U.S. Department of Labor

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

BRB No. 22-0464 BLA

THOMAS WILLIAM VANCE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED, c/o HEALTHSMART CCS	)	DATE ISSUED: 11/20/2023
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for Employer and its Carrier.

Sarah M. Karchunas (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 JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Awarding Benefits (2018-BLA-06091) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on November 28, 2016.[1]

The ALJ found Claimant established 15.31 years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] and established a change in an applicable condition of entitlement.[3] 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §§718.305, 725.309. Further, he found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer asserts the ALJ erred in determining Claimant's length of coal mine employment and thus improperly invoked the Section 411(c)(4) presumption. It specifically argues the ALJ was bound by ALJ Mosser's length of coal mine employment

[1] Claimant filed his initial claim on August 5, 2008. Director's Exhibit 1 at 2-12. ALJ Donald W. Mosser denied it on March 16, 2010. *Id*. He found Claimant established total disability, 20 C.F.R. §718.204(b)(2), but did not establish pneumoconiosis or total disability due to pneumoconiosis. 20 C.F.R. §§718.202, 718.204(c).

[2] Section 411(c)(4) of the Act 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) (2018); 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish pneumoconiosis or total disability due to pneumoconiosis in the prior claim, he had to submit new evidence establishing one of these elements to obtain review of his claim on the merits. *Id*.

finding from Claimant's prior claim. Further, it argues the ALJ did not adequately explain his own length of coal mine employment finding. On the merits of entitlement, it contends the ALJ erred in finding it did not rebut the presumption. It also challenges the ALJ's commencement date for benefits finding.[4] Claimant has not filed a response. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the ALJ was not bound by ALJ Mosser's length of coal mine employment finding, but he agrees with Employer that the ALJ incorrectly determined the commencement date for benefits.

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.[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 (1965).

Invocation of the Section 411(c)(4) Presumption – Length 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 "substantially similar" surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i).

We first reject Employer's argument that the ALJ was bound by ALJ Mosser's finding of fourteen years of coal mine employment in Claimant's prior claim based on the law of the case doctrine. Employer's Brief at 7-9. The regulation at 20 C.F.R. §725.309(c)(5) states that if Claimant "demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (*see* [20 C.F.R. §725.463]), will be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(c)(5). Further, the law of the case doctrine applies to findings made in the same case, and a subsequent claim constitutes a new case. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988); *E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d

[4] 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 14.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Claimant's Exhibit 6 at 6.

502, 510, 513 (4th Cir. 2015); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362 (4th Cir. 1996); Director's Brief at 4-5.

We next address Employer's argument that the ALJ did not adequately explain his length of coal mine employment finding.[6] 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 on length of coal mine employment if it is based on a reasonable method of calculation that is supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

To credit a miner with a year of coal mine employment, the ALJ must first determine whether that miner was engaged in coal mine employment for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i); *see Daniels Co. v. Mitchell*, 479 F.3d 321, 334-36 (4th Cir. 2007); *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 the miner worked for at least 125 working days within that one-year period. 20 C.F.R. §725.101(a)(32). Where a miner establishes he was engaged in coal mine employment for a period of one calendar year or partial periods totaling one year, "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).

In calculating the length of Claimant's coal mine employment, the ALJ considered his deposition testimony, Social Security Administration (SSA) earnings records, employment history forms, and employment verification forms. Decision and Order at 4-8; Claimant's Exhibit 6; Director's Exhibits 4-10. He found Claimant's SSA earnings records are the most probative. Decision and Order at 5. Specifically, he concluded the evidence establishes Claimant "began working in the coal mining industry in 1969 and continued through 1972, started again in 1975 and continued through 1986, and began again in 1992 and stopped by the end of that year." *Id*. at 5-6. Having found that Claimant established a calendar year relationship with coal mine operators in those years, the ALJ then evaluated whether the evidence rebuts the presumption that Claimant had 125 working days in each year. *Id*. at 5-8.

[6] We affirm, as unchallenged, the ALJ's finding that all of Claimant's coal mine employment was performed in underground coal mines. *See Skrack*, 6 BLR at 1-711; Decision and Order at 8-9.

The ALJ noted that for Claimant's pre-1978 coal mine employment, he may credit Claimant with a quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 from coal mine operators. Decision and Order at 6. However, he only applied this method for the years 1969 to 1972. Decision and Order at 4-8. Because Claimant earned at least $50.00 in thirteen quarters from 1969 to 1972, the ALJ credited him with 3.25 years[7] of coal mine employment for those years.[8] *Id*.

Still relying on Claimant's SSA earnings records, the ALJ concluded he could not determine the beginning and ending dates of Claimant's coal mine employment for years 1975 to 1986, and 1992. Decision and Order at 6-9. Therefore, for those years, he applied the formula at 20 C.F.R. §725.101(a)(32)(iii)[9] to determine Claimant's number of working

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[7] The ALJ explained his calculation as follows:

> According to the Claimant's [SSA earnings records], Claimant earned more than fifty dollars in two non-overlapping quarters with Meadows Coal [] in 1969. Therefore, I credit [him] with 0.50 years of coal mine employment in 1969. In 1970, [he] earned more than fifty dollars in three non-overlapping quarters, including in the first quarter with Meadows Coal [], the second quarter with Truel W. Brown and H C Bostic Coal Company, and the third quarter with Meadows Coal [], Runyon & Ward Coal [], and the Pittston Company. Consequently, I credit [] Claimant with an additional 0.75 years of coal mine employment in 1970. Further, in 1971 and 1972, [] Claimant earned more than fifty dollars in all four non-overlapping quarters each year during his work for Meadows Coal [], Runyon & Ward, Truel W. Brown, Jewell Ridge, Beatrice Pocahontas, and Virginia Pocahontas. Thus, I credit him with 2.0 years of coal mine employment for his work in 1971 and 1972. Therefore, absent any evidence to the contrary, I find [] Claimant worked as a coal miner for a total of 3.25 years from 1969 through 1972.

Decision and Order at 6, *citing* Director's Exhibit 9.

[8] Employer argues the ALJ erred in crediting Claimant with a full year of coal mine employment in 1969. Employer's Brief at 9-11. As the ALJ actually found Claimant established one-half year of coal mine employment in 1969, we reject this argument. Decision and Order at 6.

[9] 20 C.F.R. §725.101(a)(32)(iii) provides that, if the beginning and ending dates of a miner's coal mine employment cannot be ascertained or the miner's coal mine employment lasted less than a calendar year, the ALJ may determine the length of the

days in each calendar year. *Id.* He divided Claimant's yearly earnings as reported in his SSA earnings records by the coal mine industry's average daily earnings, as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual. Id.* If Claimant's earnings reflected 125 or more working days in a given year, the ALJ credited him with one year of coal mine employment. *Id.* If Claimant had less than 125 working days, the ALJ credited him with a fractional year based on the ratio of the actual number of days worked to 125. *Id.* Based on this method, he found Claimant had 2.6571 years from 1975 to 1977 and 9.4009 years from 1978 to 1986 and in 1992, for a total of 15.31 years of qualifying coal mine employment. *Id.*

Employer argues the ALJ erred as he changed his method of calculation for the years 1969 to 1972 and then for the years 1975 to 1977 without explanation.[10] Employer's Brief at 11-19. We agree. Although the ALJ indicated that for Claimant's pre-1978 coal mine employment, he may credit Claimant with a quarter of a year of coal mine employment for each quarter in which his SSA earnings records indicate he earned at least $50.00 from coal mine operators, he did not explain why he applied this method only for the years 1969 to 1972, but then chose not to apply this method for the years 1975 to 1977. Decision and Order at 4-9. Although he indicated he could not ascertain the beginning and ending dates of Claimant's coal mine employment for the years 1975 to 1977, thus utilizing the formula at 20 C.F.R. §725.101(a)(32)(iii), he did not explain how he was able to ascertain the beginning and ending dates of Claimant's coal mine employment for the years 1969 to 1972. *Id.* Thus the ALJ's length of coal mine employment finding does not satisfy explanatory requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[11] *See Wojtowicz v.*

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miner's work history by dividing the miner's yearly income from work as a miner by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual.* Exhibit 610, titled *Average Earnings of Employees in Coal Mining*, sets forth the average "daily earnings" of miners and the "yearly earnings (125 days)" by year for employees in coal mining, as reported by the BLS.

[10] We affirm as unchallenged the ALJ's calculations of 9.4009 years from 1978 to 1986 and in 1992. *Skrack*, 6 BLR at 1-711; Employer's Brief at 118-19.

[11] The Administrative Procedure Act (APA) provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Duquesne Light Co., 12 BLR 1-162, 1-165 (1989). We therefore vacate the ALJ's finding that Claimant established 15.31 years of coal mine employment. Consequently, we must vacate his finding that Claimant invoked the Section 411(c)(4) presumption and the award of benefits.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment taking into consideration the relevant evidence and using any reasonable method of calculation.[12] *See Muncy*, 25 BLR at 1-27; *Kephart*, 8 BLR at 1-186. He must explain his findings as the APA requires. *Wojtowicz*, 12 BLR at 1-165. If the ALJ finds Claimant established fifteen or more years of coal mine employment, thereby invoking the Section 411(c)(4) presumption, he must then determine whether Employer has rebutted the presumption.[13] 20 C.F.R. §718.305(d)(1); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-150 (2015). If Claimant is unable to establish at least fifteen years of coal mine employment, 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).

[12] We also agree that the ALJ has not adequately explained his cigarette smoking history finding. Employer's Brief at 6-7. The ALJ summarized relevant evidence and summarily found "Claimant likely smoked one package of cigarettes per day for approximately twenty years." Decision and Order at 3. The ALJ did not explain this finding as the APA requires. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). On remand, he must reconsider Claimant's cigarette smoking history, render a finding, and explain his basis for doing so. *Id.*

[13] We decline to address, as premature, Employer's arguments that the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption, as well as its and the Director's arguments concerning the commencement date for benefits. Employer's Brief at 22-31, 34-48; Director's Brief at 6-10.

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