BRB No. 13-0237 BLA

JOSEPH FLEMING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ABERRY COAL, INCORPORATED	)	DATE ISSUED: 12/17/2013
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2012-BLA-05241) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on July 19, 2010,[1] pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-

[1] Claimant filed an initial claim on November 1, 1994, which was finally denied by the district director on March 1, 1995, as claimant did not establish any of the elements of entitlement. Director's Exhibit 1.

944 (Supp. 2011) (the Act). The administrative law judge credited claimant with at least fifteen years of underground coal mine employment and determined, based on employer's stipulation, that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[2] The administrative law judge further found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and that employer did not rebut that presumption.[3] Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting claimant with fifteen years of underground coal mine employment. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board. In a reply brief, employer reiterates its previous contentions.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] The revisions made to 20 C.F.R. §725.309, which became effective on October 25, 2013, do not impact this case. 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013)(to be codified at 20 C.F.R. §725.309).

[3] Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant's coal mine employment was underground, that claimant is totally disabled, and that claimant established a change in an applicable condition of entitlement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 5; Hearing Transcript at 11.

[5] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering whether claimant had fifteen years of qualifying coal mine employment to invoke the amended Section 411(c)(4) presumption, the administrative law judge reviewed claimant's 2010 application for benefits, his testimony at the hearing on this claim, and the Social Security earnings records (SSERs) submitted with this claim. The administrative law judge found that claimant's SSERs established that his work as a miner began in 1970 and ended in 1991. Decision and Order at 3; Director's Exhibit 7. The administrative law judge further noted that claimant testified that he did not work from 1981 through 1984 and in 1991 due to a back injury, and that he was employed in construction for one year. Decision and Order at 3; Director's Exhibit 7. The administrative law judge found that claimant's SSER confirmed his testimony regarding the gap in his employment history between 1981 and 1985 and his work in the construction industry. *Id*. The administrative law judge concluded that "there are at most sixteen different years in which claimant could have worked as a coal miner." Decision and Order at 3.

The administrative law judge then indicated that the district director found that claimant's SSER showed 9.25 years of coal mine employment, based on a comparison of "claimant's earnings to the average yearly earnings of coal miners . . . based on 125 days of exposure, or less than half the number of work days in a year." Decision and Order at 4; Director's Exhibit 25. The administrative law judge also acknowledged employer's assertion that claimant has 5.3 years of coal mine employment, based upon a comparison of the earnings figures on the SSERs to the daily average of coal miners' earnings, as calculated by the Bureau of Labor Statistics. Decision and Order at 4. The administrative law judge found that, although the method used by the district director was the more reasonable one, the district director did not consider claimant's allegation that he was entitled to credit for additional years of coal mine employment, as his SSERs are not accurate. *Id*. The administrative law judge stated:

> This is not the first time that a miner has alleged that not all of his wages were properly credited. The standard is based on a preponderance of the evidence and the records are not necessarily dispositive. The [c]laimant is not a good historian, but the records do not substantiate that he was out of work as long as six years due to workers' compensation related injuries. I note from the earnings record that [c]laimant worked sporadically or

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States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

> intermittently prior to work with [e]mployer. Claimant did not exaggerate on other matters during the hearing. He alleged that some of the mines he worked for did not take out Social Security taxes. ([Hearing Transcript at] 17, 23-24). He stated that there may have been some confusion as the earnings record credited him at the location of a home office when he was actually working in mining. For example, the notation for T.O.M. Corporation in Ann Arbor, Michigan, actually represents work performed with the East Kentucky Coal Co. ([Hearing Transcript at] 26). Likewise, work credited to Boise Cascade is in error, as he has never been in Idaho. *Id.* at 27.
>
> It is reasonable to expect that he also worked for periods "under the table," as alleged, early in his career, in the 1970's. *See* colloquy at 31-32. Therefore, I find that [c]laimant engaged in coal mine employment for at least [fifteen] years.

Id. at 5.

Employer argues that the administrative law judge's finding cannot be affirmed, as the administrative law judge did not fully consider the relevant evidence and did not adequately explain how he arrived at his conclusion. We agree. The length of claimant's coal mine employment is an issue on which claimant bears the burden of proof. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Because the regulations do not contain a required method for computing the time spent in coal mine employment, the Board has held that it will uphold the administrative law judge's determination if it is based on a reasonable method and is supported by substantial evidence in the record considered as a whole. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In the present case, employer alleges correctly that the administrative law judge did not adequately explain the method he used to compute a coal mine employment history of at least fifteen years. It can be discerned from the administrative law judge's Decision and Order that he credited the district director's determination that claimant had 9.25 years of coal mine employment, as consistent with claimant's SSERs and the product of a reasonable method of computation. *See* Decision and Order at 4. It can also be discerned that the administrative law judge found that, because the district director did not do so, he was required to address claimant's allegation that the SSERs underreport the extent of his coal mine employment. *Id*. at 5. In contrast, the method by which the administrative law judge derived at least an additional five years of coal mine employment from claimant's hearing testimony on this issue is not apparent and, as a

consequence, we cannot determine whether the method the administrative law judge used is a reasonable one.

Specifically, the administrative law judge did not explain how he resolved the conflict between his determination that claimant "is not a good historian" and his crediting of claimant's testimony, nor did he address the significance of claimant's statement that he could not identify which employer failed to withhold Social Security taxes. Decision and Order at 5; Hearing Transcript at 17, 32. Similarly, the administrative law judge did not resolve conflicts in the evidence regarding the years in which claimant engaged in coal mine employment. As employer notes, the administrative law judge apparently credited claimant with one year of coal mine employment in 1970, although the SSERs show no such earnings until the third quarter. Director's Exhibit 4. Employer also correctly maintains that, in determining that claimant could have worked as a miner for sixteen years between the starting and ending date of his coal mine employment, the administrative law judge accounted for the periods of unemployment to which claimant testified, but did not consider the fact that claimant's SSERs reflect that he was also unemployed in 1986 and had no coal mine employment in 1987. Decision and Order at 4; Director's Exhibit 7. Because the administrative law judge did not identify the method by which he arrived at his length of coal mine employment determination, and did not resolve the conflicts in all of the relevant evidence as discussed above, his Decision and Order does not comply with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate his finding that claimant established at least fifteen years of coal mine employment and his determination that claimant invoked the presumption at amended Section 411(c)(4).

On remand, the administrative law judge must reconsider whether claimant has established fifteen years of underground coal mine employment sufficient to invoke the amended Section 411(c)(4) presumption. In so doing, the administrative law judge must be mindful that claimant bears the burden of proof on this issue. *See Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003); *Kephart*, 8 BLR at 1-186. Due to the absence of specific guidelines for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record considered as a whole.[6] *See Muncy*, 25 BLR at 1-27. Accordingly, the administrative

[6] For this reason, we reject employer's allegation that the administrative law judge was required to apply the method that it used, i.e., comparing claimant's earnings to the daily average of coal miners' earnings, or explain why he rejected that method. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

law judge must consider all relevant evidence of record in ascertaining the dates and length of claimant's underground coal mine employment including, but not limited to, claimant's testimony, the employment history forms submitted in both claims, and claimant's SSERs.[7] *Id*. If the administrative law judge finds that the evidence is insufficient to establish the beginning and ending dates of claimant's coal mine employment, or he finds that any of claimant's work lasted less than a calendar year, the administrative law judge may total the partial periods of employment, or divide claimant's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics.[8] *See* 20 C.F.R. §725.101(a)(32)(iii).

Because we have vacated the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, we decline to address employer's arguments relevant to rebuttal of the presumption, as they are not ripe for consideration. If the administrative law judge finds on remand that claimant has established fifteen years of underground coal mine employment, he may reinstate his finding that claimant is entitled to the invocation of the amended Section 411(c)(4) presumption and, further, reinstate the award of benefits. Conversely, if the administrative law judge finds on remand that claimant is unable to establish the fifteen years of underground coal mine employment necessary for invocation of the amended Section 411(c)(4) presumption, the administrative law judge must consider whether claimant has established entitlement pursuant to 20 C.F.R. Part 718 without benefit of the presumption.

[7] This includes evidence from the miner's 1994 claim and the present subsequent claim. Employer alleges that there is a conflict between the evidence in claimant's initial claim and the evidence in claimant's subsequent claim regarding the end date of his coal mine employment. Employer's Brief in Support of Its Petition for Review at 8-9.

[8] Because the administrative law judge's use of this formula is discretionary, we reject employer's allegation that the administrative law judge is required to either apply the formula, or explain why he did not. *See Muncy*, 25 BLR at 1-27.

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

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