U.S. Department of Labor

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

BRB Nos. 24-0369 BLA
and 24-0369 BLA-A

JERRY A. DAVIS)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
ISLAND CREEK COAL COMPANY)
)
Employer-Respondent)
Cross-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)

NOT-PUBLISHED

DATE ISSUED: 09/11/2025

DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Denying Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Jerry A. Davis, North Tazewell, Virginia.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Victoria Yee (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without representation,[1] and Employer cross-appeals Administrative Law Judge (ALJ) Francine L. Applewhite's Decision and Order Denying Benefits (2022-BLA-05285) rendered on a subsequent claim filed on December 6, 2021,[2] pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant had at least fifteen years of coal mine employment and established a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Further finding all of Claimant's coal mine employment occurred underground and is therefore "qualifying" for purposes of invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[3] 30 U.S.C. §921(c)(4) (2018), she found Claimant invoked the Section 411(c)(4) presumption and established a change in an applicable condition of entitlement.[4] *See* 20 C.F.R. §§718.305, 725.309. However, she found the evidence did not support the presence of pneumoconiosis and denied benefits. 20 C.F.R. §718.305.

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[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the ALJ's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keene Trucking Co*., 19 BLR 1-88 (1995) (Order).

[2] This is Claimant's second claim for benefits. Director's Exhibit 1. The district director denied Claimant's prior claim for failure to establish any element of entitlement. *Id.* at 20-21.

[3] 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); *see* 20 C.F.R. §718.305.

[4] 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 she 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); *see 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 the district director denied Claimant's prior claim for failure to establish any element of entitlement, Claimant needed to submit new evidence establishing any element of entitlement to obtain review of the Miner's subsequent claim on the merits. *White*, 23 BLR at 1-3; Director's Exhibit 1.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial of benefits. On cross-appeal, it argues the ALJ erred in finding Claimant established at least fifteen years of coal mine employment and therefore invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.305. Employer additionally challenges the ALJ's calculation of Claimant's smoking history.[5] The Acting Director, Office of Workers' Compensation Programs (the Director), responds to Claimant's appeal and Employer's cross-appeal, urging the Board to vacate the ALJ's findings at rebuttal, but to affirm her findings that Claimant had at least fifteen years of coal mine employment and invoked the Section 411(c)(4) presumption.

In an appeal filed without representation, the Board addresses whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Claimant's Appeal

Rebuttal of the Section 411(c)(4) Presumption

Initially, we address the basis for the ALJ's denial of benefits. Because the ALJ found Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish he has neither legal nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20

[5] We affirm, as unchallenged, the ALJ's findings that all of Claimant's coal mine employment is qualifying for purposes of invoking the Section 411(c)(4) presumption and that Claimant established a totally disabling pulmonary or respiratory impairment and, therefore, a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9-15.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as Claimant performed his last coal mine employment in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 35.

[7] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption because Claimant failed to establish he suffers from either legal or clinical pneumoconiosis.[8] Decision and Order at 15-19.

The Director argues the ALJ erred in not shifting the burden of proof to Employer to disprove pneumoconiosis and disability causation as the Section 411(c)(4) presumption requires. Director's Brief at 1-2. Employer argues the ALJ properly weighed the evidence regarding legal and clinical pneumoconiosis to find them both rebutted. Employer's Brief at 15. We agree with the Director's argument.

Legal Pneumoconiosis[9]

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Co.,* 25 BLR 1-149, 1-155 n.8. (2015).

The ALJ considered the opinions of Drs. Harris, McSharry, and Fino. Decision and Order at 18-19. Dr. Harris diagnosed Claimant with legal pneumoconiosis in the form of severe obstruction with diffusion impairment caused by both cigarette smoking and coal mine dust exposure. Director's Exhibit 16; Employer's Exhibit 3. Drs. McSharry and Fino diagnosed Claimant with chronic emphysema but determined that the disease was not significantly aggravated by coal dust exposure. Director's Exhibit 25; Employer's Exhibit 2. After summarizing the physicians' opinions, the ALJ afforded "some weight" to each and found they "do[] not support a finding of a chronic lung disease or impairment and its sequelae arising out of coal mine employment." Decision and Order at 19. Further finding Claimant's treatment records do not support a finding of legal pneumoconiosis, the ALJ found Claimant failed to establish legal pneumoconiosis on the record as a whole. *Id.* We cannot affirm the ALJ's findings.

Rather than determining whether the evidence rebutted the existence of legal pneumoconiosis, the ALJ instead found it does not establish legal pneumoconiosis. Decision and Order at 18-19. Having found that Claimant had established at least fifteen

[8] The ALJ did not address disability causation.

[9] Because we must vacate the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption and the burden may be on Claimant to establish the existence of pneumoconiosis on the merits under 20 C.F.R. §718.202(a) on remand, *see infra*, we need not address whether the ALJ erred in finding Employer rebutted the presumption of clinical pneumoconiosis.

years of qualifying coal mine employment, the ALJ erroneously placed the burden on Claimant to establish the existence of legal pneumoconiosis and failed to properly evaluate whether Employer met its burden to show that coal mine dust exposure did not "significantly contribute to, or substantially aggravate," Claimant's respiratory impairment. 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see W. Va. CWP Fund v. Director, OWCP* [*Smith*], 880 F.3d 691, 699 (4th Cir. 2018); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 134-35 (4th Cir. 2015).

Moreover, the ALJ has not explained her analysis of the medical opinions. The Administrative Procedure Act (APA) requires the ALJ to set forth her "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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). While the ALJ summarized the opinions of Drs. Harris, McSharry, and Fino, she did not make any findings regarding the credibility of each of their opinions as to the role that coal mine dust played in Claimant's respiratory impairment. Decision and Order at 18-19. Because the ALJ provided no analysis of the physicians' opinions and failed to explain how she resolved the conflict in the evidence, her findings are not in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *McCune v. Cent. Appalachian Coal Co*., 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). We therefore vacate the ALJ's finding that Employer established Claimant does not have legal pneumoconiosis as well as her determination that Employer rebutted the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1)(i)(A); Decision and Order at 18-19.

Employer's Cross-Appeal

We next address Employer's challenge on cross-appeal to the ALJ's finding that Claimant established at least fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis.

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 determination 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).

The regulations define a "year" of coal mine employment as "a period of one calendar year (365 days, 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32); *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). The regulations permit an adjudicator to rely on a comparison of the miner's wages to the average daily earnings in the coal mining industry "[i]f 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 . . . ." 20 C.F.R. §725.101(a)(32)(iii).

The ALJ considered Claimant's Social Security Earnings Records (SSER) and Employment Verification Letter (EVL). Director's Exhibits 7-9. Comparing Claimant's annual earnings in coal mine employment to the industry's corresponding average daily earnings, she credited Claimant with full and partial years of coal mine employment based on a 125-work-day year. Decision and Order at 7-8. Using this formula, she found Claimant's SSER reflected 1.92 partial years of coal mine employment in 1971, 1983, and 1987, and 14 full years of coal mine employment from 1972 through 1982 and 1984 through 1986.[10] *Id.* In total, the ALJ found Claimant established a total of 15.92 years of coal mine employment. *Id.* at 9.

Employer does not dispute the ALJ's finding that Claimant worked ten full years in coal mine employment in the following years: 1974; 1976 to 1981; and 1984 to 1986.[11] Employer's Brief at 10-13. It asserts, however, that the ALJ erred in finding that Claimant's employment in 1971 to 1973, 1975, 1982 to 1983, and 1987 amounted to an additional five years of coal mine employment and, therefore, that Claimant invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. *Id.* at 12. Employer contends the ALJ utilized an improper method of calculation and failed to consider all relevant evidence when calculating Claimant's length of coal mine employment. Employer's Brief at 5-14. We agree.

In calculating Claimant's coal mine employment, the ALJ divided Claimant's yearly earnings from coal mine employers set forth in his SSER by the coal mine industry's average daily earnings, crediting him with a full year of employment when he worked 125 days or more, and with partial periods of employment by dividing his working days by 125 to credit him with a portion of a year. Decision and Order at 7-9. However, the Board has

[10] The ALJ credited Claimant's partial years of coal mine employment as follows: 0.42 years in 1971, 0.7 years in 1983, and 0.8 years in 1987. Decision and Order at 7-8.

[11] We affirm, as unchallenged, the ALJ's finding that Claimant established ten full years of coal mine employment during this period. *Skrack*, 6 BLR at 1-711.

long interpreted Fourth Circuit case law to require the ALJ to first determine whether the miner was engaged in an employment relationship for a period of one calendar year, i.e., 365 days, or partial periods totaling one year. *See Mitchell*, 479 F.3d at 334-35 (a 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) (recognizing the 2001 amendments to the regulations require a one-year employment relationship during which the miner worked 125 days to establish a year of employment); *Clark*, 22 BLR at 1-280.

If the threshold one-year period is met, the ALJ must then determine whether the miner worked for at least 125 working days within the one-year period.[12] 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 this case, the ALJ failed to make the necessary threshold determination of a calendar year of employment consistent with the law of the Fourth Circuit[13] and did not consider evidence relevant to the starting and ending dates of Claimant's coal mine employment.[14] *See* Director's Exhibit 50; 30 U.S.C. §923(b) (fact-finder must address all

[12] 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).

[13] We reject the Director's assertion that the Board's unpublished decision in *Horn v. Jewel Ridge Coal Corp.*, BRB No. 22-0287 BLA (Aug. 15, 2023) (unpub.), supports affirming the ALJ's length of coal mine employment calculation in this case. In *Horn*, the Board did not address, let alone affirm, the ALJ's use of a 125-day earnings divisor as reasonably accounting for a 365-day employment relationship. Rather, pursuant to the claimant's pro se appeal in that case, the Board held substantial evidence supported the ALJ's finding of less than fifteen years of coal mine employment. *See Horn*, BRB No. 22-0287 BLA, slip op. at 3-4.

[14] Specifically, the ALJ failed to consider: the specific dates of coal mine employment set forth in Employer's EVL concerning Claimant's employment between 1971 and 1982 (Director's Exhibit 50 at 39); Claimant's deposition testimony discussing his employment history in detail (Director's Exhibit 50 at 7-38); Claimant's answers to interrogatories in which he noted he earned $100.00 per day for Brent Coal Company, Spotlight Coal Company, and Old Oak Coal Company (Director's Exhibit 50 at 43); and Claimant's October 17, 1996 Virginia Workers' Compensation award for a November 2,

relevant evidence); *Mitchell*, 479 F.3d at 334-36; *McCune*, 6 BLR at 1-998. Because the ALJ did not make the necessary threshold determination, we vacate her determination that Claimant established five years of coal mine employment in 1971 to 1973, 1975, 1982 to 1983, and 1987, and, therefore, that he established at least fifteen years of coal mine employment. *Mitchell*, 479 F.3d at 334-36; Decision and Order at 6-9. Thus, we vacate her finding that Claimant invoked the Section 411(c)(4) presumption.[15]

Smoking History

Employer also challenges the ALJ's finding that Claimant has a "35-year smoking history," arguing that the ALJ failed to consider relevant evidence and adequately explain her finding. Decision and Order at 9; Employer's Brief at 16-17. Because this finding is relevant to the issue of legal pneumoconiosis on the merits under 20 C.F.R. Part 718 should the ALJ find Claimant cannot invoke the Section 411(c)(4) presumption on remand, we address it.

Employer contends the ALJ did not address Claimant's treatment notes reflecting smoking more than forty-two years at rates of one to two packs per day, which could support a fifty pack-year smoking history. Employer's Response Brief at 16-17; Director's Exhibit 1; Employer's Exhibits 6-11. It also argues the ALJ did not explain how Claimant's testimony and the smoking histories that Drs. Harris, McSharry, and Fino recorded support a 35-year smoking history and failed to provide a determination as to the

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1983 low-back injury which noted Claimant had an average weekly wage of $500.00 at the time of his accident while working for Old Oak (Director's Exhibit 50 at 74).

[15] Employer also challenges the ALJ's reference to the "quarterly method" as additional support for crediting Claimant with a full quarter of coal mine employment, for years prior to 1978, if his SSER reported at least $50.00 in earnings with a coal mine operator. Decision and Order at 7 n.14. It asserts that the quarterly method is an improper method of calculating coal mine employment. Employer's Brief at 12-14. As the ALJ did not use the quarterly method to calculate Claimant's length of coal mine employment in any year, this argument is moot. To the extent she referenced it as additional support for her findings, however, both the Fourth Circuit and the Board have held it is reasonable to credit a miner for any quarter in which the record shows earnings of at least $50.00 in coal mine employment for years prior to 1978. *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"); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 n.2 (1984).

number of pack-years that she determined Claimant had. Employer's Brief at 16; Decision and Order at 9.

The ALJ accurately observed: 1) Claimant testified he intermittently smoked one-half a pack of cigarettes per day for approximately twenty-five to thirty years until he stopped in 2000; 2) Dr. Harris reported a smoking history of one-half to one pack per day for thirty years; 3) Dr. McSharry reported a smoking history of up to one-half pack per day for thirty years, and 4) Dr. Fino reviewed Claimant's treatment records and concluded that he smoked one or two packs per day for forty to fifty years. Hearing Transcript at 30-31; Director's Exhibits 1; 16 at 7; 25 at 5. However, she did not explain how she derived a thirty-five-year smoking history from these accounts of Claimant's smoking history or make a specific number of pack-years finding. Decision and Order at 9.

Because the ALJ's decision fails to explain the basis for the thirty-five-year finding, address all relevant evidence, or resolve the conflicting smoking histories, it does not satisfy the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Wojtowicz*, 12 BLR at 1-165; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (length and extent of a miner's smoking history is a factual determination for the ALJ). We therefore vacate the ALJ's finding. *See* 30 U.S.C. §923(b) (fact-finder must address all relevant evidence); *McCune*, 6 BLR at 1-998.

Remand Instructions

On remand, the ALJ must determine the length of Claimant's coal mine employment, taking into consideration all relevant evidence and using any reasonable method of calculation. *See Muncy*, 25 BLR at 1-27; *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986). In doing so, and to the extent the evidence permits, the ALJ must ascertain the beginning and ending dates of Claimant's coal mine employment. 20 C.F.R. §725.101(a)(32)(ii). If the evidence does not establish the beginning and ending dates of Claimant's coal mine employment, the ALJ may, in her discretion, apply the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine calendar years of coal mine employment.[16] If the threshold finding of a calendar year is established, then the ALJ is to consider whether Claimant worked for 125 days during each one-year period. *Mitchell*, 479 F.3d at 334-36; *Martin*, 277 F.3d at 474-75.

[16] If the ALJ relies on Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (Black Lung Benefits Act) Procedure Manual*, she should attach the exhibit to the Decision and Order. 20 C.F.R. §725.101(a)(32)(iii).

If Claimant establishes at least fifteen years of coal mine employment, then he will invoke the Section 411(c)(4) presumption and the ALJ must determine whether Employer is able to rebut the presumed fact that Claimant is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. But if Claimant establishes less than fifteen years of coal mine employment, the ALJ must address whether Claimant can establish his entitlement under 20 C.F.R. Part 718. If Claimant fails to establish any element of entitlement, the ALJ must deny benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In rendering her findings on remand, the ALJ must consider all relevant evidence and explain her findings and credibility determinations in compliance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Accordingly, we affirm in part and vacate in part the ALJ's Decision and Order Denying Benefits, and remand the case 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