U.S. Department of Labor

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

BRB Nos. 19-0160 BLA
and 19-0167 BLA

SINA E. HUFF (o/b/o and Widow of CLAUDE HUFF, JR.) Claimant-Respondent v. SHAMROCK COAL COMPANY, INCORPORATED, Self-insured by SUNCOKE ENERGY, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/08/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims (2015-BLA-05923 and 2015-BLA-05924) of Administrative Law Judge Richard M. Clark rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2102) (the Act). This case involves a miner's claim filed on October 25, 2013, and a survivor's claim filed on July 31, 2014.[1]

The administrative law judge found the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. Thus, he determined claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] He further found employer did not rebut the presumption and awarded benefits in the miner's claim. Based on the award of benefits in the miner's claim, he found claimant derivatively entitled to survivor's benefits pursuant to Section 422(*l*).[3] 30 U.S.C. §932(*l*) (2012).

On appeal, employer argues the administrative law judge lacked the authority to decide the case because he was not appointed consistent with the Appointments Clause of

[1] The miner died on February 28, 2014, while his claim was pending before the district director. Director's Exhibit 34. Claimant, the miner's widow, is pursuing his claim on behalf of his estate, as well as her survivor's claim. Director's Exhibit 35A. The Board consolidated these appeals for purposes of decision only. *Huff v. Shamrock Coal Co.*, BRB Nos. 19-0160 BLA and 19-0167 BLA (Feb. 6, 2019) (Order) (unpub.).

[2] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes 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) (2012); 20 C.F.R. §718.305.

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her 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*) (2012).

the Constitution, Art. 11 § 2, cl. 2. Employer further contends, based on *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018), the Affordable Care Act (ACA) is unconstitutional and the provision reinstating the amendments to the Act contained in the ACA is inseverable. It also challenges the administrative law judge's determination claimant established the fifteen years of qualifying coal mine employment necessary to invoke the presumption and his finding it failed to rebut the presumption if invoked. Claimant responds in support of the awards in both claims. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, urging the Board to reject employer's arguments concerning the Appointments Clause and the constitutionality of the ACA.

The Board's scope of review is defined by statute. We must affirm the administrative law judge'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 Associates, Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer argues the administrative law judge was appointed in the same manner as Securities and Exchange Commission administrative law judges that the United States Supreme Court found inconsistent with the Appointments Clause[5] in *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). Employer's Brief at 5-7; *see also* Employer's Reply Brief at 2-4. It further maintains the Secretary of Labor's ratification of the prior appointments

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

[5] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

of all sitting Department of Labor (DOL) administrative law judges[6] was insufficient to cure the constitutional defect because it "merely rubber stamped" the original improper procedure. Employer's Brief at 6. The Director responds the Secretary's ratification brought the administrative law judge's appointment into compliance because employer failed to rebut the presumption of regularity that applies to the actions of public officers such as the Secretary. Director's Brief at 3-5. We agree with the Director.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 3, *quoting Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification is permissible so long as the agency head 1) had at the time of ratification the authority to take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress authorized the Secretary to appoint administrative law judges to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all administrative law judges in a single letter. Rather, he specifically identified Administrative Law Judge Clark and indicated he gave "due consideration" to his appointment. Secretary's December 21, 2017 Letter to Administrative Law Judge Clark. The Secretary further stated he was acting in his "capacity as head of the

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to Administrative Law Judge Clark.

Department of Labor" when ratifying the appointment of Judge Clark "as an Administrative Law Judge." *Id.*

Employer does not assert that the Secretary had no "knowledge of all the material facts" or that he did not make a "detached and considered judgement" when he ratified Judge Clark's appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary therefore properly ratified the administrative law judge's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment of civilian members of the United States Coast Guard Court of Criminal Appeals valid where Secretary of Transportation issued a memorandum "adopting" the General Counsel's assignments "as judicial appointments of my own"); *Advanced Disposal*, 820 F.3d 592, 604-05 (NLRB's retroactive ratification appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" its earlier invalid actions was proper). Therefore we reject employer's argument that this case should be remanded for a new hearing before a different administrative law judge. Employer's Brief at 6-7.

Constitutionality of the ACA

Citing *Texas v. United States*, 340 F.Supp.3d 579, employer contends the individual mandate contained in the ACA is unconstitutional and the remainder of the legislation, which reinstated the amendments to the Act among other things, is inseverable.[7] Employer's Brief at 7; Employer's Reply Brief at 5-7. The Director responds that because the district court stayed its ruling, the decision does not preclude application of the amendments to the Act found in the ACA. Director's Brief at 5.

We agree the decision does not affect application of the amendments to the Act. On appeal of the district court's opinion, the Fifth Circuit affirmed the individual mandate is unconstitutional, but vacated and remanded the determination the remainder of the ACA is inseverable.[8] *Texas v. United States*, No. 19-10011, 2019 WL 6888446, at 27-28 (5th Cir. Dec. 18, 2019) (King, J., dissenting). Further, the United States Supreme Court upheld the

[7] Section 1556 of the ACA reinstated the Section 411(c)(4) presumption of total disability due to pneumoconiosis for certain miners and survivors, as well as restored automatic entitlement at Section 422(*l*) for certain survivors. Pub. L. No. 111-148, §1556 (2010).

[8] Furthermore, the Board has declined to hold cases in abeyance pending the resolution of legal challenges to the ACA. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-26 (2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

constitutionality of the ACA, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and the United States Court of Appeals for the Fourth Circuit has held that the amendments to the Act have a stand-alone quality, *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). We therefore reject employer's argument that the ACA provisions are unconstitutional and inapplicable to this case.

The Miner's Claim - Invocation of the 411(c)(4) Presumption

Length of Coal Mine Employment

Because the miner had a totally disabling respiratory impairment,[9] claimant is entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b)(1)(i). Conditions at a surface coal mine are "substantially similar" if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden to establish the number of years the miner worked in coal mine employment. *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 administrative law judge's determination on the length of coal mine employment if based on a "reasonable method" and supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

On his application for benefits, the miner alleged he worked twenty-three years as a coal miner, and on his CM-911a Employment History form he indicated he worked in surface mine employment from 1974 until 1977 followed by underground employment until February 21, 1993. Director's Exhibits 2, 3. The administrative law judge found the miner had a combined total of at least fifteen years of underground and qualifying above-ground coal mine employment, from 1975 to February 21, 1993. Decision and Order at 6-7.

For the years 1975 and 1977, the administrative law judge credited the miner for any quarter in which his itemized statement of earnings from the Social Security Administration (SSA) showed he earned at least $50.00 in coal mine employment.[10] Decision and Order at 6. Finding the pre-1978 SSA statement showed five quarters where

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 16-17.

[10] The miner's SSA earnings record does not reflect earnings in 1976 or 1979. Director's Exhibit 5.

the miner earned more than $50.00, the administrative law judge credited him with 1.25 years of coal mine employment for this time period. *Id*.

Employer argues that the administrative law judge's "conclusory reliance" on crediting a miner for each quarter in which he had earnings from coal mine employment exceeding $50.00 was erroneous. Employer's Brief at 12. Contrary to employer's contention, the Board and the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, have upheld this method of calculation as reasonable.[11] *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *see also Shepherd v. Incoal, Inc.*, 915 F.3d 392, 405-06 (6th Cir. 2019), *reh'g denied*, No. 17-4313 (6th Cir. May 3, 2019) (administrative law judge may apply the *Tackett* method unless the beginning and ending dates of the miner's coal mine employment reveal "the miner was not employed by a coal mining company for a full calendar quarter"). We therefore affirm the administrative law judge's finding claimant established five quarters or 1.25 years of coal mine employment for 1975 and 1977. *See Muncy*, 25 BLR at 1-27; Decision and Order at 6.

Referencing the formula at 20 C.F.R. §725.101(a)(32)(iii)[12] for the years 1978 and 1980 through 1992, the administrative law judge calculated the miner's employment by dividing his annual earnings by the average yearly wage in Exhibit 610 of the *Coal Mine*

[11] In *Shepherd*, the Sixth Circuit noted "as quarterly income approaches th[e] floor of $50.00, it seems reasonable to conclude that the miner did not work in the mines most days in the quarter." *Shepherd v. Incoal, Inc.*, 915 F.3d 392, 406 (6th Cir. 2019). Here, claimant earned between $684.00 and $4,947.25 in each quarter the administrative law judge credited. Director's Exhibit 5.

[12] Pursuant to 20 C.F.R. §725.101(a)(32)(iii):

> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, then the adjudication officer may use the following formula: divide the miner's yearly income from work as a miner by the coal mine industry's daily average earnings for that year, as reported by the Bureau of Labor Statistics (BLS).

The BLS data is reported in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*.

(*Black Lung Benefits Act*) *Procedure Manual*.[13] Decision and Order at 5-7. Using this method, he credited the miner with a full year of coal mine employment for each year from 1980 through 1992, for a total of thirteen years of coal mine employment. *Id*. He also credited the miner with 0.70 of a year in 1978. Thus, he found claimant establish 13.70 years of coal mine employment for the years 1978 and 1980 through 1992. *Id*.

We reject employer's argument that the administrative law judge erred in calculating the miner's coal mine employment for 1978 because his actual working days for various employers may have "overlapped" so that his work in 1978 would not have spanned over 0.70 of a year.[14] Employer's Brief at 9-10. The Sixth Circuit specifically held in *Shepherd* that "regardless of the actual duration of employment for the year," if the calculation at 20 C.F.R. §725.101(a)(32)(iii) yields less than 125 days, "the miner still can be credited with a fractional portion of a year based on the ratio of the days worked to 125." 915 F.3d at 402.

Employer also asserts the administrative law judge failed to adequately address evidence concerning the start date for the miner's coal mine employment in 1980. Employer's Brief at 9. Employer states he erroneously credited the miner with a full year of employment with Clover Coal Company in 1980, asserting that Dr. Habre's report indicating a start date for the miner's coal mine employment of May 1980 and claimant's 1980 wages being less than his 1981 wages support that the miner worked for less than a year. *Id*. Contrary to employer's argument, Dr. Habre listed a start date for the miner's coal mine employment in 1980 with Shamrock Coal Company, not Clover Coal Company, and there is no evidence they are the same company, Director's Exhibit 8, or have the same wage scale.[15] Thus, we reject employer's argument the administrative law judge erred in crediting the miner with a full year of coal mine employment in 1980.

[13] The "average yearly earnings" figures appear in the center column of Exhibit 610 and reflect multiplication of the "average daily wage" by 125 days.

[14] For the year 1978, the administrative law judge determined the miner was employed for partial periods by Lewis & Lewis Coal Company Incorporated, Chiggar Coal Company Incorporated, Benham Coal Incorporated, Lazy Seven Coal Company Incorporated, and Bledsoe Coal Company. Decision and Order at 6; Director's Exhibit 5.

[15] As the administrative law judge noted, the miner's SSA earnings statement shows he worked for Clover Coal Company in 1980, earning $19,217.24, and for Shamrock Coal Company in 1981, earning $29,700.00. Decision and Order at 6; Director's Exhibit 5.

Similarly, employer contends the administrative law judge did not consider all relevant evidence in finding an ending date for the miner's coal mine employment with Shamrock Coal Company of February 21, 1993. *See* Employer's Brief at 9-10. Employer states claimant listed "2/02/93" on Form CM-913, Description of Coal Mine Work and Other Employment, which its calculations comparing the miner's 1992 earnings with his 1993 earnings supports. *Id.*; *see* Director's Exhibits 5, 32. Contrary to employer's assertion, the administrative law judge permissibly credited the miner with one month and three weeks of coal mine employment in 1993 based on the miner's assertion in his claim for benefits, which the employment history forms the miner and claimant both submitted supports. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 7; Director's Exhibit 2-3, 31. Moreover, employer has not explained how crediting the miner with one month and two days of coal mine employment as opposed to one month and three weeks, as the administrative law judge found, would have amounted to less than fifteen years of coal mine employment.[16] *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"). Thus, we affirm the administrative law judge's finding claimant established at least fifteen years of coal mine employment as supported by substantial evidence.[17] *Muncy*, 25 BLR at 1-27; Decision and Order at 7.

We agree with employer, however, that the administrative law judge did not adequately explain his finding that all of the miner's work from 1975 to 1993 constituted qualifying coal mine employment in accordance with the Administrative Procedure Act (APA).[18] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Employer's

[16] Although it is claimant's burden to establish the miner's years of coal mine employment, employer is in the best position, as the administrative law judge noted, to provide evidence concerning the miner's employment dates but it did not do so. *See* Decision and Order at 6 n.3.

[17] In addition to finding "just over [fifteen] years of coal mine employment[,]" the administrative law judge credited "[c]laimant's [credible] testimony that [the miner] worked for two or three years at a small underground coal mine after they married in 1966," but stated "the record does not allow me to determine the precise starting and ending dates of any of that coal mine employment." Decision and Order at 7. Employer does not specifically challenge this finding but generally asserts that prior to 1975, the miner was employed with several employers who "were not established to be coal mine operators." *See* Employer's Brief at 12.

[18] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons

Brief at 12-13. On the miner's CM-911a Employment History form, he indicated he was employed in "surface mining" from "? 1974" to 1977 running a loader for "Lewis & Joseph."[19] Director's Exhibit 4. Similarly, claimant completed a CM-911a form also indicating the miner was employed in "surface mining" from 1974 to 1977 running a loader for "Lewis & Joseph." Director's Exhibit 31. Claimant further testified the miner worked for Lewis & Joseph Coal Company at a strip mine "run[ning] a high lift or something to load the coal." Hearing Transcript at 18. The administrative law judge did not address whether Lewis & Joseph Coal Company was the same employer as Lewis & Lewis Coal Company Incorporated (Lewis & Lewis), which he credited as employing the miner in 1975, 1977, and 1978. *See* Decision and Order at 6. Further, the administrative law judge did not address whether the miner's employment with Lewis & Lewis occurred at an underground mine site or a surface coal mine site in conditions substantially similar to those of an underground mine. 20 C.F.R. §718.305(b). Because we are unable to discern the basis for the administrative law judge's finding, we vacate his determination that all the miner's coal mine employment constituted qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. 20 C.F.R. §718.305; *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *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). Thus we vacate his finding claimant invoked the Section 411(c)(4) presumption and also vacate the award of benefits in the miner's claim.[20]

On remand, the administrative law judge must determine whether the evidence establishes the miner had fifteen years of underground coal mine employment or whether his surface coal mine employment was performed in conditions substantially similar to those of an underground mine. 20 C.F.R. §718.305(b)(2); *see Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013) (no showing of comparability of conditions is necessary for an employee working on the surface at an underground coal

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or basis therefor, on all the material issue 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).

[19] The miner indicated on his Employment History form that he worked as a surface miner from 1974 to 1977 and the rest of his coal mine employment took place underground or on the surface at an underground mine. Decision and Order at 4, 5; Director's Exhibit 3.

[20] Because we have vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we decline to address, as premature, employer's arguments pertaining to the administrative law judge's findings regarding rebuttal of the presumption.

mine); *Muncy*, 25 BLR at 1-29. If claimant establishes fifteen years of qualifying coal mine employment on remand, she will invoke the Section 411(c)(4) presumption and the administrative law judge must determine whether employer rebutted the presumption. Alternatively, if claimant is unable to establish fifteen years of qualifying coal mine employment, the administrative law judge must consider entitlement to benefits under 20 C.F.R. Part 718.[21] *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In rendering his findings on remand, the administrative law judge must consider all relevant evidence and explain his underlying rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

The Survivor's Claim

In light of our decision to vacate the administrative law judge's award of benefits in the miner's claim, we also vacate the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*). If the administrative law judge again awards benefits in the miner's claim on remand, claimant is automatically entitled to benefits in the survivor's claim pursuant to Section 422(*l*). *See* 30 U.S.C. §932(*l*). Should the administrative law judge deny benefits in the miner's claim, he must consider whether claimant can establish entitlement to survivor's benefits pursuant to Section 411(c)(4)[22] or by establishing that the miner's death was due to pneumoconiosis under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86 (1988).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Living Miner's and Survivor's Claims is affirmed in part, vacated in part, and the case

[21] Without the benefit of the presumption, claimant has the burden to establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

[22] On remand, if the administrative law judge finds the evidence establishes the miner had fifteen years of qualifying coal mine employment, claimant would invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. In that case, the administrative law judge would be required to address whether employer could establish rebuttal of the presumption in accordance with the standards set forth at 20 C.F.R. §718.305(d)(2)(i), (ii).

is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge