U.S. Department of Labor

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

BRB Nos. 23-0180 BLA
and 23-0181 BLA

EARLENE A. BARR (o/b/o and Widow of BILLIE B. BARR) Claimant-Respondent v. FAIRFIELD SOUTHERN COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/18/2024 DECISION and ORDER

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

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

Kary Bryant Wolfe (Jones Walker LLP), Birmingham, Alabama, and M. Brent Almond (Huie, Fernambucq & Stewart, LLP), Birmingham, Alabama, for Employer.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Lauren C. Boucher's Decision and Order Awarding Benefits on Remand (2017-BLA-05125 and 2018-BLA-05227) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a previous denial of a miner's subsequent claim filed on June 20, 2011, and a survivor's claim filed on September 3, 2013.[1] The miner's claim is before the Benefits Review Board for the second time.

When the case was previously before the Board, Claimant appealed and Employer cross-appealed ALJ Lee J. Romero, Jr.'s August 3, 2018 Decision and Order Denying Benefits on Modification in the miner's claim. *Barr v. Fairfield Southern Co.*, BRB Nos. 18-0567 BLA and 18-0567 BLA-A (Jan. 27, 2021) (unpub.) (*Barr* 1). The primary issue before the Board was whether the Miner had at least fifteen years of qualifying coal mine employment necessary 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).[2] *Barr* 1 at 7. Because ALJ Romero relied on ALJ Adele Higgins Odegard's prior coal mine employment findings in her August 15, 2014 Decision and Order Denying Benefits, the Board also considered ALJ Odegard's decision.[3] *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 3-4, 7-16.

[1] The survivor's claim was held in abeyance during the pendency of the miner's claim but was consolidated before ALJ Boucher on January 10, 2023, after the miner's claim was remanded to the Office of Administrative Law Judges. Decision and Order on Remand at 2.

[2] 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.

[3] We incorporate the Board's summary of the procedural history of this case and the detailed summary and analysis of ALJ Odegard's August 15, 2014 Decision and Order Denying Benefits and ALJ Romero's August 3, 2018 Decision and Order Denying Benefits

The Board noted that the Miner worked as a rail transport worker from 1965 to 1983 for U.S. Steel. He delivered empty rail cars to the coal preparation plant at U.S. Steel's Concord Mine (Concord Mine), an operational underground mine, and those cars were loaded with coal extracted from the mine. *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 7. He positioned or spotted the cars for loading, oversaw the loading, and delivered the coal by rail to various locations. *Id.* Around 1983, the Concord Mine closed its underground mining operation, and by 1984 the site was operating only as a preparation plant. *Id.* About the same time, U.S. Steel transferred its internal rail operations to Fairfield Southern Company (Fairfield) and the Miner went to work for them, still as a rail transport worker. *Id.* From approximately 1984 to 1987, the Miner performed the same job for Fairfield as he had for U.S. Steel, with one difference. *Id.* The coal he loaded for Fairfield was not extracted at the Concord Mine itself; it was extracted at U.S. Steel's Oak Grove (Oak Grove) underground mine, approximately five miles away. *Id.* The coal was then transported to Concord Mine's preparation plant by a conveyor belt connecting the two facilities. *Id.*

The Board rejected Employer's argument on cross-appeal that none of the Miner's work as a rail transport operator was that of a miner. It affirmed ALJ Romero's determination that the Miner's work at U.S. Steel and Fairfield 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. Consequently, the Board also affirmed the ruling that the Miner's work constituted coal mine work. *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 7-8. In addition, the Board affirmed ALJ Romero's finding that Employer failed to rebut the presumption at 20 C.F.R. §725.202(b)(2)(i) that the Miner's transportation work at the Concord Mine preparation plant was that of a miner. *Id.* at 9-10. The Board reversed, however, ALJ Romero's finding that the Miner's overall number of years of coal mine employment with U.S. Steel should be reduced because, at times, he did not work "exclusively" at the company's coal mining operations. *Id.* at 10. It thus reinstated ALJ Odegard's earlier findings that all of the Miner's work for U.S. Steel and Fairfield was as a miner and he had established seventeen years and four months of coal mine employment. *Id.* at 10-11.

Concerning the nature of the Miner's coal mine employment for purposes of invoking the Section 411(c)(4) presumption, i.e., whether it was in an underground mine or in conditions similar to an underground mine, the Board held substantial evidence supports ALJ Romero's finding that the Miner's transportation work at the Concord Mine preparation plant constituted qualifying coal mine employment during the Miner's

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on Modification, set forth in *Barr v. Fairfield Southern Co.*, BRB Nos. 18-0567 BLA and 18-0567 BLA-A (Jan. 27, 2021) (unpub.) (*Barr* 1).

employment with U.S. Steel because at that time it was an operational underground mine. *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 12, 15.

But the Board reversed ALJ Romero's finding that the Miner's employment with Fairfield from 1984 to 1987 did not constitute work at an underground mine and, thus, also reversed ALJ Romero's determination that the Miner did not establish he had at least fifteen years of qualifying coal mine employment. *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 14-15. It noted that in finding the Concord Mine preparation plant no longer qualified as an underground mine, ALJs Romero and Odegard determined it had ceased its underground mining operations by the time Fairfield employed the Miner. *Id*. at 12. However, the Board determined their analysis was incomplete and held they erred as a matter of law in applying the term "appurtenant" from the regulatory definition of an underground mine. *Id*. at 13. The Board concluded that the term "more accurately relates to shared functions and relationships between properties." *Id*. It therefore held that, regardless of the distance separating the Concord Mine preparation plant where the Miner performed his work and the Oak Grove underground mine that supplied the coal to the preparation plant, the conveyor belt physically connected them; therefore, the preparation plant was "appurtenant" to an underground mine. *Id*. at 13-14.

The Board thus also held the Miner's additional three years of qualifying coal mine employment with Fairfield from 1984 to 1987, added to the Miner's at least fourteen years of qualifying coal mine employment with U.S. Steel from 1965 to 1983, established more than fifteen years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 14-15.

Because Claimant established at least fifteen years of qualifying employment and a totally disabling pulmonary impairment,[4] the Board held she invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4). *Barr* 1, BRB Nos. 18-0567 BLA/A, slip op. at 15-16. The Board therefore remanded the case to ALJ Romero to determine whether Employer rebutted the presumption. *See* 20 C.F.R. §718.305(d)(1)(i), (ii); *Barr* 1 at 16. Subsequently, the Board denied Employer's motion for reconsideration en banc.[5] *Barr v. Fairfield Southern Co.*, BRB Nos. 18-0567 BLA and 18-0567 BLA-A (Nov. 7, 2022) (Order on Recon.) (unpub.).

[4] The Board previously affirmed, as unchallenged on appeal, Claimant established the Miner was totally disabled at 20 C.F.R. §718.204(b)(2). *Barr* 1 at 4 n.8.

[5] In its motion for reconsideration, Employer argued the Board erred in holding the Miner had three years of qualifying coal mine employment with Fairfield, the Miner

ALJ Romero retired, and this case was reassigned on remand to ALJ Boucher (the ALJ). In her Decision and Order Awarding Benefits on Remand dated January 30, 2023, that is the subject of this appeal, she found Employer did not rebut the Section 411(c)(4) presumption in the miner's claim and awarded benefits. Thus, she found Claimant entitled to derivative survivor's benefits pursuant to Section 422(*l*) of the Act.[6] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer challenges the Board's prior holdings in the miner's claim that the Miner's work constituted that of a coal miner under the Act, that Claimant invoked the Section 411(c)(4) presumption, and that the Concord Mine preparation plant is an underground mine. It states it is not contesting the ALJ's finding that it failed to rebut the presumption and acknowledges that the issues in this appeal are thus "the same issues" that were presented in its prior appeal to the Board. Employer's Brief at 3. Finally, it asserts the survivor's award of benefits "was not proper" and that "there is no evidence that [the Miner's] death was due to pneumoconiosis." *Id.* Claimant responds in support of the awards. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject Employer's arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order on Remand if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

Miner's Claim

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regularly worked at the Concord Mine preparation plant, the Concord Mine preparation plant constituted an underground coal mine, and all of the Miner's work with U.S. Steel constituted qualifying coal mine employment. Employer's February 26, 2021 Motion for Reconsideration.

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

[7] 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); Decision and Order at 4 n.3; Director's Exhibit 1.

As Employer acknowledges, the Board addressed and rejected its arguments in its previous decision. That disposition constitutes the law of the case. Employer has not advanced any arguments showing the Board's decision was clearly erroneous or set forth any other valid exception to the law of the case doctrine, and we therefore decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). In addition, we affirm, as unchallenged on appeal, the ALJ's finding that Employer failed to rebut the Section 411(c)(4) presumption. *Skrack v. Island Creek. Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the award of benefits in the miner's claim.

Survivor's Claim

The ALJ found Claimant is the Miner's qualifying surviving spouse under Section 422(*l*): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order on Remand at 17.

Employer generally argues the survivor's award was improper and the evidence does not support a finding that the Miner's death was due to pneumoconiosis. Employer's Brief at 3-4. However, because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the ALJ's determination that Claimant is automatically entitled to survivor's benefits under Section 422(*l*), without having to establish death due to pneumoconiosis, we affirm it. 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits on Remand.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge