U.S. Department of Labor

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

BRB No. 14-0407 BLA

CRANDALL L. WALLS Claimant-Respondent v. COVE COAL COMPANY and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/30/2015 DECISION and ORDER

Appeal of the Decision and Order on Remand - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Sarah M. Hurley (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, Chief Administrative Appeals Judge, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand - Award of Benefits (2011-BLA-05696) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent claim[1] filed pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge credited claimant with 15.55 years in underground coal mine employment and found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Further, the administrative law judge found that the presumption was not rebutted. Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). *Walls v. Cove Coal Co*., BRB No. 13-0147 BLA, slip op. at 3 n.5 (Jan. 31, 2014)(unpub.). The Board also noted that employer did not challenge the administrative law judge's failure to render a finding regarding the issue of a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Walls*, BRB No. 13-0147 BLA, slip op. at 2 n.4. However, the Board vacated the administrative law judge's finding that claimant has 15.55 years of coal mine employment, and remanded the case to the administrative law judge to reconsider the length of claimant's coal mine employment and to fully explain his weighing and crediting of the evidence. *Walls*, BRB No. 13-0147 BLA, slip op. at 4. The Board additionally vacated the administrative law judge's finding that claimant was entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). *Id*. Further, the Board vacated the administrative law judge's finding that employer failed to establish rebuttal of the presumption by disproving the existence of pneumoconiosis and by proving that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. *Walls*, BRB No. 13-0147 BLA, slip op. at 5. The Board instructed the administrative law judge to reconsider whether employer established rebuttal of the presumption, if he found that claimant established invocation of the presumption at amended Section 411(c)(4). *Id*. The Board also instructed the administrative law judge to address whether claimant met his burden

[1] Claimant filed his first claim on February 23, 2007. Director's Exhibit 1. It was finally denied by the district director on October 4, 2007, because claimant failed to establish that he was totally disabled by pneumoconiosis. *Id*. Claimant filed this claim on March 24, 2010. Director's Exhibit 3.

to establish all elements of entitlement under 20 C.F.R. Part 718, if he credited claimant with less than 15 years of qualifying coal mine employment. *Id*.

On remand, the administrative law judge credited claimant with at least 15 years in underground coal mine employment. The administrative law judge therefore found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge also found that the presumption was not rebutted. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established at least 15 years in underground coal mine employment and, thus, that claimant is entitled to invocation of the rebuttable presumption at amended Section 411(c)(4). Employer also contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption by disproving the existence of legal pneumoconiosis. Claimant has not filed a brief in response to this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter, declining to file a substantive brief in this appeal, but noting that the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis should be vacated and remanded for further consideration because it does not comply with the Administrative Procedure Act (APA),[2] if the Board does not affirm the administrative law judge's decision. The Director also notes that the administrative law judge may take official notice of documents regarding the credibility of Dr. Wheeler's x-ray readings, if the Board vacates the administrative law judge's award of benefits and remands the case for further consideration.

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.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[3] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibits 1, 5, 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

In 2010, Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, 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 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); 20 C.F.R. §718.305.

Initially, employer contends that the administrative law judge erred in finding that claimant has at least 15 years in underground coal mine employment. Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). 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 Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Smith v. National Mines Corp.*, 7 BLR 1-803 (1985); *Miller v. Director, OWCP*, 7 BLR 1-693 (1983); *Maggard v. Director, OWCP*, 6 BLR 1-285 (1983).

In this case, the administrative law judge noted the various coal companies that claimant's Social Security Administration (SSA) earnings records showed had employed claimant from 1973 to 2003. Decision and Order on Remand at 2-3. The administrative law judge also noted that "[c]laimant's proposed method for calculating the length of coal mine work is to compare his earnings (as demonstrated by the Social Security Records) with the yearly earnings standards."[4] *Id*. at 3. In calculating claimant's length of coal

[4] After considering the method that claimant proposed for calculating the length of his coal mine employment, the administrative law judge noted that employer proposed two methods for calculating the length of claimant's coal mine employment. The administrative law judge stated: "The first method involves dividing [c]laimant's yearly earnings with coal mine employers in each year by the daily average wage of a coal miner to arrive at the number of days in each year that the claimant worked in coal mining. Then I must divide by five to get the number of weeks worked, then divide by fifty to get the percentage of the year that was worked." Decision and Order on Remand at 4. The administrative law judge further stated: "Alternatively, I could divide the

mine employment, the administrative law judge compared "[claimant's] earnings (as demonstrated by the Social Security Records) with the yearly earnings standards," as reflected in "the table of Coal Mine Industry Average Earnings at DX 35." *Id*. at 3-4; *see* Director's Exhibit 35.

Employer asserts that "[the administrative law judge] erred by ignoring evidence relevant to claimant's coal mine employment history." Employer's Brief at 9. Specifically, employer argues that "[the administrative law judge] erred as a matter of law by mischaracterizing the claimant's testimony regarding his pay rates as shaded by uncertainty when the claimant actually provided unequivocal testimony regarding his pay rate with his most recent employers." *Id*. at 14. Employer therefore argues that the administrative law judge should have considered claimant's testimony in determining the length of his coal mine employment.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). In this case, the administrative law judge considered the credibility of claimant's testimony with regard to his coal mine employment in determining whether to adopt the methods proposed by employer for calculating the length of claimant's coal mine employment. The administrative law judge stated that "when [claimant] did specify his pay rate, he expressed uncertainty, stating, for example, that he made 'About seventeen dollars, something like that' in 1974." Decision and Order on Remand at 4. The administrative law judge additionally stated:

> Regarding [c]laimant's coal mine employment in 1982, I note that [c]laimant testified "I don't remember," when asked if the $847 in 1982 is what his employer gave him for vacation time when he was off work. *Id*. When asked whether it's possible that he injured himself in 1981 rather than 1982, the [claimant] testified that "It could have been, sir. I don't know, not for sure." *Id*. He further testified that *maybe* he was off work in 1981 to 1982 and that's why he had only $847 in earnings in 1982. *Id*.

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claimant's earnings in each year by wages that the claimant testified to earning for various employers or, in instances where the claimant could not recall his pay rate, by the 125 day average for coal miner's (sic) set forth by the [Department of Labor]." *Id*. The administrative law judge nevertheless determined that: "[c]ontrary to [e]mployer's argument, [e]mployer's method will not necessarily result in a much more accurate calculation of coal mine employment because [c]laimant testified that he could not remember what his pay rate was and did not testify regarding his pay rate at all for several of his years in coal mine employment." *Id*.

Id. at 4-5. Because the administrative law judge permissibly found that claimant had difficulty remembering what his pay rate had been for various coal companies, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), we reject employer's assertion that the administrative law judge erred by failing to consider claimant's testimony regarding his coal mine employment.[5] Employer also argues that the Social Security earnings records reflect no earnings in the first quarter of 1974, and that they also show earnings from self-employment in 1995.[6] These arguments have some merit. However, they would reduce the number of hours of coal mine employment by no more than seven months. They thus would not reduce the 15.8 years of coal mine employment calculated by the administrative law judge to below the 15 years required to qualify for the Section 411(c)(4) presumption.[7]

Employer also asserts that "[the administrative law judge] erred by improperly shifting the burden of proof to employer to establish that claimant did not work in the mines for 15 years." Employer's Brief at 9. Employer argues that "[the administrative law judge] provided claimant with the benefit of the doubt and defaulted to positions that favored the claimant where "[the administrative law judge] believed the evidence was uncertain." Employer's Brief at 15. Contrary to employer's assertion, the administrative law judge properly acknowledged that "[c]laimant bears the burden of establishing the length of coal mine employment." Decision and Order on Remand at 2; *see Shelesky*, 7 BLR at 1-36. Thus, we reject employer's assertion that the administrative law judge erred by improperly shifting the burden of proof to employer. As employer alleges no other specific error with regard to the administrative law judge's length of coal mine

[5] We note that the hourly rates, which employer asserts the administrative law judge improperly ignored here were provided by claimant in his answers to interrogatories and that in his deposition testimony, which confirmed that he had supplied those rates in answer to the interrogatories claimant stated [as to the answers to the interrogatories], "… I was just guessing, that was just guesswork…." Director's Exhibit 23 at 44.

[6] Employer argues that the earnings from self-employment would be three to four months. Employer's Brief at 11. The Social Security records showed no earnings from Hawley Coal Mining Corporation in the first quarter of 1974, but do show earnings from Consolidation Coal Company in that quarter: employer suggests claimant's testimony that the mine was on strike that quarter precludes counting it.

[7] Employer uses a figure of 15.55 years of coal mine employment, which was the qualifying period of coal mine employment found by the administrative law judge in his initial decision. However, the administrative law judge found 15.8 years in his decision on remand. Decision and Order on Remand at 5.

employment determination, and does not otherwise challenge the methodology utilized,[8] we affirm the administrative law judge's finding that claimant established at least 15 years in underground coal mine employment.

Next, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005 and was pending after March 23, 2010. 30 U.S.C. §921(c)(4). We also affirm the administrative law judge's unchallenged finding that, upon establishing fifteen years of coal mine employment, claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that no part of claimant's total disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d). The administrative law judge found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) by both methods.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Employer asserts that the administrative law judge erred in finding that it did not establish the absence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer argues that the administrative law judge erred in discounting the opinions of Drs. Fino and Castle. The administrative law judge reasonably found that Drs. Fino and Castle did not adequately explain why claimant's coal dust exposure did not at least aggravate his respiratory impairment.[9] *See Milburn*

[8] Consequently, we will not otherwise consider the correctness of the methodology employed and the determination he reached.

[9] In considering the opinions of Drs. Fino and Castle, the administrative law judge stated, "Even if cigarette smoking played a role in [c]laimant's impairment, I find that Drs. Fino and Castle failed to explain how they determined that coal mine dust exposure did not at least aggravate the impairment." Decision and Order on Remand at 9. Rather, the administrative law judge found that "their logic establishes a false dichotomy between cigarette smoking and coal mine dust exposure." *Id.* Specifically, the administrative law judge determined that, while Dr. Fino stated that claimant's coal mine dust exposure was a potential risk factor in developing emphysema and Dr. Castle stated that claimant had "a sufficient enough time" in underground mining to develop coal workers' pneumoconiosis if he were a susceptible host, "Yet, in rendering their diagnoses, these physicians failed to take into account [c]laimant's history of coal dust exposure." *Id.*

Colliery Co. v. Hicks, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we reject employer's assertion that the administrative law judge erred in discounting the opinions of Drs. Fino and Castle. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[10]

Finally, we will address the administrative law judge's finding that employer failed to carry its burden of proving that pneumoconiosis did not contribute to claimant's total disability. In considering the opinions of Drs. Castle and Fino, the administrative law judge noted that "Drs. Castle and Fino opined that [c]laimant does not suffer from legal pneumoconiosis, yet they both found that [c]laimant suffers from a totally disabling respiratory impairment." Decision and Order on Remand at 10. The administrative law judge permissibly discounted the disability causation opinions of Drs. Castle and Fino because the doctors opined that claimant does not suffer from legal pneumoconiosis, contrary to the administrative law judge's finding on this issue. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's total disability is not due to pneumoconiosis.

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[10] Because we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis, we need not address the contention of the Director, Office of Workers' Compensation Programs, that the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis did not comply with the Administrative Procedure Act. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge