U.S. Department of Labor

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

BRB No. 17-0141 BLA

GLENN B. JENKINS Claimant-Respondent v. CLINCHFIELD COAL COMPANY c/o HEALTHSMART CASUALTY CLAIMS and (Self-insured through) THE PITTSTON COMPANY c/o HEALTHSMART CASUALTY CLAIMS Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/29/2017 DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-5547) of Administrative Law Judge Larry W. Price rendered 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 miner's subsequent claim filed on March 1, 2013.[1]

Applying Section 411(c)(4) of the Act,[2] the administrative law judge credited claimant with at least fifteen years of underground coal mine employment[3] and accepted employer's concession that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309,[4] and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section

[1] Claimant filed three previous claims, which were all finally denied. On October 23, 2002, the district director denied claimant's most recent prior claim, filed on March 6, 2002, because he found that although claimant's pulmonary function study established total pulmonary disability, the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment or disability causation. Director's Exhibit 3.

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

[3] Employer conceded that claimant had 13.99 years of coal mine employment. Decision and Order at 2 n.2; Hearing Transcript at 10-11.

[4] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

411(c)(4). The administrative law judge also found that employer failed to rebut the presumption and awarded benefits accordingly.

On appeal, employer challenges the administrative law judge's finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal.[5]

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.[6] 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).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of underground coal mine employment, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. The administrative law judge began his analysis by noting, correctly, that all of claimant's coal mine employment was with employer and that the record contains an employment history form that "provides exact beginning and end dates of [c]laimant's employment."[7] Decision and Order at 11; Hearing Transcript at 19; Director's Exhibit 9. The administrative law judge further noted that to be credited with a year of coal mine employment, claimant must prove that he was engaged in coal mine employment for 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); Decision and Order at 12.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled 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 3-4.

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 2.

[7] The record reflects that claimant worked from June 7, 1966 through September 1, 1979 and from November 27, 1979 through July 24, 1980. Director's Exhibit 9. Claimant remained employed until January 25, 1982 in sick/injured status. *Id.*

Based on his determination that claimant worked entire calendar years from 1967 through 1978, the administrative law judge credited claimant with twelve years of coal mine employment during this period. After determining that claimant worked only partial periods in 1966, 1979, and 1980, the administrative proceeded to calculate the number of days claimant worked during those years. Finding that claimant worked more than 125 days in each year, the administrative law judge credited claimant with one full year of coal mine employment for each of the three years. Decision and Order at 12. Thus, the administrative law judge credited claimant with a total of "15 years of qualifying coal mine employment, which includes 12 full years plus the three partial years in which he worked more than 125 days." *Id*.

Alternatively, referencing the formula set forth at 20 C.F.R. §725.101(a)(32)(iii), the administrative law judge calculated the length of claimant's employment in 1966, 1979, and 1980 by dividing claimant's yearly earnings by the coal mine industry's average yearly earnings for 125 days of employment.[8] Because claimant's income exceeded the average income for miners who worked 125 days in each of the years 1966, 1979, and 1980, the administrative law judge again credited claimant with a full year of employment "for each of [the] three partial years[.]"[9] Thus, the administrative law judge again found that claimant established "a total of 15 years of qualifying coal mine employment." Decision and Order at 12-13.

Employer challenges both methods of calculation, arguing that for the years 1966, 1979, and 1980, the administrative law judge erred in crediting claimant with a full calendar year of employment based on his finding that claimant worked at least 125 days,

[8] This data, along with the average daily earnings of employees in coal mining, is reported by the Bureau of Labor Statistics (BLS) and set forth in Exhibit 610 of the *Coal Mine (BLBA) Procedure Manual*. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm.

[9] By comparing claimant's income to the average earnings of coal mining employees who worked for 125 days in 1966, 1979, and 1980, the administrative law judge essentially found that claimant established at least 125 working days in each of those years. For example, claimant was credited with a full year of employment in 1966 because his income ($4,343.15) exceeded the average income for employees who worked 125 days that year ($3,438.75, i.e., 125 days at the industry average of $27.51 per day). Thus, although he described this as an "alternate" calculation of claimant's employment, both methods used by the administrative law judge resulted in claimant being credited with a full year of coal mine employment based solely on the fact that he worked for at least 125 days during partial periods in those years.

or had income that exceeded the average income for miners who worked 125 days, during each those years.[10] Employer's Brief at 2-5.

We agree with employer that the administrative law judge's methods of calculating claimant's years of qualifying coal mine employment in 1966, 1979, and 1980 cannot be upheld. To credit claimant with a year of coal mine employment, the administrative law judge must first determine whether claimant was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the administrative law judge must determine whether claimant worked as a miner for at least 125 working days within that one-year period.[11] 20 C.F.R. §725.101(a)(32). However, proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year does not satisfy the requirement that such employment occur during a 365-day period and thus, in itself, does not establish one full year of coal mine employment as defined in the regulations.[12] *See Clark*, 22 BLR at 1-281.

[10] Because employer does not challenge the administrative law judge's finding that claimant worked twelve years from 1967 through 1978, it is affirmed. *See Skrack*, 6 BLR at 1-711; Employer's Brief at 2.

[11] If the threshold 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).

[12] As indicated *supra*, the administrative law judge acknowledged that the regulations provide an optional method for calculating a miner's employment "where the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year[.]" 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 11-12. As a practical matter, the method provided – "divid[ing] the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year" – results in the number of *days* that a miner worked in a given year, but does not establish that such employment occurred during a 365-day period. *Id*. For example, the miner's income in 1966 ($4,343.15), divided by the average daily earnings of employees in coal mining ($27.51), suggests that claimant had 157.87 days of employment that year. *See* Exhibit 610; Director's Exhibit 8. Although the administrative deviated slightly from this formula by comparing claimant's income to the yearly income of employees who worked for 125 days, rather than dividing claimant's income by the daily average, *see* Decision and

In the instant case, as employer asserts, the administrative law judge failed to acknowledge the threshold inquiry of whether claimant established a calendar year of employment prior to determining that claimant worked at least 125 days in 1966, 1979, and 1980. The result is that claimant was credited with full years of coal mine employment simply because he established 125 working days during part of those years. *See Clark*, 22 BLR at 1-281. As the methods employed by the administrative law judge in determining claimant's length of coal mine employment are not in accordance with the definition of "year" as defined in the regulations, they cannot be affirmed. *See Clark*, 22 BLR at 1-281; *Tackett v. Director, OWCP*, 12 BLR 1-11, 1-13 (1988); *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Moreover, because the administrative law judge credited claimant with twelve years of coal mine employment from 1967 through 1978, and determined that claimant worked for less than a calendar year in 1966, 1979, and 1980, claimant cannot establish a full fifteen years of coal mine employment as a matter of law. 20 C.F.R. §725.101(a)(32)(i); *see Clark*, 22 BLR at 1-281. Therefore, we must vacate the administrative law judge's finding of fifteen years of qualifying coal mine employment.

As claimant is not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we vacate the administrative law judge's findings that claimant invoked the presumption and that employer failed to establish rebuttal. We remand this case for the administrative law judge to consider whether claimant can establish entitlement under 20 C.F.R. Parts 718[13] and 725, without the benefit of the Section 411(c)(4) presumption.[14]

Order at 13, the result is essentially the same. Under both the administrative law judge's calculation and the regulatory formula, claimant can be said to have established at least 125 working days, but not that such work occurred during "a period of one calendar year . . . or partial periods totaling one year." 20 C.F.R. §725.101(a)(32).

[13] We reject claimant's suggestion that the administrative law judge's findings necessarily establish claimant's entitlement to benefits, regardless of whether the Section 411(c)(4) presumption is invoked. Although the administrative law judge found that Dr. Forehand's diagnosis of legal pneumoconiosis "outweighs the opinions of Drs. Fino and Rosenberg [that claimant does not have legal pneumoconiosis]," he did so in the context of "the burden [being] on [e]mployer at this juncture to establish by a preponderance of the evidence that [c]laimant does not have pneumoconiosis." Decision and Order at 21-22. We decline to infer that the administrative law judge would reach the same result after reweighing the evidence with the burden of proof placed properly on claimant. The

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

Board cannot make findings of fact or reweigh the evidence. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

[14] Because the district director determined in the prior claim that claimant was totally disabled, we also vacate 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 based on employer's concession that claimant is totally disabled. Decision and Order at 13-14; Director's Exhibit 3.