U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 25-0155 BLA
and 25-0155 BLA-A

DONALD G. NELSON Claimant-Petitioner Cross-Respondent v. LOWLANDS COAL CORPORATION and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	**NOT-PUBLISHED** DATE ISSUED: 04/27/2026 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Wendle D. Cook (Cook and Cook, Attorneys at Law), Madison, West Virginia, for Claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer and its Carrier.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and Employer and its Carrier (Employer) cross-appeal, Administrative Law Judge (ALJ) Drew A. Swank's Decision and Order Denying Benefits on Remand (2023-BLA-05713) rendered on a claim filed on October 28, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Act).[1] This case is before the Benefits Review Board for a second time.[2]

In his initial Decision and Order Awarding Benefits, the ALJ found Claimant established 16.025 years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, 20 C.F.R. §718.204(b)(2), thus invoking the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4). He further found Employer did not rebut the presumption and awarded benefits.

Pursuant to Employer's appeal, the Board vacated those findings, as the ALJ did not explain how he determined Claimant had more than sixteen years of coal mine employment in years 1978 to 1982 and 1985 to 1995.[4] *Nelson v. Lowlands Coal Corp.*, BRB No. 24-0315 BLA, slip op. at 4 (Oct. 30, 2024) (unpub.). Consequently, the Board remanded the case for reconsideration of this issue.

---

[1] Claimant filed a prior claim, but he withdrew it. Director's Exhibits 1; 54. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306.

[2] Chief Administrative Appeals Judge Daniel T. Gresh and Administrative Appeals Judge Jonathan Rolfe are substituted on the panel for Administrative Appeals Judges Judith S. Boggs and Greg J. Buzzard, who are no longer with the Board. 20 C.F.R. §802.407(a).

[3] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305.

[4] The Board affirmed, as unchallenged, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *Nelson v. Lowlands Coal Corp.*, BRB No. 24-0315 BLA, slip op. at 2 n.3 (Oct. 30, 2024) (unpub.).

On remand, the ALJ found Claimant established 13.533 years of qualifying coal mine employment and therefore did not invoke the Section 411(c)(4) presumption. Addressing Claimant's entitlement under 20 C.F.R. Part 718, he found Claimant failed to establish the existence of either clinical or legal pneumoconiosis and, consequently, could not establish that his total disability was due to pneumoconiosis. Accordingly, the ALJ denied benefits.

On appeal, Claimant challenges the ALJ's findings that he established less than fifteen years of coal mine employment and did not establish pneumoconiosis or disability causation. Employer responds in support of the denial of benefits and, in a cross-appeal, argues the ALJ erred in weighing the opinions of Drs. Zaldivar and Basheda on the issue of legal pneumoconiosis. Claimant filed a reply reiterating his contentions. The Director, Office of Workers' Compensation Programs, did not file a response brief.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in "underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof[.]" 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden of establishing the number of years he worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The Board will uphold an ALJ's length of employment determination that is based on a reasonable method of calculation, supported by substantial evidence, and in accordance with law. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011) (ALJ "may apply any reasonable method of calculation"); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986) (same). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, recently held that a miner need only show he or she worked 125 days within a calendar year (or partial periods totaling one year) to establish a year of employment. *Hayes v. Director, OWCP*, F.4th , No. 24-11260, 2026 WL 936027, at *4 (11th Cir. Apr. 7, 2026); *see also Shepherd v. Incoal, Inc*., 915 F.3d 392, 402 (6th Cir. 2019) (if the formula

[5] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit because Claimant performed his last coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 11.

at 20 C.F.R. §725.101(a)(32)(iii) yields at least 125 working days, a miner can be credited with a year of coal mine employment regardless of the actual duration of employment for the year).

The ALJ observed Claimant alleged different periods of coal mine employment in his claim application, hearing testimony, and CM-911a employment history form. Consequently, he relied on Claimant's Social Security Administration Earnings Statements to calculate the length of coal mine employment. For the pre-1978 period, the ALJ credited Claimant with a full quarter of a year for each quarter in which Claimant earned at least $50 in coal mine employment. The ALJ thus found Claimant established 3.5 years of coal mine employment with Westmoreland Coal for 1974 through 1977. Decision and Order on Remand at 5.

For 1978 and later, because the Social Security Administration transitioned from reporting earnings quarterly to reporting them annually in 1978, the ALJ divided Claimant's annual earnings in coal mine employment by the product of 250 days multiplied by the industry's average daily earnings. The ALJ reasoned that a "coal miner whose earnings from coal mine employment equal 250 days of average daily earnings from coal mine employment will have worked for a full calendar year" because the "divisor of 250 days represents 52 weeks minus two weeks of vacation." Decision and Order on Remand at 6. Using this method, the ALJ found Claimant established 10.033 years of coal mine employment for years 1978 through 1983, and 1985 through 1997.[6] Adding this amount to Claimant's 3.5 years in 1974 through 1977, the ALJ concluded Claimant established 13.533 years of coal mine employment and could not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[7] *Id.*

Claimant contends the ALJ erred in calculating his post-1977 length of coal mine employment based on a 250 work-day calendar year. He argues the ALJ instead should have applied a 125-day divisor to his annual earnings in calculating his years of coal mine employment. We agree with Claimant's argument that the ALJ's length of coal mine employment calculation cannot be affirmed.

[6] Although the ALJ calculated 10.033 years of coal mine employment, his method of computation actually yields 10.043 years of coal mine employment for years 1978 through 1983, and 1985 through 1997.

[7] The ALJ found Claimant worked in one or more underground mines and in conditions substantially like underground mines for his entire coal mining career. Decision and Order on Remand at 6.

Subsequent to the filing of the briefs in this appeal, the Eleventh Circuit held that 20 C.F.R. §725.101(a)(32) requires only a showing that a miner worked at least 125 working days in coal mine employment during a calendar year, or partial periods totaling one year, to establish one year of coal mine employment for purposes of the Act. *Hayes*, 2026 WL 936027, at *4. Because the ALJ's calculation is not consistent with the standard now governing cases arising in the Eleventh Circuit, we vacate the ALJ's findings of 10.033 years of post-1977 coal mine employment and less than fifteen years of coal mine employment overall, as well as his finding that Claimant did not invoke the Section 411(c)(4) presumption. We remand the case for reconsideration of Claimant's length of coal mine employment under the 125-day standard. Because Claimant may invoke the presumption on remand, we decline to address, as premature, the parties' remaining arguments concerning the ALJ's weighing of the medical opinion evidence under Part 718, as those issues may be affected by the ALJ's findings on remand.

Remand Instructions

On remand, the ALJ must reconsider the length of Claimant's coal mine employment consistent with *Hayes*, 2026 WL 936027, at *4, and recalculate Claimant's post-1977 coal mine employment under 20 C.F.R. §725.101(a)(32). The ALJ must explain his findings and underlying rationale in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant establishes at least fifteen years of qualifying coal mine employment, he will have invoked the Section 411(c)(4) presumption, and the ALJ must consider whether Employer rebutted that presumption. 20 C.F.R. §718.305. If the ALJ finds Claimant established fewer than fifteen years of qualifying coal mine employment, he must reconsider whether Claimant established entitlement under Part 718 by a preponderance of the evidence. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Accordingly, the ALJ's Decision and Order Denying Benefits on Remand is vacated, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge