U.S. Department of Labor

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

BRB No. 18-0272 BLA

BIGE MESSER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANDALEX RESOURCES, INCORPORATED	)	DATE ISSUED: 05/17/2019
	)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2012-BLA-05370) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on November 12, 2010, and is before the Board for the second time.[1]

In his initial Decision and Order, the administrative law judge found that claimant has 15.33 years of underground coal mine employment[2] and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore found that claimant invoked the Section 411(c)(4) presumption[3] that he is totally disabled due to pneumoconiosis, and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). 30 U.S.C. §921(c)(4) (2012). He further determined that employer failed to rebut the presumption and awarded benefits.

Upon review of employer's appeal, the Board affirmed that claimant established total disability. *Messer v. Andalex Res., Inc.*, BRB No. 16-0499 BLA, slip op. at 2 n.3 (June 29, 2017) (unpub.). The Board also rejected employer's argument that the administrative law judge erred in crediting claimant with ten years of coal mine employment for the years 1978, 1981-1987, and 1990-1991 and, thus, affirmed his calculation for these years. *Id*. at 5. However, the Board vacated his finding of at least fifteen years of coal mine employment because he did not consider all relevant evidence

[1] We incorporate the procedural background of this case as set forth in the Board's prior decision. *Messer v. Andalex Res., Inc.*, BRB No. 16-0499 BLA, slip op. at 2 n.1 (June 29, 2017) (unpub.).

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989) (en banc).

[3] 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.

when crediting claimant with 2.75 years of coal mine employment between 1973 and 1977. *Id*. at 3-4. The Board also held that he erred in crediting claimant with 2.58 years of coal mine employment for the years 1979, 1980, 1988, 1989, 1992, and 1993 because he incorrectly applied the calculation at 20 C.F.R. §725.101(a)(32)(iii) by using Exhibit 609 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual (BLBA Procedure Manual)*, rather than Exhibit 610.[4] *Id*. at 5.

Therefore, the Board vacated the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption.[5] *Messer*, BRB No. 16-0499 BLA, slip op. at 6. In the interest of judicial economy, the Board rejected employer's arguments that it rebutted the Section 411(c)(4) presumption and held that if claimant established sufficient employment to invoke the presumption, the administrative law judge could reinstate the award. *Id*.

On remand, the administrative law judge credited claimant with sixteen years and one month of underground coal mine employment and reiterated his finding that claimant established total disability. He therefore determined that claimant invoked the Section 411(c)(4) presumption[6] and reinstated the award.

On appeal, employer argues[7] the administrative law judge lacked the authority to decide this case because he was not properly appointed consistent with the Appointments

[4] 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 administrative law judge may determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS data is reported in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*.

[5] The Board also vacated 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. *Messer*, BRB No. 16-0499 BLA, slip op. at 6.

[6] Thus, he again found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309.

[7] In its opening brief, employer requested that this case be held in abeyance pending a decision in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, U.S. , 2018 WL 386565 (Jan. 12, 2018). Employer's

Clause of the Constitution, Art. II § 2, cl. 2.[8] Alternatively, employer asserts that he erred in finding claimant established at least fifteen years of underground coal mine employment necessary to invoke the Section 411(c)(4) presumption, and in finding that it did not rebut the presumption. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting that employer waived its Appointments Clause challenge by failing to raise it in its previous appeal to the Board. Employer replies that it did not waive the argument.

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. 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. Appointments Clause

We agree with the Director that employer waived its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.") (citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 3-4. The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018) is inapplicable because, unlike the Federal

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Brief at 16. The Supreme Court's subsequent decision rendered employer's request moot. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).

[8] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law.[9] *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts); *Duck v. Fluid Crane and Constr. Co.*, 36 BRBS 120, 121 n.4 (2002) (the Board "possesses sufficient statutory authority to decide substantive questions of law including the constitutional validity of statutes and regulations within its jurisdiction"). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

II. Invocation of the Section 411(c)(4) Presumption – Length of Coal Mine Employment

Claimant bears the burden 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). The Board will uphold an administrative law judge's determination if based on a reasonable method and supported by substantial evidence. *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).

Initially, we decline to address employer's argument that the administrative law judge erred in crediting claimant with ten years of coal mine employment for the years 1978, 1981-1987, and 1990-1991. Employer's Brief at 10-11. As noted above, the Board rejected this argument in the prior appeal because the administrative law judge permissibly found that claimant was continuously employed for full calendar years and had at least 125 working days during those calendar years. *Messer*, BRB No. 16-0499 BLA, slip op. at 6. Because employer 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, we decline to disturb the

[9] Moreover, unlike the petitioner in *Jones Brothers* who at least "identified the constitutional issue" in its appeal to the Federal Mine Safety and Health Review Commission, employer in this case did not identify the issue at all in its previous appeal to the Board. The fact that the Supreme Court issued its decision in *Lucia* after employer filed its previous appeal in this claim does not excuse employer's failure to raise the argument, as *Lucia* makes clear "that existing case law 'says everything necessary to decide this case'" and "[n]o precedent prevented the company from bringing the constitutional claim before then." *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 257 (6th Cir. 2018), *quoting Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2053 (2018).

Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (holding that if a miner was employed by a coal mining company for 365 days and worked for at least 125 days in or around a coal mine, he clearly established one year of coal mine employment).

We further reject employer's argument that the administrative law judge erred in calculating claimant's coal mine employment for the years 1973-1977, 1979, 1980, 1988, 1989, 1992, and 1993. Employer's Brief at 8-9. The administrative law judge's first task is attempting to determine the beginning and ending dates of all periods of coal mine employment. 20 C.F.R. §725.101(a)(32)(ii); *Shepherd*, 915 F.3d at 407. He must consider and weigh all relevant evidence, which may include "earnings statements, pay stubs, specific remembrances, or other indicia of reliability." *Shepherd*, 915 F.3d at 406-07. Only "after such an evaluation" should he "determine whether the miner accumulated the [fifteen] years of coal mine employment necessary to invoke the rebuttable presumption." *Id*. The administrative law judge should give effect to all provisions and options set forth in 20 C.F.R. § 725.101(a)(32) when calculating claimant's coal mine employment. *Id*.

For the period from 1973 to 1976, the administrative law judge correctly noted the record contains two pieces of evidence relevant to claimant's coal mine employment. Decision and Order on Remand at 3. Claimant's Social Security Administration (SSA) earnings statements showed earnings from coal mine operators for several quarters from 1973 to 1976, while claimant stated on his Form CM-911a that he worked only during the winter months for these years.[10] Decision and Order on Remand at 2-3; Director's Exhibits 4 at 1; 8. The administrative law judge permissibly declined to rely on Form CM-911a as establishing the beginning and ending dates of claimant's employment because he found this statement "was not the subject of any questioning at the hearing before" him. Decision and Order on Remand at 2-3; *see Shepherd*, 915 F.3d at 406-07; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). He

[10] Contrary to employer's argument, the administrative law judge did not err in finding that this evidence is in conflict, as claimant indicated that he worked in the winter months during these years, but his Social Security Administration (SSA) records reflect earnings in both winter and non-winter months in 1975 and 1976 and do not reflect earnings in all of the winter months in 1974. *See Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-07 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019); Director's Exhibits 4, 8; Employer's Brief at 8-9. Further, the Sixth Circuit explained in *Shepherd* that an administrative law judge need not always credit a miner's statements about his own work history in the face of conflicting evidence. *Shepherd*, 915 F.3d at 406-07.

instead found, within his discretion, that claimant's SSA earnings statements reflecting income in winter and non-winter quarters are "the best evidence of [claimant's] coal mine employment during this period." *Id.*; *see Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003) (crediting of SSA records over claimant's statements is permissible).

Thus, having properly applied the regulatory framework, he permissibly credited claimant with coal mine employment for every pre-1978 quarter in which he had earnings from coal mine operators that exceeded $50.00 as reflected in the SSA earnings statements.[11] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd*, 915 F.3d at 405-06 (administrative law judge may apply *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"); Decision and Order on Remand at 2-3. Using this method,[12] the administrative law judge found that claimant's coal mine employment earnings exceeded $50.00 for seven quarters between 1973 and 1976 and four quarters in 1977, a total of two years and nine months.[13] We thus affirm the administrative law judge's finding that claimant had two years and nine months of coal mine employment before 1978.[14] *Muncy*, 25 BLR at 1-27; Decision and Order on Remand at 2-3.

[11] Unlike his employment from 1973-1976, claimant's employment history form does not state that he worked only in the winter months in 1977. Director's Exhibit 4. This is consistent with his SSA earnings statements which show significant income in each quarter of 1977. Director's Exhibit 8. The administrative law judge's crediting of four quarters of coal mine employment in 1977 is affirmed. *See Shepherd*, 915 F.3d at 405-06; *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

[12] Employer again argues it is irrational to credit claimant with certain quarters of employment simply because he earned comparatively higher income in other quarters. Employer's Brief at 8-9. The Board previously rejected this argument. *Messer*, BRB No. 16-0499 BLA, slip op. at 4-5; *see Tackett v. Director, OWCP*, 6 BLR 1-839 (1984).

[13] We note further that claimant earned significantly more than $50.00 for nearly all quarters in which he was credited with coal mine employment. Director's Exhibit 8.

[14] Even if there was merit to employer's argument that the administrative law judge erred in crediting claimant with whole quarters of employment for various periods in 1973-1976, employer has not explained how this would reduce claimant's employment to less than fifteen years. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could have made any difference"); Employer's Brief at 8-9.

We also reject employer's argument that the administrative law judge erred in calculating claimant's coal mine employment for the years 1979, 1980, 1988, 1989, 1992, and 1993. Employer's Brief at 10-11. For these years, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii) and, using Exhibit 610 of the *BLBA Procedure Manual*, found that claimant worked 170 days in 1979, 198 days in 1980, 48 days in 1988, 155 days in 1989, 234 days in 1992, and 60 days in 1993. Decision and Order on Remand at 3-4. After accounting for weekend days, and using 365 calendar days in a year as a denominator,[15] the administrative law judge found that claimant established

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Employer estimates the number of days claimant worked by comparing his SSA-reported income with the average daily earnings of employees in coal mining in Exhibit 610 of the *BLBA Procedure Manual*. Then, apparently assuming a 6-day workweek, employer calculates the total number of weeks for which claimant should be credited. For example, based on income of $1,305 in the first quarter of 1974, employer estimates claimant worked approximately 4.5 weeks ($1,305 income / $48.64 average daily earnings in Exhibit 610 / 6-day workweek = 4.47 weeks). With this method, employer asserts claimant is entitled to credit for 21 weeks, or 5.25 months, as follows: fourth quarter of 1973 (0.5 weeks), first quarter of 1974 (4.5 weeks), third and fourth quarters of 1975 (14 weeks), and first quarter of 1976 (2 weeks). This calculation, however, inexplicably does not include credit for any of claimant's income in the final two quarters of 1976, during which he earned $1,616.00 and $3,501.00 from coal mine employment. Director's Exhibits 7, 8. Using the method employer applied to the other quarters would result in an additional 13.31 weeks, or 3.33 months, of coal mine employment ($5,117.00 earnings / $64.07 Exhibit 610 average daily earnings / 6-day workweek = 13.31 weeks).

Thus, employer's own calculation yields more than eight and one-half months of coal mine employment between 1973 and 1976. When added to the administrative law judge's other findings of eleven years in 1977, 1978, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1990, and 1991, and three years and four months in 1979, 1980, 1988, 1989, 1992, and 1993, claimant still has at least fifteen years of coal mine employment (8.5 months + 11 years + 3 years and 4 months = 15 years and 0.5 months). Decision and Order on Remand at 3-4. Further, as explained below, the administrative law judge undercounted claimant's employment for the years 1979, 1980, 1988, 1989, 1992, and 1993, indicating claimant had greater than the sixteen years and one month for which he was credited. The record establishes that claimant had a total of 4.86 years of coal mine employment during these years based on the proper application of the formula at 20 C.F.R. §725.101(a)(32)(iii), not three years and four months found by the administrative law judge. *See Shepherd*, 915 F.3d at 402-405.

[15] The administrative law judge gave claimant credit for two additional days for every five working days, representing the weekends. Decision and Order on Remand at 3-

eight months of coal mine employment in 1979, nine months in 1980, two months in 1988, seven months in 1989, eleven months in 1992, and three months in 1993. *Id*. Thus he credited claimant with an additional three years and four months of coal mine employment. *Id*. Initially, we reject employer's argument that the administrative law judge erred in relying on the average daily earnings of employees in the coal mining industry when calculating the number of days claimant worked in these years. *See Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016); Employer's Brief at 11.

Further, the administrative law judge's calculation does not require remand because, if anything, it underestimates claimant's coal mine employment. In *Shepherd*, the Sixth Circuit held that a claimant need not establish a full calendar year employment relationship under the formula at 20 C.F.R. §725.101(a)(32)(iii). *See Shepherd*, 915 F.3d at 402-405. Rather, if the result of the formula "yields at least 125 working days, the miner can be credited with a year of coal mine employment, regardless of the actual duration of employment for the year." *Id*. at 402. If the results yield less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." *Id*. Thus, under *Shepherd*, claimant is entitled to a full year of coal mine employment for the years in which the administrative law judge found he had more than 125 working days (1979, 1980, 1989, and 1992), as well as 0.38 of a year in 1988 (48/125) and 0.48 of a year in 1993 (60/125), for a total of 4.86 years of coal mine employment for these years. Because the administrative law judge found that claimant established at least fifteen years of coal mine employment, any underestimation of employment for the years 1979, 1980, 1988, 1989, 1992, and 1993, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established more than 15 years of coal mine employment.[16]

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4. Thus, he found claimant established 238 days of employment (170 working days plus 68 weekend days) in 1979, 277 days (198 plus 79) in 1980, 66 days (48 plus 18) in 1988, 217 days (155 plus 62) in 1989, 326 days (234 plus 92) in 1992, and 84 days (60 plus 24) in 1993. *Id.* He then divided the total days by 365 to calculate the fractional year of coal mine employment, and multiplied this fraction by 12 to calculate the number of months claimant worked.

[16] Employer argues the administrative law judge failed to address claimant's January 14, 2011 deposition testimony in which he stated that he did not work for a full year in some years because he was "sometimes" laid off. Director's Exhibit 16 at 6; *see* Employer's Brief at 11. Employer does not allege that claimant's testimony was specific to any particular year for which the administrative law judge credited him with a full year of coal mine employment; for several of the calendar years in which claimant earned

Further, because it is unchallenged on appeal, we affirm his finding that all of claimant's coal mine employment was in underground coal mines. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 5.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm his determination that claimant invoked the Section 411(c)(4) presumption. Further, as discussed above, the administrative law judge properly reinstated his finding that employer failed to rebut the presumption. We decline to revisit our prior holding with respect to rebuttal of the Section 411(c)(4) presumption, as it constitute the law of the case, and employer has not shown that an exception to the doctrine applies here. *See Brinkley*, 14 BLR at 1-150-151.

income, he was found not entitled to credit for full years of employment (1973, 1974, 1975, 1976, 1979, 1980, 1989, 1992). Thus employer does not explain how this testimony would affect the length of coal mine employment finding. *See Shinseki*, 556 U.S. at 413; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

RYAN GILLIGAN
Administrative Appeals Judge