U.S. Department of Labor

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

BRB No. 17-0073 BLA

RONNIE G. COOMES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ITMANN/CONSOLIDATION COAL COMPANY	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 11/29/2017
CONSOL ENERGY, INCORPORATED	)	
	)	
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 Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Joseph A. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Andrea Berg (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michelle S. Gerdano (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2011-BLA-05099) of Administrative Law Judge Adele H. Odegard, awarding benefits on a claim filed on January 27, 2010, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

In her initial decision, issued on March 27, 2014, the administrative law judge credited claimant with fourteen years of underground coal mine employment with employer based on the parties' stipulation.[1] The administrative law judge also considered claimant's assertion that he had two additional years of coal mine employment as a coal mine construction worker while building a tipple for Allen & Garcia Company (Allen & Garcia). The administrative law judge found that claimant failed to establish that his work for Allen & Garcia occurred at an underground mine or in conditions substantially similar to those in an underground mine, and therefore was not qualifying employment for purposes of invoking the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012).[2] Because claimant established only fourteen years of qualifying coal mine employment, the administrative law judge determined that he did not invoke the presumption. Considering the claim under 20 C.F.R. Part 718, with the burden on claimant to establish all elements of entitlement, the administrative law judge found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20

[1] Claimant's coal mine employment was in West Virginia. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the claimant 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

C.F.R. §718.204(b)(2), but failed to establish that he has either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, she denied benefits.

Claimant appealed, and the Board vacated the administrative law judge's finding that his work for Allen & Garcia was not qualifying coal mine employment for purposes of the Section 411(c)(4) presumption. *Coomes v. Itmann Coal Co./Consolidation Coal Co.*, BRB No. 14-0241 BLA, slip op. at 4 (Feb. 12, 2015) (unpub.). The Board instructed the administrative law judge to reconsider whether claimant's work for Allen & Garcia occurred in conditions substantially similar to those in an underground mine, in light of the rebuttable presumption at 20 C.F.R. §725.202(b)(1) that coal mine construction workers are exposed to coal mine dust during their employment. *Id*. In addition, the Board instructed the administrative law judge to reconsider the length of claimant's coal mine construction work, noting that although claimant stated that he worked for Allen & Garcia for two years, his Social Security Administration (SSA) earnings records showed only three quarters of employment with the company.[3] *Id.*

On remand, the administrative law judge again credited claimant with fourteen years of underground coal mine employment with employer based on the parties' stipulation.[4] She also credited claimant with one full year of coal mine employment with Allen & Garcia and determined that his work there was qualifying for purposes of the Section 411(c)(4) presumption. She therefore credited claimant with a total of fifteen years of qualifying employment and, based on her finding that claimant has a totally disabling respiratory or pulmonary impairment, found that he invoked the presumption that he is totally disabled due to pneumoconiosis. The administrative law judge further found that employer failed to establish that claimant does not have legal pneumoconiosis

[3] The Board also affirmed the administrative law judge's finding that claimant failed to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), but vacated her finding that claimant failed to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Coomes v. Itmann Coal Co./Consolidation Coal Co.*, BRB No. 14-0241 BLA, slip op. at 5-8 (Feb. 12, 2015) (unpub.).

[4] At the hearing on November 13, 2012, the parties stipulated that claimant had fourteen years of coal mine employment with employer. Hearing Tr. at 23. Claimant testified that he worked for employer at an underground mine for "fourteen or fifteen" years, beginning in April 1972. *Id*. at 14, 19. Consistent with his testimony, claimant's SSA earnings statement reflects that he earned wages with employer during sixteen calendar years, beginning in the second quarter of 1972 and ending in 1987. Director's Exhibit 5.

or that no part of his totally disabling respiratory impairment is due to pneumoconiosis, and therefore did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption.[5] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, attaching his brief in *Stiltner v. A&K Transp., Inc.*, BRB No. 16-0081 BLA, in support of his position that the presumption of coal dust exposure at 20 C.F.R. §725.202(b)(1) does not relieve surface construction workers of their burden to prove that they worked in conditions substantially similar to those in an underground coal mine to invoke the Section 411(c)(4) presumption.

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).

Length of Coal Mine Employment

Claimant bears the burden of proof in establishing the length of his coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985). To invoke the Section 411(c)(4) presumption, he must establish that he worked for at least fifteen years in underground coal mines or at surface mines "in conditions substantially similar to those in underground mines[.]" 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27-28 (2011). Because the regulations provide only limited guidance for calculating the length of a miner's coal mine employment, an administrative law judge's determination will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy*, 25 BLR at 1-27.

Because claimant stipulated to fourteen years of coal mine employment with employer, claimant's entitlement to the Section 411(c)(4) presumption hinges on whether

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2, 8.

he established at least one full year of qualifying coal mine employment with Allen & Garcia.[6] We agree with employer that the administrative law judge erred in crediting claimant with a full year of coal mine employment with Allen & Garcia and, for the reasons that follow, we reverse the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.

The regulations define a "year" as "a period of 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). Thus, there are two steps in determining whether a miner established at least one year of coal mine employment. *Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36, 24 BLR 2-1, 2-17-18 (4th Cir. 2007); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). The administrative law judge must first determine whether the miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *Mitchell*, 479 F.3d at 334-36, 24 BLR at 2-17-18; *Clark*, 22 BLR at 1-280. If the threshold requirement of a one-year period is met, the administrative law judge must determine whether the miner worked for at least 125 days during that yearlong period.[7] *Mitchell*, 479 F.3d at 334-36, 24 BLR at 2-17-18; *Clark*, 22 BLR at 1-280. Proof that a miner had at least 125 working days with an employer, without also establishing that the miner's employment lasted for a full calendar year, does not establish one year of coal mine employment as defined in the regulations. *Mitchell*, 479 F.3d at 334-36, 24 BLR at 2-17-18; *Clark*, 22 BLR at 1-280.

With respect to the threshold question of whether claimant's employment with Allen & Garcia lasted for a full calendar year, the administrative law judge noted that claimant testified that he worked for Allen & Garcia for "about two years," his employment history form indicates he worked there from "1970-1971," and his SSA earnings records indicate that he received wages from Allen & Garcia only in the first three quarters of 1971. Decision and Order at 4-5; Hearing Transcript at 14-15; Director's Exhibits 3, 5. The administrative law judge gave the SSA records the most weight, finding them to be "the most reliable evidence" of claimant's employment with

[6] Other than his work for employer and Allen & Garcia, claimant did not allege any other coal mine employment, and our review of the record reveals none. Director's Exhibit 3; Hearing Transcript at 14-15.

[7] If the requirement of a one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment[,]" in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

Allen & Garcia because they were compiled contemporaneously with claimant's employment,[8] whereas claimant's testimony concerned his recollection of employment that "occurred more than 40 years ago".[9] Decision and Order at 5. Therefore, she found that claimant worked for Allen & Garcia for "at least a portion of each of the first three calendar quarters of 1971." *Id*.

The administrative law judge then determined that claimant "worked for Allen & Garcia for the entire calendar year of 1971." Decision and Order at 5 n.5. In so doing, she noted that claimant listed Allen & Garcia as his only employer in 1971 on his employment history form, his SSA earnings records "support [this] recollection[,]" and claimant's employment with employer did not start until 1972. *Id*.; Director's Exhibits 3, 5. Despite previously finding the SSA earnings records to be the most reliable evidence of claimant's employment with Allen & Garcia, the administrative law judge gave more weight to claimant's employment history form — supported, in her view, by the SSA earnings records — "than any contrary indication contained in the record, such as the apparent lack of income in the last quarter of 1971 per [c]laimant's Social Security Earnings Record." Decision and Order at 5 n.5. Citing the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, the administrative law judge reasoned that "a full year of coal mine work is presumed when a miner's income exceeds the average yearly wage for coal miners within the first three quarters of a given year, and when a miner's Social Security Earnings Statement purportedly shows no reported income within the fourth quarter." *Id*., citing Coal Mine (BLBA) Procedure Manual, ch. 2-700, ¶ 11 (1994). She noted that claimant's SSA earnings records show that he earned $5,896.53 in the first three quarters of 1971, which is more than the average yearly wage of $5,008.75 for miners who worked for 125 days in 1971, as reflected in Exhibit 610 of the BLBA Procedure Manual.[10] Decision and Order at 5 n.5;

[8] The administrative law judge also noted that "there is no evidence that [claimant's SSA earnings records] were inaccurate" and she thus "presume[d] that they accurately reflect both the timeframe in which the [c]laimant was employed and his earnings." Decision and Order at 5.

[9] Further, the administrative law judge gave "no weight" to the employment history set forth in Dr. Rasmussen's medical report, "as it most likely came directly from the [c]laimant, and reflects the [c]laimant's recollection." Decision and Order at 5.

[10] Exhibit 610 of the BLBA Procedure Manual contains data reported by the Bureau of Labor Statistics on the average daily earnings, and average yearly earnings for 125 days of work, for employees in coal mining in a given year. It can be accessed at: https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit610TR16.02.pdf.

Director's Exhibit 5. Therefore, the administrative law judge concluded that "I may reasonably find that Claimant worked for Allen & Garcia Co. for the entire calendar year of 1971; moreover the preponderant evidence of record supports this finding." Decision and Order at 5 n.5.

With respect to whether claimant worked for at least 125 days for Allen & Garcia in 1971, the administrative law judge found, based on claimant's reported income that year, that he worked forty-two days in the first quarter, sixty-five days in the second quarter, and sixty-four days in the third quarter.[11] Totaling his work days for each of the three quarters, the administrative law judge found that claimant worked for Allen & Garcia "for at least 170 days" in 1971. *Id*. Therefore, "[b]ecause a miner who works at least 125 days in a calendar year may be credited with one year of coal mine employment," the administrative law judge determined that claimant's time working for Allen & Garcia constituted one year of coal mine employment. *Id*.; *see* 20 C.F.R. §725.101(a)(32).

We hold that the administrative law judge erred in determining that claimant worked for Allen & Garcia for the entire calendar year of 1971, and thus erred in crediting claimant with a full year of coal mine employment with that employer. In making that finding, the administrative law judge cited claimant's listing of Allen & Garcia on his employment history form as his only employer in 1971 — a recollection supported, in the administrative law judge's view, by claimant's SSA earnings records. Decision and Order at 5 n.5. Claimant, however, did not include on his employment history form the specific days or months in 1971 when he worked for Allen & Garcia, asserting only that he worked there from "1970-1971". Director's Exhibit 3. Indeed, the administrative law judge noted that the record contains "no specific evidence as to the precise beginning or ending dates of the [c]laimant's employment in 1971 with this employer[.]" Decision and Order at 5. Thus, the employment history form is evidence that claimant worked for Allen & Garcia sometime during 1971, but it is not evidence that claimant worked for Allen & Garcia for that entire calendar year.

[11] Because claimant earned the most wages in the second quarter of 1971, receiving $2,248.40, the administrative law judge presumed that he worked the entire quarter and was paid for thirteen weeks of work, or sixty-five days. Decision and Order at 5. She thus concluded that claimant earned $34.59 per day. *Id*. Using that average and claimant's wages in the first and third quarters of the year ($1,451.09 and $2,197.04, respectively), the administrative law judge calculated that claimant worked forty-two days in the first quarter and sixty-four days in the third quarter. *Id*. at 6.

Furthermore, claimant's SSA earnings records, which indicate that he received wages only in the first three quarters of 1971, do not support the conclusion that he worked for Allen & Garcia for the entire calendar year. Director's Exhibit 5. Although the administrative law judge accurately noted that a miner's SSA earnings records may underreport his true wages, in finding that claimant's wages were in fact underreported she incorrectly compared claimant's wages to the average yearly earnings of miners who worked 125 days in 1971. *See* Exhibit 610 of the BLBA Procedure Manual. Although the wage information in Exhibit 610 can be used to determine whether a miner's earnings are comparable to those of other miners who worked 125 days in a given year, such data does not indicate whether a miner's wages are underreported in his SSA earnings records. *Osborne v. Eagle Coal Co.*, 25 BLR 1-195 (2016). As explained in *Osborne*, the proper figure for use in making such a determination is the SSA wage base amount, reported in Exhibit 609 of the BLBA Procedure Manual:

> Exhibit 609 actually sets out the limit on income subject to Social Security tax for each year since 1937. As explained in the [BLBA] Procedure Manual, this table's purpose is to caution that the Social Security earnings record may underreport a miner's true wages because the earnings record "will not normally show income greater than the wage base amount for a given year."

Osborne v. Eagle Coal Co., 25 BLR 1-195, 1-203-04 & n.10 (2016), *quoting* Director's November 18, 2015 Letter Brief at 2. Because claimant's wages through the third quarter of 1971 ($5,896.53) do not meet or exceed the SSA wage base amount for that year ($7,800), it cannot be inferred on that basis that he earned additional unreported income in the fourth quarter.[12] *See Osborne*, 25 BLR at 1-203-04 & n.10; Exhibit 609 of the BLBA Procedure Manual.[13] The fact that claimant's wages in 1971 ($5,896.53) exceeded the average yearly earnings for miners who worked 125 days ($5,008.75), as found by the administrative law judge, may support a finding that claimant established more than 125 working days with Allen & Garcia in 1971, but does not support her

[12] Moreover, claimant did not testify that he was paid under the table or offer any other evidence that would support a finding that his wages with Allen & Garcia were underreported in his SSA earnings records. *See* 20 C.F.R §725.101(a)(32)(ii) ("The dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony.")

[13] Exhibit 609 of the BLBA Procedure Manual can be accessed at https://www.dol.gov/owcp/dcmwc/blba/indexes/Exhibit609TR16.02.pdf.

findings that claimant's wages were underreported and that claimant therefore was employed by Allen & Garcia for all of 1971, including the fourth quarter.

Accordingly, we must vacate the administrative law judge's decision to credit claimant with one year of coal mine employment for Allen & Garcia. Moreover, in light of claimant's stipulation to fourteen years of coal mine employment with employer and the absence of any other evidence in the record to support a finding that claimant worked for Allen & Garcia for a full calendar year or partial periods totaling one year, we hold that claimant cannot establish at least fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption.[14] *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219 (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, 315-16 (6th Cir. 2017).

Because claimant cannot invoke the Section 411(c)(4) presumption, *see* 20 C.F.R. §718.305(b)(1)(i), we also vacate the administrative law judge's finding that employer failed to rebut the presumption, and vacate the award of benefits. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i)-(ii); Decision and Order at 8-16.

On remand, the administrative law judge must determine whether claimant can establish entitlement to benefits under 20 C.F.R. Part 718 by establishing that he has pneumoconiosis, that it arose out of his coal mine employment, and that his totally disabling respiratory or pulmonary impairment 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 an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

[14] Having held that claimant cannot be credited with a year of coal mine employment for Allen & Garcia, we need not address the administrative law judge's determination that his employment with Allen & Garcia was substantially similar to underground coal mine employment, pursuant to 20 C.F.R. §718.305(b)(1)(i), (2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge