BRB No. 10-0630 BLA

BASIL E. THOMAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BILL BRANCH COAL COMPANY	)	
	)	DATE ISSUED: 06/22/2011
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Basil E. Thomas, Cedar Bluff, Virginia, *pro se*.

Douglas A. Smoot and Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jonathan P. Rolfe (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order

[1] Claimant, Basil E. Thomas, filed his application for benefits on August 21, 2008. Director's Exhibit 2.

Denying Benefits (09-BLA-5613) of Administrative Law Judge Linda S. Chapman on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge adjudicated this claim, filed on August 21, 2008, pursuant to 20 C.F.R. Part 718, and credited claimant with 14.24 years of qualifying coal mine employment. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, accordingly, denied benefits.

On appeal, claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a supplemental letter brief limited to addressing the impact of Section 1556 of Public Law No. 111-148 on this claim. This provision amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, the effective date of the amendments. In particular, Section 1556 reinstated the "15-year presumption" of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The Director asserts that the amended Section 411(c)(4) may be applicable to this claim, contrary to the administrative law judge's finding that it is inapplicable, because the claim was filed on August 21, 2008 and was pending as of March 23, 2010. The Director contends that amended Section 411(c)(4) will have no bearing on this case only if the Board determines that the administrative law judge concluded that the preponderance of the evidence affirmatively proves that claimant does not have clinical or legal pneumoconiosis, with the burden of proof on employer, because such a determination would satisfy employer's burden to establish rebuttal. Otherwise, the Director avers that the administrative law judge's denial of benefits must be vacated and the case remanded for further consideration. The Director further asserts that, on remand, the administrative

---

[2] Carol Ann Blankenship of Stone Mountain Health Services, Oakwood, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, as she is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Relevant to this case, Section 411(c)(4) provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

law judge should initially reconsider her length of coal mine employment determination, and specifically determine whether claimant worked for fifteen years in underground coal mine employment or in substantially similar conditions; if so, she should consider whether claimant is entitled to invocation of the amended Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). In addition, the Director asserts that the administrative law judge must allow the parties to proffer additional evidence on remand, consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1), if the evidence exceeds the limitations. As set forth *infra*, we vacate the administrative law judge's determination that claimant established 14.24 years of qualifying coal mine employment, and remand the case to the administrative law judge for further consideration.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[4] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant 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; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In addressing the merits of a case, the administrative law judge must render a determination of the length of a miner's coal mine employment. Claimant bears the burden of proof in establishing the length of his coal mine employment. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge is given great latitude in the computation of years of coal mine employment and, as such, her calculation of years of coal mine work will be upheld, when based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

(1983).

In addressing the length of coal mine employment, the administrative law judge acknowledged claimant's allegation that he worked in the coal mines for twenty to twenty-five years, and noted the district director's determination that claimant worked for 14.24 years. The administrative law judge concluded that claimant established 14.24 years of qualifying coal mine employment that ended on March 1, 1983, because she found that this determination was supported by claimant's Social Security earnings report. Decision and Order at 3. However, when the Social Security earnings report is reviewed in its entirety, it reveals that claimant worked for multiple companies in the coal mining industry between the years of 1962 and 1983, yet the administrative law judge did not specify which periods of employment she credited. Director's Exhibit 5. Nor did the administrative law judge address the credibility of claimant's testimony at the formal hearing on March 9, 2010, stating that he had worked "[t]wenty-five years" in underground coal mine employment; his statement that he worked between twenty and twenty-five years noted on his application for benefits; or his allegation of twenty-five years of coal mine employment contained in his post-hearing brief. Hearing Transcript at 14; Director's Exhibit 2. Because the administrative law judge's Decision and Order does not set forth the specific quarters of qualifying coal mine employment she credited in claimant's Social Security earnings report, and she failed to indicate how much weight, if any, she accorded to claimant's testimony or to any other relevant evidence in the record, we are unable to discern precisely how the administrative law judge computed 14.24 years of coal mine employment. *See Tressler v. Allen & Garcia Co.*, 8 BLR 1-365, 1-368 (1985) (administrative law judge's computation of time will be upheld provided that it is based on a reasonable method and supported by substantial evidence); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984) (length of coal mine employment based on Social Security earnings record and claimant's hearing testimony is a reasonable method of computation). Accordingly, we vacate the administrative law judge's denial of benefits and her determination to credit claimant with 14.24 years of qualifying coal mine employment, and remand the case for further consideration of the issue. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988); *Brewster v. Director,* OWCP, 7 BLR 1-120, 1-121-122 (1984). If, on remand, the administrative law judge credits claimant with at least fifteen years of qualifying coal mine employment, she must assess whether the evidence establishes the presence of a totally disabling respiratory impairment[5] and, consequently, whether claimant is entitled to invocation of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). If claimant establishes invocation, the administrative law judge must then consider whether employer has satisfied its burden to rebut the presumption. On remand, the administrative law judge must allow the parties the opportunity to submit

[5] The administrative law judge did not reach the issue of whether the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).

additional evidence to address the change in law, *see Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986), in compliance with the evidentiary limitations at 20 C.F.R. §725.414. If evidence exceeding those limitations is proffered, its admission must be justified by a showing of good cause pursuant to 20 C.F.R. §725.456(b)(1).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge