

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 17-0057 BLA

HAROLD HAMMONDS, JR.)
)
 Claimant-Respondent)
)
 v.)
)
 GIBBER TRUCKING, INCORPORATED)
)
 and)
)
 TRAVELERS INDEMNITY COMPANY) DATE ISSUED: 11/14/2017
)
 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 Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Herbert Deskins, Jr., Pikeville, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,
Kentucky, for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor; Maia S. Fisher,
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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05196) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on December 27, 2012.¹

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),² the administrative law judge credited claimant with at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground mine. Employer also contends that the administrative law judge erred in awarding benefits payable from February 2008. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation

¹ Claimant filed his first claim for benefits on July 17, 2006, which was denied by the district director on February 1, 2007 for failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action on this claim.

² Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes that the miner had 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. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Programs (the Director), has filed a letter response brief, urging affirmance of the administrative law judge's finding that the conditions in claimant's surface mine employment were substantially similar to those in an underground mine. The Director agrees with employer, however, that the administrative law judge erred in designating February 2008 as the commencement date for payment of benefits.³

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.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).

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

Section 411(c)(4) requires that a miner work for at least fifteen years either in "underground coal mines," or in "a coal mine other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). Further, Section 718.305(b)(2) provides that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."⁵ 20 C.F.R. §718.305(b)(2).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

⁵ The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

[T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or

The administrative law judge reviewed claimant's uncontradicted hearing testimony that all of his coal mine work was at surface mines, primarily as a truck driver hauling coal at the mine sites. The administrative law judge noted claimant's testimony that the dust conditions during his employment were "bad." Decision and Order at 5, *citing* Hearing Transcript [H. Tr.] at 14. Claimant testified that "you get dust off the wraps, comes from the new four lane round [sic]," that he had to get out of his truck and was exposed to dust while the truck was being loaded with coal, and that his clothes were "dusty" after his shift. *Id.*, *citing* H. Tr. at 14-16. The administrative law judge concluded that claimant's testimony was sufficient to demonstrate that he was regularly exposed to coal mine dust in his surface mine employment.

Employer challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground coal mine. While employer stipulated that claimant worked in coal mine employment for fifteen years, employer maintains that the mere evidence of some dust exposure is insufficient to constitute comparability with conditions in an underground coal mine. Employer argues that claimant's testimony is insufficient to establish substantial similarity because claimant failed to indicate "the level or duration" of his dust exposure. Employer's Brief at 12.

The Director counters, arguing that the regulatory provision at 20 C.F.R. §718.305(b)(2) "does not require a claimant to quantify these factors," and that "lay evidence addressing the individual miner's experiences" may be sufficient to satisfy claimant's burden. Director's Brief at 3. Hence, the Director urges affirmance of the administrative law judge's finding of substantial similarity, based on claimant's uncontradicted testimony. We agree with the Director.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, the administrative law

incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

judge permissibly found that claimant's uncontradicted testimony was credible and demonstrated that claimant worked in conditions substantially similar to those in underground mines. *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 25 BLR 2-549 (10th Cir. 2014); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-274 (7th Cir. 2001); *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988); *see also Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 489-490, 25 BLR 2-633, 2-642-643 (6th Cir. 2014); Decision and Order at 4-5; H. Tr. at 13-19. As substantial evidence supports the administrative law judge's findings, we affirm her determination that claimant established fifteen years of qualifying coal mine employment for purposes of Section 411(c)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Consequently, we affirm the administrative law judge's finding that claimant established invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4).

As employer has not challenged the administrative law judge's finding that the evidence did not rebut the Section 411(c)(4) presumption, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's award of benefits.

Date for the Commencement of Benefits

Once entitlement is established, the date for the commencement of benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). In a subsequent claim, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

In the present case, the administrative law judge determined that although claimant filed his current claim in December 2012, he was already totally disabled when Drs. Forehand and Jarboe examined him in conjunction with his prior claim filed in July

2006.⁶ Decision and Order at 23. The administrative law judge further determined that the record was devoid of evidence that claimant was not disabled at any time after 2006, and noted that she had credited the opinions of physicians who attributed claimant's disability to pneumoconiosis over the contrary opinions in the current claim. *Id.* Thus, relying on Section 725.309(c)(6), the administrative law judge awarded benefits payable from February 1, 2008, one year from the issuance of the district director's denial of the prior claim.⁷ Decision and Order at 23-24.

Employer asserts that evidence found to be insufficient to establish entitlement in the prior claim cannot be credited to establish an onset date of total disability due to pneumoconiosis. Employer's Brief at 13-14. Employer further argues that even though the administrative law judge found the evidence associated with the current claim sufficient to establish a change in one of the applicable conditions of entitlement, this evidence did not establish that claimant was totally disabled due to pneumoconiosis "before the filing of [his] subsequent claim and no such evidence was cited or relied upon by [the administrative law judge]." Employer's Brief at 14. The Director agrees, averring that the administrative law judge incorrectly designated February 2008 as the commencement date for the payment of benefits because "no medical evidence was submitted suggesting that [claimant] became totally disabled due to pneumoconiosis after the denial of the prior claim and before the filing of the current claim." Director's Brief at 3-4. Hence, the Director maintains that because claimant has been found to be entitled to benefits in the current claim, but the medical evidence does not establish when claimant first became totally disabled due to pneumoconiosis, the commencement date for the payment of benefits should be December 2012, the month in which the subsequent claim was filed. We agree.

⁶ The administrative law judge indicated that the opinions of Drs. Forehand and Jarboe associated with claimant's July 2006 claim "have not been considered in reaching my determination that the [c]laimant has established a change in an applicable condition of entitlement." Decision and Order at 15. Nevertheless, the administrative law judge noted that Dr. Forehand opined that claimant suffered a significant respiratory impairment due to coal dust exposure and Dr. Jarboe diagnosed a totally disabling respiratory impairment due to smoking. Director's Exhibit 1 at 39, 193.

⁷ The Director correctly notes that "[t]he prior denial by the district director actually became final 30 days after it was issued on February 1, 2007, because no party requested a hearing or a revision." Director's Brief at 3 n.2; *see* 20 C.F.R. §725.419(d).

It is undisputed that the record contains no medical evidence demonstrating when claimant first became totally disabled due to pneumoconiosis.⁸ Moreover, the record contains no medical evidence demonstrating that claimant became totally disabled due to pneumoconiosis after the denial of his prior claim but before the filing of the current claim.⁹ Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we modify the administrative law judge's decision to reflect that benefits are payable from December 2012, the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

⁸ While the administrative law judge credited Dr. Alam's February 13, 2013 opinion that claimant is totally disabled due, in part, to pneumoconiosis, this evidence does not establish when claimant first became totally disabled due to pneumoconiosis. Decision and Order at 23; Director's Exhibit 12; see *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986).

⁹ Employer and the Director correctly maintain that because the district director determined in the finally denied prior claim that claimant was not totally disabled due to pneumoconiosis, the administrative law judge and the parties are bound by this determination and its factual predicate. See *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Thus, the evidence from the prior claim cannot be relied upon to establish entitlement in the current claim.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed, as modified to reflect a commencement date of December 2012 for the payment of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge