U.S. Department of Labor

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

BRB No. 20-0333 BLA

GENEVA BONNER (Widow of RAYMOND BONNER) Claimant-Petitioner v. APEX COAL CORPORATION and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/24/2022 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Thomas L. Ferreri and Matthew J. Zanetti (Ferreri Partners, PLLC), Louisville, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

GRESH, Administrative Appeals Judge:

Claimant appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Denying Benefits (2014-BLA-05468) rendered on a survivor's claim filed on February 28, 2013, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1]

The ALJ credited the Miner with seventeen years of surface coal mine employment. But she found Claimant did not establish at least fifteen of those years took place in conditions substantially similar to those in an underground mine. 20 C.F.R. §718.305(b)(1)(i), (2). She therefore found Claimant could not invoke the presumption that the Miner's death was due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under Part 718, she found Claimant established clinical pneumoconiosis arising out of coal mine employment, but failed to establish legal pneumoconiosis or that the Miner's death was due to clinical pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203, 718.205. Because Claimant failed to establish an essential element of entitlement, the ALJ denied benefits.

On appeal, Claimant asserts the ALJ erred in finding the Miner did not have at least fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[3] Employer and its Carrier (Employer) respond in support of the denial. The Director, Office of Workers' Compensation Programs (the Director), has filed a response

[1] Claimant is the widow of the Miner, who died on December 4, 2012. Director's Exhibits 2, 9, 10. Because the Miner never established entitlement to benefits during his lifetime, Claimant is not eligible for derivative survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's 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.

[3] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established seventeen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

agreeing with Claimant that the ALJ erred in evaluating the evidence with respect to the Miner's regular dust exposure.

The Benefits Review 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.[4] 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).

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had at least fifteen years of "employment in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "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." 20 C.F.R. §718.305(b)(2); *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 489-90 (6th Cir. 2014).

In addressing whether the Miner was regularly exposed to coal mine dust in his surface coal mine jobs, the ALJ first considered an affidavit of Bill Cook, the Miner's coworker. Claimant's Exhibit 2. Although Mr. Cook worked in surface coal mining employment for approximately twenty years, he stated he worked with the Miner for only two years in the early 1990s. *Id.* During that time, they worked in "daily dust conditions" that Mr. Cook described as "a constant cloud of coal and rock dust which hung in the air and accumulated on clothes and equipment." *Id.* Because Mr. Cook worked with the Miner for only two years, the ALJ found Mr. Cook's affidavit does not establish whether the Miner was regularly exposed to coal mine dust for the remaining fifteen years of his employment. Decision and Order at 7. Thus she permissibly found Mr. Cook's affidavit credible and sufficient to establish at least two years of qualifying coal mine employment. *U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); *Duncan*, 889 F.3d at 304; *Kennard*, 790 F.3d at 663; Decision and Order at 7.

The ALJ next considered an employment history form Claimant completed in which she indicated the Miner was exposed to dust, gases, or fumes throughout his coal mine employment. Decision and Order at 6; Director's Exhibit 3. The ALJ also considered Claimant's hearing testimony. Decision and Order at 6. Claimant stated she was married

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because the Miner performed his coal mine employment in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

to the Miner during the entire seventeen years he worked in coal mine employment. Hearing Transcript at 10. She testified that when he returned home from work, he was "dirty from top to bottom because there [were] no places to change [and] no places to wash up or anything." *Id.* at 11. She also testified the Miner, for the entire time he worked in coal mining, came home covered in black coal mine dust from the "dirty places" he worked. *Id.* at 11-12. Finally, she indicated the Miner took a shower when he returned home from work and she would wash his dirty clothes. *Id.* at 23-24. In order to wash his clothes, she had to shake the coal mine dust off. *Id.*

In evaluating Claimant's testimony and written statement, the ALJ noted a finding of total disability in the case of a deceased miner cannot be "based solely upon the affidavits or testimony of any person who would be eligible for benefits . . . if the claim were approved." Decision and Order at 7, *quoting* 20 C.F.R. §718.305(b)(4). Applying the rationale of this regulation, the ALJ found Claimant's testimony and written statements do not establish qualifying coal mine employment because they are "self-serving statements" and cannot be used to invoke the Section 411(c)(4) presumption. *Id.* She further found Claimant's testimony about the Miner's "appearance" when he returned home from work does not establish qualifying coal mine employment because "Claimant did not describe the environment in which [the] Miner worked, and there is no indication that Claimant had any personal knowledge of [the] Miner's daily working conditions." *Id.*

We agree with Claimant and the Director that the ALJ erred in concluding Claimant's testimony is unacceptable for establishing the Miner was regularly exposed to coal mine dust. Claimant's Brief at 1-3; Director's Response Brief at 3. Her evaluation of Claimant's testimony is inconsistent with applicable law.

The ALJ first erred by dismissing Claimant's lay testimony as "self-serving" statements because Claimant is the party seeking to establish entitlement to benefits in this survivor's claim. Neither the Act nor the regulations prohibit use of a widow's testimony for purposes of establishing the dust conditions of a miner's employment because she would be eligible for benefits.

The Act limits the use of lay testimony from an individual seeking eligibility for benefits in the context of total disability. 30 U.S.C. §923(b) (2018) ("Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits . . . shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis."). When Congress passed Section 1556 of the Patient Protection and Affordable Care Act, Public Law No. 111-148, §1556 (2010), it reinstated the Section 411(c)(4) presumption for survivors' claims with no corresponding limitation on the use of lay testimony to establish the dust conditions of a miner's employment. 30 U.S.C. §921(c)(4) (2018); 20 C.F.R. §718.305(b). Where "Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotations omitted); *Russello v. United States*, 464 U.S. 16, 23 (1983).

Nor do the regulations contain a similar limitation on the use of lay testimony in order to establish the dust conditions of a miner's employment. Although the regulations bar using the lay testimony of any person who would be eligible for benefits to prove total disability under certain circumstances, 20 C.F.R. §§718.204(d)(3), 718.305(b)(4),[5] the ALJ erred in applying the rationale underlying that regulation when evaluating whether the Miner was regularly exposed to coal mine dust. As the Director accurately argues, proving total disability and dust exposure are decidedly dissimilar issues. Director's Response Brief at 3.

In promulgating 20 C.F.R. §718.305, the Department of Labor (DOL) recognized miners and their survivors face notable obstacles in proving dust conditions, acknowledging coal mine operators generally control the technical information relating to such conditions at their mines. 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). It determined claimants would likely not have access to this information. *Id.* Therefore, the DOL explicitly rejected requiring claimants to produce technical, scientific evidence specifically quantifying a miner's exposure to coal mine dust during surface coal mining to establish regular dust exposure. *Id.* Rather, the DOL noted "the standard should be one that may be satisfied by *lay evidence* addressing the individual miner's experiences." *Id.* (emphasis added). Thus, the DOL anticipated that lay testimony would play a central role in establishing a miner was regularly exposed to coal mine dust. Moreover, in doing so it did not limit the use of that testimony from individuals who would be eligible for benefits in the event of an award.

The ALJ also erred in finding Claimant's evidence insufficient to establish the Miner was regularly exposed to coal mine dust because "she did not describe the environment in which [the] Miner worked, and there is no indication that Claimant had any personal knowledge of [the] Miner's daily working conditions." Decision and Order 7. In fact, Claimant did submit evidence describing the Miner's work environment: a signed employment history form indicating the Miner was exposed to dust, gases, or fumes throughout his coal mine employment. Director's Exhibit 3. Moreover, a survivor may

[5] In the case of a deceased miner, affidavits (or equivalent sworn testimony) from persons knowledgeable of the miner's physical condition must be considered sufficient to establish total disability due to a respiratory or pulmonary impairment if no medical or other relevant evidence exists which addresses the miner's pulmonary or respiratory condition; however, such a determination must not be based solely upon the affidavits or testimony of any person who would be eligible for benefits (including augmented benefits) if the claim were approved. 20 C.F.R. §§718.204(d)(3), 718.305(b)(4).

establish a miner was regularly exposed to coal mine dust in his employment based on her knowledge of his appearance when he returned from work and the dust present on his clothes. *Duncan*, 889 F.3d at 304 (widow's testimony that miner's face and clothes were very dirty when he returned from work, in conjunction with statement that he was exposed to dust, gases, and fumes for his entire coal mine employment, establish regular coal mine dust exposure); *see* 78 Fed. Reg. at 59,103-05 (lay evidence addressing the individual miner's experiences satisfies the regular dust exposure standard). By their very nature, survivors' claims may involve anecdotal testimony from a widow about the miner's appearance when returning from work, as the miner is deceased and unable to provide direct testimony about his working conditions. The DOL recognized "Congress enacted the Section 411(c)(4) presumption to assist miners *and their survivors* in establishing entitlement to benefits, and also permitted certain claimants to prove entitlement by lay evidence. Putting insurmountable hurdles in claimants' paths does not comport with that intent." 78 Fed. Reg. at 59,104-05 (emphasis added), *citing* 30 U.S.C. §923(b).

Based on the foregoing, we conclude the ALJ exceeded her discretion by disregarding Claimant's testimony on whether the Miner was regularly exposed to coal mine dust. *Jones*, 386 F.3d at 992; *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 252-53 (4th Cir. 2016) (reviewing court's deference to an ALJ's factual findings is not unlimited); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989). If the ALJ finds it credible, Claimant's testimony may be sufficient to establish the Miner was regularly exposed to coal mine dust for at least fifteen years of coal mine employment. 20 C.F.R. §718.305(b)(1)(i), (2); *see Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (ALJ evaluates the credibility and weight of the evidence of record, including witness testimony); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Thus we vacate the ALJ's finding that Claimant failed to establish at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(1)(i), (2); Decision and Order at 7. We also vacate the ALJ's finding that Claimant failed to invoke the Section 411(c)(4) presumption and the denial of benefits, and remand this case for further consideration.

The ALJ must reconsider Claimant's testimony and reweigh the evidence to determine whether Claimant has established at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(1)(i), (2). If so, the ALJ would then address whether Claimant has established the Miner had a totally disabling respiratory or pulmonary impairment at the time of his death. 20 C.F.R. §§718.305(b)(1)(iii), 718.204(b)(2). If Claimant establishes total disability, then she has invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305(b)(1). The ALJ must then determine whether Employer has rebutted the presumption. 20 C.F.R. §718.305(d)(2)(i), (ii). She must consider and

weigh all relevant evidence and adequately explain her findings as the Administrative Procedure Act requires.[6] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

However, if Claimant does not establish at least fifteen years of qualifying coal mine employment or total disability, the ALJ may reinstate her denial of benefits as Claimant does not dispute that she failed to meet her burden of establishing the Miner's death was due to pneumoconiosis without the benefit of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); 20 C.F.R. §718.205.

Accordingly, the ALJ's Decision and Order Denying Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

Claimant, Geneva Bonner, is the widow of the Miner, Raymond Bonner, a coal miner of seventeen years who died on December 4, 2012. The sole question presented in

[6] The Administrative Procedure Act provides that every adjudicatory decision must include "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).

this appeal is whether Claimant's testimony establishes that the Miner's surface coal mine work took place in conditions "substantially similar" to those underground. If it does, Claimant can invoke the Section 411(c)(4) presumption that the Miner's death was due to pneumoconiosis if she also establishes that he was totally disabled at the time of his death. 30 U.S.C. §921(c)(4). For the following reasons, I would hold that Claimant's testimony meets this standard and remand the claim for the ALJ to consider whether the Miner was totally disabled for purposes of invoking the presumption and, if necessary, whether Employer rebutted it.

As the majority acknowledges, the ALJ erred as a matter of law in determining Claimant's testimony is inadmissible on the question of whether the Miner worked in conditions substantially similar to those underground. Under certain circumstances, the Act and regulations prohibit reliance solely on a widow's testimony to establish medical diagnoses. 30 U.S.C. §923(b); 20 C.F.R. §§718.204(d)(3), 718.305(b)(4). They do not prohibit such testimony to answer the factual question of whether a surface miner was regularly exposed to coal mine dust.[7] *See* 20 C.F.R. §718.305(b)(2).

I disagree with my colleagues that remand is necessary for the ALJ to consider whether Claimant's testimony credibly establishes the dustiness of the Miner's work. Under the law and facts, the Board should reverse the ALJ's finding that substantial similarity was not established and hold that Claimant's testimony meets that standard.

First, Claimant's testimony, on its face, establishes the Miner was regularly exposed to coal mine dust throughout his surface mining career. She testified that she was married

[7] The ALJ acknowledged that 20 C.F.R. §718.305(b)(4) is not applicable to questions involving the length and nature of a miner's coal mine employment, but nevertheless denied the claim based on the regulation's "underlying rationale" that benefits cannot be awarded based "solely" on a widow's "self-serving" testimony. Decision and Order at 7. Any suggestion that a surviving spouse's testimony may be dismissed as inherently self-serving is undermined by the Act itself. 30 U.S.C. §923(b) ("all relevant evidence must be considered," including "[the miner's] wife's affidavits"); *see Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406-407 (6th Cir. 2019) (Board violated requirement to consider "all evidence" by "cavalierly" ignoring widow's relevant testimony regarding the length of her husband's coal mine employment); *Hillibush v. U.S. Dep't of Labor, Benefits Review Bd.*, 853 F.2d 197, 203-04 (3d Cir. 1988) (widow can establish entitlement through her own testimony and other laypersons' affidavits); *Dempsey v. Director, OWCP*, 811 F.2d 1154, 1159 (7th Cir. 1987), *quoting* S. Rep. No. 209, 95th Cong., 1st Sess. 11-12 (1977) (The purpose of Section 413(b) is "to provide for the legal sufficiency of affidavits in the case of a deceased miner because '[e]vidence available to a miner's widow is often incomplete, inadequate, or non-existent.'").

to the Miner during the entire seventeen years he worked as a coal miner. Hearing Transcript at 10. During this time, when he came home, he was "dirty from top to bottom because there [were] no places [at the mine] to change [and] no places to wash up or anything." *Id*. at 11. The entire time he worked in coal mining, he came home covered in black coal mine dust from the "dirty places" he worked. *Id*. at 11-12. The Miner was covered in so much coal dust "you could [only] see the whites of his eyes." *Id*. In response to questioning from the ALJ, Claimant revealed that the Miner took a shower when he returned home, and she had to shake coal mine dust off his clothes before washing them. *Id*.

Federal Courts of Appeals have routinely held testimony like Claimant's sufficient to establish a surface miner's regular exposure to coal mine dust. Thus, the ALJ erred in finding it too "general" to prove the Miner's "actual" dust exposure. Decision and Order at 7; *see, e.g.*, *Spring Creek Coal Co. v. McLean*, 881 F.3d 1211, 1215 (10th Cir. 2018) (miner's widow's and son's "testimony of his daily appearance after work suggest[ed] [he] was regularly exposed to dust"); *Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 298 (6th Cir. 2018) (widow's testimony her husband came home from work so covered in dust "you could only see the color of his eyes" and she had to wash his clothes "several times to even get them clean" supports a finding of regular dust exposure); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 487-88 (6th Cir. 2014) (testimony that a surface miner's clothes were covered in dust at the end of his shift supports a finding of regular dust exposure, as it is "typical" of testimony from underground miners who "similarly complain about being exposed to dust while in the mines and having significant dust on their clothes when they return home from work").

Second, Employer does not argue Claimant's testimony is not credible; nor does the record support such a finding. Claimant testified to exactly the type of information of which a spouse would be aware, and did so with sufficient detail: her husband came home from work every day covered from head to toe in coal mine dust; he was so dusty you could only see the whites of his eyes; and she had to shake the coal dust off his clothes before washing them. The ALJ's finding that Claimant did not have "personal knowledge" of the "environment in which [the] Miner worked," Decision and Order at 7, as well as Employer's argument that Claimant's testimony is not "direct evidence" of the Miner's dust exposure because she did not "observe" him at work, misconstrues Claimant's burden. Employer's Response Brief at 3-4.

Setting aside that Claimant's testimony *is* direct evidence of the Miner's regular dust exposure,[8] a surviving spouse is not required to submit evidence from someone who

[8] Where but his coal mine employment would the Miner have encountered so much coal mine dust immediately before returning home from work?

"witnessed" the Miner breathing coal dust. Decision and Order at 6-7; Employer's Response Brief at 3-4. As the Department concluded when it promulgated the regulations, evidence of a miner's dust exposure will be "inherently anecdotal." 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). The ALJ deeming Claimant's testimony insufficient for lacking "direct knowledge" of her husband's work conditions imposes the type of "insurmountable hurdle" that has been rejected by the Department and federal Courts of Appeals alike. *Id*.; *see Duncan*, 889 F.3d at 304; *McLean*, 881 F.3d at 1222. This hurdle is particularly insurmountable given that the Miner is deceased and cannot testify on his own behalf about work exposures that happened decades prior. *See Fife v. Director, OWCP*, 888 F.2d 365 (6th Cir. 1989) (noting the "substantial weight" given to lay testimony when the miner is deceased).

Moreover, although not a legal requirement, Claimant in this case *did* submit evidence from one of the Miner's coworkers who actually witnessed his dust exposure. Bill Cook's affidavit, which was fully credited by the ALJ, establishes that for the two years he and the Miner worked together, he personally observed the Miner's daily exposure to "a constant cloud of coal and rock dust which hung in the air and accumulated on clothes and equipment." Claimant's Exhibit 2. Both his and the Miner's clothes "were so coated with dusts and grime that you could not tell what color [their] shirts were at the end of each shift." *Id*. Although limited to his two years of personally observing the Miner's work, Mr. Cook's statements corroborate Claimant's own testimony that she observed him covered in coal mine dust every day when he returned home from work.

While credibility determinations are for the ALJ, *Bradberry v. Director, OWCP*, 117 F.3d 1361, 1367 (11th Cir. 1997), Employer does not allege, nor is there any basis to conclude, that Claimant's testimony lacks accuracy or honesty. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015) (miner's "uncontested lay testimony" of his dust conditions at work "easily supports" a finding of regular dust exposure); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1344 (10th Cir. 2014) (affirming finding of substantial similarity where the employer "d[id] not dispute [the miner's] recounting of his working conditions"). And, as noted, there is no real dispute that Claimant's testimony is anything but sufficient to meet the legal standard for regular coal mine dust exposure and consistent with the only other credited evidence of record. *McLean*, 881 F.3d at 1215; *Duncan*, 889 F.3d at 304; *Sterling*, 762 F.3d at 488.

As such, remand for the ALJ to determine whether Claimant's testimony credibly establishes the Miner's regular coal mine dust exposure is unnecessary. *See Adams v. Director, OWCP*, 886 F.2d 818, 826 (6th Cir. 1989) (reversing denial of benefits where the facts reveal "only [one] reasonable outcome"); *Scott v. Mason Coal Co.*, 289 F.3d 263, 270 (4th Cir. 2002) (denial of benefits reversed where "only one factual conclusion is possible"). Because there are no further factual determinations to be made on this issue,

and the outcome is clear, I would reverse the ALJ's finding that the Miner was not regularly exposed to coal mine dust and remand the claim for her to determine whether Claimant can invoke the Section 411(c)(4) presumption by establishing that the Miner was totally disabled.

I therefore dissent.

GREG J. BUZZARD
Administrative Appeals Judge