U.S. Department of Labor

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

BRB No. 22-0164 BLA

DUDLEY E. BOWLING Claimant-Respondent v. ACE COLLIERY, INCORPORATED and EMPLOYERS INSURANCE OF WAUSAU, c/o LIBERTY MUTUAL INSURANCE GROUP Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 6/12/2023 DECISION and ORDER

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

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

Jason A. Mullins (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Larry S. Merck's Decision and Order Awarding Benefits in a Subsequent Claim (2019-BLA-05523) rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim[1] filed on May 3, 2017.

The ALJ credited Claimant with nineteen and three-quarter years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.[3] Claimant responds in support of the award. The Director, Office of Workers' Compensation Programs, has filed a response urging the Benefits Review Board to affirm the ALJ's length of coal mine employment finding.

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

[1] The ALJ noted Claimant filed three prior claims that were denied, but "those claim files have been destroyed under the record retention procedure since the claims are older than fifteen years." Decision and Order at 2.

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is 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) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established total disability. *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 21.

with applicable law.[4] 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, 362 (1965).

To invoke the Section 411(c)(4) presumption, Claimant must establish he worked at least fifteen years in underground coal mine employment 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. *See 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 if it is 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); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant's hearing testimony, paystubs, Social Security Administration (SSA) earnings records, employment history forms, and personnel records. Decision and Order at 4-6; Director's Exhibits 3, 4, 6, 8, 9. He found the SSA records do not reflect coal mine employment before 1970. Decision and Order at 4-5. But he noted Claimant testified he worked for Bentley & Derry Coal Company for two years from 1967 through 1968 when he was paid in cash. Decision and Order at 4-5; Hearing Tr. at 24, 42-43. He found this testimony credible and establishes two years of coal mine employment for these years. Decision and Order at 4-5.

With respect to the remaining years of Claimant's coal mine employment, the ALJ found his SSA earnings records are credible. Decision and Order at 4-5. For Claimant's pre-1978 coal mine employment (other than the years 1967 and 1968), the ALJ credited him with a quarter of a year of coal mine employment for each quarter in which his SSA records indicate he earned at least $50.00 from coal mine operators. Decision and Order at 5, *citing Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019) (ALJ may apply the *Tackett* method unless "the miner was not employed by a coal mining company for a full calendar quarter"); *Shrader v. Califano*, 608 F.2d 114, 117 n.3 (4th Cir. 1979) (income exceeding fifty dollars is "an appropriate yardstick for determining quarters which will be fully credited to a black lung claimant in determining the duration of his coal mine employment"). Using this method, the ALJ credited Claimant with six years of coal mine employment between the fourth quarter of 1970 and the end of 1977. *Id.*

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 6; Director's Exhibit 3; Hearing Tr. at 37.

In calculating Claimant's coal mine employment from 1978 to 1993, the ALJ declined to apply the method of calculation at 20 C.F.R. §725.101(a)(32)(iii).[5] Decision and Order at 5. Specifically, he was not persuaded that he should utilize the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Coal Mine Black Lung Benefits Act Procedure Manual*, because Claimant's paystubs demonstrate he earned "significantly less" than the average daily wage rate. Decision and Order at 5; *see* Director's Exhibit 6. Utilizing Claimant's paystubs, personnel records, and yearly earnings set forth in his SSA records, the ALJ determined the evidence establishes eleven and three-quarter years of coal mine employment for the years 1978 to 1993. Decision and Order at 5. He thus found Claimant established a total of nineteen and three-quarter years of coal mine employment. *Id*. at 6.

Employer argues the ALJ erred in crediting Claimant's hearing testimony with respect to his work for Bentley & Derry Coal in the years 1967 through 1968 because Claimant self-reported he had a poor memory as to the details of his earliest employment. Employer's Brief at 9 (unpaginated). We are not persuaded. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). 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). The ALJ recognized Claimant indicated he had "some lack of memory regarding the details of this earliest coal mine employment," but the ALJ acted within his discretion in finding Claimant's testimony credible and sufficient to establish two years of coal mine employment in 1967 through 1968. Decision and Order at 4; *see Rowe*, 710 F.2d at 255; *Stallard*, 876 F.3d at 670; *Clark*, 12 BLR at 1-155; *Tackett*, 12 BLR at 1-14. Moreover, any alleged error would be harmless because, as discussed below, Claimant established at least fifteen years of coal mine employment even if the ALJ had not credited him with two years of employment in 1967 and 1968. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[5] The regulation provides that if the beginning and ending dates of a miner's employment cannot be ascertained, or the miner's employment lasted less than a calendar year, the ALJ "may" determine the length of the miner's work history by dividing his yearly income by the average daily earnings of employees in the coal mining industry, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine Black Lung Benefits Act Procedure Manual.*

Employer also argues the ALJ should have applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to calculate the length of Claimant's employment from 1970 to 1993. Employer's Brief at 8-12 (unpaginated). It contends that, had the ALJ done so, Claimant would have only 12.31 years of coal mine employment for the years 1970 to 1993. We again are unpersuaded.

Use of the formula at 20 C.F.R. §725.101(a)(32)(iii) is discretionary, particularly in circumstances such as in this case where there is evidence of Claimant's actual wages. *See* 20 C.F.R. §725.101(a)(32)(ii) (the 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); *Shepherd*, 915 F.3d at 400-02; *Muncy*, 25 BLR at 1-27. Employer has not demonstrated why it was unreasonable for the ALJ to decline to use the formula at 20 C.F.R. §725.101(a)(32)(iii). *Rowe*, 710 F.2d at 255.

Even if the ALJ had used the formula at 20 C.F.R. §725.101(a)(32)(iii), however, Claimant still would have established at least fifteen years of coal mine employment. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a miner is entitled to credit for a full year of coal mine employment if he establishes 125 working days in a calendar year, "regardless of how long the miner actually was employed by the mining company in any one calendar year or partial periods totaling one year." *Shepherd*, 915 F.3d at 401-02. The court in *Shepherd* expressly instructed the ALJ to "give effect to all provisions and options set forth in 20 C.F.R. §725.101(a)(32)," including 20 C.F.R. §725.101(a)(32)(i) which states that 125 working days comprises a year of coal mine employment for all purposes under the Act. *Id.* at 407.

Employer concedes that, had the ALJ used the formula at 20 C.F.R. §725.101(a)(32)(iii), Claimant's SSA records would establish he had at least 125 working days in the following fifteen calendar years: 1974-1975, 1977-1983, 1985, 1988-1991, 1993. Employer's Brief at 10-11 (unpaginated). Thus, by Employer's own calculations, Claimant would have established at least fifteen years of coal mine employment based on his coal mine employment in these years alone. Claimant also would receive additional credit for partial years in which he had less than 125 working days. Thus, Employer has not explained how the errors it alleges would make a difference. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009).

We thus affirm the ALJ's finding that Claimant established at least fifteen years of coal mine employment. Decision and Order at 6. Further, Employer does not challenge the ALJ's finding that all of Claimant's coal mine employment took place in underground mines; thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 7. As Claimant established at least fifteen years of underground coal mine employment and total disability, we affirm the ALJ's determination that

Claimant invoked the Section 411(c)(4) presumption. Decision and Order at 7; *see* 20 C.F.R. §718.305. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, *see Skrack*, 6 BLR at 1-711, we affirm the award of benefits. Decision and Order at 28-30.

Accordingly, the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge