BRB No. 97-1066 BLA

WILLIAM B. RUDDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jeffrey S. Goldberg (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denial of Benefits (96-BLA-0921) of Administrative Law Judge Robert L. Hillyard on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. The administrative law judge found that the evidence established two years and six months of qualifying coal mine employment, but that it was insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

[1] Claimant is the miner, William B. Rudder, who filed a claim with the Department of Labor (DOL) on August 18, 1994. Director's Exhibit 1.

On appeal, claimant challenges the administrative law judge's finding regarding the years of coal mine employment. Claimant asserts that the evidence establishes at least ten years of coal mine employment. Claimant next challenges the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c)(4), contending that Dr. Vaezy's opinion establishes the existence of pneumoconiosis and supports a finding of total respiratory disability. The Director, Office of Workers' Compensation Programs (the Director), in response, agrees that the administrative law judge erred in his calculation of the years of coal mine employment. Further, the Director contends that the administrative law judge's rejection of Dr. Vaezy's opinion, as the only opinion of record, mandates that the case be remanded in order to secure a complete pulmonary examination.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially contends that the administrative law judge erred when he calculated only two years and six months of coal mine employment. Claimant asserts that the administrative law judge should have credited him with six years from 1946-51 for the time he worked for his father, Sam Rudder, as supported by his father's affidavit. Claimant next asserts that three years should have been credited as supported by affidavit, the years 1952-54 during which claimant worked for C.B. Robinson. Claimant further contends that one year should be credited for the year 1955, during which claimant worked for House and Robbins Coal, as verified by Glen House's affidavit. Claimant concedes that the one-quarter of a year that the administrative law judge credited him for employment with Farris & Bowman Coal, Corp. (Farris) was proper. Claimant's Brief at 4.

The Director responds, stating that claimant's work for his father covered only a four-year period, between 1948-52, as found by the administrative law judge. The Director asserts, however, that the administrative law judge erred by discounting the time worked on the basis that it was part-time based on *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989). The Director asserts that claimant should therefore be credited with a full four years. Further, the Director concedes an additional two years for work for C.B. Robinson from 1952 to 1954. Director's Brief at 10. Next, the Director states that the administrative law judge properly credited claimant with one-quarter in 1955 for work with House and Robbins and one-quarter in 1980 for work with Farris. The Director further

[2] Inasmuch as the administrative law judge's findings at 20 C.F.R. §§718.202(a) (1)-(3), and 718.204(c)(1)-(3), are unchallenged on appeal, they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*, 6 BLR 1-710 (1983).

concedes an additional two and one-quarter years between 1973-75, when the claimant was hauling coal. Director's Brief at 12.

Inasmuch as the Director now offers several concessions on various periods of claimant's coal mine employment that were not previously raised before the administrative law judge, we vacate in part the administrative law judge's years of coal mine employment determination and remand this case for reconsideration of the evidene in light of the concessions and the discussion below.

With respect to claimant's employment with his father, Sam Rudder, during the alleged years of 1946-54, the administrative law judge resolved conflicts between claimant's testimony and his father's affidavit. The administrative law judge relied on claimant's testimony that he began working for his father when he was 12 or 13, (1948) and his father's affidavit that his son worked until December 1951. Director's Exhibit 3; H. Tr. at 10. The administrative law judge however only credited the claimant with two years of coal mine employment during this period because claimant testified he worked part-time. *Id*. The Director, however, correctly contends that the holding in *Griffith, supra*,[3] requires that the administrative law judge credit each day worked as a full day, despite the fact that the work was performed after school and for approximately five or six hours a day. *See* 20 C.F.R. §718.301(b). H. Tr. at 10. On remand, the administrative law judge must reconsider claimant's employment with his father in light of *Griffith*.

Claimant challenges the administrative law judge's failure to credit any employment with C.B. Robinson and contends he should be credited with three years. The administrative law judge found the evidence inadequate to credit claimant with any employment with Robinson. The Director however now concedes two years of employment with Robinson between 1952-54. Director's Brief at 10. The Board has held that while an administrative law judge is not required to accept uncorroborated, uncontradicted testimony, *see Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986), such testimony is not necessarily negated by the absence of written records, *see Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). On remand, the administrative law judge must reconsider the evidence relating to claimant's coal mine employment from 1952-54 in light of the conflicting contentions of the parties.

[3] The Court held it was improper for the administrative law judge to split the miner's time on a daily basis between the time he was exposed to coal dust and not exposed to coal dust since a "working day" means any day or part of a day for which the miner received pay for work as a miner. *Griffith v. Director, OWCP*, 868 F.2d 847, 12 BLR 2-185 (6th Cir. 1989).

With respect to claimant's allegation of one year of coal mine employment for House and Robbins Coal, the Director correctly argues that the administrative law judge's finding of only one-quarter of employment during 1955 comports with the evidence of record. The affidavit submitted by Glen House states only that claimant worked for him "for a short time". Director's Exhibit 5. In addition, the administrative law judge permissibly relied upon the Social Security Administration (SSA) records, which indicated only one-quarter earnings for 1955 with House and Robbins Coal. Director's Exhibit 4; *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Thus, we affirm the administrative law judge's finding that the evidence establishes only one-quarter of a year for House and Robbins Coal.

Next, all parties agree that the administrative law judge properly credited only one-quarter of employment for work with Farris, as supported by SSA records. *Id*; Claimant's Brief at 4; Director's Brief at 11. We affirm, therefore, the administrative law judge's finding of one-quarter in 1980 for Farris, as supported by substantial evidence.

Finally, the Director concedes an additional two and one-quarter years of coal mine employment that claimant spent hauling coal from 1973-75, which claimant does not challenge. This is supported by claimant's statements and his testimony. Director's Exhibits 2, 6; H. Tr. at 14-15. Thus, on remand, the administrative law judge must also determine whether this stipulation is in conformity with the evidence of record. *Calfee, supra*.

Claimant also contends that the administrative law judge erred in failing to find the medical opinion of Dr. Vaezy established the existence of pneumoconiosis and his total disability due to pneumoconiosis. The administrative law judge found that Dr. Vaezy's opinion, was insufficient to establish the existence of pneumoconiosis or total disability because there was nothing in his report to explain his diagnosis of pneumoconiosis and that his assessment that claimant has a mild impairment was "insufficient to establish disability." Decision and Order at 7-8. The Director however asserts that because the administrative law judge rejected Dr. Vaezy's opinion at Sections 718.202(a)(4) and 718.204(c), and it is the only opinion of record, the record lacks a complete pulmonary evaluation as required by Section 413(b), 30 U.S.C. §923(b). In light of the Director's concession, we vacate the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c)(4), and remand this case for the district director to receive the evidence which the Director will offer to discharge his statutory obligation pursuant to *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990). *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 718.405(b).

Additionally, the Director asserts that the administrative law judge improperly discounted Dr. Vaezy's opinion at Section 718.204(c)(4) because Dr. Vaezy diagnosed a mild impairment, and the administrative law judge found that a mild impairment cannot be disabling. Decision and Order at 7-8. The Director and claimant correctly assert that the administrative law judge is required to identify the exertional requirements of claimant's

usual coal mine employment and then compare those to the limitations as described by the doctor. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). On remand, the administrative law judge must reweigh the medical opinion evidence in conjunction with claimant's years of coal mine employment and the exertional requirements of his usual coal mine employment at Section 718.204(c)(4) in light of *McMath, supra*, and *Budash, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge