BRB No. 13-0377 BLA

MAC ARTHUR YOUNCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROCKETT COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/22/2014
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE 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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2007-BLA-5316) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim filed on January 20, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. The Board previously affirmed the findings of Administrative Law Judge Thomas F. Phalen, Jr. that claimant is entitled to benefits,[2] but vacated his determination that employer is the responsible operator. *See Younce v. Crockett Coal Co.*, BRB No. 09-0836 BLA, slip op. at 11 (Sept. 30, 2010) (unpub.). Specifically, the Board held that Judge Phalen erred by not considering claimant's testimony when determining whether claimant worked 125 days for employer in a twelve month period.[3] *Id*. at 5. Accordingly, the Board remanded the case for the administrative law judge to reconsider the issue of whether employer is the responsible operator. *Id*. Employer filed a motion for reconsideration, challenging the Board's affirmance of the award of benefits, which was summarily denied. *See Younce v. Crockett Coal Co., Inc.*, BRB No. 09-0836 BLA (Feb. 28, 2011) (unpub. Order on Recon.).

The case was assigned to Judge Craft (the administrative law judge), who issued a Decision and Order on Remand on April 19, 2013, which is the subject of this appeal. The administrative law judge concluded that claimant worked 125 days for employer in a twelve month period and that it is the responsible operator.

On appeal, employer continues to challenge its designation as the responsible operator, asserting that the administrative law judge overlooked relevant testimony from

[1] The procedural history of the case is set forth in the Board's prior decision. *See Younce v. Crockett Coal Co.*, BRB No. 09-0836 BLA, slip op. at 2 n.1 (Sept. 30, 2010).

[2] The Board rejected employer's arguments and affirmed the findings of Judge Phalen that claimant is totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). *Younce*, BRB No. 09-0836 BLA, slip op. at 6-10. The Board also affirmed, as unchallenged by employer, the administrative law judge's determination regarding the date from which benefits commence. *Id*. at 11 n.7.

[3] Employer did not contest that claimant worked for it for a cumulative period of at least one calendar year. *Younce*, BRB No. 09-0836 BLA, slip op. at 4. However, employer asserted that the administrative law judge erred in substituting the "Industry Average Wages" in calculating whether claimant worked for 125 days, as opposed to considering actual proof in the record regarding the number of hours claimant worked and the hourly rate claimant was paid. *Id*. Employer maintained that Judge Phalen's calculations were illogical because he credited claimant with more days of work in a four month period in 1989 than were credited for ten months of work in 1990. *Id*.

claimant and applied an incorrect standard in considering the evidence. Employer also argues that the Board erred in affirming the award of benefits and Judge Phalen's determination as to the date from which benefits commence. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, also arguing that the case should be remanded for the administrative law judge to address all of claimant's testimony relevant to the number of days claimant worked for employer during a period of one calendar year. The Director, however, urges the Board to reject employer's challenges regarding claimant's entitlement and the date for commencement for benefits.

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).

I. Responsible Operator

The regulations provide that the operator responsible for the payment of benefits is the most recent operator to employ the miner, provided that it meets the criteria of a "potentially liable operator," pursuant to 20 C.F.R. §725.494. 20 C.F.R. §§725.494(c), 725.495(a)(1). In determining whether an employer is a potentially liable operator, the Director must establish, inter alia, that the miner worked for the operator for at least one year.[5] 20 C.F.R. §725.494(c). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32). Where the evidence establishes that the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

In determining whether claimant worked 125 days for employer within a twelve month period, the administrative law judge first considered claimant's Social Security Earnings Statements, and his W-2 Wage and Tax statements. She found that claimant

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 5, 19.

[5] The Department of Labor has stated that the definition of one year of coal mine employment is the same for identification of a responsible operator and application of the presumptions under the Act. *See* 65 Fed. Reg. 79,951 (Dec. 20, 2000) ("20 C.F.R. §725.101(a)(32) contains a single definition with general applicability.").

had total earnings of $11,384.00 with employer in 1989, and total earnings of $10.008.00 with employer in 1990. Decision and Order on Remand at 4. Using the formula provided in 20 C.F.R. §725.101(a)(32)(iii), and the table of Average Earnings of Employees in Coal Mining, as provided by the Bureau of Labor Statistics, the administrative law judge divided claimant's total earnings for each year by the industry average wages for that year,[6] and determined that claimant worked 87.57 days for employer in 1989 and 74.87 days in 1990, for a total of 162.44 (rounded up to 163) during his fourteen month tenure with employer. *Id*. In order to determine the number of days claimant worked in a twelve month period, the administrative law judge divided 163 days (the total number of days worked) by fourteen (the total number of months worked), which came to an average of 11.64 days per month. *Id*. She then multiplied 11.64 days by twelve, and found that claimant worked "139.68 days" with employer during a twelve month period. *Id*.

The administrative law judge next considered claimant's testimony and found that it "helps support a calculation that shows he worked more than 125 days within twelve months." Decision and Order on Remand at 5. The administrative law judge noted that claimant "testified that he worked 70-80 hours per week, at $10.00 per hour for employer. . . . [and] there are no time records or other evidence, to either support or disprove claimant's testimony." *Id*. She also noted specifically that, "employer did not present any evidence," or "[elicit] any testimony from the Claimant, as to how many days a week [he] worked." *Id*. The administrative law judge also observed that "there is no evidence that the [c]laimant earned overtime pay for the hours he worked, or any evidence to rebut earning above or below $10 per hour." *Id*.

The administrative law judge divided $21,392.00, the total amount that claimant earned while working for employer, by the hourly rate of $10.00, and found that claimant worked for employer for a total of 2,139.2 hours. Decision and Order on Remand at 5. The administrative law judge next divided 2,139.2 hours by 80 hours, "the typical amount of hours per week [claimant] testified that he worked," and found that claimant worked for a total of 26.74 weeks. *Id*. The administrative law judge observed that if claimant worked "six days per week, he would have worked 137.52 days over a twelve-month period." *Id*. However, if claimant worked only five days per week "then he worked a total of 114.6 days in the twelve month period. *Id*. In conclusion, the administrative law judge stated:

[6] The administrative law judge found that claimant earned $11,384.00 in 1989 and that the industry average wage for that year was $16,250.00. Decision and Order on Remand at 4. She also found that claimant earned $10,008.00 in 1990 and that the industry average wage for that year was $16,710.00. *Id*.

> While I find it unlikely that the Claimant worked 80 hours each week in only a five-day time frame (or 16 hour days), that is not a determination that I have to make. The burden is on the Employer to overcome the presumption that because the one-year employment relationship has been established and is uncontested, the Claimant must have worked more than 12 days during a twelve-month period. That has not been done in this case.

Id. Thus, the administrative law judge found that employer is the responsible operator.

Employer contends that the administrative law judge erred in relying on the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine if claimant worked for 125 days. The administrative law judge, however, had discretion to apply any reasonable method for calculating the period of time that claimant worked for employer. *See Dawson v. Old Ben Coal Co.*, 11 BLR 1-59 (1988). Additionally, we reject employer's argument that the administrative law judge erroneously placed the burden of proof on employer to show that the miner worked less than 125 days. *See* 20 C.F.R. §725.102, 725.495(b); 65 Fed. Reg. 79,960 (Dec. 20, 2000); *Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72-73 (1996) (en banc) (McGranery, J., concurring and dissenting).

Employer argues that the administrative law judge failed to properly address claimant's April 2004 deposition testimony, wherein he testified that he worked "mostly five days a week and occasionally six," and that he was paid $9.00 per hour, as opposed to $10.00 per hour.[7] Employer's Brief in Support of Petition for Review at 14, *quoting* Director's Exhibit 39 (April 2004 deposition testimony). The Director agrees with employer that the case should be remanded for the administrative law judge to address all of claimant's testimony relevant to his employment with employer. Director's Brief at 3. However, the Director asserts that employer has not produced clear evidence showing that it employed claimant for less than 125 days, and should be held liable as the responsible operator. The Director maintains that, contrary to employer's assertion, when claimant stated that he worked five days a week, claimant was referring to work with "Sandra Renee West (RS) Trucking in 1992," and not employer. Director's Brief, *citing* Director's Exhibit 39 at 9-10. The Director contends that because employer can only speculate as to the number of days claimant worked a week, the employer must be retained as the responsible operator, "but the administrative law judge must make this finding in the first instance, based on a review of all potentially relevant evidence." Director's Brief at 4.

[7] Employer maintains that regardless of whether claimant worked five or six days a week, based on the administrative law judge's formula and the hourly rate of $9.00, claimant worked less than 125 days in a twelve month period. Employer's Brief in Support of Petition for Review at 14.

It is the province of the finder-of-fact to evaluate the evidence, draw inferences, and assess the probative value of the evidence. *See Jericol Mining Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR at 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge did not address all of claimant's testimony pertaining to his hourly wage and the number of hours he worked in a week, which may affect her calculations, we are compelled to vacate her determination that employer is the responsible operator. On remand, the administrative law judge must address employer's contention that claimant's testimony and wages show that he worked longer hours but fewer days during a week, and also determine the significance, if any, of claimant's testimony regarding overtime pay. The administrative law judge must consider the entirety of claimant's testimony and the record evidence in determining whether claimant worked less than 125 days during a twelve month period for employer.

II. Commencement of Benefits

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 891-92, 22 BLR 2-514, 2-530 (7th Cir. 2002); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In determining the date for commencement of benefits, Judge Phalen stated:

> While I find that [claimant] is entitled to benefits under the Act, I cannot determine the month of onset of [c]laimant's total disability due to pneumoconiosis. Thus, benefits are payable to [c]laimant beginning with the month in which he filed his application for benefits. Therefore, because [c]laimant filed his application in April 2005, I find that benefits are payable beginning in that month.

Younce v. Crockett Coal Co., Inc., OALJ Case No. 2007-BLA-5316, slip op. at 34 (July 15, 2009), citation omitted.

On appeal, employer argues that Judge Phalen awarded benefits to commence as of April 2005, based on the mistaken understanding that April 7, 2005 was the date on which claimant filed his application for benefits. Employer's Brief in Support of Petition for Review at 24. Employer correctly points out that, in fact, the April 7, 2005 application for benefits was subsequently withdrawn, and was refiled on January 20, 2006. Director's Exhibits 2-2, 2-3, 4-1. As Judge Phalen erred in relying on April 7, 2005 as the filing date of the claim, we must vacate the administrative law judge's designation of April 2005, as the month from which benefits are payable.[8] *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990). On remand, the administrative law is instructed to determine the date for commencement of benefits consistent with this opinion.[9]

[8] Employer failed to raise this argument in the prior appeal, or in its motion for reconsideration following the Board's prior decision in this case. However, as Judge Phalen's determination was clearly erroneous, we are compelled to address this argument now, over the objection of the Director, Office of Workers' Compensation Programs. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

[9] Employer further requests that the Board revisit its prior affirmance of the administrative law judge's findings on the merits of entitlement. Employer, however, has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine. *See Brinkley*, 14 BLR at 1-151; *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the Decision and Order on Remand is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge