U.S. Department of Labor

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

BRB Nos. 21-0579 BLA
and 21-0580 BLA

JEWELL CHAPPELL (Widow of and o/b/o EDWARD CHAPPELL)	)	
Claimant-Petitioner	)	
v.	)	
DRUMMOND COMPANY, INCORPORATED	)	DATE ISSUED: 6/06/2023
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 and the Decision and Order Denying Request for Reconsideration of Patrick M. Rosenow, Acting District Chief Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for Claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for Employer.

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

PER CURIAM:

Claimant[1] appeals Acting District Chief Administrative Law Judge (ALJ) Patrick M. Rosenow's Decision and Order Denying Benefits and Decision and Order Denying Request for Reconsideration (2018-BLA-05788 and 2020-BLA-05122) 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 miner's subsequent claim filed on June 16, 2006,[2] and a survivor's claim filed on August 11, 2014.

In a December 3, 2010 Decision and Order Denying Request for Modification in the miner's claim, ALJ Theresa C. Timlin credited the Miner with thirty-six years of underground coal mine employment. She found the evidence did not establish the presence of complicated pneumoconiosis, and therefore the Miner could not invoke the irrebutable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304. However, she found the evidence established the existence of simple pneumoconiosis arising out of his coal mine employment, and therefore the Miner established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c)(1). She further found the evidence did not establish total respiratory disability, 20 C.F.R §718.204(b)(2), and therefore the Miner was not entitled to the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[3] As he failed to establish total disability, a necessary element of entitlement, she denied benefits.

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[1] Claimant is the widow of the Miner, who died on March 15, 2009. Decision and Order at 3. Claimant is pursuing the miner's claim on her husband's behalf. *Id.*

[2] This is the Miner's third claim for benefits. On September 12, 2002, ALJ Gerald Tierney denied his prior claim, filed on August 23, 1999, for failure to establish any element of entitlement. Miner's Claim (MC) Director's Exhibit 1. ALJ Alice M. Craft denied a request for modification as untimely filed. *Id.* When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the subsequent claim must also be denied unless the ALJ finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because the Miner's prior claim was denied for failure to establish any element of entitlement, Claimant had to submit new evidence to establish one of these elements in order to obtain a review of the miner's claim on the merits. 20 C.F.R. §725.309(c).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis or his death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment

Pursuant to Claimant's appeal, the Benefits Review Board affirmed, as unchallenged, the ALJ's determinations that the Miner had thirty-six years of underground coal mine employment, the evidence established simple pneumoconiosis arising out of his coal mine employment, and the evidence did not establish total disability. *Chappell v. Drummond Company, Inc.*, BRB No. 11-0290 BLA, slip op. at 4 n.6 (Jan. 31, 2012) (unpub.); Miner's Claim (MC) Director's Exhibit 77. The Board further affirmed the ALJ's determination that the evidence did not establish complicated pneumoconiosis. *Id.* Claimant's motion for reconsideration was denied as untimely. *Chappell v. Drummond Company, Inc.*, BRB No. 11-0290 BLA (Aug. 8, 2012) (Order on Recon.) (unpub.); MC Director's Exhibit 77. On December 17, 2013, the United States Court of Appeals for the Eleventh Circuit held that the Board correctly denied Claimant's motion for reconsideration because it was not timely filed, and the court also dismissed Claimant's appeal of the Board's initial Decision and Order as untimely filed. *Chappell v. Director, OWCP*, No. 12-15171 (Dec. 13, 2013); *see* MC Director's Exhibit 83. The court subsequently denied her request for reconsideration. *Chappell v. Director, OWCP*, No. 12-15171-DD (Oct. 21, 2014); *see* MC Director's Exhibit 84. Thereafter, the district director denied Claimant's three requests for modification. MC Director's Exhibits 84, 103, 110. Claimant ultimately requested a hearing in the miner's claim.

While the appeal of the miner's claim was still before the Eleventh Circuit, Claimant filed her survivor's claim on August 11, 2014, which the district director denied on February 2, 2018. She requested a hearing and her claim was forwarded to the Office of Administrative Law Judges (OALJ). By Order dated August 2, 2018, the ALJ remanded the survivor's claim to the district director to be consolidated with the miner's claim. The claims were consolidated and returned to the OALJ for disposition on November 1, 2019.

In his Decision and Order issued on February 16, 2021, that is the subject of this appeal, the ALJ credited the Miner with thirty-six years of underground coal mine employment. He further found Claimant did not establish complicated pneumoconiosis in either the miner's or survivor's claims and therefore could not invoke the irrebuttable presumption that the Miner was totally disabled or that his death was due to pneumoconiosis. In addition, he found Claimant did not establish total disability in either claim, and thus could not invoke the Section 411(c)(4) presumption. Finally, he found there is no evidence that the Miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b). Thus, the ALJ denied benefits in both claims. Pursuant to Claimant's request for reconsideration, the ALJ reiterated his findings and again denied benefits.

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and a totally disabling respiratory impairment at the time of his death. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On appeal in the miner's claim, Claimant contends that the ALJ considered evidence in excess of the evidentiary limitations. She also asserts he erred in finding the evidence does not establish complicated pneumoconiosis at 20 C.F.R. §718.304. In addition, she challenges the ALJ's finding that the evidence does not establish the Miner was totally disabled, and therefore that she did not invoke the Section 411(c)(4) presumption. In the survivor's claim, Claimant contends she is entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018),[4] based on Claimant's entitlement to benefits in the miner's claim. Employer responds, urging affirmance of the ALJ's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response.[5]

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

Evidentiary Limitations

Claimant contends the ALJ considered evidence in excess of the evidentiary limitations in the miner's claim by considering the evidence from the Miner's prior claims. Claimant's Brief at 25.

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[4] 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).

[5] By Order dated January 19, 2023, the Board rejected Claimant's third motion to supplement the record and request for an extension of time to file a reply brief, giving Claimant ten days from receipt of the order to file a reply brief and stating that no further extensions would be granted. *Chappell v. Drummond Co., Inc.*, BRB Nos. 21-0579 BLA and 21-0580 BLA (Jan. 19, 2023) (Order) (unpub.). The Board therefore denies Claimant's February 2, 2023 "Motion to Compel Production of the Appellate Record and an Extension of Time Within Which to File The Reply Brief" and March 7, 2023 "Supplemental Motion to Supplement the Record and Extend Reply Date." The record is closed.

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

Contrary to Claimant's argument, "[a]ny evidence submitted in conjunction with any prior claim must be made a part of the record in the subsequent claim." 20 C.F.R. §725.309(c)(2). Moreover, the ALJ did not rely on the evidence from the prior claims to make any determination in this case. Consequently, we reject Claimant's argument.[7] *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).[8]

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[7] To the extent Claimant contends the ALJ erred in not finding a mistake in a determination of fact based on the award to the Miner of benefits due to black lung disease by the Social Security Administration (SSA), we reject this argument. Claimant's Brief at 13-17. While the Miner testified at the January 16, 2008 hearing that he received benefits for black lung disease, ALJ Timlin found the SSA award was not probative as there was no objective evidence documenting the basis for the award or any of the medical documentation used in generating the award, a determination that the Board affirmed. *Chappell v. Drummond Company, Inc.*, BRB No. 11-0290 BLA, slip op. at 6 (Jan. 31, 2012) (unpub.); MC Director's Exhibit 77. On modification, the ALJ permissibly found that the award was not probative as there is no documentation showing the basis for the award and all documents relating to the SSA claim have been destroyed. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 5. To the extent Claimant alleges Dr. Hasson's 1985 opinion formed the basis of an SSA award for total disability due to pneumoconiosis, we note Dr. Hasson opined that although the Miner had "mild" pneumoconiosis radiographically, his pulmonary function was "essentially normal." Survivor's Claim (SC) Director's Exhibit 31.

[8] We further reject Claimant's argument that the ALJ should have inferred that the Miner's SSA award was for total disability due to black lung disease because Employer's insurance company previously paid him long-term disability benefits for his knee injury and black lung disease. Claimant's Brief at 13-17. While Claimant alleges this argument is supported by a "Long-Term Disability File," she does not identify it by exhibit number and the record reflects she did not submit it in accordance with the ALJ's evidentiary orders. Pursuant to the parties' request for a hearing on the record, the ALJ instructed the parties to submit an evidence summary form designating the evidence they intended to rely upon and submit pre-marked and separate proposed exhibits. *Chappell* v. *Drummond Co.*, OALJ Nos. 2018-BLA-05788, 2020-BLA-05122 (Feb. 18, 2020) (Order). Claimant submitted a number of exhibits that did not include the disability file and did not designate it as evidence she was relying on. *See* Claimant's Exhibits 1-10.

Miner's Claim

In considering whether to grant modification of the prior denial of the Miner's subsequent claim, the ALJ was required to determine whether the denial was based on a mistake in a determination of fact or whether the evidence submitted on modification, along with the evidence previously submitted in the subsequent claim, was sufficient to establish a change in an applicable condition of entitlement. 20 C.F.R. §§725.309(c), 725.310; *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). The ALJ is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (emphasis added).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner was totally disabled due to pneumoconiosis if the miner was suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter (cm) in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304. In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must consider all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 983 (11th Cir. 2007).

The ALJ considered five new interpretations of the x-ray dated January 29, 2009, by Drs. DePonte, Alexander, Meyer, Seaman, and Tarver, along with the previously submitted interpretation of the same film by Dr. Loveless. Decision and Order at 9-10; Order on Reconsideration at 2. Drs. DePonte, Alexander, and Loveless interpreted the film as positive for simple pneumoconiosis with a category A large opacity of pneumoconiosis. MC Director's Exhibit 35; Survivor's Claim (SC) Director's Exhibit 16; Claimant's Exhibit 1. Drs. Tarver, Seaman, and Meyer each interpreted the film as negative for pneumoconiosis. Employer's Exhibits 1, 2, 4. The ALJ accurately noted that all six of the physicians are dually-qualified B readers and Board-certified radiologists. Decision and Order at 10. Because an equal number of dually-qualified physicians read this x-ray as positive and negative for complicated pneumoconiosis, the ALJ found the readings of the

January 29, 2009 x-ray in equipoise. *Id.* Consequently, he found the new x-ray evidence did not establish complicated pneumoconiosis.[9] *Id.* at 9-10.

Contrary to Claimant's argument, the ALJ was not required to discredit the x-ray interpretations of Drs. Traver, Seaman, and Meyer because they failed to diagnose simple pneumoconiosis despite ALJ Timlin's finding that the Miner had the disease.[10] Claimant's Brief at 2. Rather, the ALJ performed the necessary quantitative and qualitative analysis of the x-ray readings, taking into account both the interpretations and the physicians' credentials, and permissibly found the readings of the January 29, 2009 x-ray to be in equipoise. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 10. Thus, we affirm the ALJ's findings that the x-ray evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 9-10; Order on Reconsideration at 2.

The ALJ next considered the autopsy reports of Drs. Aguilar and Caffrey, which ALJ Timlin previously considered. Decision and Order at 10; *see* 20 C.F.R. §718.304(b). Dr. Aguilar conducted the autopsy of the Miner. SC Director's Exhibit 16. He noted a 1.3 cm nodule in the right main bronchus connected to a stony mass in the upper lobe that was streaked with anthracotic pigment. *Id.* He diagnosed lung cancer, emphysema, anthracosis pulmonary lymph nodes, cor pulmonale, arteriosclerotic cardiovascular disease, and cerebral atrophy. *Id.* In response to a subsequent questionnaire, he circled "yes" in response to the question "Did the autopsy show 'progressive massive fibrosis' OR 'massive lesions' in the miner's lungs?" *Id.* Dr. Caffrey reviewed the slides and opined that the Miner had a very mild degree of simple coal workers' pneumoconiosis, and that "[t]here

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[9] The ALJ further adopted ALJ Timlin's finding that the x-ray evidence previously submitted with the Miner's June 16, 2006 request for modification of his subsequent claim was negative for complicated pneumoconiosis, Decision and Order at 9-10; MC Director's Exhibit 70, which the Board subsequently affirmed on appeal. *See Chappell v. Drummond Company, Inc.*, BRB No. 11-0290 BLA, slip op. at 12 (Jan. 31, 2012) (unpub.); MC Director's Exhibit 77.

[10] ALJ Timlin found that "most of [the Miner's] x-rays were interpreted as negative for simple pneumoconiosis," but she credited Drs. Caffrey's and Aguilar's autopsy reports as establishing the presence of the disease. *Chappell v Drummond Co.*, OALJ No. 2009-BLA-05518, slip op. at 12 (Dec. 3, 2010). The Board subsequently affirmed ALJ Timlin's finding that the autopsy evidence established simple pneumoconiosis as unchallenged on appeal. *See Chappell*, BRB No. 11-0290 BLA, slip op. at 4 n.6; MC Director's Exhibit 77.

are absolutely no lesions that are macronodules or lesions of progressive massive fibrosis." MC Director's Exhibit 50. He further opined that the large masses described by Dr. Aguilar were cancer. *Id.* The ALJ found Dr. Aguilar's opinion inadequately explained, as well as unsupported because the physician did not conduct a microscopic examination to determine the composition of the tumors or nodules. Decision and Order at 9-10. Thus, the ALJ found no mistake in ALJ Timlin's determination that the autopsy evidence did not establish the presence of complicated pneumoconiosis. *Id.*

Claimant generally argues that Dr. Aguilar's opinion confirms the radiographic findings of complicated pneumoconiosis, and therefore she is entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Claimant's Brief at 18-19.

Contrary to Claimant's arguments, the ALJ permissibly declined to credit Dr. Aguilar's diagnosis of complicated pneumoconiosis because it was inadequately explained and unsupported. *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 991 (11th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). Claimant's arguments amount to a request to reweigh the evidence, which we cannot do. *Anderson v. Valley Camp Coal of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that the autopsy evidence does not establish complicated pneumoconiosis. 20 C.F.R. §718.304(b); Decision and Order at 10; Order on Reconsideration at 3.

As Claimant raises no other challenges to the ALJ's determination that the evidence did not establish the presence of complicated pneumoconiosis, it is affirmed. 20 C.F.R. §718.304.

Invocation of the Section 411(c)(4) Presumption: Total Disability

A miner was totally disabled if he had a pulmonary or respiratory impairment which, standing alone, prevented him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). Claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). The ALJ found the evidence does not establish total disability.[11] 20 C.F.R. §718.204(b)(2); Decision and Order at 11-12.

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[11] As the only pulmonary function study and arterial blood gas study did not establish disability and there is no evidence of cor pulmonale with right-sided congestive

On modification, the ALJ considered the new medical opinion of Dr. Rosenberg, who opined the Miner did not have a totally disabling respiratory or pulmonary impairment. Decision and Order at 11-12; Employer's Exhibit 3. He further considered the previously submitted opinions of Drs. Hasson, Caffrey, and Bradley. Decision and Order at 11-12; Order on Reconsideration at 5-6. The ALJ accurately found Dr. Bradley was the only physician to diagnose total disability.[12] Decision and Order at 11. He found Dr. Bradley's opinion conclusory and inadequately documented, and therefore entitled to little weight. *Id.* Consequently, he found the medical opinion evidence did not establish total disability. *Id.*

Claimant generally contends the Miner was totally disabled from a respiratory impairment since February 11, 1985. Claimant's Brief at 1-29. However, it is the ALJ's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Jones*, 386 F.3d at 992; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."). Moreover, Claimant alleges no specific error in the ALJ's determination that Dr. Bradley's opinion is not well-reasoned or documented. *See* 20 C.F.R. §802.211(b) (petition for review must specifically state "the issues to be considered by the Board," and contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue"); *see Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the ALJ's findings that Dr. Bradley's opinion is entitled to little weight, the medical opinion evidence does not establish total disability, and the evidence as a whole does not establish total disability. 20 C.F.R. §718.204(b)(2); Decision and Order at 12. We therefore affirm the ALJ's

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heart failure, the ALJ rationally determined Claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order at 11-12; MC Director's Exhibit 9.

[12] In the context of alleging the Miner was totally disabled, Claimant contends the ALJ should have discredited Dr. Hasson's medical opinion because his statement in 2006 that the Miner did not have pneumoconiosis conflicts with his 1985 reading of an x-ray as positive for the disease. Claimant's Brief at 24-25; SC Director's Exhibit 31. As Claimant bears the burden to establish total disability, however, she has not explained how discrediting Dr. Hasson's opinion on simple pneumoconiosis would make any difference in this case. *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"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

determination that Claimant did not invoke the Section 411(c)(4) presumption, and the denial of benefits.

Survivor's Claim

Claimant contends she is automatically entitled to benefits under Section 422(*l*) based on an award in the miner's claim.[13] Claimant's Brief at 27. As we have affirmed the denial of benefits in the miner's claim, we reject this argument and affirm the denial of benefits in the survivor's claim. 30 U.S.C. §932(*l*) (2018); Decision and Order at 12-13.

Accordingly, the ALJ's Decision and Order Denying Benefits and the Decision and Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

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[13] We affirm, as unchallenged on appeal, the ALJ's determinations that Claimant did not invoke the Section 411(c)(3) or 411(c)(4) presumptions in the survivor's claim or establish the Miner's death was due to pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 12.