U.S. Department of Labor

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

BRB No. 17-0081 BLA

IMOGENE SHEPHERD (Widow of TRAMBLE SHEPHERD) Claimant-Respondent v. INCOAL, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	 DATE ISSUED: 11/27/2017 DECISION and ORDER

Appeal of the Decision and Order on Reconsideration of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Evan B. Smith, Appalachian Citizens' Law Center, Inc., Whitesburg, Kentucky, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Reconsideration (2009-BLA-5618) of Administrative Law Judge Peter B. Silvain, Jr., awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on August 27, 2008,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with 15.85 years of underground coal mine employment,[2] and found that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) rebuttable presumption that the miner's death was due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the miner suffered from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Shepherd v. Incoal, Inc.*, BRB No. 12-0403 BLA (Apr. 19, 2013) (unpub.). However, the Board held that the administrative law judge did not adequately explain how he arrived at his finding of 15.25 years of underground coal mine employment. *Id.* The Board therefore vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, and remanded the case for further consideration. In addition to reconsidering the length of the miner's coal mine employment on remand, the Board

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[1] Claimant is the surviving spouse of the miner, who died on July 31, 2008. Director's Exhibit 11.

[2] The miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more 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 are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

instructed the administrative law judge to address all evidence relevant to the location of the miner's coal mine employment, including the miner's testimony that only two-thirds of his coal mine employment took place underground.[4] *Id.*

On remand, the administrative law judge credited the miner with only 13.08 years of coal mine employment. The administrative law judge, therefore, found that the claimant did not invoke the rebuttable Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Turning to whether claimant could affirmatively establish her entitlement to survivor's benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied benefits.

Claimant timely moved for reconsideration, asserting that the administrative law judge erred in crediting the miner with less than fifteen years of qualifying coal mine employment. Claimant asserted that the miner should have been credited with a total of 15.08 years of coal mine employment. Upon review of claimant's motion for reconsideration, the administrative law judge found that a recent published Board decision, *Osborne v. Eagle Coal Co.*, 25 BLR 1-195 (2016),[5] required him to recalculate

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[4] In the interest of judicial economy, the Board also affirmed the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *Shepherd v. Incoal, Inc.*, BRB No. 12-0403 BLA (Apr. 19, 2013) (unpub.). The Board therefore instructed the administrative law judge that if he again found, on remand, that claimant invoked the Section 411(c)(4) presumption, he could reinstate the award of benefits. *Id.*

[5] In *Osborne v. Eagle Coal Co.*, 25 BLR 1-195 (2016), the Board observed that Exhibit 609 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual* (*BLBA Procedure Manual*), entitled "*Average Wage Base*," does not contain "the coal mine industry's average daily earnings," as specified in 20 C.F.R. §725.101(a)(32)(iii). Rather, the Board noted that Exhibit 609 reports the Social Security Administration's 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. *Id.* The Board, therefore, held that reliance on Exhibit 609 to determine the length of a miner's coal mine employment when the formula at 20 C.F.R. §725.101(a)(32)(iii) is applied is not appropriate because it contains a wage base that is not specific to the coal mine industry. In contrast, the Board noted that the table at Exhibit 610 of the *BLBA Procedure Manual*, entitled *Average Earnings of Employees in Coal Mining*, contains the information specified in 20 C.F.R. §725.101(a)(32)(iii), i.e., "the coal mine industry's average daily

the length of the miner's coal mine employment. After his recalculation, the administrative law judge credited the miner with 15.07 years of coal mine employment. The administrative law judge further found that all of the miner's coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption that that the miner's death was due to pneumoconiosis. Given the Board's previous affirmance of the finding that employer failed to rebut the Section 411(c)(4) presumption, the administrative law judge reinstated his award of benefits.

On appeal, employer contends that the administrative law judge erred in crediting the miner with fifteen years of coal mine employment. Employer also contends that the administrative law judge erred in not reopening the record so that employer could submit proof on the scientific validity of the preamble to the 2001 regulatory revisions. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's decision not to reopen the record. In a reply brief, employer reiterates its previous contentions.

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).

Claimant bears the burden of proof to establish the number of years he actually 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). As the regulations provide only limited guidance 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. *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).

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earnings for that year." *Id.* In calculating the miner's coal mine employment after 1977, the administrative law judge had relied upon Exhibit 609, rather than Exhibit 610, when he applied the formula at 20 C.F.R. §725.101(a)(32)(iii). Decision and Order on Remand at 13-15. The administrative law judge, therefore, recalculated the length of the miner's post-1977 coal mine employment using Exhibit 610. Decision and Order on Reconsideration at 9-12.

On reconsideration, the administrative law judge used two methods to calculate the length of the miner's coal mine employment. For the years 1963 through 1977, relying on the miner's Social Security Earning Statement (SSES), the administrative law judge identified the number of quarters in each year in which the miner earned at least $50.00 from coal mine employment, and credited the miner with a total of twenty-nine quarters, or 7.25 years of employment. Decision and Order on Reconsideration at 8-9. For the years 1978 through 1985, the administrative law judge applied the formula at 20 C.F.R. §725.101(a)(32)(iii) and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, credited the miner with an additional 7.82 years of coal mine employment, for a total of 15.07 years of coal mine employment. *Id.* at 9-12.

Employer contends that the administrative law judge committed numerous errors in calculating the length of the miner's coal mine employment. Employer initially challenges the administrative law judge's reliance upon the miner's SSES to credit the miner with 7.25 years of coal mine employment from 1963 through 1977. Employer argues that the administrative law judge erred in crediting the miner with a total of 1.75 years of coal mine employment in 1963 and 1964. The miner's SSES reveals that the miner worked for Allen Fork Coal Company (Allen Fork) during the second and third quarters of 1963, and for Expert Coal Mining Company (Expert Coal) during the third and fourth quarters of 1963, and all four quarters in 1964. Director's Exhibit 7. Because the miner earned over $50.00 during seven quarters from 1963 through 1964, the administrative law judge credited the miner with 1.75 years of coal mine employment during this period. Decision and Order on Reconsideration at 9.

Employer argues that the administrative law judge erred in relying upon the miner's SSES when the miner provided specific beginning and ending dates for his employment with Allen Fork and Expert Coal in 1963 and 1964. Employer's Brief at 12. We agree. The miner completed a CM-911 Employment History form in connection with his 1987 claim. Miner's Claim at 387. The miner indicated that he worked for Allen Fork from May of 1963 to July of 1963, and for Expert Coal from August of 1963 to November of 1964.[6] *Id.* Consequently, the miner's self-reported and uncontradicted employment history reveals that he was not engaged in coal mine employment during the first four months of 1963 or the last month of 1964.[7] Thus, the miner was entitled to, at

[6] The miner did not list any coal mine employment prior to May of 1963, and indicated that he served in the U.S. Army from November of 1964 to October of 1966. Miner's Claim at 387.

[7] The miner's self-reported coal mine employment history is consistent with the miner's Social Security Earnings Statement (SSES). The miner reported that he worked for Allen Fork Coal Company (Allen Fork) from May of 1963 to July of 1963. Miner's Claim at 387. The miner's SSES shows that the miner did not earn any wages from Allen

most, nineteen months (1.59 years) of coal mine employment from 1963 through 1964. Consequently, we hold that the administrative law judge, by crediting the miner with 1.75 years of coal mine employment during this period, overestimated the length of the miner's coal mine employment by 0.16 of a year. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, 224, BLR (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, BLR (6th Cir. 2017).

We also agree with employer that the administrative law judge overestimated the length of the miner's coal mine employment in 1973. Claimant's SSES reveals that the miner worked for Hite Preparation Company (Hite) during the third and fourth quarters of 1973. Director's Exhibit 7. Because the miner earned over $50.00 during each of these quarters, the administrative law judge credited the miner with 0.50 of a year of coal mine employment. Decision and Order on Reconsideration at 9. The miner, however, indicated that he did not begin his employment with Hite until September of 1973.[8] Miner's Claim at 387. The miner's self-reported and uncontradicted employment history is consistent with Hite's own employment records, which show that the miner started work on September 15, 1973. Miner's Claim at 380. Consequently, the miner's self-reported and uncontradicted employment history, corroborated by Hite's company records, reveals that the miner was not engaged in coal mine employment during the first eight months of 1973.[9] Thus, the miner was entitled to, at most, 0.34 of a year of coal

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Fork until the second quarter of 1963. Director's Exhibit 7. The miner reported that he stopped working for Expert Coal Mining Company (Expert Coal) in November of 1964. Miner's Claim at 387. This reported history is consistent with the miner's SSES, showing that Expert Coal paid the miner significantly higher wages in the first three quarters of 1964 ($479.18, $562.11, and $539.70) than during the fourth quarter of 1964 ($297.57). The miner's SSES also shows that the U.S. Army paid the miner $111.80 during the last quarter of 1964. Director's Exhibit 7.

[8] The miner indicated that he worked for R&S Truck Body Company (R&S) building truck beds from May of 1969 to September of 1973. Miner's Claim at 387. The miner's SSES corroborates this reported history, showing that the miner received significant income from R&S during the first three quarters of 1973 ($2,319.18, $2,571.30, and 2,164.05). Director's Exhibit 7.

[9] The miner's self-reported coal mine employment history is consistent with his SSES. The miner reported that he worked for Hite Preparation Company (Hite) from September of 1973 to February of 1977. Miner's Claim at 387. The miner's SSES shows that the Hite paid the miner $200.00 in the third quarter of 1973 and $2,826.73 in the fourth quarter of 1973, consistent with the miner commencing his employment with Hite in September of 1973. Director's Exhibit 7.

mine employment in 1973. Consequently, the administrative law judge, by crediting the miner with 0.50 of a year of coal mine employment during this period, overestimated the length of the miner's coal mine employment by 0.16 of a year. *Fleming*, 843 F.3d at 224.

The two above-referenced over-calculations total 0.32 of a year, thereby bringing the miner's total coal mine employment below fifteen years (15.07 – 0.32 = 14.75).[10] Because the miner's modified length of coal mine employment finding is less than fifteen years, we reverse the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. Moreover, because claimant, in her motion for reconsideration, did not challenge the administrative law judge's finding that the evidence did not establish the existence pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or the administrative law judge's finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b), these findings are reinstated. We, therefore, reverse the administrative law judge's award of benefits.[11]

[10] Since these two errors alone result in a coal mine employment history of less than fifteen years, we need not resolve employer's additional contentions of error regarding the administrative law judge's calculation of the miner's coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] In light of our reversal of the administrative law judge's award of benefits, we need not address employer's contention that the administrative law judge erred in not reopening the record so that employer could submit proof on the scientific validity of the preamble. *Larioni*, 6 BLR at 1-1278.

Accordingly, the administrative law judge's Decision and Order awarding benefits is reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge