LESTER SARGENT	)	
	)	
Claimant	)	
v.	)	
	)	
ISLAND FORK CONSTRUCTION, LIMITED	)	
	)	
	)	
and	)	DATE ISSUED: 01/29/2020
	)	
WEST VIRGINIA CWP FUND	)	
	)	
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 of Administrative Law Judge Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Jeffrey R. Soukup (Jackson Kelley PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (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 Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2016-BLA-05631) of Administrative Law Judge Lauren C. Boucher rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case involves a subsequent claim filed on June 17, 2010.

The administrative law judge credited claimant with at least 15.09 years of coal mine employment, with fifteen or more years in underground mines or in conditions substantially similar to those in an underground mine. Accepting employer's concession that claimant has a totally disabling respiratory impairment, she further determined claimant invoked the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012)[2] and established a change in an applicable condition of entitlement.[3] The administrative law judge then determined employer did not rebut the presumption and awarded benefits.

[1] Claimant filed his initial claim for benefits on July 28, 2005, which the district director denied on March 8, 2006, because claimant did not establish total respiratory or pulmonary disability. Director's Exhibit 1; Decision and Order at 2. The record does not show that claimant took any other action on his 2005 claim before filing the current subsequent claim. *See* Director's Exhibit 3 at 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment or 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(b)(1).

[3] When a claimant 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)(1); *see 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). Claimant's last claim was denied because he did not establish total disability.

On appeal, employer argues that based on the holding in T*exas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), the Affordable Care Act (ACA)[4] is unconstitutional and the administrative law judge's award of benefits should be vacated or reversed. In the alternative, employer asserts that the case must be remanded as the administrative law judge did not sufficiently explain her determination that claimant had enough qualifying coal mine employment to invoke the Section 411(c)(4) presumption. In addition, employer contends the administrative law judge erred in finding that it failed to rebut the presumption.

Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer's ACA argument has no merit.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Awarding Benefits must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[6] 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).

I. Constitutionality of 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, employer contends the ACA, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer asserts the district court 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*

[4] The ACA includes a provision making the Section 411(c)(4) presumption applicable to a claim filed on or after January 1, 2005, and pending on or after March 23, 2010.

[5] We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant established a total respiratory or pulmonary disability and a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1986).

[6] Because claimant's coal mine employment occurred in Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

v. United States, 352 F.Supp.3d 665, 690 (N.D. Tex. 2018). Director's Brief at 1 n.1. Thus, the Director argues the decision does not preclude application of the amendments to the Act found in the ACA. *Id.* 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.[7] *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at 27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 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.

II. Invocation of the Section 411(c)(4) Presumption – Qualifying Coal Mine Employment

To invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) under the facts of this case, claimant is required to establish that he worked at least fifteen years in underground mines or in aboveground coal mine employment in "conditions substantially similar to those in underground mines." 20 C.F.R. §718.305(b)(1)(i). This requirement is met if claimant establishes that he "was regularly exposed to coal-mine dust" while working at an aboveground mine. 20 C.F.R. §718.305(b)(2); *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91 (6th Cir. 2014).

The relevant evidence in this case consists of claimant's Employment History Form (Form CM-911a) and his hearing testimony. On Form CM-911a, claimant reported he worked underground for Harlan Cumberland Coal (Harlan) as a shuttle car operator and a scoop operator. Director's Exhibit 4. He also indicated he was employed underground by Oscar Elliott as an "augger [sic]." *Id.* Claimant testified at the hearing in response to a question regarding whether he ever worked aboveground: "I would have probably a total of two years outside. Guessing roughly." Hearing Transcript at 18. When the administrative law judge asked him to identify where he worked on the surface and what type of job he did, claimant replied Harlan employed him on an underground mine site as "an outside man . . . in case something goes wrong. You knock the power, put the power in, stuff like that." *Id.* at 25. In response to a subsequent question from employer's counsel asking him whether he ever worked aboveground away from an underground mine,

[7] Furthermore, the Board has declined to hold cases in abeyance pending the resolution of legal challenges to the ACA. *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).

claimant answered in the affirmative and identified his job as "auger," but did not name his employer. *Id*. at 26.

The administrative law judge found claimant worked aboveground for Harlan for two years. Decision and Order at 12. She determined the year claimant spent aboveground at an underground mine site constituted a year of qualifying coal mine employment.[8] *Id*. at 12, *citing Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-29 (2011). Regarding claimant's work operating an auger on the surface, away from an underground mine, she acknowledged employer's contention that claimant did not testify as to the dust conditions he experienced and stated:

> Claimant is not limited to using hearing testimony to meet his burden. He need only proffer sufficient evidence of dust exposure in his work environment. Claimant's Employment History Form [CM-]911a, submitted with his application for benefits, indicates that, throughout his coal mining employment history, he worked in underground coal mining or in conditions substantially similar to the conditions in an underground mine. Claimant specifically reported that all of his employment, including his work described only as "auger [sic]," occurred in environments that exposed him to "dust, gases, or fumes."

Decision and Order at 13, *citing* Employer's Post-Hearing Brief at 3 (other internal citations omitted). The administrative law judge determined, "based on [c]laimant's Form [CM-]911a, as well as my own generalized knowledge of coal mine operations," such work performed for "a coal mining entity involves direct exposure to rock and coal dust." Decision and Order at 13. Thus, she concluded claimant was regularly exposed to coal dust during his auger work and credited him with a year of qualifying coal mine employment for a total of "fifteen or more years" of such employment, sufficient to invoke the Section 411(c)(4) presumption. *Id*.

Employer begins its challenge to the administrative law judge's finding by setting forth a slightly different interpretation of claimant's Form CM-911a and hearing testimony. Employer maintains this evidence establishes claimant performed one year of aboveground auger work for Harlan, away from an underground mine site, and one year of underground auger work for Oscar Elliot.[9] Employer's Brief at 13, 15-16. Employer therefore asserts

[8] We affirm this finding as unchallenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

[9] The administrative law judge recognized claimant listed auger work with Oscar Elliot on Form CM-911a, while finding claimant's hearing testimony "appears to indicate"

the issue before the administrative law judge was whether claimant established he was regularly exposed to coal mine dust while operating an auger for Harlan. *Id*. at 16. Employer contends the administrative law judge erred in finding claimant's "yes" response on Form CM-911a indicating he was exposed to dust, gas or fumes during his tenure with Harlan sufficient to establish his aboveground auger work was in conditions substantially similar to those in an underground mine. Employer's Brief at 13; Director's Exhibit 4. In addition, employer alleges the administrative law judge violated the Administrative Procedure Act (APA)[10] when she substituted her general knowledge of coal mining for evidence affirmatively establishing claimant's aboveground auger work constituted qualifying coal mine employment. Employer's Brief at 17. These allegations of error have merit.

As previously indicated, claimant must prove the substantial similarity of his surface employment to underground employment by establishing his "non-underground mine working conditions regularly exposed him to coal dust." 78 Fed. Reg. 59,105 (Sept. 25, 2013). We agree with employer that in this case, the administrative law judge did not properly address the evidence claimant relied on to satisfy his burden. The administrative law judge indicated she based her determination that claimant was regularly exposed to coal mine dust on Form CM-911a rather than his hearing testimony. Decision and Order at 13. She did not address, however, the fact that claimant's "yes" response to the question on Form CM-911a as to whether he was exposed to dust, gases or fumes while employed by Harlan was paired with his notation that all of his work for Harlan was underground. Director's Exhibit 4. In addition, she did not discuss the significance of the fact that based on the phrasing of the question regarding exposure to "dust, gases, or fumes," claimant's affirmative response does not, by itself, indicate he was exposed to *coal mine dust* and that

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he operated an auger for Harlan. Decision and Order at 13 n.15. She stated, "[d]espite this inconsistency, I find the Form [CM-]911a is sufficient to establish that, when [c]laimant worked with an auger, regardless of which coal mining entity employed him at the time, he was regularly exposed to coal mine dust." *Id*. When calculating the length of claimant's coal mine employment, she did not credit claimant for any time with Oscar Elliot because such work is not reflected on claimant's Social Security earnings records and there is no evidence showing the length of claimant's tenure with Oscar Elliot. *Id*. at 9.

[10] The Administrative Procedure Act, 5 U.S.C. §§500-591, 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 . . . ." 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, 1-165 (1989).

such exposure occurred *regularly*, as the regulations require. 20 C.F.R. §718.305(b)(1)(i), (2).

Moreover, although the administrative law judge correctly observed that she is generally permitted to rely on her knowledge of the coal mining industry when determining whether a miner was regularly exposed to coal mine dust on the surface, her findings must be supported by substantial evidence and adequately explained. *See Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988) (administrative law judge may, based on his or her expertise, "compare the surface mining conditions *established by the evidence* to conditions known to prevail in underground mines.") (emphasis added); Decision and Order at 13 n.16. As indicated *supra*, it is unclear whether claimant provided sufficient evidence of his aboveground auger work to allow the administrative law judge to rely on her knowledge that doing such work "while employed by a coal mining entity involve[d] direct exposure to rock and coal dust." Decision and Order at 13. In addition, the administrative law judge did not fully explain the basis for her finding that adjudicating black lung claims gave her sufficient expertise and knowledge of the conditions of this claimant's aboveground augering work. *Id*. This is not consistent with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-161, 1-165 (1989).

In light of the errors in the administrative law judge's consideration of the relevant evidence, we must vacate her determination that claimant established fifteen or more years of qualifying coal mine employment. *See Sterling*, 762 F.3d at 490-91. We further vacate her finding that claimant invoked the amended Section 411(c)(4) presumption and remand the case to her for reconsideration. 20 C.F.R. §718.305(b)(1).

On remand, the administrative law judge must reweigh the relevant evidence and determine whether claimant has affirmatively established that he was regularly exposed to coal mine dust in his aboveground auger work. Should the administrative law judge find that claimant has not established fifteen years of qualifying coal mine employment, claimant cannot invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.305(b)(1)(i). Where no statutory presumptions apply,[11]

[11] The administrative law judge must also render a finding on remand as to whether claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In her summary of the evidence, she observed that Dr. Bollavaram read a CT scan dated July 10, 2015, as showing a two-centimeter nodule in the right middle lobe of claimant's lungs and mentioned complicated pneumoconiosis in the notes of a discussion with claimant about the CT scan. Decision and Order at 29, 30; Claimant's Exhibits 7, 9. The administrative law judge did

claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Finally, because we have vacated the administrative law judge's finding claimant invoked the Section 411(c)(4) presumption, we decline to address employer's arguments that the administrative law judge erred in finding that employer failed to establish rebuttal of the presumption. Employer may still raise these arguments, as necessary, in any future proceeding in this case.

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not, however, determine whether this, or any other evidence of record, established invocation of the irrebuttable presumption.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge