U.S. Department of Labor

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

BRB No. 17-0482 BLA

CHARLIE BAILEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ABUNDANCE COAL, INCORPORATED	)	DATE ISSUED: 07/10/2018
	)	
and	)	
	)	
CHARTIS CASUALTY COMPANY	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

Tighe Estes (Fogle Keller Walker, PLLC), Lexington, Kentucky, for employer.

Rita A. Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2015-BLA-05320) of Administrative Law Judge Alice M. Craft, rendered on a claim filed on October 29, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge initially determined that employer is the properly designated responsible operator and credited claimant with 17.328 years of coal mine employment, either in underground mines or at underground mine sites. The administrative law judge further found that claimant established that he has a totally disabling respiratory or pulmonary impairment, and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2012). The administrative law judge then determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it is the responsible operator. Employer also challenges the administrative law judge's finding that claimant had over fifteen years of qualifying coal mine employment. Claimant responds in support of the administrative law judge's length of coal mine employment finding and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to hold that employer is the properly designated responsible operator and to affirm the award of benefits.[2]

[1] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine 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), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 19-20.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[4] Once a potentially liable operator has been identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for a cumulative period of at least one year and is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

In this case, the district director issued a Notice of Claim on February 28, 2014, informing carrier and employer, doing business as Abundance Coal Incorporated (Abundance Coal), that it had been identified as a potentially liable operator. Director's Exhibit 16. Employer did not respond within the thirty-day period specified in the Notice of Claim, instead requesting a copy of the claim file in a letter dated May 9, 2014. Director's Exhibit 18; *see* 20 C.F.R. §725.408(a)(1). Thereafter, employer consistently maintained that claimant worked for a separate operator named Abundance Coal Incorporated #2 (Abundance Coal #2). In support of its argument, employer cited W-2 forms naming Abundance Coal #2 as claimant's employer, state records verifying the

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 10. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen at least in part out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, one working day of the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

dissolution of Abundance Coal in 2004, and carrier's coverage of Abundance Coal #2. Director's Exhibit 5.

In her Decision and Order, the administrative law judge rejected employer's assertions, finding that claimant's Social Security Administration (SSA) earnings record "reflect[s] reported earnings from Abundance Coal through 2012," with "no reported earnings in claimant's [SSA] records from Abundance Coal #2." Decision and Order at 8. She determined that because employer failed to prove "that it was not reporting the [c]laimant's earnings to [SSA] as Abundance Coal Inc.," it failed to affirmatively establish that it is not the potentially liable operator that most recently employed the miner. *Id*. Accordingly, the administrative law judge concluded that employer is the responsible operator in the present claim. *Id.*

Employer argues on appeal that the administrative law judge erred in finding that the evidence is insufficient to establish that Abundance Coal #2 is the properly designated responsible operator. In response, the Director asserts that by failing to timely respond to the district director's liability determination in the Notice of Claim, employer waived the right to dispute its status as the responsible operator on any of the grounds set forth in 20 C.F.R. §725.408(a)(2).[5] Director's Brief at 5, *citing* 20 C.F.R. §725.408(a)(3); *Appleton*

[5] The regulation at 20 C.F.R. §725.408(a)(2) provides:

> If the operator contests its identification, it shall, on a form supplied by the district director, state the precise nature of its disagreement by admitting or denying each of the following assertions. In answering these assertions, the term "operator" shall include any operator for which the identified operator may be considered a successor operator pursuant to § 725.492.
>
> (i) That the named operator was an operator for any period after June 30, 1973;
>
> (ii) That the operator employed the miner as a miner for a cumulative period of not less than one year;
>
> (iii) That the miner was exposed to coal mine dust while working for the operator;
>
> (iv) That the miner's employment with the operator included at least one working day after December 31, 1969; and

& Ratliff Coal Corp. v. Ratliff, 664 F. App'x. 470 (6th Cir. 2016). The Director maintains that because employer failed to timely controvert its liability, employer's argument on appeal constitutes an impermissible challenge to its status as the named responsible operator under the regulations, i.e., that "the operator employed the miner as a miner for a cumulative period of not less than one year." 20 C.F.R. §725.408(a)(2)(ii); (3).

We agree with the Director. By failing to timely respond to the Notice of Claim, employer is precluded from disputing its designation as the responsible operator by asserting that claimant did not work for employer. 20 C.F.R. §725.408(a)(2)(ii), (3); *see Weis v. Marfork Coal Co., Inc.*, 23 BLR 1-182, 1-188-89, n.8 (2006) (en banc) (McGranery & Boggs, JJ., dissenting). We therefore affirm the administrative law judge's finding that employer is the responsible operator. Consequently, we need not address whether the administrative law judge properly found that claimant's SSA earnings records, standing alone, are sufficient to establish that employer is the responsible operator, as error, if any, is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Length of Qualifying Coal Mine Employment

Claimant bears the burden of proof to establish the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). As the regulations provide only limited guidance 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. *See 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 this case, the administrative law judge noted that claimant's SSA records show that he worked full and partial years as a miner from 1976 to April of 2012. Decision and Order at 4; Director's Exhibit 3. She determined that claimant had 1.50 years of coal mine employment in 1976 and 1977, by crediting him with a quarter of coal mine employment for each quarter in which he earned more than $50.00. Decision and Order at 5. The administrative law judge further found that claimant's SSA records indicate that he worked

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> (v) That the operator is capable of assuming liability for the payment of benefits.

20 C.F.R. §725.408(a)(2).

as a miner for a full year in 1978, 1989, 1995, 2002, and 2005 through 2011, for a total of eleven years. *Id*. For the period from January 1, 2012 to April 27, 2012, the administrative law judge credited claimant with 0.25 years. *Id*. at 7. For the years in which she could not determine the beginning and ending dates of claimant's employment, the administrative law judge applied the formula set forth in 20 C.F.R. §725.101(a)(32)(iii), and credited claimant with an additional 4.578 years, for a total of 17.328 years of coal mine employment.[6] *Id*. at 6-7.

Employer initially contends that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, without making a determination as to whether he worked in an underground mine or in conditions substantially similar to those in an underground mine. We reject employer's argument. A miner who worked above ground at the site of an underground mine need not prove "substantial similarity." *Muncy*, 25 BLR at 1-29; *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058, 25 BLR 2-453, 2-468 (6th Cir. 2013). In the present case, the administrative law judge permissibly determined that claimant's employment history form and hearing testimony established that he "worked both inside and outside of the mines, but all of his work was at underground mine sites."[7] Decision and Order at 4, *citing* Hearing Transcript at 10-17 and Director's Exhibit 3; *see Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). Thus, the administrative law judge was not required to address the issue of "substantial similarity" when determining the length of claimant's qualifying coal mine employment. *See Muncy*, 25 BLR at 1-29; *Ramage*, 737 F.3d at 1058, 25 BLR at 2-468.

Employer also argues that the administrative law judge erred in using a five-day work week to calculate claimant's partial years of qualifying coal mine employment.

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[6] Section 725.101(a)(32)(iii) provides, in pertinent part:

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer *may* use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

20 C.F.R. §725.101(a)(32)(iii) (emphasis added).

[7] Because employer does not challenge this finding on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer asserts that "[t]his methodology is flawed because it does not take into account" claimant's statement on Form CM-913, Description of Coal Mine Work and Other Employment, that he worked six days a week.[8] Employer's Brief at 6. Employer maintains that when a six-day work week is used, the partial years of coal mine employment would produce a much lower total than the 4.578 years found by the administrative law judge.

We reject employer's contention, as error, if any, in the administrative law judge's calculation of claimant's partial years of coal mine employment is harmless. *See Larioni*, 6 BLR at 1-1278. On Form CM-913, claimant's report of a six-day work week pertained only to employer.[9] Director's Exhibit 4. As noted by the administrative law judge, the evidence establishes that claimant worked for employer during an unspecified portion of 2004; from January 1, 2012 to April 27, 2012; and full years from 2005 through 2011. Decision and Order at 5; Director's Exhibits 3, 4. Applying the formula at 20 C.F.R. §725.101(a)(32)(iii) to 2004, but substituting a six-day work week, reduces the total of the partial years credited to claimant by 0.163.[10] When 0.163 is subtracted from the total of 17.328 years of coal mine employment the administrative law judge calculated, claimant would have 17.165 years, sufficient to invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). [ ]

We also reject employer's allegation that the administrative law judge made an error in arithmetic when totaling her findings as to the length of claimant's coal mine employment. According to employer, the total "should be 15.828 years (11 + 4.578 + 0.25 = 15.828)," rather than the 17.328 years found by the administrative law judge. Employer's Brief at 7. Employer's calculation is incorrect, however, as the administrative law judge

[8] Claimant's Social Security Administration earnings record reflects partial years of coal mine employment in 1979, 1986, 1988, 1990-92, 1994, 1996-97, 1999-2001, and 2003-04. Director's Exhibit 6.

[9] The instructions on Form CM-913 asked claimant to provide information "concerning your current or last coal mine work." Director's Exhibit 4. Claimant responded that he last worked as a repairman, and that he earned $25.00 per hour, six days per week, from "June ?" to April 27, 2012. *Id*.

[10] In computing the fractional year for 2004, the administrative law judge assumed a five-day work week and a fifty-week work year, and credited claimant with 0.975 years of coal mine employment (243.7 days worked ÷ 5 = 48.740; 48.740 ÷ 50 = 0.975) in 2004. Decision and Order at 6-7. Substituting a six-day work week reduces claimant's coal mine employment in 2004 by 0.163 (243.7 days worked ÷ 6 = 40.617; 40.617 ÷50 = 0.818; 0.975 – 0.818 = 0.163).

added 11 (the number of full years of coal mine employment shown in claimant's SSA record), 4.578 (the combined partial years of coal mine employment calculated with the regulatory formula), 0.25 (for the three months claimant worked for employer in 2012), *and 1.50* (the six quarters in 1976 and 1977 in which claimant earned at least $50.00) to arrive at the total of 17.328 (11 + 4.578 + 0.25 + 1.50 = 17.328) years of coal mine employment.[11] Decision and Order at 5-7.

Finally, employer alleges that the administrative law judge erred in failing to consider whether claimant performed the work of a miner with Incoal Incorporated in 1978 and 1979, and with Glaco Mining and Inner Mountain Manufacturing in 1986. Employer maintains that the 1.829 years that the administrative law judge credited to claimant should be "reduced by half" because claimant's job as a repairman took place in a remote shop, rather than at an underground mine site. Employer's Brief at 8. We decline to address the substance of employer's argument, as error, if any, by the administrative law judge is harmless. *See Larioni*, 6 BLR at 1-1278. Even assuming that employer is correct, if 0.0914 is subtracted from the 17.328 years found by the administrative law judge, claimant would still have 17.237 years of coal mine employment.[12]

Because employer has not identified any error requiring remand, the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment is affirmed. We also affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), in light of our prior affirmance of the administrative law judge's finding that claimant established total disability. 30 U.S.C. §921(c)(4). As employer does not challenge the administrative law judge's findings on the merits of entitlement, we further affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[11] As indicated *supra*, using 4.415 as the figure for the combined partial years of coal mine employment reduces the total to 17.165 years.

[12] Using 17.165 years, the total calculated by assuming a six-day work week for 2004, claimant's coal mine employment would be reduced to 17.074.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge