U.S. Department of Labor

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

BRB Nos. 18-0567 BLA
and 18-0567 BLA-A

BILLIE B. BARR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
FAIRFIELD SOUTHERN COMPANY	)	DATE ISSUED: 01/27/2021
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on Modification of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

John R. Jacobs and J. Thomas Walker (Maples Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

M. Keith Gann and M. Brent Almond (Huie, Fernambucq & Stewart, LLP), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant[1] appeals and Employer cross-appeals Administrative Law Judge Lee J. Romero, Jr.'s Decision and Order Denying Benefits on Modification (2017-BLA-05125) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves Claimant's request for modification of the previous denial of the Miner's subsequent claim filed on June 20, 2011.[2]

The primary issue in this appeal is whether Claimant established that the Miner had at least fifteen years of qualifying coal mine employment to 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] In a Decision and Order Denying Benefits dated August 15, 2014, Administrative Law Judge Adele Higgins Odegard considered Claimant's assertion that the Miner's thirty-two years as a rail transport worker, first for U.S. Steel Corporation (U.S. Steel) and later for Fairfield Southern Company (Fairfield or Employer), constituted the work of a coal miner. Director's Exhibit 73. Judge Odegard credited the Miner with no more than fourteen years and four months of coal mine employment with U.S. Steel, which she found occurred at an underground mine. *Id.* While she credited the Miner with an additional three years of coal mine employment at Fairfield, she found it did not occur either at an underground coal mine or in conditions substantially similar to those in an underground mine and, thus, did not constitute qualifying coal mine employment. *Id.* Therefore, she concluded Claimant did not invoke the Section 411(c)(4) presumption. *Id.*

Considering whether Claimant established entitlement to benefits without the aid of any presumption,[4] Judge Odegard found the new evidence established clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a),

[1] Claimant is the widow of the Miner, who died on August 6, 2013. She is pursuing the Miner's claim on his estate's behalf.

[2] The Miner filed two prior claims. On May 17, 2002, the district director denied the Miner's most recent prior claim, filed on October 4, 2001, because he did not establish pneumoconiosis arising out of coal mine employment. Director's Exhibit 2. The Miner took no further action until filing the current claim on June 20, 2011. Director's Exhibit 4.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled 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.

[4] Administrative Law Judge Adele Higgins Odegard also determined there is no evidence the Miner had complicated pneumoconiosis. 20 C.F.R. §718.304; 2014 Decision and Order at 23.

718.203(b) and therefore a change in an applicable condition of entitlement at 20 C.F.R. §725.309(c). *Id.* She further found, based on all the evidence, Claimant established the Miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), but failed to establish his disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id.* Consequently, Judge Odegard denied benefits.

Both Claimant and Employer filed motions for reconsideration. In a Decision and Order on Reconsideration dated October 3, 2014, Judge Odegard denied their respective motions. Director's Exhibit 77.

Claimant filed a request for modification. Director's Exhibits 79. On September 28, 2015, the district director issued a Proposed Decision and Order denying Claimant's request for failure to establish a totally disabling respiratory impairment and, therefore, found Claimant failed to invoke the Section 411(c)(4) presumption that the Miner was totally disabled due to pneumoconiosis.[5] Director's Exhibit 96. The district director further found the newly submitted evidence on modification did not establish the existence of either clinical or legal pneumoconiosis.[6] *Id*. Claimant filed a second request for modification on April 15, 2016. Director's Exhibit 97.

In his Decision and Order dated August 3, 2018, that is the subject of this appeal and cross-appeal, Administrative Law Judge Lee J. Romero, Jr. (the administrative law judge) determined granting modification would render justice under the Act and thus reopened the record to consider modification.[7] He found Judge Odegard erred in

[5] Upon receipt of Claimant's request for modification, Employer also filed a request for modification, noting "it may not be necessary." Director's Exhibit 84. After denying Claimant's request for modification of the prior denial, the district director did not act on Employer's request and Employer did not pursue it.

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] We note the administrative law judge inappropriately conducted this analysis as a "threshold determination" before he addressed the merits of Claimant's modification

calculating the duration of the Miner's employment with U.S. Steel, and further erred in finding all of that work was that of a miner. He found no mistake, however, in Judge Odegard's ultimate determination that the Miner had less than fifteen years of qualifying coal mine employment and thus could not invoke the Section 411(c)(4) presumption. He also found that because Claimant did not establish complicated pneumoconiosis at 20 C.F.R. §718.304, she could not invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Considering the claim without the aid of the presumptions, he found Claimant established the Miner had clinical pneumoconiosis and a totally disabling respiratory or pulmonary impairment, but failed to establish the Miner's total disability was due to pneumoconiosis and denied benefits.

On appeal, Claimant argues the administrative law judge 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. Employer responds in support of the denial of benefits. Claimant filed a reply brief, reiterating her contentions. The Director, Office of Workers' Compensation Programs, has not filed a brief.[8]

On cross-appeal, Employer argues the administrative law judge erred in determining any of the Miner's work as a rail transport worker constituted that of a "miner" under the Act. Employer also argues the administrative law judge erred in finding the Miner had clinical pneumoconiosis. Claimant responds, urging affirmance of the administrative law

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request. Decision and Order on Modification at 8-11, *citing Sharpe v. Director, OWCP*, 495 F.3d 125, 128 (4th Cir. 2007) (*Sharpe I*). Contrary to the administrative law judge's analysis, nothing in *Sharpe I* establishes an administrative law judge must make such a determination at the outset. Instead, the facts will dictate the timing of the inquiry. While it might make sense to make a threshold determination in cases of obvious bad faith, it does not follow that a threshold determination is appropriate in cases such as this where there is no indication of an improper motive. In such a case, the administrative law judge should first consider the merits. If there is no basis to grant the relief requested in a modification petition, there is no reason to determine whether that relief would render justice. *See O'Keeffe v. Aerojet General Shipyards, Inc.*, 404 U.S. 254, 255 (1971) (the plain purpose of modification is to vest an adjudicator "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.").

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established the Miner was totally disabled at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

judge's findings that the Miner worked as a "miner" and had clinical pneumoconiosis. Employer filed a reply brief, reiterating its contention the Miner did not perform any qualifying coal mine employment.

The Benefits Review 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.[9] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Status as a Miner and Coal Mine Employment

Because Claimant established the Miner had a totally disabling respiratory or pulmonary impairment, she is entitled to the Section 411(c)(4) presumption if she establishes the Miner had at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4). Under the Act:

> The term miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a).[10] The United States Court of Appeals for the Eleventh Circuit has held the definition of a "miner" comprises a "situs"

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[9] This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the Miner's coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 2, 5.

[10] The regulations define a "miner" as the following:

> [A]ny person who . . . worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who . . . worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.

20 C.F.R. §725.202(a). The regulations define the term "coal mine" as the following:

requirement (i.e., that a miner worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that a miner worked in the extraction or preparation of coal). *See Fox v. Director, OWCP*, 889 F.2d 1037 (11th Cir. 1989); *Baker v. United States Steel Corp.*, 867 F.2d 1297 (11th Cir. 1989); *Foreman v. Director. OWCP*, 794 F.2d 569 (11th Cir. 1986). To satisfy the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Fox*, 889 F.2d at 1043; *Baker*, 867 F.2d at 1298; *see also Tobin v. Director,* OWCP, 8 BLR 1-115 (1985).

The regulation at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), also includes special provisions for coal mine transportation workers. 20 C.F.R. §725.202(b). Transportation workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted 1) by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) by evidence which demonstrates that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. §725.101(a)(12). The focus of the situs inquiry is whether the intended use of the area of land on which the claimant worked was for the extraction or preparation of coal. *McKee v. Director, OWCP*, 2 BLR 1-804 (1980).

The phrase "coal preparation" is defined as the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of . . . coal, and such other work of preparing coal as is usually done by the operator of a coal mine." 20 C.F.R. §725.101(a)(13). An individual need not be engaged in the actual extracting or preparing of coal to meet the function test so long as the work performed is integral to the coal production process. *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990) (en banc).

The Miner worked as a rail transport worker from 1965 to 1997 for U.S. Steel and Fairfield. From 1965 until 1983, he worked for U.S. Steel delivering empty rail cars to the preparation plant at U.S. Steel's Concord Mine, an operational underground mine, to be loaded with coal extracted from it. He then positioned or spotted the cars for loading, oversaw the loading, and delivered the coal by rail to various locations elsewhere. Director's Exhibit 56 at 20-28, 39; Director's Exhibits 4-6.

Around 1983, the Concord Mine closed its underground mining operation and by 1984 the site was operating only as a preparation plant. About the same time, U.S. Steel transferred its internal rail operations to Fairfield and the Miner went to work for them, still as a rail transport worker. From approximately 1984 to 1987 he performed the same job for Fairfield as he had for U.S. Steel, delivering empty rail cars to the Concord preparation plant, spotting and positioning the cars, overseeing the loading of coal, and delivering it to various locations. Director's Exhibit 56 at 29, 43, 51-53. The only difference was the coal he loaded during that time was not extracted at the Concord Mine itself but was extracted at U.S. Steel's Oak Grove underground mine, approximately five miles away, and transported to U.S. Steel's Concord preparation plant by conveyor belt connecting the two facilities.

The administrative law judge found no mistake in Judge Odegard's prior determination that the Miner's duties for both U.S. Steel and Fairfield of delivering empty rail cars to the coal preparation plant, spotting and positioning the cars, and overseeing the loading of coal constituted the work of a miner. Decision and Order on Modification at 27.

On cross-appeal, Employer argues the administrative law judge erred in determining any of the Miner's work as a rail transport operator, either with U.S. Steel or Fairfield, was that of a miner under the Act. Employer contends that because the Miner transported and loaded only processed coal, his duties were not integral to the extraction or preparation of coal and thus did not satisfy the function test.[11] Employer's Brief on Cross-Appeal at 2-8. We disagree.

[11] Employer further asserts that because the Miner's work only involved coal after it was processed at the preparation plant, Claimant failed to satisfy the "status" prong which "focusses on whether the coal was 'raw coal' or 'processed coal.'" Employer's Brief on Cross-Appeal at 5-6, *citing Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985). Contrary to Employer's assertion, the Eleventh Circuit adopted a two-prong test that considers situs and function, not status. *See Baker v. United States Steel Corp.*, 867 F.2d 1297 (11th Cir.

The Miner's duties at U.S. Steel and Fairfield included loading and delivering coal on a daily basis. Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 59). While the delivery of processed coal to consumers has been held to not constitute coal mine employment, the loading of coal at a preparation facility prior to its entering the stream of commerce is integral to the preparation of coal. *See* 30 U.S.C. §802(i), as implemented by 20 C.F.R. §725.101(13) (defining coal preparation as including the loading of coal); *Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780 (4th Cir. 1993); *Hanna v. Director, OWCP*, 860 F.2d 88, 93 (3d Cir. 1988) (loading coal is the final step of the preparation of coal); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 930-35 (6th Cir. 1989). Further, the Miner's other duties at U.S. Steel and Fairfield delivering and positioning rail cars for loading also have been held to relate to the preparation of coal for delivery into the stream of commerce. *See Shrader*, 5 F.3d at 780 (engineer's delivery of empty railroad cars to coal preparation facility was integral to process of loading coal and was part of coal preparation); *Spurlin v. Director, OWCP*, 956 F.2d 163, 163 (7th Cir 1992) (conductor whose work included "spotting" cars for loading with coal at mine was a miner); *Mitchell v. Director, OWCP***,** 855 F.2d 485, 490 (7th Cir. 1988) (claimant whose job was to clean railroad cars so that they could be loaded with new coal at a preparation plant was employed as a miner).

Notably, while the portion of the Miner's working day spent delivering processed coal may not be coal mine work, a miner need not engage in coal mine employment for an entire day in order to be credited with a full day of mining work. *See* 20 C.F.R. §725.101(a)(32) ("A 'working day' means any day or part of a day for which a miner received pay for work as a miner."). Thus, contrary to Employer's arguments, the administrative law judge properly found the Miner's work delivering rail cars to the coal preparation plant, positioning the cars, and overseeing the loading of the cars was integral to the extraction and preparation of coal. *See Hanna*, 860 F.2d at 93; Decision and Order on Modification at 25-27. We therefore affirm the administrative law judge's finding that the Miner's daily work duty of delivering rail cars to the preparation plant and loading them with coal constituted coal mine work.[12] *Id*.

1989). While Employer also asserts the Miner failed to satisfy the "situs" test, it offered no arguments in support of that contention. Employer's Brief on Cross-Appeal at 8.

[12] Employer cites several cases it asserts support the proposition that coal preparation work is not always that of a miner. Employer's Brief on Cross-Appeal at 6-7. Those cases are distinguishable as they did not turn on the fact that the coal was already processed, as Employer contends, but the fact that the processed coal was not entering the stream of commerce. In *Fox*, the claimant worked in the coal preparation facility of a coke plant. In *Foreman*, the claimant worked in the coal preparation facility of an ore mine

We also reject Employer's assertion that the administrative law judge erred in finding it failed to rebut the presumption at 20 C.F.R. §725.202(b)(2)(i) that the Miner's transportation work at the Concord preparation plant was that of a miner. Employer's Brief on Cross-Appeal at 9-10. Employer argues the testimony of Mr. John Silinsky, a supervisor with Fairfield, establishes the Miner's loading activities brought him within only 200 to 250 feet of the loading chute for about fifteen minutes per day.[13] *Id*., *referencing* Director's Exhibit 56 at 85-91, 89; 2015 Hearing Transcript at 85-86. Employer thus contends the Miner was not regularly exposed to coal mine dust during his transportation work at the Concord preparation plant. 20 C.F.R. §725.202(b)(2)(i); Employer's Brief on Cross-Appeal at 9-10.

Contrary to Employer's assertion, Judge Odegard correctly noted the regulatory test for rebutting the presumption is whether a miner was "regularly" exposed to dust, not whether he was "regularly and continuously" exposed to it. 20 C.F.R. §725.202(b)(2)(i); Director's Exhibit 77 at 6. Further, she found Mr. Silinsky's testimony that the Miner delivered rail cars to the Concord preparation plant "pretty steadily" for several years established he was "regularly" exposed to coal mine dust as a transportation worker.[14]

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power plant. In both cases, the Eleventh Circuit held that because the facilities were coal consumers, and the claimants were readying it for internal use rather than preparing it for shipment in the stream of commerce, they were not doing the work of miners. *See Fox v. Director, OWCP*, 889 F.2d 1037, 1042-43 (11th Cir. 1989); *Foreman v. Director, OWCP*, 794 F.2d 569, 571 (11th Cir. 1986). Similarly, in *Southard* the claimant worked at a retailer facility that consumed coal rather than prepared it for shipment. *Southard v. Director, OWCP*, 732 F.2d 66, 69-71 (6th Cir. 1984). In *Eplion*, the claimant worked in a railroad terminal where processed coal was transferred from trains to barges. The primary issue was not the function test, but whether the railroad terminal in which he worked was "in or around a coal mine" for purposes of the situs test. *See Eplion v. Director, OWCP*, 794 F.2d 935, 936-37 (4th Cir. 1986).

[13] Mr. Silinsky described his personal experience operating trains for Fairfield in August 1986. 2015 Hearing Transcript at 87-88.

[14] At the hearing before Judge Odegard, the Miner testified it took about thirty minutes to load one rail car and he stood twenty to twenty-five feet away or within the range of thirty feet. Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 23-25). He stated the loading process created a "dusty environment." *Id*. He "couldn't avoid" breathing in the coal dust because "[i]t was everywhere you would step, you would be six inches deep in coal dust." *Id*.; *see also* Director's Exhibit 2 (Form CM-913, Description of Coal Mine and Other Work, dated October 2, 2001, describing standing "in coal dust up to [his] ankles"). When his employer switched from U.S. Steel to Fairfield, his job placed

Decision and Order on Modification at 26, *referencing* Director's Exhibit 73 at 14-15, 17-18 and Director's Exhibit 77 at 6. As it is supported by substantial evidence, we affirm the administrative law judge's conclusion that Judge Odegard did not make a mistake in a determination of fact in finding Employer failed to rebut the presumption that the Miner performed coal mine employment. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992 (11th Cir. 2004); Decision and Order on Modification at 26.

We reverse, however, the administrative law judge's subsequent determination that Judge Odegard erred in finding all of the Miner's work for U.S. Steel constituted qualifying coal mine employment. Because the Miner was involved in incidents at the Coke Works, and the Edgewater and Wenonah iron ore mines,[15] the administrative law judge found he did not work "exclusively" at an underground site and therefore his "coal mine employment [with U.S. Steel] is likely far less than 14 years." Decision and Order on Modification at 31-33.

Contrary to the administrative law judge's determination, Claimant does not have to establish the Miner worked "exclusively" at Concord to get credit for that employment, nor did Judge Odegard find he worked only at Concord as a factual matter. *See* 20 C.F.R. §725.101(a)(32) ("A 'working day' means any day or part of a day for which a miner received pay for work as a miner."). As discussed, Judge Odegard found the Miner was "regularly" exposed to coal mine dust as a transportation worker. *See Jones*, 386 F.3d at 992; Decision and Order on Modification at 26, *referencing* Director's Exhibit 73 at 14-15, 17-18 and Director's Exhibit 77 at 6. Moreover, none of the incidents involving the handling of iron ore and metal products that the administrative law judge referenced contradict the Miner's testimony that he loaded coal at the Concord Mine site "one time in one shift . . . for five days" per week, nor even necessarily indicate he was not also at the Concord Mine on the particular days the incidents occurred. Director's Exhibit 56 (January 30, 2013 Hearing Transcript at 59).

Thus we reverse the administrative law judge's modification finding, and reinstate Judge Odegard's original determination that the Miner's work for both U.S. Steel and Fairfield delivering empty rail cars to the preparation plant at the Concord site, spotting

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him "closer" to the dust. Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 50-53). He testified he was exposed to dust when spotting rail cars and breathed it in. *Id*.

[15] It is unclear why the administrative law judge found Edgewater to be an iron ore mine. The Miner specifically identified Edgewater as a coal mine, where he loaded coal. Director's Exhibits 1, 2 (Form CM-913, Description of Coal Mine and Other Work, dated September 13, 1994 and October 2, 2001).

and positioning the cars, and overseeing the loading of processed coal for delivery constituted the work of miner, thereby establishing seventeen years and four months of coal mine employment. *See Hanna*, 860 F.2d at 93.

Nature of Coal Mine Employment

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). "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 v. 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).

A miner who worked aboveground at an underground mine need not otherwise establish the conditions were substantially similar to those in an underground mine, however. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The regulations define a "coal mine" as including:

> . . . an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. § 725.101(a)(12). They further define an "underground coal mine" as:

> . . . a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e. overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, *appurtenant thereto*.

20 C.F.R. §725.101(a)(30)(emphasis added).

With respect to the nature of the Miner's coal mine work, the administrative law judge agreed with Judge Odegard that the Concord Mine was an operational underground mine during the Miner's entire tenure with U.S. Steel. Decision and Order on Modification at 27, 28. Thus, he agreed that all the Miner's work delivering rail cars to the Concord Mine for U.S. Steel constituted qualifying coal mine work for purposes of invoking the Section 411(c)(4) presumption based on the definition of an underground mine. *Id.* at 28.

Regarding the Miner's employment with Fairfield, the administrative law judge found no mistake in Judge Odegard's determination that from approximately 1984 to 1987, he performed the same job as he did for U.S. Steel at the Concord preparation plant. Director's Exhibit 56 at 29, 43, 51-53. In finding the Concord preparation plant no longer covered by the definition of an underground mine, however, both Judge Odegard and the administrative law judge found it ceased its underground mining operations by the time Fairfield employed the Miner, and thus, in their view, it ceased to be an underground mine.[16] Both further found it immaterial that, during the same period, a conveyor belt delivering the facility's coal physically attached U.S. Steel's Concord preparation plant to the underground mine U.S. Steel owned and operated at Oak Grove. Decision and Order on Reconsideration at 4-5; Decision and Order on Modification at 34-35.

As the administrative law judge noted, Judge Odegard recognized the regulatory definition of an underground coal mine includes "all land, structures, facilities . . . and other property, real or personal, *appurtenant* thereto." 20 C.F.R. §725.101(a)(30)(emphasis added). In finding the Concord preparation plant was not appurtenant to Oak Grove, Judge Odegard noted the two entities were "not even near" each other, but were "at least five miles" apart and the conveyor belt system was "more than seven miles long." Decision and Order on Reconsideration at 5; Director's Exhibit 77 at 5. Relying on a strictly distanced-based construction of the term "appurtenant thereto" -- without attempting to define it -- and noting Judge Odegard's "thorough[] discuss[ion]," the administrative law judge found no mistake in her determination. Decision and Order on Modification at 35. Beyond noting the distance between the properties, however, neither judge further considered the meaning of the word "appurtenant" nor analyzed the relationship between

[16] The administrative law judge noted Judge Odegard found the Concord underground mine closed in 1983 and Mr. Jones testified the Concord site was only a preparation plant when Fairfield became an entity in 1984. Decision and Order on Modification at 33. Judge Odegard further noted the Miner testified that after the Concord Mine ran out of coal, U.S. Steel started "belting" it in from its Oak Grove underground mine to its Concord preparation plant "to load in the rail cars." Director's Exhibit 73 at 5; *see* Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 24-25).

the preparation plant and the underground mine for the purposes of applying 20 C.F.R. §725.101(a)(30).

We thus find their analysis incomplete and, upon further review, hold they erred as a matter of law in applying the term "appurtenant" contained in the regulatory definition of an underground mine. By both its plain meaning and as a legal term of art, "appurtenant" does not relate exclusively to physical proximity. Rather, The *Oxford English Dictionary* defines "appurtenant" as "[b]elonging to a property or legal right" or "constituting a property or right subsidiary to one which is more important." *Oxford English Dictionary* 590 (2d ed.1989). It defines "appurtenance" as "[a] thing that belongs to another, a 'belonging'; a minor property, right, or privilege, belonging to another more important, and passing in possession with it; an appendage." *Oxford English Dictionary* 589–90 (2d ed.1989). *Black's Law Dictionary* similarly defines "appurtenant" as "[a]nnexed to a more important thing." *Appurtenant*, *Black's Lung Dictionary* (11th ed. 2019). It further defines "appurtenance" as "[s]omething that belongs or is attached to something else; esp., something that is part of something else that is more important." *Appurtenance*, *Black's Lung Dictionary* (11th ed. 2019).

Thus, the term more accurately relates to shared functions and relationships between properties than it does strictly to their proximity. *See, e.g., Sec'y of Labor v. Nat'l Cement Co. of Cal., Inc.*, 494 F.3d 1066 (D.C. Cir. 2011) ("*National Cement*") (meaning of "appurtenant" contained in the Mine Safety and Health Act's definition of a mine is ambiguous when applied to portions of a 4.3 mile access road, not because of physical distance, but because of questions regarding the mine operator's "complete control" over it); *U.S. v. Lara*, 590 Fed.Appx. 574, 578-79 (5th Cir. 2016) ("appurtenant to" can mean "physically attached" or it can denote a "relationship between objects"); *1500 Range Way Partners, LLC v. JP Morgan Chase Bank,* 800 F. Supp.2d 716, 720 (D.S.C. 2011) (collecting cases containing the legal definition of "appurtenant to" in various contexts and concluding that when used in a contract, it covered not only physically attached bank premises, but subordinate banking properties wherever located).

National Cement is particularly instructive. In that case, a divided panel of the United States Court of Appeals for the District of Columbia Circuit vacated a finding by the Federal Mine Safety Health Review Commission that the Secretary of Labor lacked authority to force National Cement to install guardrails on a portion of a 4.3 mile long road that accessed a mine on its 5,000 acre property. 494 F.3d at 1077. Relying on dictionary definitions of the term "appurtenant," the majority rejected the Commission's interpretation that, given the length of the road and its use by other commercial entities, including it in the definition of a mine would lead to absurd results. *Id.* Finding it ambiguous whether the Secretary of Labor intended to include the entire road, or just the portion over which National Cement had sole authority, it remanded for the Secretary to

indicate whether "exclusive access" and "complete control" were required for the entire road to be considered part of the mine. *Id.*

The dissenting judge found no ambiguity in the term whatsoever, and would have reversed instead of vacating. He found the entire 4.3 mile road included under the usual dictionary definition of appurtenant because, among other things, the "common meaning of appurtenance has nothing to do with exclusivity." *Id.* at 1078. Neither the majority nor the dissent found the length of the road disqualifying in any way.[17]

Following *National Cement*, we assume the agency was aware of the plain meaning of the term "appurtenant thereto" when it drafted 20 C.F.R. §725.101(a)(30). *See, e.g.*, *United States v. Johnson*, 529 U.S. 53, 57 (2000) (in a statutory or regulatory provision, words are presumed to have their ordinary, common sense meanings). Moreover, none of the issues regarding exclusivity and control at issue in *National Cement* that prevented the majority from finding the entire road appurtenant to the mine arise here. There is no suggestion that anyone other than the two private facilities, that U.S. Steel owned and operated at the relevant time, had access to the conveyor belt attaching them, unlike the access road shared by numerous commercial entities in *National Cement*.

Moreover, a direct physical attachment and an interdependent relationship preparing coal for entry into the stream of commerce connected Concord and Oak Grove while the Miner worked for Fairfield. Both facilities were owned by, and thus belonged to, U.S. Steel. The conveyor belt connected the mine to the plant. Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 24-25, 41, 74); October 25, 2017 Hearing Tr. at 58-60, 81-82. And the plant depended on the mine for coal in the same manner it previously depended on its own underground operations. Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 65-66). As the conveyor belt physically connected the two facilities allowing U.S. Steel to extract and prepare coal, the preparation plant was "appurtenant" to the underground mine, regardless of the distance separating them. 20 C.F.R. §725.101(a)(30); *Nat'l Cement Co. of Cal., Inc.*, 494 F.3d at 1077.

We therefore reverse the administrative law judge's finding that the Miner's employment with Fairfield from 1984 to 1987 did not constitute work at an underground

[17] The Mine Act defines a "mine" to include "an area of land from which minerals are extracted," 30 U.S.C. § 802(h)(1)(A), and "private ways and roads *appurtenant to* such [an] area," *id.* § 802(h)(1)(B)(emphasis added).

mine, providing an additional three years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption.[18]

Because substantial evidence supports Judge Odegard's original finding that the Miner worked as a miner for at least fourteen years for U.S. Steel at its Concord facility when it was an active underground mine, and because the Miner performed the same work for approximately three years at Fairfield when Concord was appurtenant to U.S. Steel's active underground mine at Oak Grove, we also reverse the administrative law judge's finding Claimant did not establish at least fifteen years of qualifying coal mine employment. *See Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29; 20 C.F.R. §725.101(a)(30). As Claimant established at least fifteen years of qualifying employment

[18] In view of our holding, we need not address Claimant's alternative argument that whether or not the Concord underground mine was still active while the Miner worked for Fairfield is immaterial to its status as an underground mine, and take no position on the matter. We note, however, that even if the Concord site ceased to be an underground mine, we would remand for the administrative law judge to reconsider whether Claimant established that the Miner worked in "substantially similar" dust conditions at an underground mine while he worked at Fairfield, i.e., "was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Judge Odegard's finding of no regular dust exposure was based solely on a document indicating that during three days in 1990, jobs comparable to the Miner's experienced low "respirable" and "total" dust concentrations as compared to Occupational Safety and Health Administration (OSHA) standards. Director's Exhibit 73 at 17-18. She did not explain, however, why she "presumed" dust conditions were the same in 1990 as they were 1987 when the Miner stopped working or why a document showing "low" dust exposure compared to OSHA standards in 1990 undermines a finding of "regular" dust exposure based on the Miner's testimony that the loading process created a "dusty environment," he stood within twenty to thirty feet of the coal loading process, he was exposed to coal dust while spotting rail cars, and he "couldn't avoid" breathing in the coal dust because "[i]t was everywhere you would step, you would be six inches deep in coal dust." Director's Exhibit 56 (January 30, 2013 Hearing Tr. at 23-25, 50-53); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490 (6th Cir. 2014) (claimant's testimony that the conditions throughout his employment were "very dusty" met claimant's burden to establish he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17 (10th Cir. 2014) (claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove, and he was exposed to "pretty dusty" conditions, "provided substantial evidence of regular exposure to coal mine dust").

and a totally disabling pulmonary impairment, she invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). Therefore, we remand the case to the administrative law judge to determine whether Employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii).

On remand, the administrative law judge must consider whether Employer can rebut the presumption by establishing the Miner had neither legal nor clinical pneumoconiosis, or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). In rendering his findings on remand, the administrative law judge must explain the bases for his credibility determinations in accordance with the Administrative Procedure Act.[19] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because Claimant is entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis, we decline to address the administrative law judge's finding Claimant failed to establish disability causation.[20] 20 C.F.R. §718.204(c).

[19] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "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).

[20] In view of our disposition of this case, we need not address Employer's argument on cross-appeal regarding the administrative law judge's analysis of the x-ray evidence in finding Claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Accordingly, the administrative law judge's Decision and Order Denying Benefits on Modification is affirmed in part, reversed in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge