BRB No. 11-0849 BLA

OKEY L. MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AERO ENERGY, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 09/17/2012
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (2000-BLA-5750) of Administrative Law Judge Larry S. Merck rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case, involving a subsequent claim filed on July 17, 2006,[1] is before the Board for the second time. Director's Exhibit 3.

In the initial decision, Administrative Law Judge Thomas F. Phalen, Jr. credited claimant with at least seventeen years of coal mine employment,[2] as stipulated by the parties, and found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On review of the entire record, however, Judge Phalen found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, Judge Phalen denied benefits.

Pursuant to claimant's appeal, the Board vacated Judge Phalen's denial of benefits, noting that, after Judge Phalen's decision, an amendment to the Act was enacted that affects claims filed after January 1, 2005. *May v. Aero Energy, Inc.*, BRB No. 09-0388 BLA, slip op. at 3-4 (June 30, 2010) (unpub.). Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 the evidence establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). Noting that claimant filed his claim after January 1, 2005, Judge Phalen credited him with seventeen years of coal mine employment, and determined that claimant has a totally disabling respiratory impairment,[3] the Board vacated the denial of benefits and remanded the case for consideration of whether claimant is entitled to the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *May*, slip op. at 3. The Board instructed Judge Phalen that if he found claimant entitled to the presumption

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[1] Claimant's initial claim, filed on September 26, 2002, was finally denied on December 8, 2003, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 3, 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] The Board noted that employer had neither challenged the finding of total disability, nor withdrawn its stipulation to seventeen years of coal mine employment. *May v. Aero Energy, Inc.*, BRB No. 09-0388 BLA, slip op. at 3 n.4 (June 30, 2010) (unpub.).

that he is totally disabled due to pneumoconiosis, he must then determine whether employer rebutted the presumption, by establishing that claimant does not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *May*, slip op. at 3-4. The Board further instructed Judge Phalen to allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *May*, slip op. at 4.

On remand, due to Judge Phalen's retirement, the case was reassigned, without objection, to Administrative Law Judge Larry S. Merck (the administrative law judge). Applying amended Section 411(c)(4), the administrative law judge found that, while claimant's coal mine employment spanned at least seventeen years, and included some above ground work, claimant worked in underground coal mine employment for a total of 15.76 years. The administrative law judge also found that the new medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further 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 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. Additionally, employer argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption.[4] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to submit a substantive response brief.[5]

[4] Employer additionally contends that because amended Section 411(c)(4) provides that "the Secretary" can rebut the presumption by making certain showings, but does not refer to coal mine operators, the rebuttable presumption of Section 411(c)(4) does not apply to responsible operators. Employer's Brief at 4 n.2. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011), slip op. at 4, *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2), and thus

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's finding that claimant worked for at least fifteen years in underground coal mine employment. The administrative law judge initially noted that employer stipulated that claimant had worked at least seventeen years in coal mine employment, and had not withdrawn this stipulation. Decision and Order on Remand at 5. The administrative law judge further noted, correctly, that in order to be entitled to invocation of the Section 411(c)(4) presumption, claimant must establish that at least fifteen years of his coal mine employment was underground, or in conditions substantially similar to those in an underground mine. *Id.* Finding that neither party had addressed the issue of coal mine employment in their post-remand briefs, or submitted new evidence relevant to this issue, the administrative law judge turned to claimant's Employment History Form, CM-911a, and his Social Security earnings records.

The administrative law judge found that claimant's employment history form indicated that, with the exception of his employment with John T. Coleman Trucking Company (Coleman Trucking), all of claimant's coal mine employment was underground.[6] Decision and Order on Remand at 5. Thus, the administrative law judge sought to determine whether claimant's periods of underground employment, standing alone, totaled at least fifteen years. Using claimant's yearly income from the Social Security earnings records, the administrative law judge initially credited claimant with three-quarters of a year of underground coal mine employment for work with Preece Coal Company prior to 1978. Decision and Order on Remand at 5, 6; Director's Exhibit 6. Noting that the Social Security records after that period were not broken down by quarters, the administrative law judge calculated the length of claimant's underground

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established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*,6 BLR 1-710, 1-711 (1983).

[6] Claimant indicated on his employment history forms that from May 1977 to March 1988, and from November 1991 through June 1995, he worked as an underground miner for Preece Coal Company, Scotts Branch Company, Aero Energy, and Garrett Mining. In addition, from November 1988 to November 1991, he was employed by John L. Coleman Trucking Company as a contract truck driver, hauling coal, gob, and slate. Director's Exhibits 1, 4.

coal mine employment, based on the average "yearly" earnings for miners for 125 days, as reported by the Bureau of Labor Statistics in Exhibit 610.[7] Thus, the administrative law judge divided claimant's reported yearly earnings in underground coal mine employment for each year by the industry average "yearly" earnings for 125 days, and added each proportional amount together to total the number of years of coal mine employment from 1978 to 1995, for a total of 15.01 years of underground coal mine employment. Combining this employment with the three-quarters of a year of underground employment with Preece Coal Company prior to 1978, the administrative law judge credited claimant with a total of 15.76 years of underground coal mine employment, and invoked the rebuttable presumption at Section 411(c)(4). Decision and Order on Remand at 6; Director's Exhibits 4, 6.

We agree with employer that the administrative law judge's method of calculating claimant's years of underground coal mine employment cannot be upheld. To be credited with a year of coal mine employment, claimant must prove that he worked in or around a coal mine over 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). The regulations provide that, if the beginning and ending dates of the miner's employment cannot be ascertained, the administrative law judge may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average "daily" earnings for that year as reported by the Bureau of Labor Statistics at Exhibit 610. 20 C.F.R. §725.101(a)(32)(iii). In the instant case, the administrative law judge used the incorrect table at Exhibit 610 to credit claimant with 365 days of employment if his income exceeded the industry average for just 125 days of work. *See Clark v. Barnwell Coal Co.,* 22 BLR 1-277, 1-281 (2003). Thus, the method employed by the administrative law judge in determining claimant's length of coal mine employment is not reasonable. *See Clark*, 22 BLR at 1-277, 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 Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Because we find that the method employed by the administrative law judge is not reasonable, we vacate his finding of 15.76 years of qualifying coal mine employment. As the administrative law judge's finding of greater than fifteen years of underground coal mine employment affects the applicability of amended Section 411(c)(4), we also vacate his findings that claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis thereunder, and that employer failed to establish

[7] The Bureau of Labor Statistics average coal mine earnings table is located at Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual. *See* http://www.dol.gov/owcp/dcmwc/exh610.htm.

rebuttal. We, therefore, remand this case for further findings regarding the length of claimant's qualifying coal mine employment.

On remand, however, contrary to employer's contention, the administrative law judge is not required to use the Bureau of Labor Statistics wage base history table located at Exhibit 609 to determine the length of claimant's qualifying coal mine employment, as use of this table is not specified in the regulation. 20 C.F.R. §725.101(a)(32)(iii); Employer's Brief at 7. Nor is the administrative law judge *required* to use the "daily" wage column at Exhibit 610, described at Section 725.101(a)(32)(iii). Rather, the use of this table is discretionary, if the administrative law judge finds that the record does not contain sufficient evidence of the beginning and ending dates of claimant's employment. Here, claimant's employment records indicate the beginning and ending months for each period of employment. Director's Exhibits 1, 4. Moreover, the administrative law judge may use any credible evidence to determine the dates and length of claimant's underground coal mine employment, including claimant's testimony, his employment history forms, and his Social Security earnings records, and any reasonable method of computation will be upheld if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

If the administrative law judge determines, on remand, that the record evidence as a whole does not establish at least fifteen years of underground coal mine employment, the administrative law judge must consider whether claimant's employment with Coleman Trucking constituted qualifying coal mine employment for the purposes of invoking the Section 411(c)(4) presumption. The Board has held that the type of mine (underground or surface), rather than the location of the particular worker (surface or below ground), is the factor that determines whether claimant's coal mine employment is qualifying.[8] *See Muncy*, 25 BLR at 1-28-29; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-503-504 (1979) (Smith, Chairman, dissenting). Thus, if the administrative law judge finds that claimant worked at Coleman Trucking as an above ground worker at an underground mine, then that period of employment constitutes additional qualifying coal mine employment, for the purposes of invoking the rebuttable presumption. *See Muncy*, 25 BLR at 1-28-29; *Alexander*, 2 BLR at 1-503-504. If

[8] On the employment history form, CM-911a, submitted with his initial claim, claimant indicated that from November 1988 to November 1991 he worked for "John L. Coleman/Branham & Baker Coal Prep," and described the type of industry as "coal mining." Director's Exhibit 1 at 213. On the employment history form submitted with his current claim, claimant similarly listed his employment from November 1988 to November 1991 as being with "John L. Coleman/Branham & Baker Coal Prep," and described the type of industry as "coal prep. plant." Director's Exhibit 4.

claimant's employment with Coleman Trucking did not occur at the site of an underground mine, but occurred at a surface mine, then the administrative law judge must determine whether claimant's work at Coleman Trucking occurred in dust conditions substantially similar to those in an underground mine.

To establish that his or her work conditions were substantially similar to those in an underground mine, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011).

On the employment history form, CM-911a, submitted with his initial claim, claimant described his work with Coleman Trucking as: "at tipple, hauling gob, slate." Director's Exhibit 1 at 213. On the employment history form submitted with his current claim, claimant further described his work with Coleman Trucking as that of a "contract driver," involving "haul[ing] coal and refuse." Director's Exhibit 4. At the hearing, claimant described the working conditions during his seventeen years of coal mine employment. He testified that it was "very, very dusty operating in the face," and that the "[b]elt lines were very dusty, and about anywhere you work in the mines, there was dust" including "road dust" and "mine safety dust." Hearing Tr. at 14. Claimant added that dust would get in his eyes, nose, and throat, that he would cough and spit coal dust after a day's work, and that his face, body, and clothing were "very dirty" and "black." *Id.*

If, on remand, the administrative law judge determines that claimant's work at Coleman Trucking occurred at a surface mine, then he must make a specific finding as to whether claimant worked in surface conditions substantially similar to conditions in an underground mine. *Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512. The administrative law judge must then combine claimant's years of underground coal mine employment, as determined by any reasonable method, with any periods of qualifying surface mine employment, to determine whether claimant has established at least fifteen years of qualifying of coal mine employment, thereby establishing invocation of the Section 411(c)(4) presumption. If claimant establishes invocation of the Section 411(c)(4) presumption, the administrative law judge must then determine whether employer has rebutted the presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge