BRB Nos. 12-0232 BLA
and 12-0437 BLA

JEFF D. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 05/28/2013
	)	
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 - Awarding Benefits and the Supplemental Decision and Order – Awarding Attorney Fees of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (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:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order – Awarding Attorney Fees (2007-BLA-5409) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) on a

subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge credited claimant with 15.5 years of qualifying coal mine employment.[2] Although the administrative law judge found that the new evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, he found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv). Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits. Further, the administrative law judge subsequently awarded claimant's counsel a total fee of $13,516.69 for both legal services and costs in pursuit of the claim.

On appeal, employer challenges the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Employer also challenges the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer additionally challenges the administrative law judge's finding that employer did not rebut the presumption. Claimant has not filed a brief in response to employer's appeal in this case. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Employer filed a brief in reply to the Director's response brief, reiterating its prior contentions.[3]

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[1] Claimant filed his first claim on July 23, 2004. Director's Exhibit 1. It was finally denied by the district director on March 16, 2005, because the evidence did not establish that claimant has pneumoconiosis, that the disease was caused, at least in part, by coal mine dust, and that he was totally disabled by the disease. *Id*. Claimant filed this claim (a subsequent claim) on May 12, 2005. Director's Exhibit 3.

[2] The administrative law judge noted that "[claimant] consistently testified that virtually all of his coal mining employment has been underground in the dusty area near the face of the mine" and that "[t]he [e]mployer offered no evidence to refute [c]laimant's testimony about how much of his work was underground." Decision and Order at 27.

[3] Because the administrative law judge's findings that the new evidence did not establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, that the new evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iii), and that the new evidence established total respiratory

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.[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 filed pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his disability is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's contention that the administrative law judge erred in finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Specifically, employer asserts that the administrative law judge erred in finding that claimant established 15.5 years of qualifying coal mine employment. Employer argues that the administrative law judge did not impose the burden to establish the length of coal mine employment on claimant, but "instead calculated the years of [claimant's] coal mine employment by relying on a presumption that 125 days of coal mine employment equaled one year of work." Employer's Brief at 12. Employer further argues that the administrative law judge calculated the length of claimant's coal mine employment without reference to actual evidence in the record.

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disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv) are not challenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Since the Act fails to provide any 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 in the record considered as a whole. *See Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In addressing the length of coal mine employment issue, the administrative law judge noted that claimant indicated that he worked as a coal miner for 17 years from 1968 to 1985, and that all of his coal mine employment was with employer. The administrative law judge also noted that employer's statement listed three periods of employment that amounted to 13 years and 130 days of coal mine employment. In addition, the administrative law judge noted that the Social Security earnings record listed earnings from employer from 1968 to 1985. After noting that claimant's testimony at the hearing regarding his coal mine employment during this period was ambiguous, as "[c]laimant does not extrapolate on what is meant by 'the shutdowns and the strikes and all that," Decision and Order at 21, the administrative law judge determined that claimant's testimony was consistent with a finding that the coal mine employment was not continuous, but subject to interruptions. The administrative law judge also determined that a finding that claimant's employment from 1968 to 1985 with employer was not continuous was consistent with employer's statement and the Social Security earnings record. Nevertheless, the administrative law judge determined that there were significant differences between employer's statement and the Social Security earnings record. The administrative law judge therefore determined that the Social Security earnings record was the most credible evidence regarding the length of claimant's coal mine employment. Based on the Social Security earnings record and his application of the formula set forth at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge found that claimant established 15.5 years of coal mine employment.

Section 725.101(a)(32) provides that to be credited with a year of coal mine employment, claimant must prove that the miner worked in or around a coal mine over a period of one calendar year, or partial periods totaling one year, during which he worked for at least 125 working days. 20 C.F.R. §725.101(a)(32). Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing 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). Additionally, the pertinent regulation provides that "[a] copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history." *Id*. The Department of Labor uses the tables identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Whereas Exhibit 609, titled *Wage Based History*, contains the average annual wages by year for miners, Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, contains the average annual earnings by year for miners who spent an actual 125 days at a mine site.

In this case, the administrative law judge created a chart to summarize the earnings listed in claimant's Social Security earnings record and applied the formula set forth at Section 725.101(a)(32)(iii) to determine the length of claimant's coal mine employment from 1968 to 1985. However, the administrative law judge did not specifically identify the table that he used to determine the length of claimant's work history. Nevertheless, it is apparent that the administrative law judge used the incorrect table at Exhibit 610 to credit claimant with 365 days of employment if his income exceeded the industry standard for 125 days of work, or to credit him with a proportional amount of time if his income did not exceed the industry standard for 125 days of work.[5] *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003). In noting that Section 725.101(a)(32)(iii) offers a formula that may be used to calculate a miner's coal mine employment, the administrative law judge stated:

> The formula requires that one divide the annual earnings of the coal miner for each year worked by the average daily earnings of a coal miner for the applicable year to arrive at the number of days that [c]laimant] worked as a coal miner for that year. [20 C.F.R. §725.101(a)(32)(iii).] For each year that the miner has worked 125 days or more, he is credited with one year of coal mine work; and for each year that he has worked less than 125 days, he is credited with a fractional year of coal mine work. *Id.*

Decision and Order at 21. Moreover, the administrative law judge's failure to take note of whether claimant's coal mine employment, as set forth in the Social Security earnings

[5] A mere showing of 125 working days does not establish one year of coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996)(en banc)(McGranery, J., concurring and dissenting). Thus, the administrative law judge erred by relying on the table at Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual* to credit claimant with 365 days of employment if his income exceeded the industry average for 125 days of work. *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-281 (2003).

record, spanned the whole year, or just quarters within a year, inflated the length of his coal mine employment.[6] Thus, the administrative law judge's method of calculating the years of claimant's coal mine employment is not reasonable. Consequently, we vacate the administrative law judge's finding that claimant established 15.5 years of coal mine employment, and remand the case to him for further consideration of this issue. On remand, the administrative law judge must determine whether claimant has at least 15 years of qualifying coal mine employment for purposes of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

Further, because we herein vacate the administrative law judge's length of coal mine employment finding, we also vacate the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) and remand the case to him for further consideration thereunder. If, on remand, the administrative law judge finds that claimant has less than 15 years of coal mine employment and, thus, that the presumption at amended Section 411(c)(4) is not applicable to this case, then he must consider the evidence on the merits under 20 C.F.R. Part 718.

At the outset, on remand, the administrative law judge must determine whether the new evidence establishes a change in applicable condition of entitlement at 20 C.F.R. §725.309 by establishing one of the elements of entitlement that was previously decided against claimant,[7] namely that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he is totally disabled due to pneumoconiosis. *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Finally, because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of this claim at this time. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Therefore, the administrative law

[6] The administrative law judge noted that "[c]laimant's Social Security earnings record lists earnings from [e]mployer for every year from 1968 to 1985." Decision and Order at 21.

[7] Employer asserts that, because the element of total respiratory disability was not previously decided against claimant, the administrative law judge erred in finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 on that ground.

judge's award of attorney's fees is not final and enforceable at this time. Consequently, we decline to address, as premature, employer's contentions with respect to the administrative law judge's award of attorney's fees.[8]

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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] Employer objects to the hourly rates approved by the administrative law judge for legal services performed in this case.