U.S. Department of Labor

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

BRB No. 17-0033 BLA

JIMMY D. McCALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOLBROOK MINING COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 10/30/2017
	)	
AMERICAN MINING 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 of William J. King, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Matthew Moynihan (Penn, Stuart & Eskridge) Bristol, Virginia, for employer/carrier.

Jeffrey S. Goldberg (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 GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2013-BLA-05797) of Administrative Law Judge William J. King 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 subsequent claim filed on May 31, 2012.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has 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 established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and invoked the Section 411(c)(4) presumption that claimant's total disability is due to pneumoconiosis. The administrative law judge also found that employer 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 it is the responsible operator. Employer further contends that the administrative law judge erred in finding that claimant established fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that

[1] Claimant's previous claim, filed on July 27, 1976, was finally denied by the district director on August 29, 1980, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled 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.

[3] The record reflects that claimant'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).

it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's identification of employer as the responsible operator.[4]

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).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494,[5] that most recently employed the miner" for a cumulative period of at least one year. 20 C.F.R. §§725.494(c), 725.495(a)(1). The administrative law judge noted that employer, in contesting its status as the responsible operator, conceded that it employed claimant as a night watchman for at least one year. Decision and Order at 3. Employer, however, contended that claimant's work as a night watchman was not the work of a "miner" under the Act. Thus, the administrative law judge accurately noted that the issue of whether employer is the responsible operator "is actually whether . . . [c]laimant worked as a 'miner' for the [e]mployer." *Id.*

In determining whether claimant's work as a night watchman for employer constituted the work of a miner, the administrative law judge applied the rebuttable presumption set forth at 20 C.F.R. §725.202(a), which provides that:

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

> A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation or transportation of coal, or any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in the maintenance or construction of the mine site; or
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a) (emphasis added).[6]

The administrative law judge credited claimant's testimony that his work as a night watchman for employer took place in or around a coal mine or coal preparation facility. Decision and Order at 7. The administrative law judge, therefore, found that claimant invoked the Section 725.202(a) presumption that his work as a night watchman was that of a miner. *Id.* The administrative law judge further found that employer did not establish rebuttal of the presumption. *Id.* The administrative law judge, therefore, found that claimant's work as a night watchman for employer was that of a "miner." *Id.*

On appeal, employer contends that the administrative law judge erred in requiring employer to rebut the Section 725.202(a) presumption that claimant's work as a night watchman was that of a miner. Citing *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 12

[6] The Department of Labor's comments to the regulations explain the rationale underlying the presumption set forth at 20 C.F.R. §725.202(a):

> This presumption reflects the rational assumption that an individual working in and around a coal mine is involved in the extraction, preparation or transportation of coal, or in the construction of a mine site; these functions are enumerated by the statutory definition of a "miner." The operator may rebut the presumption by disproving either the required nexus between the worker's duties and coal mining, or any regular employment at a coal mine facility. This burden is not onerous given the operator's access to information about the use and duties of the workers at its facilities.

65 Fed. Reg. 79,920, 79,961 (Dec. 20, 2000).

BLR 2-271 (6th Cir. 1989) and *Navistar, Inc. v. Forester*, 767 F.3d 638, 25 BLR 2-659 (6th Cir. 2014), employer argues that claimant should have been required to affirmatively prove that his work as a night watchman involved the extraction or preparation of coal. Employer's Brief at 9. Employer's reliance upon *Clemons* is misplaced. In *Clemons*, the United States Court of Appeals for the Sixth Circuit held that in order to qualify as a miner, "an individual must establish" both a "situs" test and a "function" test. *Clemons*, 873 F.2d at 921, 12 BLR at 2-278. However, as the Director accurately notes, the Sixth Circuit issued its *Clemons* decision eleven years before 20 C.F.R. §725.202(a) was amended to provide claimant with the rebuttable presumption, applied in this case, that his work constituted that of a miner.[7] Director's Brief at 9.

Employer's reliance upon *Forester* is equally misplaced. In that decision, the Sixth Circuit merely recognized that because a federal mine inspector serves a purely regulatory function, and is not involved in the day-to-day overall operation of any particular mine, his work does not constitute the work of a "miner." *Forester*, 767 F.3d at 646, 25 BLR at 2-672. Neither the Sixth Circuit, nor any other court, has invalidated the rebuttable presumption set forth at 20 C.F.R. §725.202(a). We therefore affirm the administrative law judge's determination that claimant invoked the Section 725.202(a) presumption that his work as night watchman for employer was that of a miner.[8] As employer raises no other arguments with respect to the administrative law judge's findings that claimant invoked the presumption that he is a miner and employer did not rebut the presumption, we affirm the administrative law judge's determination that

[7] Even if claimant had been required to establish that his work as a night watchman satisfied the "function" test, it is noteworthy that the administrative law judge credited claimant's testimony that his work as a night watchman encompassed non-security duties, including pumping water, washing and greasing mining equipment, and accompanying coal loaders into the pit (as required by safety inspectors). Decision and Order at 6.

[8] In setting forth its argument that the administrative law judge erred in requiring employer to rebut the presumption that claimant was a miner, employer concedes that claimant "testified to at times completing tasks 'integral to the extraction or preparation of coal.'" Employer's Brief at 10. Employer asserts, however, that "the record does not establish with sufficient clarity" that all of claimant's shifts involved the work of a miner. *Id*. This argument similarly ignores that, where the presumption has been properly invoked, it is employer's burden to establish that claimant "was not engaged in the extraction, preparation or transportation of coal . . . or in the maintenance or construction of the mine site" or that he "was not regularly employed in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a)(1)-(2).

claimant worked as a miner for employer for at least one year.[9] Decision and Order at 7. Because employer does not raise any additional contentions of error regarding the administrative law judge's designation of employer as the responsible operator, that finding is affirmed.

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

Employer argues that the administrative law judge erred in crediting claimant with at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption that his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis.

Length of Coal Mine Employment

Employer contends that the administrative law judge erred in crediting claimant with at least fifteen years of coal mine employment. 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).

The administrative law judge first considered the length of claimant's coal mine employment between 1962 and 1975. Relying on claimant's Social Security records, the administrative law judge identified the number of quarters in which claimant earned at least $50.00 from coal mine employment, and credited claimant with a total of thirty-two quarters, or eight years of employment, for this period. Decision and Order at 10-11, *citing Tackett v. Director, OWCP*, 6 BLR 1-839 (1984) (For pre-1978 employment, it is reasonable to credit claimant with each quarter in which at least $50 in earnings from coal mine employment is reflected in the Social Security records.). Employer challenges only one quarter of coal mine employment credited by the administrative law judge in

[9] Claimant worked as a night watchman for employer from 1988 to 2000. Director's Exhibit 7. While the administrative law judge found that claimant's 2012 and 2015 testimony did not rebut the presumption that his work as a night watchman was that of a "miner" from 1993 to 2000, the administrative law judge found that claimant's 1992 testimony "conclusively establish[ed]" that claimant's duties prior to 1993 were limited to patrolling the mine site. Decision and Order at 13. The administrative law judge, therefore, found that claimant's work for employer from 1988 to 1992 was not that of a miner. *Id.*

1975.[10] We, therefore, affirm, as unchallenged on appeal, the administrative law judge's crediting of the remaining 7.75 years of coal mine employment from 1962 to 1974. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge next considered the length of claimant's employment with employer between 1988 and 2000. The administrative law judge considered claimant's 1992 testimony that he was paid the "unusually low amount of $150 per week" while working full-time for employer. Decision and Order at 13; Employer's Exhibit 31 at 7-8. The administrative law judge noted that claimant's annual earnings from 1989 to 1992 ($7,800) reflect the amount that an individual would earn if he worked 52 weeks per year at $150 per week.[11] *Id.* Because claimant's full-time yearly income of $7,800 from 1989 to 1992 was less than half the average yearly earnings in coal mine employment set forth in Exhibit 610 of the *BLBA Procedure Manual*,[12] the administrative law judge determined that Exhibit 610 was "clearly not an accurate means of assessing the [c]laimant's length of coal mine employment . . . ." Decision and Order at 13. Therefore, the administrative law judge calculated the length of claimant's remaining coal mine employment, from 1993 to 2000, as follows:

> Given [the] pattern of compensation, together with the [c]laimant's testimony that he worked full-time, throughout the years, for [employer], I

[10] Employer contends that the administrative law judge erred in crediting claimant with 0.25 years of coal mine employment for MCN, Incorporated (MCN) in 1975, without addressing evidence that claimant stopped working for MCN in 1974. Employer's Brief at 6. Because we are able to affirm the administrative law judge's finding of over fifteen years of coal mine employment without relying on this disputed 0.25 years, *see* discussion, *infra*, the administrative law judge's error, if any, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] The administrative law judge determined that, based on claimant's testimony and Social Security records, claimant established .35 years of employment with employer in 1988, and an additional 4 years between 1989 and 1992. Decision and Order at 13. However, as noted *supra*, these years of employment were not included in the administrative law judge's overall calculation of claimant's coal mine employment because claimant's work for employer during this time period "was not the work of a miner." *Id*.

[12] The Bureau of Labor Statistics table cited by the administrative law judge is referenced in 20 C.F.R. §725.101(a)(32)(iii), which sets forth a formula an administrative law judge "may use" to calculate the length of coal mine employment based on the miner's earnings.

> also find that although the [c]laimant's increased earnings after 1993 are not equal to the averages in Exhibit 610, the [c]laimant should be credited with a full year for each of the succeeding years, until 2000, when the available information suggests he again worked for only part of the year. To calculate the final year, I divide the amount the [c]laimant earned by the amount he earned the prior year.

Decision and Order at 13. The administrative law judge, therefore, credited claimant with a total of 7 years of coal mine employment between 1993 and 1999, and .60 years of coal mine employment in 2000.[13] *Id*. Based on his finding that claimant established 8 years of coal mine employment between 1962 and 1975, and 7.60 years of coal mine employment between 1993 and 2000, the administrative law judge credited claimant with a total of 15.6 years of coal mine employment. *Id.*

Employer argues that the administrative law judge failed to "explain how he was able to make a finding that [claimant's] earnings in 1993 represented a full year of employment, especially when contrasted with the earnings in 1994." Employer's Brief at 6. We disagree. The administrative law judge permissibly credited claimant's uncontradicted testimony that he worked full-time, throughout the year, for employer.[14] Decision and Order at 13. The administrative law judge reasonably concluded that, based upon the pattern of compensation and claimant's testimony that he worked "full years," claimant should be credited with a full year of coal mine employment for each year from 1993 to 1999, and an additional 0.60 years of coal mine employment in 2000 where the evidence suggests that "he again worked only part of the year." *Id.* Because the

[13] The administrative law judge credited claimant with a full year of employment during each of 1993, 1994, 1995, 1996, 1997, 1998, and 1999 based on claimant's testimony "that he worked full-time, throughout the years, for [employer]." Decision and Order at 13. For the year 2000, because "the available information suggests [claimant] again worked only part of the year," the administrative law judge credited claimant with .60 years of coal mine employment by dividing the amount claimant earned in 2000 by the amount he earned during a full year of employment in 1999, as reflected in claimant's Social Security records ($9,933.63 / $16,288.61 = .609 years).

[14] During the October 29, 2015 hearing, claimant testified that his work for employer was "full-time work." Hearing Transcript at 17; Decision and Order at 12. Claimant further testified that he worked "full years" for employer. *Id.* at 18; Decision and Order at 12. Claimant explained that this meant that he worked "entire years" for employer. *Id.*; Decision and Order at 12. Claimant testified that the only time he missed while working for employer was two weeks for a hernia injury, and two weeks recovering from an appendicitis. *Id.* at 17-18; Decision and Order at 12.

administrative law judge's determination is based upon a reasonable method of computation and is supported by substantial evidence,[15] we affirm his crediting of claimant with 7.60 years of coal mine employment with employer from 1993 to 2000. 20 C.F.R. §725.101(a)(32)(iii); *See Muncy*, 25 BLR at 1-27. Given our earlier affirmance of the administrative law judge's unchallenged finding that claimant established 7.75 years of coal mine employment from 1962 to 1974, we affirm the administrative law judge's finding that claimant established over fifteen years of coal mine employment.

Qualifying Coal Mine Employment

Employer next argues that the administrative law judge erred in determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that he was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge determined that claimant's coal mine employment between 1962 and 1975 occurred in underground coal mines. Decision and Order at 13-14. The administrative law judge further determined that claimant's subsequent 7.60 years of coal mine employment between 1993 and 2000 occurred at surface mines in conditions substantially similar to those in underground coal mines. *Id*. The administrative law judge therefore determined that claimant established over fifteen years of qualifying coal mine employment. *Id*.

Employer initially contends that the administrative law judge erred in not apportioning claimant's dust exposure based upon the number of shifts during which he was exposed to coal mine dust. Employer's Brief at 9. Contrary to employer's argument, the administrative law judge properly considered whether claimant established that he was regularly exposed to coal mine dust. 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490-91, 25 BLR 2-633, 2-643 (6th Cir. 2014) (holding that claimant need only establish that he was regularly exposed to

[15] Claimant's uncontradicted hearing testimony regarding the length of his employment with employer is supported by his Social Security records, which document significant income with employer from 1988 to 2000, and reveal no other employment during this time period. *See Aberry Coal, Inc. v. Fleming*, 843 F.3d 219, BLR (6th Cir. 2016), *amended on reh'g*, 847 F.3d 310, BLR (6th Cir. 2017).

coal dust to prove substantially similar conditions between his above ground and underground mining); Decision and Order at 14.

Employer further argues that the administrative law judge misinterpreted claimant's testimony to find that claimant was regularly exposed to coal mine dust. Employer's Brief at 7. We disagree. The administrative law judge noted that claimant testified that he was exposed to coal mine dust "about every day," particularly when he was in the pit.[16] Decision and Order at 14; Hearing Transcript at 14-15. Although the administrative law judge noted that claimant testified that he was only required to be in the pit for three or four days per week, the administrative law judge further noted claimant's testimony that, even on days when he was not in the pit, coal dust from the mining operations would still be in the air.[17] Decision and Order at 14; Hearing Transcript at 44. *Id.* The administrative law judge permissibly determined that claimant's uncontradicted testimony established that he was regularly exposed to coal mine dust while working as a night watchman from 1993 to 2000. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); Decision and Order at 13-14. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we further affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by

[16] Claimant testified that mining inspectors required his presence in the pit if another man was loading coal. Hearing Transcript at 42. Claimant would be in a truck located about 25 to 30 feet from the machine that was loading the coal. *Id.*

[17] Although claimant acknowledged that he did not go into the pit every day, he testified that he would "be in the dust everyday where they'd be mixing it up." Hearing Transcript at 44. Claimant also testified that there would be a "pretty good lot" of coal mine dust on his clothes at the end of a shift. *Id.* at 43.

establishing that claimant has neither legal nor clinical pneumoconiosis,[18] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in requiring it to rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis, because employer believes that the presumption should not have been invoked. Employer's Brief at 12. In light of our affirmance of the administrative law judge's determination that claimant is entitled to invoke the Section 411(c)(4) presumption, and because employer has not otherwise challenged the administrative law judge's finding that it did not rebut the presumption, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

[18] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge