U.S. Department of Labor

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

BRB No. 24-0255 BLA

JESSIE L. DANIELS)
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Claimant-Respondent)
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v.)
)
VIRGINIA POCAHONTAS COMPANY)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 01/24/2025

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jodeen M. Hobbs, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Austin), Norton, Virginia, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Jodeen M. Hobbs's Decision and Order Awarding Benefits (2022-BLA-05631) rendered on a claim filed on March 10, 2021, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant timely filed his claim. She also found he established 15.17 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus she concluded Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant timely filed his claim and in making evidentiary rulings in her Decision and Order without notice to the parties. It also contends she erred in crediting Claimant with at least fifteen years of coal mine employment and therefore finding Claimant invoked the Section 411(c)(4) presumption.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief.

The Benefits Review 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.[3] 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 (1965).

Timeliness

Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.308(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut this presumption, Employer must show by a preponderance of the evidence that the claim was filed more than three years after a "medical determination of total disability due

[1] 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 impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.204(b)(2); Decision and Order at 14-17.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in Virginia and West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Tr. at 43.

to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668 (4th Cir. 2017).

Employer relied on Claimant's hearing testimony to support its assertion that he did not timely file his claim.

Claimant testified during the March 23, 2023 hearing that his breathing first started bothering him four or five years earlier. Hearing Tr. at 30-31. When asked on cross-examination if a doctor ever told him he is totally disabled "by black lung disease or coal workers' pneumoconiosis," Claimant replied Dr. Puruckherr had done so in 2017. *Id*. at 31. Specifically, Claimant testified Dr. Puruckherr put him "through these tests and this breathing machine" and he could not "come up to par." *Id*. According to Claimant, Dr. Puruckherr told him the "coal dust had really interfered with [his] breathing," and that was why he "ended up on the breathing machines." *Id.* at 31-32.

On re-direct, when asked what Dr. Puruckherr told him during his initial visit, Claimant answered:

> He put me through a test where they put you on this machine that you got to blow into real hard and all that stuff. And you've got to do all these exercises. And he told me that my breathing was bad, my lungs was bad and wanted to know if I worked in the coal mines. And I told him yes. I told him my history about all that. And he told me that I had black lung. He had worked with people in Germany that had it. And he wanted me to -- he put me – did he put me on oxygen – I can't remember about that one. (sic)

Hearing Tr. at 36. Claimant admitted he did not remember the exact words Dr. Puruckherr used, but he reiterated the doctor told him his "lungs [were] really infected – well not infected but bad." *Id.* at 37.

When the ALJ asked Claimant when he went to see Dr. Puruckherr, Claimant replied it was five, six, or seven years ago. Hearing Tr. at 37. But Claimant testified Dr. Puruckherr did not advise him to apply for disability. *Id.* at 38, 40. When asked if the doctor "ever [said] the word 'disabled' at all," Claimant responded, "He said my lung was bad (sic). I do know that," but did not "specifically recall [the doctor] using the word 'disabled.'" *Id*.

For the claim to be untimely, the ALJ noted the evidence must establish a medical determination of total disability due to pneumoconiosis was communicated to Claimant three years before the filing date of the claim, March 10, 2021. Decision and Order at 7-8. She permissibly found Claimant's testimony is contradictory because he stated "both that he was told that he was totally disabled by pneumoconiosis by a medical doctor and that he did not recall whether a doctor ever used the term 'disabled' when describing his

condition." Decision and Order at 7, *quoting* Hearing Tr. at 31, 40; *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983).

Further, because Claimant filed his claim on March 10, 2021, the ALJ noted Dr. Puruckherr would have had to inform Claimant that he was totally disabled due to pneumoconiosis on or earlier than March 10, 2018. Decision and Order at 7-8. However, the ALJ noted Claimant testified his breathing problems began four to five years before the March 23, 2023 hearing or, therefore, between 2018 and 2019. *Id*. The ALJ also noted Claimant testified that Dr. Puruckherr evaluated him in 2017 for his breathing. *Id*. Because Claimant provided contradictory dates as to when his breathing problems started, the ALJ permissibly found Claimant's testimony not credible because he was "unclear" with respect to the timeline of the communications he received from Dr. Puruckherr. *Id*.; *see Stallard*, 876 F.3d at 670; *Rowe*, 710 F.2d at 255.

Employer argues the ALJ erred in discrediting Claimant's testimony because it maintains he did not contradict himself and was clear on the date of the communications he received from Dr. Puruckherr. Employer's Brief at 8-14.

The ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony. *Stallard*, 876 F.3d at 670; *Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co.* [*Karst-Robbins Coal*], 12 BLR 1-149, 1-152 (1989) (en banc). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Employer's argument is a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the ALJ fully considered Claimant's testimony and adequately explained her finding, and because that finding is supported by substantial evidence, we affirm her conclusion that the evidence is insufficient to rebut the presumption that this claim was timely filed. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012); Decision and Order at 8.

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 "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years he 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). The Board will uphold an ALJ's determination based on a reasonable method of calculation

that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

Employer argues the ALJ failed to consider relevant evidence when finding that Claimant worked for 15.17 years in coal mine employment. Employer's Brief at 4-6. Its argument has merit.

The ALJ noted Claimant testified he worked for Allied Chemicals and Island Creek Coal Company from 1969 to 1984. Decision and Order at 10, *citing* Hearing Tr. 17-21. She found the "actual dates of employment throughout Claimant's coal mine career are not available" and thus applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[4] to calculate the length of his coal mine employment. *Id*. at 10-11. She divided Claimant's yearly earnings as reported in his Social Security Administration earnings records by the coal mine industry's average yearly earnings for 125 days of employment, as reported in Exhibit 610[5] of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*. Decision and Order at 10-11.

For each year in which Claimant's earnings met or exceeded the Exhibit 610 average yearly earnings for 125 days of employment, the ALJ credited Claimant with a full year of coal mine employment. Decision and Order at 10-11. For the years in which Claimant's earnings fell short, she credited him with a fractional year calculated by dividing his annual earnings by the Exhibit 610 average yearly earnings for 125 days of employment. *Id*. In applying this formula, the ALJ credited Claimant with 15.17 years of coal mine employment from 1969 to 1984. *Id*.

Although the ALJ found there is no evidence in the record setting out the specific dates of Claimant's employment, she erred by failing to address a letter from Employer

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[4] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the of the *Office of Workers' Compensation Programs Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

[5] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

reflecting actual dates of employment from 1977 to 1984 in Director's Exhibit 7. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253-54 (4th Cir. 2016); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984); 20 C.F.R. §725.101(a)(32)(ii) (dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony); Decision and Order at 7. Because the ALJ's consideration of this evidence may affect her ultimate length of coal mine employment finding, we vacate her determination that Claimant had 15.17 years of coal mine employment. Decision and Order at 11. Because we vacate the ALJ's finding that Claimant established at least fifteen years of coal mine employment, we must also vacate her finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits, and we remand the case for further consideration of these issues.

On remand, the ALJ must reconsider the length of Claimant's coal mine employment.[6] She must determine whether the evidence establishes the beginning and ending dates of Claimant's coal mine employment and may determine those dates and the length of his coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32); *Daniels Co. v. Mitchell,* 479 F.3d 321, 334-36 (4th Cir. 2007); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of Claimant's employment cannot be determined, she may apply the formula at 20 C.F.R. §725.101(a)(32)(iii). *Osborne*, 25 BLR at 1-204 n.12.

However, because this case arises within the jurisdiction of the Unites States Court of Appeals for the Fourth Circuit, the ALJ must consider whether Claimant established a calendar year of coal mine employment prior to applying the regulatory formula at 20 C.F.R. §725.101(a)(32)(iii).[7] The Board has long interpreted Fourth Circuit caselaw as supporting the position that the ALJ must first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial

[6] Claimant testified he worked for Allied Chemicals for eight years from 1969 to 1977 and for Island Creek Coal Company for seven or eight years from 1977 to 1984 or 1985. Hearing Tr. at 17-18. Claimant also referred to employment with Virginia Pocahontas and Beatrice Pocahontas during the same time he worked for Island Creek Coal Company. *Id*. at 27. Claimant's Social Security Administration earnings records reflect earnings with Virginia Pocahontas and Beatrice Pocahontas. Employer's letter reflects employment with Consol Energy from 1977 to 1984. Director's Exhibit 7.

[7] Indeed, in all circumstances, the ALJ must determine whether a calendar year of coal mine employment has been established before considering whether the miner has established 125 working days of coal mine employment.

periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Mitchell*, 479 F.3d at 334-35 (one-year employment relationship must be established, during which the miner had 125 working days); *Armco, Inc. v. Martin*, 277 F.3d 468, 474-75 (4th Cir. 2002); *Clark v. Barnwell Coal Co.*, 22 BLR 1-277, 1-280 (2003). If the threshold one-year period is met, the ALJ must then determine whether Claimant worked for at least 125 working days within that one-year period.[8] 20 C.F.R. §725.101(a)(32). Proof that a miner worked at least 125 days or that a miner's earnings exceeded the industry average for 125 days of work in a given year, however, does not satisfy the requirement that such employment occurred during a 365-day period and therefore, in itself, does not establish one full year of coal mine employment as defined in the regulations. *See Clark*, 22 BLR at 1-281.

In rendering her length of coal mine employment finding, the ALJ must consider all relevant evidence, make appropriate findings, and fully explain her findings in accordance with the Administrative Procedure Act (APA). *See Addison*, 831 F.3d at 256-57; *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

If Claimant invokes the Section 411(c)(4) presumption, the ALJ must then determine whether Employer is able to rebut it. 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption, the ALJ must consider whether Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

Evidentiary Issue

We also address Employer's evidentiary argument. An ALJ is granted broad discretion in resolving procedural and evidentiary issues. *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (en banc); *Karst-Robbins Coal*, 12 BLR at 1-153. A party seeking to overturn an ALJ's resolution of an evidentiary issue must show that the ALJ's action was an abuse of discretion. *See V.B.* [*Blake*] *v. Elm Grove Coal Co*., 24 BLR 1-109, 1-113 (2009).

The ALJ noted Employer designated interpretations of computed tomography (CT) scans dated October 4, 2019, and January 5, 2021, by Dr. Meyer and medical opinions from Dr. Basheda dated November 24, 2021, and September 6, 2022, as its affirmative evidence. Decision and Order at 3; Employer's Evidence Summary Form at 6-8; Director's

[8] If the threshold one-year period is met, "it must be presumed, in the absence of evidence to the contrary, that the miner spent 125 working days in such employment," in which case the miner would be entitled to credit for one full year of employment. 20 C.F.R. §725.101(a)(32)(ii).

Exhibit 22; Employer's Exhibits 1-3. She admitted this evidence at the hearing. Hearing Tr. at 12-13.

In her Decision and Order, the ALJ noted Dr. Basheda's September 6, 2022 medical report contained his independent assessment of the January 5, 2021 CT scan, along with his reading of a September 28, 2016 CT scan. Decision and Order at 3-4; Employer's Exhibit 3. Given that Employer had already designated its allowance of one interpretation of the January 5, 2021 CT scan and had not listed any interpretation of the September 28, 2016 CT scan on its evidence form, the ALJ excluded Dr. Basheda's report because it contained evidence that exceeded the evidentiary limitations or evidence Employer did not designate. Decision and Order at 3-4.

Employer does not allege that the ALJ erred in excluding this evidence. Rather, citing *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-55, 1-63 (2008) (en banc), Employer argues the ALJ violated its due process rights by failing to make her evidentiary rulings prior to issuing the Decision and Order and not giving it the opportunity to respond to her exclusion of the evidence. Employer's Brief at 7-8.

In *Preston*, the Board held, "consistent with principles of fairness and administrative efficiency," an ALJ "should render his or her evidentiary rulings before issuing the Decision and Order." 24 BLR at 1-63. The stated purpose of that guidance was to give the aggrieved party an opportunity to make a "good cause" argument for why the excess evidence should nevertheless be admitted into the record, or to "otherwise resolve issues regarding the application of the evidentiary limitations[.]" *Id*.

While the ALJ should have ruled on the evidentiary issue prior to issuing her opinion, Employer has failed to show that it was denied due process. Employer has not set forth what good cause argument it would have made, or how it was denied due process given the changed evidentiary record. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). Thus we decline to instruct the ALJ to further consider this evidentiary issue.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the ALJ for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge