U.S. Department of Labor

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

BRB Nos. 19-0005 BLA, 19-0005 BLA-A,
19-0196 BLA and 19-0196 BLA-A

RUTH BISHOP, (o/b/o and Widow of OLLIE L. BISHOP)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
NO. 10 COAL MINE, INCORPORATED	)	DATE ISSUED: 03/27/2020
and	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
Employer/Carrier-Petitioners and Cross-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals and Cross-Appeals of the Decision and Order Denying Benefits in Living Miner's Claim and Awarding Benefits in Survivor's Claim of Monica Markley, Administrative Law Judge, United States Department of Labor.[1]

[1] The miner's claim and survivor's claim were consolidated before the administrative law judge and her Decision and Order Denying Benefits in the Living

Miner's Claim and Awarding Benefits in Survivor's Claim (Decision and Order) addresses both claims.

Ruth Bishop, Iaegar, West Virginia.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

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

ROLFE, Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[2] and Employer/Carrier (employer) cross-appeals the Decision and Order (2014-BLA-05798) of Administrative Law Judge Monica Markley denying benefits in a miner's claim pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). In addition, employer appeals and claimant cross-appeals, without the assistance of counsel, Judge Markley's decision (2014-BLA-05799) awarding benefits in the consolidated survivor's claim. This case involves the third request for modification of the denial of the miner's subsequent claim filed on October 16, 2003, and the denial of the survivor's claim filed on September 12, 2013.[3]

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[2] Vicki Combs and Bradley Johnson, benefits counselors with Stone Mountain Health Services of Vansant, Virginia, requested on claimant's behalf that the Board review the administrative law judge's decisions, but they do not represent claimant in either her appeal or her cross-appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Claimant, the miner's widow, is pursuing the miner's claim as well as her survivor's claim. This is the miner's fourth claim. Miner's Claim (MC) Director's Exhibits 1-2. On October 24, 1994, the district director denied the miner's most recent prior claim, his third, filed on July 20, 1994, because the miner did not establish any element of entitlement. MC Director's Exhibit 2. The miner took no further action until filing the current claim on October 16, 2003. In a Decision and Order – Awarding Benefits issued on April 13, 2006, Administrative Law Judge Edward Terhune Miller awarded benefits in the miner's current claim. MC Director's Exhibits 4, 59. Employer appealed and the Board affirmed Judge Miller's finding that the miner established total disability and therefore established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, but vacated his finding that the miner established the existence of pneumoconiosis and, therefore, the award of benefits. *Bishop v. No. 10 Coal Mine Inc.*, BRB No. 06-0615 BLA, slip op. at 3-10 (Apr. 26, 2007) (unpub.); MC Director's Exhibit

Adjudicating the miner's claim pursuant to 20 C.F.R. Part 718,[4] the administrative law judge found he worked for fifteen and three quarter years in underground coal mine employment. The administrative law judge further found the evidence submitted on modification, considered with the evidence originally submitted in the miner's subsequent claim, did not establish clinical or legal pneumoconiosis. She therefore denied benefits in the miner's claim.

In the survivor's claim, the administrative law judge found the miner was totally disabled. Thus, having credited the miner with more than fifteen years of underground coal mine employment, the administrative law judge found claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[5] The administrative law judge further determined employer did not rebut the presumption and awarded benefits.

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71. On April 15, 2009, Judge Miller issued a Decision and Order on Remand Denying Benefits, finding the miner did not establish the existence of pneumoconiosis. MC Director's Exhibit 80. On February 8, 2010, the miner filed a request for modification, which Administrative Law Judge Pamela Lakes Wood denied on April 3, 2012. MC Director's Exhibits 88-89, 115. The miner submitted a second request for modification on May 7, 2012. MC Director's Exhibit 117. The miner died on April 6, 2013, while his second request was pending before the district director and his widow was substituted as the claimant on his behalf. MC Director's Exhibits 136-137. On July 2, 2013, the district director denied modification. MC Director's Exhibit 138. Claimant filed a third request for modification in the miner's claim on August 22, 2013, and filed her survivor's claim on September 12, 2013. MC Director's Exhibit 140; Survivor's Claim (SC) Director's Exhibit 2. On January 22, 2014, the district director denied the third modification request in the miner's claim. MC Director's Exhibit 142. By order dated August 7, 2015, Associate Chief Administrative Law Judge William S. Colwell denied employer's motion to hold the survivor's claim in abeyance pending a final adjudication of the miner's claim and consolidated the two claims for adjudication on the merits of entitlement. Pursuant to claimant's request for a formal hearing, these consolidated cases were assigned to Judge Markley, who conducted a formal hearing on December 1, 2016.

[4] The rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act is not applicable to claims, such as the miner's current claim, that were filed before January 1, 2005. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305; Decision and Order at 3-4 n.1.

[5] Section 411(c)(4) of the Act provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner had at least fifteen

On appeal of the miner's claim, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance. In its cross-appeal, employer argues the administrative law judge erred in finding the miner worked at least fifteen years in underground coal mine employment.

In its appeal of the survivor's claim, employer argues that because the administrative law judge erred in finding the miner worked at least fifteen years in underground coal mine employment, she erred in finding claimant invoked the Section 411(c)(4) presumption. Employer also challenges the finding it did not rebut the presumption. Claimant did not file a response brief but instead filed a cross-appeal in the survivor's claim. The Director, Office of Workers' Compensation Programs, did not file a response brief in either appeal.[6]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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). In an appeal filed by a claimant without the assistance of counsel, the Board considers whether substantial evidence supports the Decision and Order below. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

Claimant's Appeal of the Denial of the Miner's Claim

To be entitled to benefits under the Act, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R.

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years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[6] We affirm, as unchallenged on appeal, the administrative law judge's determination in the survivor's claim that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30-31.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); MC-Director's Exhibit 7.

§§718.3, 718.202, 718.203, 718.204. Statutory presumptions can aid claimants in meeting these elements if certain conditions are met, but failure to establish any one precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310. When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). As set forth below, we find no error in the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis and, therefore, failed to establish a basis for modification of the prior denial of benefits in the miner's claim.

Existence of Pneumoconiosis

Without the assistance of any statutory presumptions, the administrative law judge addressed whether claimant met her burden to establish the existence of pneumoconiosis.[8] 20 C.F.R. §718.202(a). In evaluating the presence of clinical pneumoconiosis, the administrative law judge noted the new evidence submitted in support of modification consisted of ten interpretations of four x-rays dated November 12, 2003, March 11, 2010, February 23, 2012, and March 20, 2013, and that all of the interpreting physicians are dually qualified as Board-certified radiologists and B readers.[9] 20 C.F.R. §718.202(a)(1); Decision and Order at 20; *see* Miner's Claim (MC) Director's Exhibits 112, 117, 127- 129,

[8] 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). This definition encompasses 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).

[9] The administrative law judge indicated the treatment records contain narrative x-ray reports generated during the miner's hospitalizations but accurately found none of them include pneumoconiosis findings. Decision and Order at 20; *see* MC Claimant's Exhibits 1-3.

132; MC Employer's Exhibits 1, 4, 8; Claimant's Exhibit 5; Survivor's Claim (SC) Director's Exhibit 18.

Drs. Wolfe and Alexander interpreted the November 12, 2003 x-ray as negative for pneumoconiosis. MC Director's Exhibits 131, 132. As these readings are uncontradicted, the administrative law judge found this x-ray negative. Decision and Order at 20. Dr. Meyer interpreted the March 11, 2010 x-ray as negative for pneumoconiosis. MC Employer's Exhibit 8. As this reading is uncontradicted, the administrative law judge also found this x-ray negative. Decision and Order at 20. Drs. Miller and Alexander interpreted the February 23, 2012 x-ray[10] as positive for pneumoconiosis, while Drs. Meyer and Shipley interpreted the x-ray as negative. MC Director's Exhibits 117, 127, 128. The administrative law judge permissibly found the readings of this x-ray to be in equipoise based on the equal number of positive and negative readings from dually-qualified readers. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76 (1994); Decision and Order at 20. Dr. Crum interpreted the March 20, 2013 x-ray as positive for pneumoconiosis, while Drs. Meyer and Tarver interpreted this x-ray as negative for pneumoconiosis. MC Director's Exhibit 18; MC Employer's Exhibits 1, 4. The administrative law judge permissibly found this x-ray negative based on the preponderance of negative readings from equally-qualified readers. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); Decision and Order at 20.

Having found three x-rays negative and one x-ray inconclusive, the administrative law judge permissibly found the preponderance of the x-ray evidence insufficient to establish clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); *see Ondecko*, 512 U.S. at 280-81; *see also Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52 (4th Cir. 1992); Decision and Order at 20.

The administrative law judge also accurately observed that none of the computed tomography (CT) scans of record were interpreted as positive for pneumoconiosis.[11] *See*

[10] In her summary of the x-ray evidence in the miner's claim, the administrative law judge correctly listed the date of the February 23, 2012 x-ray but mistakenly listed the date as February 25, 2012, when analyzing the evidence. Decision and Order at 12, 20. This error is harmless, however, as it does affect the disposition of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[11] While Dr. Mull indicated a 15 mm nodule seen on a July 27, 2009 CT scan "could relate to pneumoconiosis," he further stated it could be "a scar, or could be a neoplastic nodule." SC Director's Exhibit 18.

20 C.F.R. §718.107; Decision and Order at 12, 20; Claimant's Exhibit 1; MC Director's Exhibit 105; SC Director's Exhibit 18. Further, the administrative law judge provided that Dr. Seaman reviewed three of the CT scans and concluded there were no findings consistent with coal workers' pneumoconiosis.[12] Decision and Order at 12, 20; MC Employer's Exhibit 2. We affirm her finding the CT scan evidence does not establish pneumoconiosis as supported by substantial evidence. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); Decision and Order at 20.

Claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), as the record contains no biopsy or autopsy evidence of pneumoconiosis.[13] Further, claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3), as the record contains no evidence of complicated pneumoconiosis.

The administrative law judge next considered the new medical opinions of Drs. Robinson, Patel, Basheda, and Spagnolo, together with the miner's treatment and hospitalization records. 20 C.F.R. §718.202(a)(4), Decision and Order at 13-21. Drs. Robinson and Patel, the miner's treating physicians, diagnosed the miner with pneumoconiosis.[14] *See* MC Director's Exhibit 140; MC Employer's Exhibit 5; SC Director's Exhibit 18. In contrast, Drs. Basheda and Spagnolo opined the miner did not have clinical or legal pneumoconiosis. MC Employer's Exhibits 3, 6-7.

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[12] Dr. Seaman read the CT scans dated July 27, 2009, February 21, 2011 and July 2, 2012. MC Employer's Exhibit 2. Based on Dr. Seaman's additional statements, the administrative law judge also found Dr. Seaman's report established CT scans are medically acceptable and relevant as 20 C.F.R. §718.107 requires. Decision and Order at 20 n.3.

[13] The administrative law judge did not specifically address the biopsy evidence in connection with the miner's claim. A remand is not necessary on this basis, however. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Dr. Patel performed a bronchoscopy on the miner followed by a transbronchial biopsy of the upper lobe of his right lung on August 5, 2009, but there was no mention of pneumoconiosis. SC Director's Exhibit 18.

[14] In the miner's treatment records, Dr. Robinson diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease. MC Director's Exhibit 140. Dr. Patel diagnosed the miner with clinical and legal pneumoconiosis but clarified that if the x-ray evidence was negative, he would not have diagnosed either condition. MC Employer's Exhibit 5 at 23-26.

While Dr. Robinson stated she was treating the miner for coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD) among other conditions, the administrative law judge permissibly discredited her opinion because she provided no explanation or support for these diagnoses. *See Hicks*, 138 F.3d at 533; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 20; MC Director's Exhibit 140; SC Director's Exhibit 18. Nor did she address the etiology of the miner's COPD. *See* 20 C.F.R. §718.201(a)(2), (b). Thus the administrative law judge found Dr. Robinson's opinion insufficient to establish the existence of clinical or legal pneumoconiosis. Decision and Order at 20.

The administrative law judge also found Dr. Patel's opinion insufficient to establish the miner had clinical or legal pneumoconiosis. Decision and Order at 20-21. As the administrative law judge observed, Dr. Patel diagnosed the miner with coal workers' pneumoconiosis, but stated if the x-ray evidence was negative, as the administrative law judge found, he would not diagnose coal workers' pneumoconiosis. Decision and Order at 16; MC Employer's Exhibit 5 at 26.

He also diagnosed severe COPD that he opined could be attributable solely to cigarette smoking, to coal dust exposure, or to asthma with lung remodeling. MC Employer's Exhibit 5 at 21-22. Dr. Patel clarified that he would attribute "[sixty] percent [of the impairment to] smoking and [forty] percent to the coal mine dust exposure" but that this was just his "best guess." *Id*. at 25. Based on these statements, the administrative law judge permissibly found Dr. Patel's opinion speculative and equivocal. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 21. The administrative law judge also permissibly discredited Dr. Patel's opinion as based on generalities because he testified that when a patient has a coal mine employment history of fifteen years or more, he will always attribute some of the impairment to coal dust unless the chest x-ray is negative. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-235; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 21; MC-Employer's Exhibit 5 at 25-26. As substantial evidence supports the administrative law judge's determinations to discredit the opinions of Drs. Robinson and Patel, the only opinions supportive of a finding that claimant suffers from either clinical or legal pneumoconiosis, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[15] *Compton*, 211 F.3d at 207-208; *Hicks*, 138 F.3d 524, 528; Decision and Order at 21.

[15] As the administrative law judge noted, Drs. Basheda and Spagnolo did not diagnose either clinical or legal pneumoconiosis. Decision and Order at 21; MC

Considering all of the evidence of record (the new evidence, along with the evidence previously submitted before Judges Lakes and Miller), the administrative law judge found that the medical evidence did not establish either clinical or legal pneumoconiosis. Decision and Order at 19-21; see 20 C.F.R. §725.310. The administrative law judge therefore found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Id.* As this finding is supported by substantial evidence, we affirm the administrative law judge's determination that claimant failed to establish a basis for modification of the denial of benefits in the miner's subsequent claim. 20 C.F.R. §725.310; *see Compton*, 211 F.3d at 207-208; *Jessee*, 5 F.3d at 725.

Employer's Appeal of the Award of Benefits in the Survivor's Claim

Invocation of the Presumption

Because we have affirmed the administrative law judge's finding the miner had a totally disabling respiratory impairment, claimant is entitled to the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment.[16] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Claimant bears the burden of proof to establish the number of years the miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985).

In determining whether the miner had sufficient coal mine employment to invoke the presumption, the administrative law judge considered the miner's Social Security Administration (SSA) earnings records and his employment history form. Decision and Order at 8-11; MC Director's Exhibits 6, 7; SC Director's Exhibit 5. For the years prior to 1978, the administrative law judge credited the miner with a full quarter of coal mine employment for each quarter in which he had at least $50.00 in earnings from coal mine

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Employer's Exhibit 3, 6-7. Thus, their opinions are cannot aid claimant in establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[16] Unlike in the miner's claim, claimant is not barred from invoking the rebuttable presumption of death due to pneumoconiosis set forth in Section 411(c)(4) because she filed her claim after January 1, 2005. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

operators as reflected in the SSA earnings statement.[17] Decision and Order at 10. Using this method, the administrative law judge credited the miner with fifty-nine quarters, or 14.75 years of coal mine employment. Decision and Order at 10.

For the years 1978 and 1979, when the SSA only reported annual earnings, the administrative law judge observed that the regulations define a year of employment as a period of one calendar year, or partial periods totaling one year, during which a miner worked for at least 125 working days. Decision and Order at 8, *citing* 20 C.F.R. §725.101(a)(32). The administrative law judge then noted the miner worked for C & G Coal Company in 1978 and 1979, earning $4,700.00 and $5,915.00 respectively.[18] Referencing the formula at 20 C.F.R. §725.101(a)(32)(iii),[19] she divided the miner's annual earnings by the average yearly wage in Exhibit 610 of the *Coal Mine* (*Black Lung Benefits Act*) *Procedure Manual*[20] to determine the miner worked for 0.47 years in 1978 and 0.54 years in 1979, for a total of 1.01 years of coal mine employment. *See* 20 C.F.R. §725.101(a)(32)(iii); Decision and Order at 10. Adding this amount to the 14.75 hours of coal mine employment established prior to 1978, she found the miner worked for a total of 15.75 years of coal mine employment. Decision and Order at 10.

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[17] The Board has found this method of calculation reasonable and consistent with Social Security Administration regulations. *Combs v. Director, OWCP*, 2 BLR 1-904, 1-906 (1980).

[18] The record also reflects the miner worked at Lower Muzzle Coal Company in 1978. SC Director's Exhibit 5. There is no evidence the miner worked in non-coal mine employment in 1978 and 1979.

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

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

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

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

We reject employer's contention the administrative law judge erred in applying the formula at 20 C.F.R. §725.101(a)(32)(iii) to some periods of the miner's employment and applying the "50 dollar rule" to other years of his employment. Employer's Brief at 15. The Board will uphold an administrative law judge's determination on the length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). Contrary to employer's contention, the administrative law judge is not required to use the specific method of computation set forth in 20 C.F.R. §725.101(a)(32)(iii). The regulation provides only that an administrative law judge "may" use such method. *See Muncy*, 25 BLR at 1-27; *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 432 (1986). Moreover, for income earned prior to 1978, the Board has held it is reasonable to credit a miner with each quarter that he or she earned at least $50.00 from coal mine employment. *See Clark*, 22 BLR at 1-280-81; *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). As substantial evidence supports the administrative law judge's determination to credit the miner with fifty-nine quarters, or 14.75 years of coal mine employment prior to 1978, we affirm it. *See Compton*, 211 F.3d at 207-208; *Tackett*, 6 BLR at 1-841; Decision and Order at 10.

Employer next contends that for the years 1978 and 1979 the administrative law judge erred in comparing the miner's yearly income to the average yearly earnings for 125 days, as set forth in Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*. Employer's Brief at 14. Employer asserts this method artificially credits the miner with one year of work "for less than half a years' worth of days."[21] Employer asserts the administrative law judge instead should have compared the miner's earnings "to the average yearly standard for a whole year (260 days)"[22] which employer contends would have resulted in the miner being credited with only 0.23 years in 1978 and 0.26 years in 1979. Employer's Brief at 14, 15 n.45. We note, however, that even using the method

[21] As employer notes, the administrative deviated slightly from the formula at 20 C.F.R. §725.101(a)(32)(iii) by comparing the miner's income to the yearly income of employees who worked for 125 days, rather than dividing claimant's income by the daily average. *See* Decision and Order at 10; Employer's Brief at 14. The result, however, is essentially the same. Under both the administrative law judge's calculation and the regulatory formula, claimant can be said to have established at least 125 working days.

[22] Because the administrative law judge permissibly calculated the miner's pre-1978 coal mine employment utilizing the "fifty dollar rule," we reject employer's argument she erred in failing to apply Exhibit 610 and the 260-days average earnings computation to *all* of the miner's earnings. *See discussion supra*; Decision and Order at 9-10; Employer's Brief at 14-15.

employer advocates, the resulting fractional years for 1978 and 1979 when added to the 14.75 years for employment prior to 1978, which we have affirmed, results in 15.24 years of coal mine employment.

Furthermore, employer acknowledges the administrative law judge failed to consider the miner's employment in 1978 at Lower Muzzle Coal Company that it concedes could provide an additional 0.19 years of coal mine employment.[23] Employer's Brief at 14, 15 n.45; SC Director's Exhibit 5. Based on employer's concessions that the miner had at least 0.23 years and 0.26 years with C & G Coal Company in 1978 and 1979, respectively, and potentially had an additional 0.19 years with Lower Muzzle Coal Company in 1978, any error by the administrative law judge in comparing the miner's yearly income in 1978 and 1979 with C & G Coal Company to the average yearly earnings for 125 days is harmless. *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). Thus we affirm the administrative law judge's ultimate finding of more than fifteen years of coal mine employment because it is supported by substantial evidence. *Compton*, 211 F.3d at 207-208; *Hicks*, 138 F.3d 524, 528.

Employer also asserts the administrative law judge erred in evaluating the evidence relevant to nature of the miner's coal mine employment. Employer's Brief at 12-13. Employer contends in determining all of the miner's coal mine employment was underground, the administrative law judge erred in relying on statements contained in the medical reports of Drs. Forehand and Hippensteel admitted in the miner's claim but not admitted in the survivor's claim.[24] *Id.*

We disagree. Where consolidated hearings are held, "evidence introduced in one claim may be considered as introduced in the other[]," 20 C.F.R. § 725.460, subject to the

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[23] The administrative law judge credited the miner with four quarters of coal mine employment in 1977 at Lower Muzzle Coal Company but did not acknowledge he also earned $4000 in 1978 at Lower Muzzle Coal Company, prior to moving to C & G Coal Company. SC Director's Exhibit 5; Decision and Order at 10.

[24] Drs. Forehand and Hippensteel examined the miner in conjunction with his miner's claim for benefits. In reports dated November 12, 2003, and December 17, 2009, Dr. Forehand indicated the miner reported he worked in underground coal mining for eighteen years. MC Director's Exhibits 13, 88. Similarly, in a report dated October 15, 2010, Dr. Hippensteel wrote that the miner "said that he worked for a total of 18 years in coal mines with all of it underground until he quit in 1979." MC Director's Exhibit 101.

evidentiary limitations contained in 20 C.F.R. § 725.414. *Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2006) (en banc) (Section 725.460 has to be considered in conjunction with Section 725.414). Factual descriptions of coal mine employment are not subject to the limitations placed on the objective medical testing and physician opinion contained in medical reports admitted under Section 725.414. *See, e.g.*, 20 C.F.R. § 725.414 (a)(2)(i) (listing the types of objective tests and physician opinions contained in medical reports subject to limitations). The administrative law judge's failure to formally admit the miner's exhibits in the survivor's claim thus did not prohibit her consideration of the factual descriptions of the nature of the miner's coal mine employment contained in the medical reports. 20 C.F.R. §§ 725.414, .460; *Keener*, 23 BLR at 1-241; *see also Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc)(administrative law judge may sever individual portions of a physician report that exceed Section 725.414 from consideration); *Garris v. Sugar Creek Mining Co*., BRB No. 12-0295 BLA, slip op. at 5 n.6 (Mar. 14, 2013) (unpub.).

But even if the administrative law judge were prohibited from considering the factual descriptions of coal mine employment contained in the medical reports, substantial evidence would still support her determination. Any suggestion the administrative law judge exclusively relied on the medical reports in determining the nature of the miner's coal mine employment is incorrect: the administrative law judge accurately found the miner's claim "includes more than ample evidence that all of his coal mine employment was underground." Decision and Order at 11. In addition to the histories Drs. Forehand and Hippensteel recorded, she specifically acknowledged the miner's Description of his Coal Mine Work form in which he stated: "I do not k[now] of any [occupation][] I did not ful[]fill unde[r]ground."[25] *Id.*; MC Director's Exhibit 6.

Employer has not directly contradicted the miner's statement, nor submitted any evidence that any of his work occurred above ground. As a miner's credible, uncontradicted representation may be used to establish the nature of his employment, we affirm the administrative law judge's finding as within her wide discretion that all of the miner's work occurred underground.[26] *See Tackett v. Cargo Mining Co*., 12 BLR 1-11, 1-

[25] Employer apparently concedes its admissibility argument does not apply to what it calls the "non-medical evidence" from the miner's claim, including the miner's Description of his Coal Mine Work form. Employer's Brief at 21 n.40.

[26] Moreover, as there is no contrary evidence in the record and employer does not argue that the miner's coal mine employment was not underground, it has not shown how the administrative law judge's consideration of the miner's statements contained in the medical reports of Drs. Forehand and Hippensteel, even if improper, made any difference. *See Shinseki*, 556 U.S. at 413. Nor has our dissenting colleague identified how our

14 (1988) (affirming reliance on miner's uncorroborated testimony because the "Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable.") (citation omitted); *Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984) (an administrative law judge "may rely on lay testimony regarding a miner's coal mine employment, especially if, as here, the testimony is not contradicted by any documentation of record"); *Hutnick v. Director, OWCP*, 7 BLR 1-326, 1-329 (1984)(same).

Because we affirm the administrative law judge's findings that the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, we also affirm her conclusion that claimant invoked the Section 411(c)(4) presumption of death due to pneumoconiosis. *See* 20 C.F.R. §718.305(b); Decision and Order at 31.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis, or that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method. [27]

Legal Pneumoconiosis

To disprove legal pneumoconiosis, employer must demonstrate the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered Dr. Zaldivar's opinion that the miner did not have legal pneumoconiosis but had disabling

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acknowledgment of these realities amounts to impermissible fact-finding. In short, the administrative law judge's consideration of the employment history in the medical reports was permissible. 20 C.F.R. §§ 725.414, .460. Independently, it was within her discretion to credit claimant's uncontradicted statement that all of his coal mine work occurred underground to invoke the 411(c)(4) presumption. *Tackett*, 12 BLR at 1-14.

[27] The administrative law judge found employer disproved the existence of clinical pneumoconiosis. Decision and Order at 32-33.

emphysema due entirely to cigarette smoking.[28] Decision and Order at 34-36; SC Employer's Exhibits 6, 7. She discredited his opinion as inadequately explained and inconsistent with the medical science the Department of Labor (DOL) relied on in the preamble to the 2001 regulations. Decision and Order at 34-36.

We reject employer's argument the administrative law judge erred in requiring Dr. Zaldivar to "rule out" any contribution by coal mine dust in order to disprove the existence of legal pneumoconiosis. Employer's Brief at 22-24. Contrary to employer's contention, the administrative law judge correctly stated that in order to rebut the presumption, employer "must establish the absence of any respiratory or pulmonary impairment arising out of coal mine employment, including [a] chronic pulmonary disease resulting from respiratory or pulmonary impairment significantly related to or substantially aggravated by dust exposure in coal mine employment." Decision and Order at 33; *see* 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A). Moreover, as discussed, *infra*, the administrative law judge did not reject Dr. Zaldviar's opinion because it is insufficient to meet a "rule out" standard of proof on the existence of legal pneumoconiosis.[29] *See* Employer's Brief at 22-24. Rather, she found his opinion not credible because it was not adequately explained. Decision and Order at 34-36.

Dr. Zaldivar diagnosed the miner with COPD in the form of "severe emphysema" and "bronchospasm due to asthma." SC Employer's Exhibit 6. He observed "there is not enough information in the records to determine the cause of the emphysema" but stated that "based on probabilities, smoking would be responsible." *Id*. The administrative law judge permissibly found, however, Dr. Zaldivar failed to adequately explain how "even if it was more 'probable' that smoking accounted for the severity of [the miner's]

[28] The administrative law judge also considered the opinions of Drs. Patel and Forehand, diagnosing the existence of legal pneumoconiosis, but concluded their opinions do not assist employer in satisfying its burden of disproving the presence of the disease. 20 C.F.R. §718.305(d)(2)(i)(A); Decision and Order at 33-34; SC Director's Exhibit 18; MC Director's Exhibit 88.

[29] We likewise reject employer's argument that the administrative law judge assessed the evidence relevant to rebuttal under a more stringent rebuttal standard of proof than the preponderance of the evidence standard. Employer's Brief at 17-21. The administrative law judge correctly stated because claimant invoked the presumption at 20 C.F.R. §718.305, the burden shifted to employer "to demonstrate, *by a preponderance of the evidence*, either that [the miner] did not suffer from pneumoconiosis, or that [the miner's] history of coal mine dust exposure was not a factor in his death." Decision and Order at 31, *citing* 20 C.F.R. §718.305(d) [emphasis added].

emphysema," that "underground coal dust exposure did not also play a part in that impairment." Decision and Order at 34; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *Hicks*, 138 F.3d at 533.

In addition, noting the miner did not have radiographic or CT scan evidence of pneumoconiosis, Dr. Zaldivar opined the cause of his respiratory impairment had to be "asthma-COPD overlap" because the miner did not have mineral dust in his lungs.[30] SC Employer's Exhibit 6; *see also* SC Employer's Exhibit 7 at 10-11, 50-51, 53-57, 59. Contrary to employer's contention, the administrative law judge permissibly discredited Dr. Zaldivar's opinion because he relied in part on a premise inconsistent with the regulation providing "[a] claim for benefits must not be denied solely on the basis of a negative chest X-ray" and that legal pneumoconiosis can exist in the absence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4), (b); 65 Fed. Reg. 79,920, 79,940-43 (Dec. 21, 2000); *see Looney*, 678 F.3d at 313; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); Decision and Order at 31, 33.

Because the administrative law judge permissibly discredited Dr. Zaldivar's opinion, we affirm her finding that employer failed to establish the miner did not have legal pneumoconiosis, precluding a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

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[30] Dr. Zaldivar stated:

> Coal dust can be a cause, but then one has to have some minerals – some evidence that here was some mineral dust within the lungs, or if not, as in the case of regular [p]neumoconiosis, they look for what else can reasonably explain the problem.
>
> …
>
> So what he has is asthma and COPD overlap. It fits the criteria well. He does not have any evidence of mineral dust within the lungs that could contribute to the emphysema – it wouldn't be contributing to the asthma anyway but contributing to the emphysema.

SC Employer's Exhibit 7 at 50, 54. Dr. Zaldivar explained that while it was not the sole factor, a negative x-ray was "one piece of information" that he used to rule out coal dust exposure. *Id.* at 56.

Death Causation

The administrative law judge next addressed whether employer established that no part of the miner's death was caused by pneumoconiosis. Decision and Order at 37-38. Contrary to employer's allegation, she permissibly discredited Dr. Zaldivar's opinion because he did not diagnose legal pneumoconiosis, contrary to her finding that employer did not disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116 (4th Cir. 1995) (where physician failed to properly diagnose pneumoconiosis, an administrative law judge "may not credit" that physician's opinion on causation absent "specific and persuasive reasons," in which case the opinion is entitled to at most "little weight"); Decision and Order at 37; Employer's Brief at 28-30. As it is supported by substantial evidence, we affirm the administrative law judge's determination that employer failed to rebut death causation. *See* 20 C.F.R. §718.305(d)(2)(ii).

Because claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, and employer did not rebut the presumption, claimant has established entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits in the miner's claim and awarding benefits in the survivor's claim is affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's denial of benefits in the miner's claim. In addition, in the survivor's claim, I concur with the majority's affirmance of the administrative law judge's finding the miner had at least fifteen years of coal mine employment. As the majority states, the Board has previously held an administrative law judge may reasonably credit a miner with each quarter he or she earned at least $50.00 from coal mine employment. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984). Thus, the administrative law judge permissibly credited the miner with 14.75 years of coal mine employment prior to 1978. *See* Decision and Order at 10. Based on employer's concessions concerning the miner's post-1977 employment, the administrative law judge permissibly found claimant established the miner had at least fifteen years of coal mine employment.

I respectfully dissent, however, from the majority's decision to affirm the administrative law judge's determination that the miner's coal mine employment occurred underground. In making this finding, the administrative law judge expressly relied on the miner's representations to Drs. Forehand and Hippensteel, as described in their medical reports that all of his coal mine employment was underground. MC Director's Exhibits

13, 88, 101. As employer argues, the reports of Drs. Forehand and Hippensteel were submitted in conjunction with the miner's claim and were not submitted into evidence in the survivor's claim. The regulations provide that, in consolidated claims, "evidence introduced in one claim may be considered as introduced in the others." 20 C.F.R. §725.460. They do not provide, however, that the evidence is necessarily admitted in the other claims. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241 (2007) (en banc). Here, the administrative law judge expressly relied on evidence not admitted in the survivor's claim.[31] Therefore, the administrative law judge erred in considering it. The Board is not a fact-finder; it cannot consider the evidence and make determinations which are the proper province of the administrative law judge. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012).

Consequently, I would vacate the administrative law judge's findings that claimant established fifteen years of underground coal mine employment and invoked the Section 411(c)(4) presumption. Decision and Order at 11, 31. I would also, therefore, vacate the award of benefits and remand this case for further consideration.[32] On remand, I would instruct the administrative law judge to determine the nature of claimant's coal mine employment based only on evidence properly admitted in the survivor's claim. *See Keener*, 23 BLR at 1-241. If claimant establishes at least fifteen years of qualifying coal mine employment, she will invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. If the presumption is invoked on remand, the administrative law judge must consider if employer rebutted it.[33] If the presumption is not invoked, the administrative law judge must consider claimant's entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). In reaching all of her findings on remand, the administrative

[31] While claimant, the miner's widow, testified at the hearing in her survivor's that all of his work was underground, the administrative law judge did not rely on her testimony or determine its credibility. The administrative law judge also referenced, but did not rely on, the miner's employment history form (CM 911A). It is unclear whether that form was in evidence in the survivor's claim.

[32] Because we vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, we need not reach employer's arguments that the administrative law judge erred in finding the presumption unrebutted.

[33] On remand, if the administrative law judge finds claimant invoked the Section 411(c)(4) presumption, she must consider Dr. Zaldivar's opinion in its entirety under the proper standard to determine whether employer has rebutted the presumption. *See* 20 C.F.R. §718.305(d)(2); SC Employer's Exhibits 6-7.

law judge must consider all of the relevant evidence and explain her rationale consistent with the Administrative Procedure Act.[34]

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

[34] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issue of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).