BRB No. 06-0865 BLA

HOWARD BALDWIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 08/30/2007
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

I. John Rossi, West Des Moines, Iowa, for claimant.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Living Miner's Benefits (04-BLA-0066) of Administrative Law Judge Thomas M. Burke on a claim filed on June 12, 2000[1] pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge

[1] Claimant filed a previous claim on February 18, 1994. Director's Exhibit 1. Upon claimant's request, Administrative Law Judge Jeffrey Tureck issued an order on May 17, 1999, granting the withdrawal of the claim pursuant to 20 C.F.R. §725.306. *Id.*

credited claimant with three years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.[2] The administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he established only three years of coal mine employment, and in finding that claimant failed to establish the existence of pneumoconiosis based on the medical opinion of Dr. Jewett, who opined that claimant suffers from the disease. Claimant specifically contends that the administrative law judge erred in discrediting Dr. Jewett's opinion because he found that the doctor relied on a coal mine work history of seven years, while the administrative law judge found only three years of coal mine employment established. Claimant further argues that if the Board affirms the administrative law judge's finding that Dr. Jewett's opinion was not reasoned on the existence of pneumoconiosis, then the Director, Office of Workers' Compensation Programs (the Director), has failed to provide him with a complete and credible pulmonary evaluation pursuant to 20 C.F.R. §725.406.

The Director has filed a Motion to Remand, agreeing, in some respects, that the administrative law judge erred in calculating the length of claimant's coal mine employment. The Director requests that the Board vacate the denial of benefits, and remand the case to the administrative law judge for further findings as to the length of claimant's coal mine employment, and for further consideration of Dr. Jewett's opinion at 20 C.F.R. §718.202(a)(4), based on that calculation. The Director specifically states, "if the [administrative law judge] again finds Dr. Jewett's opinion to be unreasoned, he should remand the case to the district director to allow Dr. Jewett to provide a complete and credible medical opinion." Director's Motion to Remand at 7, citing 30 U.S.C. §923 (b); 20 C.F.R. §725.406.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Claimant argues that the administrative law judge erred in crediting him with only nine months of coal mine employment for each calendar year between 1940-1943.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Eight Circuit because claimant's coal mine employment occurred in Missouri. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Claimant asserts that since he worked for at least 125 days during each calendar year, he is entitled to be credited with four years of coal mine employment from 1940-1943, and not just three years or thirty-six months of coal mine employment. Claimant also contends that the administrative law judge failed to give him any credit for his coal mine employment from 1944-1947.

The Director argues that the administrative law judge's finding of three years (thirty-six months) of coal mine employment from 1940-1943 is rational because the revised regulations require the administrative law judge to aggregate claimant's partial periods of coal mine employment in determining whether one year of coal mine employment is established. The Director asserts that 20 C.F.R. §725.101(a)(32) does not permit one year of coal mine employment to be credited upon a showing of coal mine employment for a partial period of a calendar year during which the miner worked at least 125 days. Director's Motion to Remand at 6, citing 65 Fed. Reg. 79960 (Dec. 20, 2000). However, the Director concedes that the administrative law judge erred by failing to credit claimant with any qualifying coal mine employment between 1944-1947.

We grant the Director's Motion to Remand this case to the administrative law judge for further consideration as to the length of claimant's coal mine employment. On remand, the administrative law judge should address whether claimant is entitled to one year of qualifying coal mine employment if he worked at least 125 days in one calendar year. *See* 20 C.F.R. §725.101(a)(32); 65 Fed. Reg. 79960 (Dec. 20, 2000); *see also Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989). He should also address the Director's contention that certain aspects of claimant's work from 1944-1947, that involved picking up coal, sizing and loading coal on a truck, may be covered coal mine employment. Director's Motion to Remand, citing 30 U.S.C. § 902(d) (the term "miner" includes any individual who works or has worked in or around a coal mine or coal preparation facility); 20 C.F.R. §725.101(a)(13) (defining coal preparation as "braking, crushing, sizing, clearing, washing, drying, mixing, storing, and loading" of coal and such other work of preparing coal as is usually done by the operator of a coal mine); *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984) (coal preparation involves the processing and loading of coal up to the point at which it is ready for delivery to consumers).[3]

[3] The Director asserts that it was unnecessary for the administrative law judge to determine the exact amount of time each day that claimant spent digging coal, as opposed to loading and sizing the coal for delivery, since claimant must be credited with a full day of coal mine employment, even if he only works part of the day as a coal miner. Director's Motion to Remand at 7, citing 20 C.F.R. §725.101(a)(32) ("'working day' means any day or part of a day for which the miner received pay for work as a miner").

Additionally we remand the case for further consideration of Dr. Jewett's opinion, that claimant suffers from pneumoconiosis, in light of the administrative law judge's determination on remand as to the length of claimant's coal mine employment.[4] The Director concedes that "if on remand the [administrative law judge] again finds Dr. Jewett's report to be unreasoned, then [the Department of Labor] will not have fulfilled its statutory and regulatory duty of providing claimant with a complete and credible pulmonary evaluation." Director's Motion to Remand at 7. We accept the Director's concession on this issue. Consequently, if the administrative law judge finds that Dr. Jewett's opinion is not reasoned with respect to the issue of the existence of pneumoconiosis, based on the doctor's reliance on an inaccurate length of coal mine employment, the administrative law judge is instructed to remand the case in order for the Department of Labor to satisfy its obligation to provide claimant with a complete pulmonary evaluation. *See Hodges v. BethEnergy Mines Inc.*, 18 BLR 1-84, 1-93 (1994) (granting Director's motion to remand for a complete pulmonary evaluation); Director's Motion to Remand at 7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

[4] Claimant asserts that "Dr. Sparks medical opinion at the very least should confirm the findings of [Dr.] Jewett" and notes that Dr. Sparks was his treating physician who prepared a medical report in conjunction with his February 18, 1994 claim. Claimant's Brief (unpaginated). However, since claimant's February 18, 1994 claim was withdrawn, none of the medical evidence associated with the withdrawn claim was made a part of the current record unless it was specifically designated by one of the parties pursuant to 20 C.F.R. §725.414. Because claimant did not proffer Dr. Spark's medical report as evidence in this claim, the administrative law judge committed no error in failing to give his opinion any consideration.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge