U.S. Department of Labor

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

BRB No. 20-0543 BLA

TOM S. CLAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
IMPERIAL COLLIERY COMPANY	)	DATE ISSUED: 11/23/2021
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Natalie A. Appetta, Administrative Law Judge, United States Department of Labor.

Samuel B. Petsonk, Beckley, West Virginia, for Claimant.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for Employer.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Natalie A. Appetta's Decision and Order Awarding Benefits (2018-BLA-05953) rendered on a subsequent claim filed on August 12, 2016,[1] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

Initially, the ALJ found Employer is the properly designated responsible operator. She further found Claimant totally disabled due to pneumoconiosis, and awarded benefits.[2] 20 C.F.R. §§718.202(a)(1), (4), 718.203, 718.204(b)(2), (c).

On appeal, Employer challenges its designation as the responsible operator.[3] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the ALJ's findings. Employer has filed a reply brief reiterating its arguments.

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.[4] 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).

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the coal mine operator must have employed the miner for a cumulative period of not less than

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[1] On June 16, 1999, the district director denied Claimant's prior claim, filed on March 1, 1999, for failure to establish any element of entitlement. Director's Exhibit 1; *see* Decision and Order at 3 n.4.

[2] The ALJ found Claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act or the rebuttable presumption at Section 411(c)(4). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

[3] We affirm, as unchallenged on appeal, the ALJ's determination that Claimant is entitled to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27.

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant last performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 10-11.

one year.[5] 20 C.F.R. §725.494(c). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

In determining whether Employer is the responsible operator, the ALJ considered the testimony of Claimant and his son, Claimant's CM-911a Employment History Forms from his current and past claims, Director's Exhibits 1, 4, his May 25, 2017 response to the Schedule for Submission of Additional Evidence (SSAE), Director's Exhibit 34, a November 6, 2017 "Verified Statement of Tom S. Clay", Claimant's Exhibit 3, and Claimant's Social Security Administration (SSA) earnings record. Director's Exhibits 6, 7. The ALJ noted Claimant testified he could not remember the dates of his employment following a stroke, and found the most reliable evidence of his employment was his SSA earnings record and CM-911a Form from his prior claim, created "closer in time to when he worked in mining and when his memory of it would be fresher." Decision and Order at 10. Based on this evidence, the ALJ determined Claimant worked as a coal miner for Employer for ten years, from January 6, 1969 to December 18, 1979. *Id.* She further determined there was insufficient evidence to establish he worked for a subsequent employer as a miner for at least one year. *Id.* at 11.

Employer contends the ALJ erred in finding Dino Contractors, Incorporated, did not employ Claimant as a coal miner for at least a year. Employer's Brief at 19-21. It further argues the ALJ erred in finding the evidence insufficient to establish Claimant was employed as a coal miner for at least one cumulative year by Meredith Lumber Company and also during his self-employment as a truck driver. *Id.* at 11-18. Finally, Employer contends the ALJ erred in not considering whether Claimant's work for Groundworks

[5] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

Reclamation Company and TCT, Incorporated, constituted coal mine employment. *Id*. at 6-10.

Dino Contractors, Incorporated (Dino Contractors)

Claimant testified that he worked for Dino Contractors as a coal truck driver at a strip mine subsequent to working for Employer. Hearing Transcript at 28, 32. In his prior claim, Claimant indicated on his CM-911a form that he worked for Dino Contractors in 1980. Director's Exhibit 1. However, in his current claim he indicated on his CM-911a form and in his response to the SSAE that he worked there from 1980 to 1981. Director's Exhibits 4, 34. At the hearing, although Claimant initially testified he could not remember how long he worked for Dino Contractors, he later agreed with Employer's counsel that he worked there for two years. Hearing Transcript at 28, 35, 40.

Because she found Claimant's SSA earnings record and his 1999 CM-911a Form the most reliable evidence of record, and thus more credible than Claimant's testimony, the ALJ determined Dino Contractors employed Claimant as a coal miner for only thirty-three days in 1980.[6] Decision and Order at 10-11. She therefore determined Employer failed to establish that Dino Contractors employed Claimant as a miner for at least one year. 20 C.F.R. §725.495(c).

Employer argues the ALJ erred in crediting the evidence that Claimant worked for Dino Contractors for less than a year, and contends Claimant's testimony and his May 25, 2017 response to the SSAE establish two years of coal mine employment. Employer's Brief at 19-21. The Director contends the ALJ's findings are rational and supported by substantial evidence. Director's Response Brief at 6-9. We agree with the Director.

An ALJ is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-170 (1984). The ALJ accurately noted Claimant repeatedly testified that his memory suffered following a stroke, and found he "was lead through this particular testimony by counsel." Decision and Order at 10; Hearing Transcript at 26, 46. The ALJ further accurately noted Claimant testified that he did not remember completing the May 25, 2017 response to the SSAE, and his SSA earnings records reflect income from Dino Contractors for only 1980. *Id.* at 10; Hearing

[6] The record contains no evidence identifying when Claimant's work for Dino Contractors began or ended. Director's Exhibit 1, 7. Accordingly, the ALJ calculated Claimant's length of employment at Dino Contracting by dividing his total earnings in 1980 by the average daily wage for coal mine employment in the same year. 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 10-11.

Transcript at 28; Director's Exhibit 34. The ALJ therefore permissibly accorded Claimant's testimony "little weight," because of his faulty memory. *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Mabe*, 9 BLR at 1-68; Decision and Order at 8. She further permissibly accorded greater weight to Claimant's SSA earnings record and his 1999 CM-911a Form, prepared before he suffered his stroke and "closer in time to when he worked in mining and when his memory of it would be fresher." Decision and Order at 10; *see Stallard*, 876 F.3d at 670; *Clark*, 12 BLR at 1-155; *Mabe*, 9 BLR at 1-68. Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to establish Dino Contractors employed Claimant as a miner for at least one year. 20 C.F.R. §725.495(c); Decision and Order at 11.

Self-Employment

Claimant's SSA earnings records indicate he was self-employed from 1980 to 1983, 1986 to 2002, and in 2009. Director's Exhibit 7. Claimant did not list his self-employment as coal mine employment on any of his employment history forms or lists of employment. Director's Exhibits 1, 4, 34; Claimant's Exhibit 3. However at the hearing, he and his son testified that he drove trucks and hauled various products, including sand, gravel, rails for railroads, and coal. Hearing Transcript at 43-44, 73. Claimant initially stated he did not know how much time he hauled coal but then agreed he did so for "several years." *Id*. at 43. He subsequently testified, however, that he "couldn't say" whether he hauled coal while self-employed. *Id*. at 45.

The ALJ noted Claimant could not recall the specifics of his truck driving work, and did not list any self-employment in his 1999 claim. Decision and Order at 11. She concluded that "although this work may have included some coal mine employment, the details about it are too general and sparse to make a finding that Claimant's self-employment constitutes coal mine employment." *Id*. The ALJ thus found Employer failed to establish Claimant worked as a coal miner for at least one year during his self-employment as a trucker. *Id*.

Employer contends that, because Claimant testified he hauled coal for several years and was self-employed for twenty-two years, he must have at least one cumulative year of coal mine employment. Employers' Brief at 15-18. The Director responds that the ALJ's findings are rational and supported by substantial evidence. Director's Response Brief at 9-11. We agree with the Director.

Employer must establish that another operator more recently employed Claimant as a miner for at least one year. 20 C.F.R. §725.495(c). A "miner" is "any individual who

works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The term includes individuals who worked "in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment." *Id*. The definition of a "miner" thus includes a "situs" requirement (i.e., that he worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that he worked in the extraction or preparation of coal, or in coal mine construction or transportation). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989).

As the Director notes, while there is evidence Claimant sometimes hauled coal, there is no evidence of whether Claimant hauled processed or unprocessed coal, what locations he hauled coal from or to, or for what years or portions of a year Claimant allegedly did this work. Director's Brief at 14-15, *citing Collins v. Director, OWCP*, 795 F.2d 368, 371-72 (4th Cir. 1986) and *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991). Consequently, the ALJ rationally found Claimant's testimony, that he could not recall the specifics of this employment and which was also inconsistent with his not reporting it as coal mine employment on his earlier employment history lists when his memory was "more reliable," was insufficient to establish that he worked as a coal miner for at least one year while self-employed. *See Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 69-71 (4th Cir. 1981); *Stallard*, 876 F.3d at 670; *Mabe*, 9 BLR at 1-68; Decision and Order at 11. Because it is supported by substantial evidence, we affirm the ALJ's determination that Employer failed to establish Claimant was self-employed as a coal miner for at least one year. 20 C.F.R. §725.495(c); Decision and Order at 11.

Meredith Lumber Company (Meredith Lumber)

Claimant's SSA earnings record reflects employment with Meredith Lumber from 1983 to 1986. Director's Exhibit 7. Claimant did not list this employment as coal mine employment. Director's Exhibits 1, 5, 34; Claimant's Exhibit 3. Claimant testified that he worked as a mechanic and welder for Meredith Lumber, however, which was a company that clear cut for strip mines. Hearing Transcript at 36-37. He had to go to the mine sites to repair the company's equipment, but could not remember how often he did so; he also worked in the shop at the mine site and at a lumber mill which was not at a mine site. *Id*. at 38, 75. Claimant's son testified that, while Claimant sometimes went to mine sites, not all of his father's work involved the coal mining industry, and he could not apportion the time spent doing other work. *Id*. at 78-79. The ALJ found Claimant's employment with Meredith Lumber did not constitute coal mine employment because he did not list work

with the company as coal mine employment on either of his CM-911a Forms and his son's testimony indicates "not all of the work involved coal." Decision and Order at 11.

Employer contends Claimant's work at Meredith Lumber qualifies as coal mine employment because it satisfied the situs and function requirements, as the work included repairing equipment and trucks at operational coal mine sites and was thus an integral and necessary part of the mining process. Employer's Brief at 6-10, 14. The Director asserts the ALJ erred in finding none of Claimant's work for Meredith Lumber qualifies as coal mine employment. Director's Response Brief at 11. He concedes that "at least some portion of Claimant's work for Meredith Lumber took place at coal mine sites," and that such work could have constituted coal mine employment. *Id*. But he further maintains the record does not contain evidence that could establish what portion of Claimant's work for Meredith Lumber took place at coal mine sites. *Id*. Consequently, he asserts Employer cannot establish that Meredith Lumber employed Claimant as a miner for at least one year, and thus the ALJ's error is harmless. *Id*. We agree with the Director.

To establish Meredith Lumber is the responsible operator, Employer must demonstrate it employed Claimant as a coal miner for a cumulative period of not less than one year. 20 C.F.R. §725.494(c). Here, there is no evidence indicating what portion of Claimant's work for Meredith Lumber may have constituted coal mine employment. Claimant testified he "might have worked on the trucks" at the mine sites and he "went down in their shops and worked" whenever something broke down, and his son clarified that while Claimant visited mine sites to repair Meredith Lumber's equipment, he also worked in the lumber mill that was not at a mine site, and timbering on public hunting areas and at creeks unrelated to coal mining. Hearing Transcript at 37-38, 76-80. Neither Claimant nor his son were able to estimate the amount of time Claimant spent at the sites. *Id*. Consequently, Employer cannot establish Meredith Lumber employed Claimant as a coal miner for at least one year. 20 C.F.R. §725.494(c). Any error in the ALJ's determination that none of Claimant's work for Meredith Lumber was coal mine employment is therefore harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Groundworks Reclamation Company (Groundworks Reclamation)

Although it does not appear on his SSA earnings records or on any of his self-reported lists of employers, Claimant testified at the hearing that he operated a dozer for Groundworks Reclamation. Hearing Transcript at 96; Director's Exhibits 1, 5, 7, 34; Claimant's Exhibit 3. Although the ALJ did not specifically address whether this constituted coal mine employment, she discredited Claimant's testimony, "agreeing to the dates and years of work [as set] forth by counsel," Decision and Order at 8, which was the only evidence in the record of the length of time he may have worked there.

Employer argues the ALJ's failure to determine whether Claimant's work with Groundworks Reclamation constituted coal mine employment requires remand. Employer's Brief at 6-9. The Director responds that any error in the ALJ's determination is harmless because there is no credited evidence of the length of time the company employed Claimant. Director's Response at 16-17. We agree with the Director.

While Employer asserts Claimant worked for the company from 2003 to 2006, Claimant did not testify to this. Employer's Brief at 6-9; Hearing Transcript at 96-97. Rather, Employer's counsel stated, "Mr. Clay, there was a company that you were the secretary of from 2003 to 2006 called Groundworks Reclamation Company. Do you recall working for that company or being an officer in that company?" Hearing Transcript at 96. Claimant responded, "Groundworks, yeah." *Id*. Thus, Claimant's testimony reflects that he simply recalled working for Groundworks Reclamation, not that he was agreeing that he worked there between 2003 and 2006. But even if Claimant's testimony could be read as agreeing to the years that Employer asserts he worked for Groundworks Reclamation, the ALJ permissibly found Claimant's "testimony agreeing to the dates and years of work [as set] forth by counsel was not especially credible, in light of his testimony that he no longer remembers dates, following a stroke," and reasonably gave "little weight" to Claimant's testimony about the years he worked in coal mine employment. Decision and Order at 8; *see Lafferty*, 12 BLR at 1-192; *Clark*, 12 BLR at 1-155; *Mabe*, 9 BLR at 1-68. Further, there is no other evidence of Claimant's employment with this company. Claimant's SSA records do not show any earnings from Groundworks Reclamation, and his CM-911a employment history forms, his response to the SSAE, and his November 6, 2017 list of employers do not reference the company. *See* Director's Exhibits 1, 4, 7, 34; Claimant's Exhibit 3. Employer also does not identify how it obtained the alleged dates of Claimant's employment for Groundworks Reclamation. Hearing Transcript at 96-97.

Because there is no credited evidence of how long Claimant worked for Groundworks Reclamation, Employer cannot establish the company employed him for at least one year, even if it did involve coal mine work. 20 C.F.R. §725.494(c); Director's Response Brief at 16, *citing Berkely Cnty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 241 n.15 ("[T]he statements of a lawyer are not evidence."). Consequently, any error in the ALJ's failure to determine whether Claimant's work for Groundworks Reclamation constituted coal mine employment is harmless. *See Larioni*, 6 BLR at 1-1278.

TCT, Incorporated (TCT)

Employer next argues the ALJ erred in failing to determine whether Claimant's work for TCT constituted coal mine employment. Employer's Brief at 9-10. Claimant testified that he drove trucks for the company, hauling coal, lumber, and rails. Hearing Transcript at 88, 94-98. While the ALJ again did not specifically consider whether this

work constituted coal mine employment, Employer's argument that TCT is the responsible operator fails because, like Claimant's work for Groundworks Exclamation, there is no evidence of how long he worked for TCT.

As the Director argues, "[a]lthough Claimant testified that he performed work for TCT, he never stated when he allegedly did so or for how long." Director's Brief at 16. While Employer asserted at the hearing that Claimant was the President of TCT from 2003 to 2008, neither Claimant nor his son confirmed this timeline and Employer presented no evidence to establish this fact. Hearing Transcript at 97-98. Moreover, while Claimant testified that he hauled a "number of different commodities for that company . . . over the public roadways," including "[a] little bit of coal, lumber, rails," he did not testify as to how long he worked at the company, how often he drove coal, if it was processed or unprocessed, or where he transported the coal to and from. *Id*. As such, Employer cannot establish that TCT employed Claimant as a coal miner for a cumulative year. 20 C.F.R. §725.494(c). Consequently, any error in the ALJ's failure to determine whether Claimant's work for TCT constituted coal mine employment is harmless. *See Larioni*, 6 BLR at 1-1278.

In light of the above, we affirm the ALJ's determination that Employer failed to establish that a subsequent operator more recently employed Claimant as a miner for at least one year. 20 C.F.R. §725.495(c).

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge