BRB No. 14-0151 BLA

CARL E. DUFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/24/2014
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in a Modification of a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Carl E. Duff, Eastern, Kentucky, *pro se.*

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits in a Modification of a Subsequent Claim (11-BLA-5858) of Administrative Law Judge Larry S. Merck, 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 request for modification of a denial of claimant's subsequent claim[1] filed on June 27, 2005. Director's Exhibit 3.

[1] Claimant's prior claim, filed on January 4, 1991, was denied on June 21, 1999, for failure to establish any element of entitlement. Director's Exhibit 1. The Board

The administrative law judge credited claimant with five years and eleven months of coal mine employment[2] and found that the medical evidence developed since the denial of claimant's prior claim established the existence of clinical,[3] but not legal,[4] pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).[5] Thus, the administrative law

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affirmed the denial of benefits on August 18, 2000. *Duff v. Director, OWCP*, BRB No. 99-1106 BLA (Aug. 18, 2000) (unpub.); Decision and Order at 2.

Claimant filed the current claim, his second, on June 27, 2005. Director's Exhibit 3. Administrative Law Judge Richard K. Malamphy denied benefits in a Decision and Order issued October 21, 2009, finding that although claimant established the existence of pneumoconiosis and total disability, he failed to establish that his total disability was due to pneumoconiosis. Claimant timely requested modification. Director's Exhibit 53. In a Decision and Order dated February 23, 2011, the district director denied benefits. Director's Exhibit 60. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 61.

[2] 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 (1989) (en banc).

[3] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconiosis, *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).

[4] "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).

[5] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4)(2012). Because claimant was credited with less than fifteen years of qualifying coal mine employment, claimant is not entitled to the 20 C.F.R. §411(c)(4) presumption. Therefore, the administrative law judge addressed whether claimant satisfied his burden to establish all the elements of entitlement under 20 C.F.R. Part 718.

judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge, therefore, concluded that claimant established a basis for modification under 20 C.F.R. §725.310. Considering the claim on the merits, the administrative law judge found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c), and that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge further found, however, that claimant failed to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the case be vacated and remanded to the administrative law judge for reconsideration of the length of claimant's coal mine employment.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In evaluating the evidence of record relevant to the length of claimant's coal mine employment, the administrative law judge initially noted that claimant alleged eleven years of coal mine employment. The administrative law judge summarized the testimony given by claimant in his prior claim, regarding his periods of employment between 1955, when he turned eighteen, and 1975, when he last worked in the coal mine industry. Decision and Order at 6-7. The administrative law judge noted that in the current claim, however, claimant testified that he stopped attending school, and began working at his uncle's coal mines, after the sixth grade, when he was only thirteen years old. Decision and Order at 7; 2012 Hearing Tr. at 10, 14. The administrative law judge noted that, when asked, claimant estimated that he worked for his uncle for "about four or five years" prior to 1955. 2012 Hearing Tr. at 15. Regarding claimant's alleged coal mine

employment before 1955, the administrative law judge found "that there is insufficient evidence of record to support such a finding." Decision and Order at 7. The administrative law judge, therefore, credited claimant with five years and eleven months of coal mine employment, consistent with the prior determinations of record.[6] Decision and Order at 7.

The Director contends that the administrative law judge erred in his length of coal mine employment determination. Specifically, the Director asserts that the administrative law judge failed to provide a permissible rationale for rejecting claimant's testimony regarding his pre-1955 coal mine employment. Director's Brief at 9. We agree.

Since the Act fails to provide any specific guidelines 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 considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1430 (1986); *Smith v. Nat'l Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-69 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983). Substantial evidence supports the administrative law judge's determination that from 1955 to 1975, claimant was engaged in coal mine employment for approximately five years and ten months. *See Muncy*, 25 BLR at 1-27. Regarding claimant's alleged earlier employment, however, while claimant received credit for an additional month of coal mine employment in April 1951,[7] for a total of five

[6] In his 1992 Decision and Order, issued in connection with claimant's first claim, Administrative Law Judge Charles W. Campbell noted that claimant's Social Security Administration (SSA) earning records showed some relatively small and scattered earnings from coal mine employment between 1956 and 1974, with only two of the quarters reflecting earnings of more than $100.00. Judge Campbell further noted, however, that claimant testified that not all of his coal mine work had been reported for SSA purposes, and had submitted affidavits from co-workers reflecting additional periods of work, including one month in 1951, and multiple periods between 1955 and 1964. Based on the SSA records, claimant's testimony, and the co-worker affidavits, Judge Campbell credited claimant with a total of five years and eleven months of coal mine employment. Director's Exhibit 1 (internal exhibit 50). In subsequent proceedings, Administrative Law Judges Thomas F. Phalen, Jr., Larry S. Merck, and Richard K. Malamphy adopted the findings of Judge Campbell, as supported by substantial evidence. Director's Exhibits 1 (internal exhibit 67), 29, 52.

[7] The finding of five years and eleven months of coal mine employment by Judge Campbell, and adopted by Judges Phalen, Merck, and Malamphy, includes one month of employment prior to 1955, at Rita Ann Coal Company, in April, 1951. Director's Exhibit 1 (internal exhibit 50).

years and eleven months of employment, claimant testified that he spent approximately five years in coal mine employment prior to 1955, working for his uncle. Decision and Order at 7. The administrative law judge declined to credit claimant's testimony regarding this pre-1955 employment, finding that there was "insufficient evidence of record to support such a finding." Decision and Order at 7. As the Director asserts, however, claimant is not required to support his testimony with documentary or other evidence. Rather, claimant's uncorroborated and uncontradicted testimony may constitute substantial evidence to support computation of the length of coal mine employment.[8] *See Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984); *see also Wensel v. Director, OWCP*, 888 F.2d 14, 13 BLR 2-88 (3d Cir. 1989) (absence of social security records does not necessarily prove that claimant was not employed in coal mines); *Marx v. Director, OWCP*, 870 F.2d 114, 118-119, 12 BLR 2-199, 2-205-07 (3d Cir. 1989) (an administrative law judge must consider all documentary and testimonial evidence in determining the length of coal mine employment). Further, while the administrative law judge is not required to credit claimant's testimony, even if uncontradicted, the administrative law judge must consider all relevant evidence and fully explain his findings, as required by the Administrative Procedure Act (APA), 5 U.S.C.

[8] As the Director asserts, claimant has repeatedly described pre-1955 coal mine employment. At his 1992 hearing, claimant testified that he quit school after the sixth grade, which would have been approximately 1949, "to help [his] dad work." Director's Exhibit 1 (internal exhibit 44), 1992 Hearing Tr. at 11. At his 1997 hearing, claimant testified that he started working in the coal mines in 1955. Director's Exhibit 1-63, 1997 Hearing Tr. at 9. At his 1999 hearing, claimant testified that his first documented coal mine employment was in 1955, but stated that he "had worked some before that, but I didn't count it. That was just picking slate outside and things." Director's Exhibit 1, 1999 Hearing Tr. at 14-15. In a 2008 letter, claimant wrote that he "picked slate from coal at a coal hopper over 5 years" before he turned eighteen and went inside the mines. Director's Exhibit 40. He added that this work was performed for his uncle, Ellis Sexton, and that he was paid thirty cents an hour, and worked a ten hour day. At his 2009 hearing, claimant testified that he quit school after the sixth grade, in 1949 or 1950, in order to help his father at an underground mine owned by Ellis Sexton, his uncle. Director's Exhibit 51, 2009 Hearing Tr. at 9-10, 16. Claimant testified that he worked outside for five years, until he turned eighteen, making timbers, shoveling coal from the tracks, working at the hopper, feeding the ponies and bringing them to the mine, and picking out slate. Director's Exhibit 51, 2009 Hearing Tr. at 10. He added that he was paid thirty cents an hour, and that he performed this work until 1955, when he turned eighteen and went to work for Bill Cooley. *Id.* At the 2012 hearing, claimant again testified that he performed outside work at his uncle's mines, shoveling coal off the tracks, and picking slate out of the hopper, until 1955, when he turned eighteen and started working inside the mines. 2012 Hearing Tr. at 10, 14-15.

§557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge did not make a determination as to the credibility of claimant's statements, we vacate the administrative law judge's finding as to the length of claimant's coal mine employment and remand the case to the administrative law judge to reconsider this issue.

In finding that the medical opinion evidence is insufficient to establish either the existence of legal pneumoconiosis, or that claimant's disabling respiratory impairment is due to pneumoconiosis, the administrative law judge discredited the opinion of Dr. Baker as based on an inflated coal mine employment history of eleven years. Decision and Order at 19-20, 33. Similarly, the administrative law judge credited the opinion of Dr. Mettu, as based on an accurate coal mine employment history of five years and eleven months. Decision and Order at 16. Because we have vacated the administrative law judge's finding as to the length of claimant's coal mine employment, we must also vacate the administrative law judge's findings that claimant failed to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and failed to establish disability causation pursuant to 20 C.F.R. §718.204(c).

[9] The Director notes that there are inconsistencies in the employment histories provided by claimant. Director's Brief at 9-11.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Modification of a Subsequent Claim is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge