**U.S. Department of Labor**

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

BRB No. 20-0241 BLA

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| TIMOTHY H. PARISH | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| JEWELL SMOKELESS COAL CORPORATION | ) | DATE ISSUED: 06/28/2021 |
| | ) | |
| Employer-Respondent | ) | |
| | ) | |
| 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 of Carrie Bland, Acting Associate Chief Administrative Law Judge, United States Department of Labor.

Timothy H. Parish, Abingdon, Virginia.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

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

PER CURIAM:

Without the assistance of counsel[1] Claimant appeals Acting Associate Chief Administrative Law Judge Carrie Bland's Decision and Order Denying Benefits (2017-BLA-05426) rendered on a claim filed on July 20, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge accepted Employer's concession that Claimant has a totally disabling respiratory or pulmonary impairment. She also found that while Claimant established thirty-six years of coal mine employment, he failed to prove he worked at least fifteen years in underground coal mine employment or in surface coal mine employment in conditions substantially similar to an underground mine. Thus, the administrative law judge determined Claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). Considering entitlement under 20 C.F.R. Part 718, the administrative law judge found Claimant did not establish the existence of pneumoconiosis[3] and denied benefits.

On appeal, Claimant generally challenges the denial of benefits. Employer responds in support of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a brief.[4]

[1] On Claimant's behalf, Vickie Combs, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested the Benefits Review Board review the administrative law judge's decision, but Ms. Combs is not representing Claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has 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] As the record contains no evidence of complicated pneumoconiosis, we affirm the administrative law judge's finding that Claimant is unable to invoke the irrebuttable presumption at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); *see* 20 C.F.R. §718.304; Decision and Order at 4.

[4] We affirm, as unchallenged, the administrative law judge's finding that Claimant established thirty-six years of coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

In an appeal filed without the assistance of counsel, the Board evaluates whether substantial evidence supports the Decision and Order below. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86 (1994). 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.[5] 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).

**Invocation of the Section 411(c)(4) Presumption**
**Qualifying Coal Mine Employment**

To invoke the Section 411(c)(4) presumption, Claimant must establish at least fifteen years of employment either in "underground coal mines" or in surface mines in conditions "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 miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

The administrative law judge found Claimant "worked in surface-related employment as a supply clerk in a warehouse for thirty-six years" performing duties that included stocking the warehouse with parts for the mines and making deliveries to the mines. Decision and Order at 5, 15, *citing* Hearing Transcript at 12-13. She then evaluated whether Claimant performed his job in conditions substantially similar to those in an underground mine. *Id.* at 5-6. The administrative law judge noted Claimant testified that the warehouse where he worked was not located at an active mine site; he was, however, exposed to coal dust that came from coal trucks that passed on the road adjacent to the warehouse; but, when compared to an underground coal miner, he was not covered in as much dust at the end of the day. *Id.* at 6, *citing* Hearing Transcript at 15, 18, 28-31. Based on these portions of Claimant's testimony, the administrative law judge found Claimant did not establish substantial similarity and could not invoke the Section 411(c)(4) presumption. We reverse the administrative law judge's determination.

The administrative law judge erred in requiring Claimant to establish that he worked in conditions substantially similar to an underground coal mine. The type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), determines whether a claimant is required to show comparability of

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

conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Thus, a miner who worked aboveground at an underground mine site need not otherwise establish that the conditions he worked in were substantially similar to those in an underground mine.[6] *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29.

While the administrative law judge deemed Claimant's work at the warehouse "surface-related," the uncontested facts establish not only that the warehouse was located at an underground mine but that Claimant spent two to three hours per day at active underground mine sites. Thus, the entirety of his work constitutes underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption.

The regulations define a "coal mine" as:

> . . . 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) (emphasis added). 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).

Claimant was a warehouse supply clerk for Employer from 1976 until 2012. Director's Exhibit 2; Hearing Transcript at 12-13. He testified that the warehouse was located in the "middle" of Employer's coal mining property adjacent to the railroad and

[6] The administrative law judge noted Employer's concession that Claimant had at least fifteen years of coal mine employment and worked as a miner as defined under the Act. Decision and Order at 4 n.6, 7.

there "was a tipple right beside [it]." Hearing Transcript at 13-14. He noted coal mine trucks drove by the warehouse on the way to the tipple every ten to fifteen minutes during daylight hours and would "spew up dust." *Id*. at 14. His duties included delivering supplies, parts, and equipment to seven or eight underground mines that Employer owned, which were located four to twenty-five miles away from the warehouse. *Id*. at 12-13, 16, 29. He testified that he spent two to three hours daily at active underground mine sites.[7] *Id.* at 12, 20, 27-28.

Claimant's testimony and the record establish he was employed in underground coal mine employment to the extent he visited underground mines several hours each day.[8]

[7] Claimant clarified that in the latter years of his employment, he did not go to mine sites daily but instead "stay[ed] in the warehouse most of the time putting up stock." Hearing Transcript at 23.

[8] In addition, his work in the warehouse qualifies as underground coal mine employment because the warehouse is appurtenant to Employer's underground mining operations. 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 Law 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." *Id.*

Thus, "appurtenant" relates more 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

Although Claimant would spend only part of his day at an active underground mine site, 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.").

Moreover, even if Claimant was not employed at an underground mine and was required to establish substantial similarity, he has done so, contrary to the administrative law judge's finding. Claimant testified he went to active underground mining sites two to three hours each day. Hearing Transcript at 20. Claimant testified that the warehouse where he worked the remainder of his day was next to a road where coal trucks drove by on their way to the tipple and back and forth from the coke ovens. *Id*. at 14-15. He described that the trucks would "spew" both coal and rock dust. *Id*. at 14. Claimant stated everything was covered "real good" with coal dust and rock dust; his car was covered in dust; and during the summer, the three bay doors were half-way open and the ventilation system was cut-off so that air pulled from the outside did not go through the ventilation system. *Id.* at 16-18. He stated at the end of his work day, "I didn't look like I'd been underground" but "[g]oing to the mines and just staying at the warehouse, I'd get filthy . . . covered in . . . dust." *Id.* at 23. Claimant's uncontradicted testimony establishes he worked in dusty conditions sufficient to establish fifteen years of comparable coal mine employment. *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").

Because Claimant's uncontradicated testimony establishes he engaged in coal mine employment at Employer's underground mine site, and otherwise worked in conditions substantially similar to an underground mine, we reverse the administrative law judge's finding on substantial similarity and hold Claimant has established thirty-six years of qualifying coal mine employment. *See Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29. Because Claimant established at least fifteen years of qualifying coal mine employment and total disability, he has invoked the Section 411(c)(4) presumption. *See Richardson v. Director, OWCP*, 94 F.3d 164, 167 (4th Cir. 1996); *Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 730 (7th Cir. 2013); *Nippes v. Florence Mining*

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concluding that when used in a contract, it covered not only physically attached bank premises, but subordinate banking properties wherever located).

*Co.*, 12 BLR 1-108 (1985); Decision and Order at 5; Hearing Transcript at 10; Employer's Post-Hearing Brief before the ALJ at 9.

We therefore vacate the denial of benefits and remand the case for the administrative law judge to consider whether Employer has established rebuttal of the Section 411(c)(4) presumption. In order to rebut the presumption, Employer must establish Claimant has neither legal nor clinical pneumoconiosis,[9] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201."[10] 20 C.F.R. §718.305(d)(1)(i), (ii). In rendering her decision on remand, the administrative law judge must explain the bases for her credibility determinations and findings as the Administrative Procedure Act requires.[11] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

[9] "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). "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).

[10] Although the administrative law judge found Claimant did not establish the existence of pneumoconiosis, she must reconsider the issue on remand, with the burden of proof on Employer to affirmatively disprove the disease. 20 C.F.R. §718.305(d)(1)(i).

[11] The Administrative Procedure Act provides 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).

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge