U.S. Department of Labor

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

BRB No. 20-0123 BLA

ROY E. HILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PRESLEY TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 09/16/2021
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Francine L. Applewhite, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Johnson City, Tennessee, for Employer.

Stefan Babich (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

ROLFE, Administrative Appeals Judge:

Employer appeals Administrative Law Judge Francine L. Applewhite's Decision and Order Granting Benefits (2017-BLA-05615) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a subsequent claim filed on December 4, 2012.[1]

The administrative law judge found Employer is the properly designated responsible operator. She credited Claimant with 13.25 years of coal mine employment, and thus found he could not invoke 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).[2] Considering entitlement under 20 C.F.R. Part 718, she found Claimant established clinical pneumoconiosis and legal pneumoconiosis in the form of respiratory impairments arising out of coal mine employment. 20 C.F.R. §§718.202(a), 718.203(b). She further found Claimant is totally disabled due to pneumoconiosis and awarded benefits. 20 C.F.R. §718.204(b)(2), (c).

On appeal, Employer argues the administrative law judge erred in finding it is the responsible operator. It also contends the administrative law judge erred in calculating the length of Claimant's coal mine employment and cigarette smoking history. It further asserts she erred in finding Claimant established clinical and legal pneumoconiosis and total disability due to pneumoconiosis. Although Claimant did not invoke the Section 411(c)(4) presumption, Employer nonetheless challenges the constitutionality of the presumption.[3]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting the

[1] Claimant filed two previous claims. On December 9, 2009, the district director denied Claimant's most recent claim, filed on February 23, 2009, because he failed to establish any element of entitlement. Director's Exhibit 2. Claimant did not take any further action until filing his current claim. Director's Exhibit 4.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that Claimant established total disability. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because Claimant established total disability, he also established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

Benefits Review Board should affirm the administrative law judge's responsible operator determination, there is no merit to Employer's constitutional arguments, and any error the administrative law judge committed on the issue of disability causation is harmless.

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[5] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer argues the administrative law judge erred in finding it is the responsible operator, contending she mistakenly found Claimant's work for it constitutes the work of a miner. Employer's Brief at 7-15.

[4] 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); Hearing Tr. at 41.

[5] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The implementing regulation provides "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, has held duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Krushansky*, 923 F.2d at 41-42.

The administrative law judge summarized Claimant's testimony with respect to the nature and location of his work for Employer. Decision and Order at 4. Claimant stated he worked for Employer as a mechanic maintaining trucks that were used to haul coal from strip mine sites to a tipple. Hearing Tr. at 24-25; Director's Exhibit 2 at 166-167. Specifically, he maintained trucks by changing flat tires, fixing brakes, and "greas[ing]" the trucks with oil. Hearing Tr. at 24, 26. He did this work at a repair shop called "the pad," which was on the property of the Red River/Humphrey Enterprises coal mine. *Id*. at 25-26, 29. The property was several thousand acres, with four to five coal extraction sites at any given time. *Id*. at 37. The repair shop was located between ten to fifty miles from the extraction sites, which typically moved around, and between one-half and one mile from the tipple. *Id*. at 58, 62-63; *see also* Director's Exhibit 2 at 166-167.

Claimant testified he was exposed to dust when working at the repair shop because the wind blew dust all over the mine site, and it came off the trucks when he worked on them. Hearing Tr. at 27, 62; Director's Exhibit 67 at 45. In addition, he would leave the repair shop to replace flat tires on trucks either at the tipple or at an extraction site. Hearing Tr. at 26-27; Director's Exhibit 67 at 49-50. He travelled to the tipple every day to change tires because the bad road conditions around the tipple frequently caused flat tires. Hearing Tr. at 26-27; Director's Exhibit 67 at 49-50. Further, he testified that at the end of a workday, he was covered in black dust, and coughed and spit up black mucous. Hearing Tr. at 28; Director's Exhibit 67 at 45.

The administrative law judge found Claimant's testimony credible and sufficient to establish both the situs and function prongs required for his work duties to constitute the work of a miner. Decision and Order at 5.

We first reject Employer's argument that the administrative law judge erred in finding Claimant's testimony credible. The administrative law judge, in her role as fact-finder, evaluates the credibility of the evidence of record, including witness testimony. *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). She permissibly found Claimant's testimony credible with respect to the nature and location of his work with Employer. *Stallard*, 876 F.3d at 670; *Lafferty*, 12 BLR at 1-192; Decision and Order at 5. Although Employer argues Claimant's testimony is not credible because he was inconsistent in recounting his smoking history and the number of coal mine companies he worked for, Employer's Brief at 12, we consider this argument to be a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

We further reject Employer's contention that Claimant's work did not meet the function prong. Employer's Brief at 13-15. As the administrative law judge found, "truck drivers who work at mine sites transporting coal are miners under the Act." Decision and Order at 5, *citing Roberts v. Weinberger*, 527 F.2d 600, 602 (4th Cir. 1975); *Stroh v. Director, OWCP*, 810 F.2d 61, 63-64 (3rd Cir. 1987). Moreover, mechanics maintaining equipment at a repair shop are also miners under the Act, so long as their work took place in or around a coal mine. *See Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926 (6th Cir. 1989). The administrative law judge rationally found Claimant's work maintaining trucks met the function prong because the "trucks would not be able to operate and the coal would not be able to be transported from the extraction site" absent Claimant's work duties. Decision and Order at 5; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Krushansky*, 923 F.2d at 41-42.

Employer also argues the administrative law judge erred in finding Claimant's work met the situs prong. Employer's Brief at 9-13. The administrative law judge found Claimant's testimony establishes he "worked at a mine site" the "entire time" he worked for Employer as a maintenance worker. Decision and Order at 5. She specifically noted "[s]ome parts of the work day he worked near the tipple, some he was closer to the coal pits, and some he worked on [sic] the repair shop; regardless, he always worked at the mine site." *Id*. Based on Claimant's testimony that he "often" worked at the extraction site and near the tipple, and was regularly exposed to coal mine dust, she found his work met the situs prong. *Id*.

We reject Employer's argument that the administrative law judge's situs prong determination is not supported by substantial evidence. Employer's Brief at 13. Claimant's credible testimony that he visited the tipple every day is, in and of itself, sufficient to establish that he worked in or around a coal preparation facility. *See Director, OWCP v. Ziegler Coal Co.* [*Wheeler*], 853 F.2d 529, 536 (7th Cir. 1988) (work at a tipple

meets the situs test); *Stroh* 810 F.2d at 63 (same); *Amigo Smokeless Coal Co. v. Director, OWCP*, 642 F.2d 68, 70 (4th Cir. 1981) (work satisfied the situs requirement in part because it involved going to the tipple); Hearing Tr. at 26-27; Director's Exhibit 67 at 49-50.

We also affirm the administrative law judge's finding that the time Claimant worked in the repair shop also meets the situs prong because the shop was around a coal mine or coal preparation facility. In *Petracca*¸ the United States Court of Appeals for the Sixth Circuit addressed whether an on-site repair facility "physically removed from the extraction site" was located "around a coal mine." *Petracca*, 884 F.2d at 931-35. The court did not find a "fixed distance" from a mining site at which a claimant's work location ceases to be considered "around" a mine. *Id*. It held that "[w]here a mine operator maintains [a repair] facility for its own benefit, it would be grossly unfair to allow it to escape liability for illnesses which occur as a result of occupational exposure to coal dust and we do not believe that Congress intended such a result." *Id*. Thus in instances "where a mine operator maintains a repair shop in the general vicinity of one or more extraction sites in order to avail itself of the economies of an on-site repair facility, the shop should be presumed to be 'around a coal mine'" under the Act.[6] *Id*.

Similarly, in *Baker v. U.S. Steel Corp.*, 867 F.2d 1297 (11th Cir. 1989), the United States Court of Appeals for the Eleventh Circuit held a miner's work met the situs test because he worked at a "centrally located repair shop maintained for the company's convenience." *Baker*, 867 F.2d at 1300. The court further cited an unpublished opinion in which the Fourth Circuit affirmed an administrative law judge's finding that a central repair facility located from one and one-half to twenty miles from the coal mines it serviced was a covered situs. *Baker*, 867 F.2d at 1299, *citing Consolidation Coal Co. v. Graham*, 725 F.2d 674 (4th Cir.1983) (unpub.).[7]

---

[6] We thus agree with the Director's argument that the United States Court of Appeals for the Sixth Circuit's holding applies to a repair shop that is "located in the general vicinity of a coal preparation site such as a tipple given, as discussed above, that work in or around a tipple also satisfies" the situs requirement. Director's Brief at 11 n.8, *citing Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926 (6th Cir. 1989) and *Director, OWCP v. Ziegler Coal Co.* [*Wheeler*], 853 F.2d 529, 536 (7th Cir. 1988).

[7] Notably, while the Fourth Circuit has not yet adopted its view in a published decision, neither Employer nor the dissent has identified any counter-authority to this line of cases. Nor have they attempted to demonstrate they are wrongly-decided or distinguish them factually. We thus find them persuasive.

As discussed above, Claimant testified the repair shop where he worked was located on the property of the Red River/Humphrey Enterprises coal mine site. Hearing Tr. at 25-26, 29. The mine site had four to five coal extraction pits at any given time. *Id*. at 37. The extraction sites typically moved around, whereas the tipple was located between one-half and one mile from the repair shop where Claimant worked. *Id*. at 58, 62-63; *see also* Director's Exhibit 2 at 166-167. The mine site also included numerous old coal pits that had already been mined and the repair shop where he worked was located on a reclaimed strip mine. *Id*. at 68-69. Thus Claimant testified that the "whole area had been strip mined or deep mined." *Id*.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Claimant's testimony establishes he "worked at a mine site" the "entire time" he worked as a maintenance worker for Employer, as the repair shop was around a coal mine or coal preparation facility. Decision and Order at 5; *see Petracca*, 884 F.2d at 935-36 ("determination of what constitutes an 'on-site' facility may be difficult," but it is one that "must necessarily be left to the reasoned decision making of the administrative law judges"); *see also Baker*, 867 F.2d at 1300 (situs requirement is necessarily dependent on the circumstances underlying each particular claim).

Employer contends the administrative law judge's analysis does not comport with the Administrative Procedure Act (APA)[8] requirements because she failed to consider Dale Pressley's testimony. Employer's Brief at 11-13. It argues this testimony establishes Claimant rarely left the repair shop, and did not travel to the tipple or coal extraction sites on a daily basis.[9] *Id*. Employer concedes, however, that Daley Pressley testified that the repair shop itself was located on the property of the Red River/Humphrey Enterprises coal mine site, it was ten miles from the closest extraction pit, and it was within one mile of the tipple. Employer's Brief at 11-13; Employer's Exhibit 12 at 27; Hearing Tr. at 57-58, 62.

[8] The Administrative Procedure Act provides that 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).

[9] In his deposition, Dale Pressley, Employer's owner and representative, disputed Claimant's characterization that he went to the extraction sites or tipples on a daily basis to replace flat tires. Director's Exhibit 68 at 11-12, 35-36. He testified Claimant only worked on the trucks in the repair shop area and left it to change flat tires on-site once or twice a week, but did not leave it on a daily basis. *Id*. at 11-13. If Claimant had to leave the repair shop to fix tires, Dale Pressley indicated Claimant mostly went to the roads on the property, and not to the "pits" or tipple. *Id*. at 17-18.

Thus, as the Director's correctly argues, even if Dale Pressley's testimony were credible, it does not contradict the administrative law judge's finding that Claimant's work at the repair shop also meets the situs prong because it was around a coal mine or coal preparation facility. Director's Brief at 9-12, *citing Petracca*, 884 F.2d at 931-35; *Baker*, 867 F.2d at 1297.

Further, although Dale Pressley disputed that Claimant was exposed to coal dust while working in the repair shop,[10] the Act only requires an individual, such as a maintenance worker, to have "worked in or *around* a coal mine" to meet the situs requirement and be considered a miner. 30 U.S.C. §902(d). It does not require coal dust exposure to satisfy the situs requirement. That requirement is only for construction and transportation workers.[11] Further, the regulation at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), provides "there is a rebuttable presumption that a person who works or has worked in *coal mine maintenance* in or *around* a coal mine is a miner." 20 C.F.R. §725.202(a). The regulation neither requires coal dust exposure for a maintenance worker to satisfy the situs requirement nor consideration of the extent of a maintenance worker's coal dust exposure to rebut the presumption. Because Claimant's work at the repair shop was work "around" a coal mine, Dale Pressley's testimony is of no avail. Director's Exhibits 38, 68 at 11-15. Thus we conclude any error the administrative law judge made

[10] In his deposition and numerous completed questionnaires, Dale Pressley disputed Claimant was exposed to coal mine dust in the repair shop itself. Director's Exhibits 8-11, 68. Dale Pressley testified the tires on the trucks were not steam cleaned before they were changed, but they did not "kick up" a lot of dust when they came in. Director's Exhibit 68 at 36-37. He agreed Claimant did not work in a dust-free environment, but stated there is a "little dust" everywhere. *Id*. He also completed questionnaires submitted in the underlying claim and prior claims stating Claimant was not exposed to coal mine dust when working in the repair shop. Director's Exhibits 8-11. In an April 16, 2013 form, Dale Pressley stated the area where Claimant worked was not associated with coal because the trucks he worked on had dumped their coal. Director's Exhibit 11.

[11] Unlike subsection (a) of 20 C.F.R. §725.202, subsection (b) requires construction and transportation workers to be exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Subsection (b)(1) provides a rebuttable presumption that such an individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine. 20 C.F.R. §725.202(b)(1). Subsection (b)(2)(i) provides the presumption may be rebutted by evidence which demonstrates that the individual was not *regularly* exposed to coal mine dust during his or her work in or around a coal mine. 20 C.F.R. §725.202(b)(2)(i).

in failing to consider it is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

As a determination regarding whether Claimant's work satisfied the situs requirement to be considered a miner is a factual finding for the administrative law judge, and the Board is not empowered to reweigh the evidence, *Anderson*, 12 BLR at 1-113, we affirm the administrative law judge's finding that Claimant's work at the repair shop satisfied the situs requirement to be considered a miner. *Krushansky*, 923 F.2d at 41-42. We therefore affirm her finding that Employer is the properly designated responsible operator.

Cigarette Smoking History

Employer argues the administrative law judge erred in failing to render a finding on the length of Claimant's cigarette smoking history in violation of the APA. Employer's Brief at 19-20. Employer's assertion has merit.

Claimant testified at the hearing that he smoked one and one-half packs of cigarettes a day for about twenty years, sometimes less. Hearing Tr. at 39. He denied he smoked four packs a day. *Id*. He testified he began smoking between the ages of 20 and 24, and continued until 2008. *Id*. at 39-40, 46-50. He conceded he "could have" smoked cigarettes from 1969 to 2009, but denied smoking in 2012. *Id*. at 46-49. Employer's counsel presented Claimant with his documented smoking histories contained in numerous treatment records and medical opinions.[12] Hearing Tr. at 47-49. Claimant could not recall

[12] As Employer asserts, the record contains the following conflicting medical evidence: Dr. Sargent's January 5, 2014 report noting Claimant has a "60+ pack-year history of smoking"; a January 29, 2009 Mountain View Regional Medical Center treatment record noting he smoked "as much as three of (sic) four packs a day for nearly forty years"; a May 25, 2010 Mountain View Regional Medical Center treatment record noting he "smoked 2 packs daily for almost 30-40 years"; Dr. Renfro's February 10, 2005 report noting he smoked "over a pack day"; a November 20, 2012 Wellmont Health System new patient questionnaire noting he smoked two packs of cigarettes a day for forty-seven years; Dr. Agarwal's June 9, 2009 report noting he smoked "approximately" one pack of cigarettes a day from 1969 to 2009; Dr. Klayton's January 13, 2013 report noting he smoked "1-2 packs of cigarettes per day for 20 years"; Dr. Fino's July 9, 2013 report noting he "smoked 1 pack of cigarettes per day for 42 years"; Dr. Gallai's February 6, 2014 report noting he smoked "2 packs a day for 80 pack years"; and Dr. Nader's February 24, 2018 report noting he smoked "1 pack per day" of cigarettes for "a total of 43 years." Director's Exhibits 2, 18, 21; Claimant's Exhibits 3, 4; Employer's Exhibits 4, 5, 6, 7, 8.

telling Drs. Renfro, Klayton, Gallai, DeSigh, and Fino the specific smoking histories that those doctors recorded, but said he would not "lie about nothing like that." *Id*. at 47. Notwithstanding the recorded smoking histories in the medical evidence, the administrative law judge stated at the hearing that the "more important" evidence is Claimant's testimony that he "started smoking in his twenties and stopped smoking in 2008." Hearing Tr. at 50. Based on this testimony, she stated Claimant has a cigarette smoking history of "about 40-plus years." Hearing Tr. at 50.

In her Decision and Order, the administrative law judge found Claimant has a "significant" smoking history. Decision and Order at 4. She then stated:

> The record contains inconsistent information regarding how long and how much [Claimant] smoked. [Hearing] Tr. 45-50. While [Claimant] testified that he smoked for 20 years at the rate of a pack and a half a day, he also testified that he does not remember how much he told the doctors that he smoked and he wouldn't "lie about nothing like that." [Hearing] Tr. at 39-50.

Id.

We agree with Employer that the administrative law judge did not satisfy the explanatory requirements of the APA as she failed to adequately explain how she resolved the conflict in the evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge found Claimant has a "significant" smoking history in her decision, but she did not indicate whether she was incorporating her finding of "40-plus years" from her statement at the hearing or indicate which evidence she relied on to reach her determination it was simply significant. While Claimant testified he smoked a pack and a half a day for twenty years, the record also contains medical evidence indicating he smoked 60- to 80-pack years. Director's Exhibits 2, 18, 21; Claimant's Exhibits 3, 4; Employer's Exhibits 4, 5, 6, 7, 8; Hearing Tr. at 39. Because we are unable to discern the basis for the administrative law judge's smoking history determination, we vacate her finding and remand the case for further consideration of the evidence in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165; *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988)(the administrative law judge has discretion in determining the effect of an inaccurate smoking history on the credibility of a medical opinion).

On remand, the administrative law judge must consider all relevant evidence, resolve conflicts in the evidence, and provide a definitive finding regarding the length of Claimant's smoking history. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999) ("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record."); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985) (the

length and extent of a miner's smoking history is a factual determination for the administrative law judge).

Length of Coal Mine Employment

Employer argues the administrative law judge erred in calculating Claimant's coal mine employment history. Employer's Brief at 15-19. We agree.

Claimant bears the burden of establishing the number of years he 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 (1985). 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).

The administrative law judge noted the district director found Claimant had "13.25 years of coal mine employment for the purposes of the Act." Decision and Order at 6. She found Claimant and Employer did not submit evidence that establishes "more or less than the [district director's] finding." *Id*. Thus she found 13.25 years of coal mine employment. *Id*.

Because the administrative law judge did not explain her method of calculating the length of Claimant's coal mine employment, and it appears she merely adopted the district director's finding of 13.25 years,[13] we cannot affirm her finding. *See Wensel v. Director, OWCP*, 888 F.2d 14, 17 (3d Cir. 1989); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204 (2016); *Wojtowicz*, 12 BLR at 1-165. Further, the administrative law judge erred in indicating Employer did not submit evidence with respect to the length of Claimant's coal mine employment, as Claimant bears the burden of proof on this issue. *Kephart*, 8 BLR at 1-186. Finally, she erred in failing to address Employer's argument, raised in its post-hearing brief, that Claimant's work with Glen Roberts, Sunshine Mining, Reed Enterprises, Deanna Coal, Babb Coal, Manning Trucking, DJ Fuels, and Edward Warren Trucking did not constitute the work of a miner. Employer's Post-Hearing Brief at 16-19.

[13] With only one exception not applicable here, "any findings or determinations made with respect to a claim by a district director shall not be considered by the administrative law judge." 20 C.F.R. §725.455(a). When a party requests a formal hearing after a district director's proposed decision, an administrative law judge must proceed *de novo* and independently weigh the evidence to reach his or her own findings on each issue of fact and law. *See Dingess v. Director, OWCP*, 12 BLR 1-141, 1-143 (1989); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-863 (1985).

Based on the foregoing errors, we vacate the administrative law judge's length of coal mine employment finding and remand the case for further consideration of this issue. On remand, the administrative law judge must determine the length of Claimant's coal mine employment based on any reasonable method of calculation and considering all relevant evidence.[14] *Osborne*, 25 BLR at 1-205; *see Muncy*, 25 BLR at 1-27. She must fully explain her findings in accordance with the APA, including her finding that any work Claimant performed meets the definition of a miner. *See Wojtowicz*, 12 BLR at 1-165.

Because the administrative law judge's failure to properly address the length of Claimant's coal mine employment may affect her credibility findings on the issues of legal pneumoconiosis and disability causation, 20 C.F.R. §§718.202(a), 718.204(c), we vacate her finding that Claimant established these elements. Decision and Order at 15-18. Insofar as we vacate the administrative law judge's finding that Claimant established 13.25 years of coal mine employment, we further vacate her finding that Claimant failed to invoke the Section 411(c)(4) presumption.

On remand, if the administrative law judge finds the evidence establishes at least fifteen years of coal mine employment, she must then address whether the evidence establishes Claimant's coal mine employment took place in underground coal mines or surface coal mines in conditions substantially similar to those in an underground coal mine. 20 C.F.R. §718.305(b)(1)(i), (2). If the administrative law judge finds fifteen or more years of qualifying coal mine employment, Claimant will have invoked the Section 411(c)(4) presumption. The administrative law judge must then consider whether Employer can rebut the presumption. 20 C.F.R. §718.305(d)(1). Alternatively, if Claimant does not invoke the presumption on remand, the administrative law judge must consider whether

[14] The administrative law judge must first determine whether the evidence establishes the beginning and ending dates of Claimant's coal mine employment and may determine the dates and length of coal mine employment by any credible evidence, including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii); *Osborne v. Eagle Coal Co.*, 25 BLR 1-195, 1-204-05 (2016). Where the beginning and ending dates of a miner's employment cannot be determined, an administrative law judge may divide the miner's yearly reported income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). 20 C.F.R. §725.101(a)(32)(iii). A copy of the BLS table must be made a part of the record if an administrative law judge uses this method to establish the length of a miner's coal mine employment. *Id.*; *Osborne*, 25 BLR at 1-204 n.12.

Claimant can establish entitlement to benefits under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.201, 718.202, 718.203, 718.204(b), (c).

Because we have vacated the administrative law judge's finding that Claimant did not invoke the Section 411(c)(4) presumption, we note the burdens of proof on remand may change. Further, the administrative law judge's coal mine employment finding may affect her credibility findings. Thus we decline to address, as premature, Employer's arguments pertaining to the weighing of the evidence on the issues of clinical pneumoconiosis, legal pneumoconiosis, and disability causation.[15] Employer's Brief at 21-28.

In evaluating the medical opinions, however, the administrative law judge should address the comparative credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *Akers*, 131 F.3d at 441. She should address whether each physician overestimated or underestimated Claimant's cigarette smoking and coal mine dust exposure histories when weighing their opinions on the issue of legal pneumoconiosis. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR at 1-54. She should also adequately explain her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[15] Although we decline to address the administrative law judge's specific credibility findings, we agree with Employer that the administrative law judge erred in applying an incorrect standard to determine disability causation. Decision and Order at 18; Employer's Brief at 29-31. The administrative law judge erroneously focused on whether Claimant's total disability was due to coal mine dust exposure. *Id.* To establish that his total disability is due to pneumoconiosis, Claimant must prove that pneumoconiosis is a "substantially contributing cause" of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a substantially contributing cause of a miner's totally disabling impairment if it has "a material adverse effect on the miner's respiratory or pulmonary condition," or if it "[m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i), (ii). If the administrative law judge finds Claimant is unable to invoke the Section 411(c)(4) presumption, and she again finds Claimant has established pneumoconiosis, she should apply the proper standard on the issue of disability causation.

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

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer contends the Affordable Care Act (ACA), which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), is unconstitutional. Employer's Brief at 6. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*. Employer's arguments with respect to the constitutionality of the ACA and the severability of non-health care provisions are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021).

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

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 in the majority opinion that Employer's arguments with respect to the constitutionality of the Affordable Care Act, which reinstated the Section 411(c)(4) presumption, Pub. L. No. 111-148, §1556 (2010), and the severability of non-health care provisions are now moot. *California v. Texas*, U.S. , No. 19-840, 2021 WL 2459255 at *10 (Jun. 17, 2021). I also concur with my colleagues' decision to affirm the administrative law judge's findings that Claimant established total disability and a change in an applicable condition of entitlement. Further, I concur with their decision to vacate

the administrative law judge's findings with respect to the length of Claimant's coal mine employment history and his cigarette smoking history. I respectfully dissent, however, from their decision to affirm the administrative law judge's finding that Employer is the properly designated responsible operator because I agree with Employer's argument that she erred in finding Claimant's work met the situs prong. Employer's Brief at 7-13.

The administrative law judge specifically failed to consider relevant conflicting evidence or adequately explain her situs finding so as to fulfill the explanatory requirements of the Administrative Procedure Act (APA). 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

The definition of a "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the situs requirement, the work must take place in or around a coal mine or coal preparation facility. *See Krushansky*, 923 F.2d at 41-42. A fact-finder must consider all relevant evidence in making situs requirement findings, and must explain the basis for her conclusions. *Wojtowicz*, 12 BLR at 1-165; *McCune*, 6 BLR at 1-998.

The administrative law judge considered Claimant's testimony that he "worked at a mine site" the "entire time" he worked for Employer. Decision and Order at 5. She noted Claimant testified "[s]ome parts of the work day he worked near the tipple, some he was closer to the coal pits, and some he worked on [sic] the repair shop." *Id*. Based on Claimant's testimony, the administrative law judge found he "often" worked at the strip site and near the tipple and was regularly exposed to a "significant amount" of coal mine dust. *Id*. Thus she found his work met the situs prong. *Id*.

The administrative law judge did not, however, adequately explain her basis for finding Claimant's work that took place in the repair shop (as opposed to the time he worked visiting the extraction sites or tipple) was in or around a coal mine or coal preparation facility. *Krushansky*, 923 F.2d at 41. Thus this aspect of her decision does not satisfy the APA. *Wojtowicz*, 12 BLR at 1-165.

The administrative law judge also erred in failing to consider evidence relevant to the situs analysis in the form of deposition testimony and completed questionnaires from Dale Pressley, Employer's owner and representative. *Addison*, 831 F.3d at 256-57;

Director's Exhibits 8-11, 68. Pressley Trucking hauled coal, and Claimant was employed at one of the two sites (the upper shop) at which it repaired and serviced its trucks. According to Mr. Pressley, Claimant's job was to fix tires, grease trucks, and answer the phone at the upper shop. Director's Exhibits 8-11, 68. In his deposition, Dale Pressley disputed Claimant's characterization that he went to the extraction sites or tipples on a daily basis to replace flat tires. Director's Exhibit 68 at 11-12, 35-36. He testified Claimant only worked on the trucks in the repair shop area and infrequently left the shop to fix flat tires. *Id*. at 11-13. If Claimant had to leave the repair shop to fix tires, Dale Pressley indicated Claimant mostly went to the roads on the property, and not to the "pits" or tipple. *Id*. at 17-18.

Moreover, in his deposition and numerous completed questionnaires, Dale Pressley disputed that Claimant was exposed to coal mine dust in the repair shop itself. Director's Exhibits 8-11, 68. Dale Pressley testified the tires on the trucks were not steam cleaned before they were changed, but they did not "kick up" a lot of dust when they came in. Director's Exhibit 68 at 36-37. He stated there is a "little dust" everywhere. *Id*. He also completed questionnaires submitted in the underlying claim and prior claims stating that Claimant was not exposed to coal mine dust when working in the repair shop. Director's Exhibits 8-11. In an April 16, 2013 form, Dale Pressley stated the area in which Claimant worked was not associated with coal because the trucks he worked on had dumped their coal. Director's Exhibit 11. In a letter dated July 15, 2013, Dale Pressley stated Claimant was a "tire changer" and "was not connected to coal" because "[t]he coal mine was several miles away from the tire shop." Director's Exhibit 38. Thus the administrative law judge erred by failing to evaluate this evidence when addressing the situs prong. *Addison*, 831 F.3d at 253-54. When an administrative law judge has failed to account for relevant record evidence, deference is not warranted and remand is required. *Id*.

The Director argues the Board need not remand this case for consideration of the responsible operator issue in light of these errors. Director's Brief at 9-12. He asserts Claimant's work at Employer's repair shop meets the situs prong, relying on the decisions of the United States Courts of Appeals for the Sixth Circuit in *Petracca* and the Eleventh Circuit in *Baker v. U.S. Steel Corp.*, 867 F.2d 1297 (11th Cir. 1989) to support this argument. Director's Brief at 9-12.

I would decline the Director's invitation to hold the evidence establishes as a matter of law that Employer's repair shop was located "around a coal mine or coal preparation" facility in light of the decisions of *Petracca* and *Baker*.[16] Director's Brief at 9-12. This

[16] The Director notes that if "there were any ambiguity as to whether the repair shop was too removed from coal mine operations to meet the situs test, the fact that Claimant's work involved exposure to coal mine dust while working there would make it entirely

case is governed by the law of the Fourth Circuit, which has not formally adopted the views the Director cites. Moreover, as the Sixth Circuit explained in *Petracca*, the "determination of what constitutes an 'on-site' facility may be difficult," but it is one that "must necessarily be left to the reasoned decisionmaking of the administrative law judges." *Petracca*, 884 F.2d 935-36; *see also Baker*, 867 F.2d at 1300 (situs requirement is necessarily dependent on the circumstances underlying each particular claim). In this case, the administrative law judge did not conduct the necessary analysis and provide the required explanations for her findings. *Wojtowicz*, 12 BLR at 1-165. Moreover, the administrative law judge failed to properly apply the regulatory requirements. Claimant did not engage in repairing coal mine equipment for extraction or preparation of coal. Claimant's job was related to transportation activities. He was employed by a trucking company and his job consisted solely of changing truck tires, greasing trucks, and occasionally answering the phone at the truck repair facility. Director's Exhibits 8-11, 68. Consequently, if coverage applied at all, it would be as a transportation worker. Section 725.202(b) sets forth specific requirements applicable to transportation workers, including that transportation workers be exposed to coal mine dust during all periods of employment in or around a coal mine or coal preparation facility and that their activities be integral to the extraction or preparation of coal.[17] 20 C.F.R. §725.202(b). Thus, it was incumbent on the administrative law judge to fully address those requirements, including whether Employer rebutted the Section 725.202(b)(1) presumption through Mr. Pressley's testimony. The Board lacks the authority to render factual findings to fill gaps in the administrative law judge's opinion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune*, 6 BLR at 1-998. When an administrative law judge has failed to render necessary findings, remand is necessary. *Addison*, 831 F.3d at 253-54; *Hicks*, 138 F.3d at 533-34.

Based on the foregoing errors, I would vacate the administrative law judge's responsible operator determination and remand the case to her for further consideration of this issue. I would instruct the administrative law judge on remand to consider all relevant

---

reasonable for him to be covered by the Act." Director's Brief at 11-12. As noted above, however, there is evidence that contradicts Claimant's characterization of the extent of his coal mine dust exposure at the repair site in the form of completed questionnaires and statements from Dale Pressley. Director's Exhibits 8-11, 38.

[17] While subsection (b)(1) provides a presumption that such an individual was exposed to coal mine dust during all periods of such employment occurring in or around a coal mine, 20 C.F.R. §725.202(b)(1), subsection (b)(2)(i) provides the presumption may be rebutted by evidence which demonstrates that the individual was not *regularly* exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i).

evidence and adequately explain her basis for finding Claimant's work with Employer took place in or around a coal mine or coal preparation facility and met the requirements pertinent to transportation workers. *Addison*, 831 F.3d at 253-54; *Krushansky*, 923 F.2d at 41-42; *Norfolk and Western Railway Co. v. Roberson*, 918 F.2d 1144 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991); *Wojtowicz*, 12 BLR at 1-165.

For these reasons I respectfully concur in part and dissent in part from the opinion of the majority.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge