U.S. Department of Labor

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

BRB Nos. 16-0507 BLA and
16-0508 BLA

TAMARA MULLINS (o/b/o of SILAS MULLINS, deceased)	)	
Claimant-Respondent	)	
v.	)	
H & G MINING COMPANY	)	DATE ISSUED: 06/30/2017
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 on Remand 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 (Nicholas C. Geale, Acting Solicitor of Labor; Maia 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2012-BLA-05215 and 2012-BLA-06177)[1] of Administrative Law Judge Daniel F. Solomon, awarding benefits on a miner's subsequent claim filed on September 27, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[2] This case is before the Board for a second time. The Board previously vacated the administrative law judge's finding that the miner had eighteen years and eight months of coal mine employment because it was not adequately explained.[3] *Mullins v. H & G Mining Co.*, BRB No. 15-0106 BLA, slip op. at 3-4 (Jan. 20, 2016) (unpub). Consequently, the Board vacated the administrative law judge's findings that claimant

[1] The case file discloses that a survivor's claim was filed by the miner's widow, Tamara Mullins ("claimant" herein), on July 2, 2012. Survivor's Claim (SC) Director's Exhibit 1. The survivor's claim was forwarded to the Office of Administrative Law Judges on March 16, 2015, for consolidation with the miner's claim. SC Director's Exhibits 17, 21. The administrative law judge's Decision and Order on Remand, issued on May 25, 2016, contained two case numbers, 2012-BLA-05215 and 2012-BLA-06177. The Board acknowledged employer's appeal as BRB No. 16-0507 BLA, representing Case No. 2012-BLA-05215, for the miner's claim, and BRB No. 16-0508 BLA, representing Case No. 2012-BLA-06177, for the survivor's claim. However, upon our review of the administrative law judge's Decision and Order on Remand, there are no findings with regard to the survivor's claim. Accordingly, as the survivor's claim is not properly before the Board at this time, we dismiss the appeal assigned BRB No. 16-0508 BLA. *See* 20 C.F.R. §802.201.

[2] We incorporate the procedural history of the case as set forth in the Board's prior decision. *See Mullins v. H & G Mining Co.*, BRB No. 15-0106 BLA, slip op. at 2 n.1 (Jan. 20, 2016) (unpub.).

[3] The administrative law judge relied on the district director's determination that the miner's Social Security Administration (SSA) earnings records established eighteen years and eight months of coal mine employment. *Mullins*, BRB No. 15-0106 BLA, slip op. at n.5. However, the Board observed that the district director offered no explanation for this calculation in the Proposed Decision and Order, and that the administrative law judge also failed to explain how the SSA records, claimant's testimony, or any other documentary evidence in the record, supported a finding of eighteen years and eight months of coal mine employment. *Id.*

invoked the rebuttable presumption at Section 411(c)(4), 30 U.S.C. §921(c)(4),[4] and that she established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id*.

In the interest of judicial economy, the Board affirmed, as unchallenged on appeal, the administrative law judge's determination that the miner's coal mine employment occurred either in underground mines or in surface mines in conditions that were substantially similar to those in an underground mine. *Mullins*, BRB No. 15-0106 BLA, slip op. at 4 n.7. The Board also affirmed the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. *Id*. at 6-8. Thus, the Board remanded the case for the administrative law judge to reconsider only the length of the miner's coal mine employment and explain his calculation. *Id.* The Board instructed that if the record established that the miner had at least fifteen years of coal mine employment, the administrative law judge could reinstate the award of benefits.[5] *Id.* at 9. Alternatively, the Board advised that if the miner did not have fifteen years of coal mine employment, the administrative law judge had to determine whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and entitlement to benefits on the miner's claim under 20 C.F.R. Part 718. *Id.*

On remand, the administrative law judge issued an Order to Comment dated March 29, 2016, asking the parties to state their arguments with regard to the length of the miner's coal mine employment. Claimant, employer, and the Director, Office of Workers' Compensation Programs (the Director), responded. Thereafter, the administrative law judge issued his Decision and Order on Remand, which is the subject of this appeal. The administrative law judge initially noted that, in 2005, employer stipulated that the miner had at least fifteen years of coal mine employment and that

[4] Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if she establishes that the miner had at least fifteen years of underground coal mine employment, or surface 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.

[5] We affirm the administrative law judge's determination in his 2014 Decision and Order that the miner had a totally disabling respiratory or pulmonary impairment, as it was not challenged by employer in the prior appeal, and is not challenged in this appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 2014 Decision and Order at 3, 7-8.

employer was bound by that stipulation. However, the administrative law judge also indicated that he reviewed the evidence and the responses to the Order for Comment submitted by the parties. The administrative law judge found that the Director's calculation of nineteen years of coal mine employment was correct and was corroborated by the miner's hearing testimony and his Social Security Administration (SSA) earnings records. Thus, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. Observing that the Board had affirmed his findings on rebuttal, the administrative law judge awarded benefits in the miner's claim.

On appeal, employer argues that the administrative law judge erred in finding that employer's 2005 stipulation that the miner had at least fifteen years of coal mine employment was binding. Employer also contends that the administrative law judge did not comply with the Board's remand instructions to adequately explain the basis for his finding that the miner worked nineteen years in coal mine employment. Employer asks the Board to revisit its prior holding that invocation of the Section 411(c)(4) presumption may be used to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309(c).[6] Employer also contends that the Board should reconsider its prior affirmance of the administrative law judge's findings on rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director filed a limited response, asserting that the Board should affirm the administrative law judge's finding as to the length of the miner's coal mine employment, if it is reasonable and supported by substantial evidence.[7] The Director maintains that the Board's holdings in the prior appeal now constitute the law of the case and should not be revisited. Employer has filed a reply brief, reiterating its arguments.

[6] The Board rejected 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. *Mullins*, BRB No. 15-0106 BLA, slip op. at 5-6, *citing E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 511-14 (4th Cir. 2015).

[7] Counsel for the Director, Office of Workers' Compensation Programs (the Director), indicated that she was unable to obtain a complete record of the miner's claim, including evidence relevant to the computation of the administrative law judge's finding of nineteen years of coal mine employment. Director's Letter at 1 n.2. Thus, counsel advises that the Director takes no position in this appeal as to whether the administrative law judge's factual findings on the length of the miner's coal mine employment were correct.

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.[8] 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).

Employer contends that the administrative law judge erred in finding that the miner had nineteen years of coal mine employment.[9] Under the regulations and the relevant case law, claimant bears the burden of establishing the length of his coal mine employment. 20 C.F.R. §718.305(b)(1)(i); *see Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). Because the Act does not provide specific guidelines 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. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 432 (1986).

In its response to the Order to Comment, employer set forth three methods for calculating the miner's coal mine employment: 1) Employer asserted that the SSA earnings record shows "15.5" years of coal mine employment but that the administrative law judge had to subtract "three years and five quarter months" from that total, based on *claimant's testimony regarding his hourly wage* with employer; 2) Employer argued that the administrative law judge should compare the miner's SSA earnings with the *average*

[8] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director*, 12 BLR 1-200, 1-201 (1989) (en banc); Miner's Claim (MC) Director's Exhibits 1, 2.

[9] Employer correctly asserts that because of the change in the law under Section 411(c)(4), employer was not bound by its 2005 stipulation that the miner had fifteen years of coal mine employment. *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61, 1-64-65 (2012). However, the administrative law judge's error in referencing employer's 2005 stipulation was harmless to the extent that the administrative law judge made an alternative finding of nineteen years of coal mine employment based on his review of the evidence in the record and the responses by the parties to his Order to Comment. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

yearly wage base set forth in Exhibit 609,[10] and find that the miner had no more than twelve years and three months of coal mine employment; and 3) Employer argued that the administrative law judge should divide claimant's annual SSA earnings by *the average daily wage base set forth in Exhibit 610*,[11] and find that the miner had 14.17 years of coal mine employment. Employer's Brief in Response to Order to Comment at 14-18. In contrast, the Director's response to the Order to Comment contained a chart comparing the miner's yearly SSA earnings from 1971 to 1991 with the yearly earnings set forth in Exhibit 610. Director's Response to Order to Comment at 3. The Director asserted that such a calculation establishes that the miner had 19.73 years of coal mine employment. *Id.* Claimant did not provide any specific method but asserted that the SSA records supported the district director's finding and the administrative law judge's prior finding of eighteen years and eight months of coal mine employment. Claimant's Response to Order to Comment at 9-10.

On remand, the administrative law judge declined to follow any of employer's proposed methods. The administrative law judge observed that while the district director calculated eighteen years and eight months of coal mine employment, he found the Director's method of calculation to be "correct" and supported by other evidence. Decision and Order on Remand at 10. Specifically, the administrative law judge noted that the miner alleged nineteen years of coal mine employment on his application for benefits and that the district director found that the miner was employed in mining from "approximately January 1, 1971 until March 1, 1991." *Id.*, *citing* Miner's Claim (MC) Director's Exhibit 3 and *quoting* MC Director's Exhibit 30. The administrative law judge observed that the miner gave credible testimony that he worked at strip mines "going on [twenty] years" from 1971 to 1991. Decision and Order on Remand at 4, *quoting* Director's Exhibit 81. Further, the administrative law judge stated that SSA records show "enumerated quarters of coverage [that] exceed [nineteen] years of coal mine employment." Decision and Order on Remand at 10, *citing* Director's Exhibit 7. Based on this evidence, the administrative law judge found that the miner worked nineteen years in coal mine employment, and that claimant invoked the Section 411(c)(4) presumption.

[10] Exhibit 609, titled *Wage Base History*, contains the Social Security Administration's (SSA) wage base table, which sets forth the maximum amount of yearly earnings on which employers and employees in all occupations are required to pay Social Security tax.

[11] Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, contains a table of the average daily earnings of miners, and the yearly earnings for miners who worked 125 days at a mine site, as reported by the Bureau of Labor Statistics.

Initially, we reject employer's assertion that the administrative law judge did not explain the basis for his finding that the miner had nineteen years of coal mine employment, as the administrative law judge clearly adopted the calculation provided by the Director and set forth the ways in which such a calculation is supported by the other evidence of record. Decision and Order on Remand at 10. We also reject employer's assertion that the administrative law judge erred by not applying Exhibit 609, in conjunction with the formula at 20 C.F.R. §725.101(32)(iii), to calculate the length of the miner's coal mine employment as being twelve years and three months. Employer's Brief in Support of Petition for Review at 9; Employer's Brief in Response to Order to Comment at 17. Subsequent to the issuance of the administrative law judge's Decision and Order on Remand, the Board held in *Osborne v. Eagle Coal Co.*, BLR , BRB No. 15-0275 BLA, slip op. at 8-9 (Oct. 5, 2016) that reliance on Exhibit 609, when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied, is not appropriate because Exhibit 609 contains wage data that is not specific to the coal mine industry. In contrast, the Board noted that the table at Exhibit 610 contains the information specified in 20 C.F.R. §725.101(a)(32)(iii), i.e., "the coal mine industry's average daily earnings for that year." *Osborne*, BRB No. 15-0275 BLA, slip op. at 8-9.

Employer also challenges the administrative law judge's finding of nineteen years of coal mine employment, asserting that the Director "relied on the [yearly] earnings reported in Exhibit 610, but that is based on an assumption that a year consists of 125 days, an approach which the Board declined to accept in *Osborne* and explicitly rejected in *Clark v. Barnwell Coal Co.*, 22 BLR 1-275 (2003)." Employer's Reply Brief at 4. It is not necessary that we address employer's contention that the Director's method of calculation is improper, as employer has failed to demonstrate in this appeal why it is necessary to remand the case for further consideration regarding the length of the miner's coal mine employment. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). As one of its proposed methods of calculating the length of the miner's coal mine employment, employer urged the administrative law judge to apply the average daily wage at Exhibit 610. Dividing the miner's annual wages as reported in the SSA records by the average daily wage, employer calculates that the miner had "14.17 years" of coal mine employment between 1971 and 1991.[12] Employer's Brief in Support of Petition for Review at 9-10; Employer's Brief in Response to Order to Comment at 17-18. However, employer's calculation omits the miner's 1978 combined SSA earnings of $18,025 with

[12] Employer totaled the length of employment as "3400.5 days" and stated that "[if] a month has, on average, [twenty working] days, the 3400.5 days reflects 170 months or 14.17 years (170/12)." Employer's Brief in Support of Petition for Review at 10. Thus, employer's calculation is based on a 240-day work year.

Big M Corporation and Humphreys Enterprises.[13] MC Director's Exhibit 7; Employer's Brief in Support of Petition for Review at 7, 9. When those additional earnings from 1978 are applied, claimant has established that the miner had at least fifteen years of coal mine employment, based on employer's proposed method of calculation under Exhibit 610.[14] Thus, because employer's methodology establishes that the miner had at least fifteen years of coal mine employment, we consider error, if any, by the administrative law judge in finding that the miner had nineteen years of coal mine employment to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4)

[13] The miner stated that he worked as a drill operator on strip mines for Big M Coal Company in Norton, Virginia from 1977-1978. MC Director's Exhibit 4. The miner also stated that he worked as a drill operator for "Humphrey Enterprises" in Norton, Virginia beginning in April 1977 and ending sometime in 1978. MC Director's Exhibit 1. The administrative law judge found that the miner's work as a strip mine drill operator exposed him to conditions comparable to those of underground mining. Decision and Order at 6-7.

[14] The average daily wage for a coal miner in 1978 was $80.31. *See* Coal Mine (BLBA) Procedure Manual, Exhibit 610. Dividing the miner's SSA annual wage of $18,025 by the daily wage of $80.31 equals 224.4 days. Dividing 224.4 by twenty (the number employer suggests in its brief as the average number of working days in a month) equals 11.2 months. Adding together employer's calculation of 170 months and the additional calculation from 1978 of 11.2 months, the total is 181.2 months. Dividing that figure by twelve (the number of months in a year) totals 15.1 years of coal mine employment. Employer's Brief in Support of Petition for Review at 10.

Additionally, we note that employer indicated in a post-hearing brief that claimant earned $18,343.29 in 1978, and, using Exhibit 609, conceded that claimant could be credited with a full year of employment for 1978. Employer's Post-Hearing Brief at 17. However, employer inexplicably omitted the miner's 1978 wages from the subsequent charts it prepared. Employer's Brief in Support of Petition for Review at 6-9; Employer's Brief in Response to Order to Comment at 17. Using employer's figure of $18,343.29 as the wages for 1978 and dividing it by the daily wage of $80.31 equals 228.4 days. Dividing 228.4 days by twenty (employer's estimation of the average number of working days in a month) totals 11.4 months. Adding together employer's calculation of 170 months and the additional calculation from 1978 of 11.4 months, the total is 181.4 months. Dividing that figure by twelve (the number of months in a year) totals 15.1 years of coal mine employment.

presumption and that she established a change in an applicable condition of entitlement under 20 C.F.R. §725.309.[15]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

[15] We decline to reconsider our prior holdings with regard to 20 C.F.R. §725.309, and rebuttal of the Section 411(c)(4) presumption, as those holdings constitute the law of the case, and employer has not shown that an exception to the doctrine applies here. *Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236, 1-246 (2003); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990).