

U.S. Department of Labor

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



BRB Nos. 21-0646 BLA
and 21-0647 BLA

RUBY R. TAYLOR)
(o/b/o and Widow of ROGER D. TAYLOR))

Claimant-Respondent)

v.)

ADENA FUELS, INCORPORATED)

and)

AIU INSURANCE COMPANY,)
c/o CHARTIS)

DATE ISSUED: 10/18/2022

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 Granting Request for Modification and Awarding Benefits in Miner's and Survivor's Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Timothy J. Walker (Fogle Keller Walker, PLLC), Lexington, Kentucky, for Employer and its Carrier.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Granting Request for Modification and Awarding Benefits in Miner's and Survivor's Claims (Decision and Order on Modification) (2019-BLA-06210 and 2019-BLA-06211) pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹ This case involves a request for modification of a miner's claim filed on October 3, 2012, and a survivor's claim filed on December 11, 2015.²

In an August 10, 2017 Decision and Order Denying Benefits in a Miner's and Survivor's Claims, ALJ Christopher Larsen credited the Miner with 13.58 years of coal mine employment and thus found Claimant could not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).³ Considering entitlement under 20 C.F.R. Part 718, he denied benefits because Claimant failed to establish the Miner had either clinical or legal pneumoconiosis. 20 C.F.R. §718.202; Decision and Order at 37, 40-41. On May 24, 2018, Claimant timely requested modification of that denial, alleging a mistake in a determination of fact; she did not submit additional medical evidence. Survivor's Claim (SC) Director's Exhibit 51; Miner's Claim (MC) Director's Exhibits 12, 17.

In his August 31, 2021 Decision and Order on Modification, the subject of the current appeal, ALJ Sellers (the ALJ) found Claimant established the Miner had 18.03 years of underground coal mine employment and a totally disabling respiratory or

¹ Employer's appeal in the miner's claim was assigned BRB No. 21-0646 BLA, and its appeal in the survivor's claim was assigned BRB No. 21-0647 BLA. The Benefits Review Board has consolidated these appeals for purposes of decision only.

² Claimant is the widow of the Miner, who died on November 13, 2015. Miner's Claim (MC) Director's Exhibits 1 at 34, 9. She is pursuing the miner's claim on behalf of her husband's estate and her own claim for survivor's benefits. Survivor's Claim (SC) Director's Exhibits 1 at 45, 2.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's total disability or death was due to pneumoconiosis if he had 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.

pulmonary impairment at the time of his death. 20 C.F.R. §718.204(b)(2). He therefore found Claimant invoked the Section 411(c)(4) presumption and Employer did not rebut it. He determined Claimant established modification based on a mistake in a determination of fact, 20 C.F.R. §725.310, and that granting modification would render justice under the Act. Thus he awarded benefits in the miner's claim and concluded Claimant is derivatively entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).⁴

On appeal, Employer asserts the ALJ erred in finding Claimant established the Miner had at least fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption.⁵ Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief.

The 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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Modification

In a miner's claim, the ALJ may grant modification based on either a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a). The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made in the prior decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). An ALJ has broad discretion to grant modification based on a mistake of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

⁴ Section 422(l) of the Act provides the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

⁵ 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 on Modification at 21.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibit 1 at 203-204; November 9, 2020 Hearing Tr. at 19; August 11, 2016 Hearing Tr. at 19.

Moreover, a party need not submit new evidence because an ALJ is authorized “to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.” *O’Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Miner’s Claim

Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner worked at least fifteen years in underground coal mine employment or “substantially similar” surface coal mine employment. 20 C.F.R. §718.305(b)(1)(i). Claimant bears the burden to establish the number of years the Miner 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 if it is based on a reasonable method of calculation that is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986).

The ALJ considered Claimant’s hearing testimony and the Miner’s deposition testimony, the CM-911 Claim for Benefits form, the CM-911a Employment History form, Federal Insurance Contributions Act (FICA) earnings records,⁷ and Social Security Administration (SSA) earnings records. Decision and Order on Modification at 7-11; MC Director’s Exhibit 1 at 89-122, 190-208; November 9, 2020 Hearing Tr. at 15-26; August 11, 2016 Hearing Tr. at 14-24.

For the Miner’s coal mine employment from 1978 to 1998, the ALJ applied *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 401-06 (6th Cir. 2019) to determine the length of the Miner’s employment.⁸ Decision and Order on Modification at 7-11. He credited the

⁷ The ALJ referred to the Miner’s Federal Insurance Contributions Act (FICA) earnings records as his “W-2 Wage and Tax Statements.” Decision and Order on Modification at 7 n.8, 9 n.12; MC Director’s Exhibit 1 at 194-198.

⁸ The ALJ credited the Miner with a full year of coal mine employment for every year in which he worked at least 125 days, or a fraction of a 125-day work-year when the Miner worked fewer than 125 days. Decision and Order on Modification at 7-11; *see* 20 C.F.R. §725.101(a)(32)(i). When the evidence established the Miner’s employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, the ALJ presumed that, in the absence of contrary evidence, the Miner worked for at least 125 days in such employment. Decision and Order on Modification at 7-11; *see* 20 C.F.R. §725.101(a)(32)(ii). If he could not ascertain the specific beginning and ending dates of

Miner with five full years of coal mine employment for 1978, 1981 through 1983, and 1985 based on Claimant's testimony and the Miner's testimony, the Employment History form, FICA earnings records, and SSA earnings records. Further, because he could not identify the beginning and ending dates of the Miner's remaining coal mine work, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) and credited the Miner with eight full years of coal mine employment from 1991 through 1998 based on his SSA earnings records.⁹ He also credited the Miner with partial periods of coal mine employment totaling 5.03 years for 1979, 1980, 1984, and 1986 through 1990 based on the same method of calculation. Using this framework, the ALJ credited the Miner with a total of 18.03 years of underground coal mine employment. *Id.*

The ALJ's determination that Claimant established the Miner worked 13.03 years in coal mine employment in 1979, 1980, 1984, and 1986 through 1998 is unchallenged. Decision and Order on Modification at 10-11. Thus, we affirm it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Employer argues the ALJ erred in finding the Miner engaged in coal mine employment for five full years in 1978, 1981 through 1983, and 1985 because Claimant's and the Miner's testimony is "vague" and "unreliable" and "the record does not clearly identify the beginning and ending dates of the Miner's coal mine work with any employer." Employer's Brief at 18-21. It therefore asserts the ALJ should have used the formula at 20 C.F.R. §725.101(a)(32)(iii) in conjunction with the SSA earnings records to determine the length of the Miner's coal mine employment during those years. *Id.* at 21. We are not persuaded.

the Miner's employment with various operators, the ALJ applied the formula at 20 C.F.R. §725.101(a)(32)(iii) to determine the number of days the Miner worked in coal mine employment for a given year. *Id.* He divided the Miner's annual earnings for the operators as set forth in the Miner's Social Security Administration (SSA) earnings records by the yearly average wage for 125 days as reported in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.

⁹ If an ALJ cannot ascertain the beginning and ending dates of a miner's coal mine employment, or the miner's employment lasted less than a calendar year, the ALJ may apply this formula, dividing the miner's annual earnings by the average daily earnings of employees in the coal mining industry for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). The BLS wage information is published in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.

Contrary to Employer's argument, using the formula at 20 C.F.R. §725.101(a)(32)(iii) and the "daily" wage table at Exhibit 610 to determine the length of a miner's coal mine employment is discretionary. *See Muncy*, 25 BLR at 1-27. Further, the ALJ is not required to rely solely on the SSA earnings records as probative evidence of the dates and length of the Miner's coal mine employment. The ALJ permissibly relied on Claimant's hearing testimony and the Miner's deposition testimony, the Employment History form, FICA earnings records, and SSA earnings records to assess his coal mine employment for 1978, 1981 through 1983, and 1985.¹⁰ Decision and Order on Modification at 9; *see Shepherd*, 915 F.3d at 398; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); 20 C.F.R. §725.101(a)(32)(ii) ("[t]he dates and length of employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony").

The Miner testified he began working in the coal mines when he was "right around" sixteen years old and that all of his employment was full-time. MC Director's Exhibit 1 at 98, 100, 106. He responded in the affirmative when Employer's counsel asked if his application for benefits correctly reported that he "worked from 1977 to 1983 for Reldon and Caudill."¹¹ *Id.* at 99. Claimant testified the Miner "started out with his uncle," Reldon Caudill, working "full-time" for "[a]t least eight or nine years" for "cash money." August 11, 2016 Hearing Tr. at 18; November 9, 2020 Hearing Tr. at 16, 17, 20-24. She further stated Reldon Caudill's coal mine was located in Letcher County, Kentucky. November 9, 2020 Hearing Tr. at 24.

The ALJ determined the Miner's Employment History form, FICA earnings records, and SSA earnings records corroborate Claimant's and the Miner's testimony that the Miner worked "full-time" and earned "cash" when he worked for Reldon Caudill in 1978, 1981 through 1983, and 1985. Decision and Order on Modification at 9-10. Specifically, he concluded the partnership of Reldon, Narce & Forrester Caudill owned Little Emery Coal Company (Little Emery Coal) and the partnership of Reldon Caudill and

¹⁰ The Miner's FICA earnings records and SSA earnings records demonstrate he earned \$2,980.00 in 1978 from Little Emery Coal Company, \$9,449.50 in 1981 from Reldon Coal Company, Inc. (Reldon Coal), \$1,937.50 in 1982 from Reldon Coal, \$1,210.50 in 1983 from Reldon Coal, and \$3,195.00 in 1985 from RTC Coal Company. MC Director's Exhibit 1 at 190-191, 194-195.

¹¹ On his CM-911a Employment History form, the Miner stated he worked in underground coal mining for Reldon Caudill from 1977 to 1983, for Jimmy Sexton from 1983 to 1989, and for Lawrence Vanover from 1989 to 1998. MC Director's Exhibit 1 at 203.

Tony Clark owned Reldon Coal Company, Inc. (Reldon Coal), because the dates and addresses listed for the companies in the Miner's FICA earnings records and SSA earnings records "correlate" with the Miner's testimony that he worked for his uncle from 1977 to 1983 and Claimant's testimony that he worked for his uncle in Letcher County, Kentucky. *Id.* at 9 n.12. The ALJ also concluded Reldon Caudill owned RTC Coal Company (RTC Coal) because the address listed for the company in the Miner's FICA earnings records and SSA earnings records is consistent with the Miner's Employment History form notation that he worked for Reldon Caudill in Hindman, Kentucky. *Id.* at 9, *comparing* MC Director's Exhibit 1 at 191 *with* MC Director's Exhibit 1 at 203. Consequently, he determined Reldon Caudill owned Little Emery Coal, Reldon Coal, and RTC Coal at the time the Miner worked for these companies. Decision and Order on Modification at 9. He thus found the Miner worked for Reldon Caudill's coal mine companies for at least five years "in 1978 and 1985, and from 1981 to 1983." *Id.* at 10.

It is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Rowe*, 710 F.2d at 255. Employer has not explained how Claimant's and the Miner's testimony is "vague" and "unreliable," nor does it point to any evidence in the record that contradicts their testimony.¹² Employer's Brief at 18-21. Thus the ALJ permissibly credited their testimony as to the Miner's coal mine employment, along with corroborating documents such as the Miner's Employment History form, FICA earnings records, and SSA earnings records. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting a miner's uncorroborated testimony the employer characterized as "hazy and contradictory"); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (ALJ "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984).

¹² Employer identifies one instance from the August 2016 hearing in which Claimant stated her husband "probably" worked for cash. Employer's Brief at 19, *citing* Director's Exhibit 11 at 5 (ALJ Larsen's Decision and Order referencing Claimant's testimony). We are not persuaded this statement establishes error in ALJ Sellers' decision to credit Claimant's definitive November 2020 testimony that her husband worked for his uncle for cash. Decision and Order on Modification at 9, *citing* November 9, 2020 Hearing Tr. at 16, 20, 22. Nor does this statement contradict Claimant's and the Miner's testimony, credited by ALJ Sellers, that all of his coal mine work, including for his uncle, was "full-time." *Id.*, *citing* Director's Exhibit 1 at 106 (Miner's March 2013 testimony), November 9, 2020 Hearing Tr. at 22.

Because Claimant's testimony, the Miner's testimony, and his Employment History form demonstrate Reldon Caudill's coal mine companies continuously employed the Miner from 1977 through 1983, substantial evidence supports the ALJ's finding that the Miner worked full years for them in 1978, 1981, and 1982. *See Karst Robbins Coal Co. v. Director, OWCP [Rice]*, 969 F.3d 316, 323 (6th Cir. 2020) (substantial evidence is only such relevant evidence "as a reasonable mind might accept as adequate to support a conclusion."). Thus we affirm the ALJ's finding that Claimant established the Miner had at least fifteen years of coal mine employment.

Finally, Employer does not raise any specific allegations of error regarding the ALJ's finding that all of the Miner's coal mine employment took place in underground mines; thus we affirm it. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *Skrack*, 6 BLR at 1-711; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); 20 C.F.R. §718.305(b)(1)(i); Decision and Order on Modification at 11, 21. As the Miner had at least fifteen years of underground coal mine employment and was totally disabled by a respiratory or pulmonary impairment, we affirm the ALJ's finding that Claimant invoked the Section 411(c)(4) presumption. Decision and Order on Modification at 21; *see* 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305. Because Employer does not challenge the ALJ's finding that it failed to rebut the presumption, we affirm it. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 25, 27-28. Thus, we affirm the ALJ's finding that Claimant established a mistake in a determination of fact. 20 C.F.R. §725.310; Decision and Order on Modification at 30. We further affirm, as unchallenged, the ALJ's finding that granting modification would render justice under the Act. *See Skrack*, 6 BLR at 1-711; Decision and Order on Modification at 22-23.

Consequently, we affirm the award of benefits in the miner's claim. Decision and Order on Modification at 30.

Survivor's Claim

The ALJ determined Claimant established all the necessary elements for automatic entitlement to survivor's benefits. 30 U.S.C. §932(l); Decision and Order on Modification at 30-31. Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge in the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l). 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); Decision and Order on Modification at 30-31.

Accordingly, the ALJ's Decision and Order Granting Request for Modification and Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge