BRB No. 11-0187 BLA

MELVIN E. MUNCY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 11/30/2011
	)	
ELKAY MINING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (10-BLA-5031) of Administrative Law Judge Daniel L. Leland rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(*l*)) (the Act). This case involves a miner's claim filed on December 24, 2008. Director's Exhibit 2.

In considering the claim, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of employment "in one or more underground coal mines," or employment "in a coal mine other than an underground mine" in conditions "substantially similar to conditions in an underground mine," and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

The administrative law judge credited claimant with a total of fifteen years and eleven months of coal mine employment.[1] The administrative law judge, however, determined that fourteen months of that period did not count as qualifying coal mine employment for purposes of amended Section 411(c)(4). Specifically, he found that an eleven-month period, during which claimant worked aboveground loading supplies, did not include work in conditions substantially similar to those in an underground mine, because claimant testified that the dust conditions in that job did not compare to those he experienced underground. Further, the administrative law judge found that a three-month period, during which claimant worked aboveground as a laborer for a different employer, did not include work in conditions substantially similar to those in an underground mine, because claimant provided no evidence of his working conditions in that job. Excluding the fourteen months of employment that was not substantially similar to employment in an underground mine, the administrative law judge found that claimant established fourteen years and nine months of underground coal mine employment. Therefore, he concluded that claimant fell short of establishing the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

[1] The record reflects that claimant's coal mine employment was in West Virginia. Hearing Tr. at 29. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Turning to whether claimant could establish his entitlement to benefits under 20 C.F.R. Part 718 without the aid of the rebuttable presumption, the administrative law judge found that, although claimant established that he has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), he did not establish that he suffers from pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his calculation method when he found that claimant's total coal mine employment was fifteen years and eleven months. Claimant argues further that the administrative law judge erred in finding that he did not establish at least fifteen years of qualifying coal mine employment for purposes of invoking the Section 411(c)(4) presumption. Specifically, claimant argues that, under Board precedent construing Section 411(c)(4), he did not need to prove that his eleven months of work aboveground loading supplies exposed him to conditions substantially similar to those in an underground mine, because he performed that surface coal mine employment at an underground mine. Additionally, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer responds that Section 411(c)(4) is not applicable to this case because its rebuttal provisions apply to the Secretary of Labor, not to responsible operators, and because the constitutionality of Public Law No. 111-148 is being litigated in federal court. Further, employer urges affirmance of the administrative law judge's denial of benefits.

The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with claimant that, under *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979) (Smith, Chairman, dissenting), the administrative law judge should have found claimant's eleven months of aboveground coal mine employment at an underground mine to be qualifying coal mine employment for purposes of Section 411(c)(4), without any need for claimant to demonstrate that the employment took place in conditions substantially similar to those in an underground mine. The Director therefore requests that the Board vacate the denial of benefits, and remand this case to the administrative law judge for consideration under Section 411(c)(4).[2]

[2] The administrative law judge's finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) is unchallenged. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Applicability of Amended Section 411(c)(4)

Employer contends that, because amended Section 411(c)(4) provides that "the Secretary" can rebut the presumption by making certain showings, but does not refer to coal mine operators, the rebuttable presumption of Section 411(c)(4) does not apply to responsible operators. Employer's Brief at 5-6. The Board rejected the identical argument in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA (Oct. 28, 2011). We, therefore, reject it here for the same reasons set forth in *Owens*.

Employer also asserts that amended Section 411(c)(4) may not be applied, because a district court judge declared Public Law No. 111-148 unconstitutional and struck down the entire law. Employer's Brief at 4-5, *citing Florida v. HHS*, 780 F.Supp.2d 1256 (N.D. Fla. 2011). The portion of the district court's decision upon which employer relies, striking down the entirety of Public Law No. 111-148, has been reversed. *Florida v. HHS*, 648 F.3d 1235, 1322-28 (11th Cir. 2011). Further, the Board has declined to hold cases in abeyance pending the resolution of the legal challenges to Public Law No. 111-148. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214-15 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Accordingly, we decline to do so here.

Therefore, we reject employer's arguments that amended Section 411(c)(4) may not be applied in this case. We will now address, in turn, claimant's challenge to the administrative law judge's length of coal mine employment finding, and his challenge to the administrative law judge's finding that he did not establish sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.

Length of Coal Mine Employment

In determining the total length of claimant's coal mine employment, the administrative law judge considered an employment history form, employment records from claimant's former employers, and Social Security Administration (SSA) earnings records. Decision and Order at 2-3; Director's Exhibits 3, 5, 6. Utilizing this evidence, the administrative law judge found that claimant has a "total of fifteen years and eleven months of coal mine employment." Decision and Order at 3.

Relevant to the issue claimant raises in this appeal, the administrative law judge found that thirteen years and five months of that employment took place with two companies, Buffalo Mining Company (Buffalo Mining), and Elkay Mining Company (Elkay Mining). Specifically, the administrative law judge found that claimant worked for nine years and eleven months with Buffalo Mining, based on the beginning and ending dates of his employment reported in employer's records. Decision and Order at 2; Director's Exhibit 5. Further, based on the reported beginning and ending dates of claimant's employment with Elkay Mining, the administrative law judge found that claimant worked there for three years and six months.[3] *Id*.

Claimant argues that the administrative law judge erred in calculating the length of his coal mine employment with Buffalo Mining and Elkay Mining. Claimant's Brief at 9-12. Claimant asserts that the administrative law judge should have applied a formula set forth at 20 C.F.R. §725.101(a)(32)(iii) to calculate his coal mine employment by using his reported SSA earnings.[4] Had the administrative law judge utilized that formula,

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[3] The employment records document claimant's employment with Buffalo Mining Company from September 22, 1970 to March 11, 1977, July 11, 1977 to November 4, 1977, July 17, 1978 to March 26, 1980, June 2, 1980 to December 4, 1980, and June 8, 1981 to May 11, 1982. Director's Exhibit 5. The employment records document claimant's employment with Elkay Mining Company from October 31, 1983 to June 23, 1984, January 2, 1985 to April 17, 1986, and May 14, 1986 to December 13, 1987. *Id*. Additionally, considering the Social Security Administration earnings records, the administrative law judge found that claimant worked for one quarter, or three months, with Dingess Line Construction, and nine quarters, or twenty-seven months, with Island Creek Coal Company. Decision and Order at 2.

[4] Section 725.101(a)(32)(iii) provides, in relevant part, that:

> *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

claimant argues, he would have found 15.57 years established with Buffalo Mining and Elkay Mining, which, when added to claimant's remaining coal mine employment, would yield a total length of coal mine employment of 17.9 years. Claimant's Brief at 10-12.

We reject claimant's argument. In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Contrary to claimant's contention, the administrative law judge was not required to use the calculation method set forth in Section 725.101(a)(32)(iii). The regulation provides only that an administrative law judge "may" use such method. Moreover, the regulatory formula may be used where the miner's employment lasted less than one year, or where the beginning and ending dates of the miner's coal mine employment cannot be established. *See* 20 C.F.R. §725.101(a)(32)(iii). Here, the employment records indicate the beginning and ending dates of claimant's coal mine employment with Buffalo Mining and Elkay Mining. Director's Exhibit 5. Therefore, the administrative law judge did not err in declining to apply the formula at Section 725.101(a)(32)(iii). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007). Thus, we affirm the administrative law judge's finding that claimant established fifteen years and eleven months of coal mine employment.

Qualifying Coal Mine Employment Under Amended Section 411(c)(4)

In order to invoke the Section 411(c)(4) presumption, claimant must initially establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). In this case, the administrative law judge considered whether claimant's eleven months of aboveground coal mine employment with Buffalo Mining took place in conditions "substantially similar" to those in underground coal mine employment.[5] Decision and Order at 7.

> 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)(emphasis added).

[5] Claimant does not challenge the administrative law judge's finding that another three months of claimant's coal mine employment, with Dingess Line Construction, was not employment that was substantially similar to underground coal mine employment. *See Skrack*, 6 BLR at 1-711.

Claimant testified that his aboveground coal mine employment with Buffalo Mining required him to supply the underground coal miners with timbers, oil, rock dust, and cinder blocks, and that it "wasn't that dusty. It was outside." Hearing Tr. at 27. When asked how his exposure to coal mine dust at the surface compared to his exposure to coal mine dust underground, claimant responded, "There was no comparison. There was no dust out there to amount to nothing." *Id*. at 30. Based on this testimony, the administrative law judge found that claimant's "eleven months of above ground coal mine employment with Buffalo Mining must . . . be excluded . . . because [claimant] testified that the dust conditions did not compare to the dust conditions underground." Decision and Order at 7.

Claimant argues that, because his eleven months of aboveground coal mine employment occurred at Buffalo Mining's underground coal mine, he did not need to prove that his work there took place in conditions substantially similar to those in an underground mine. Claimant's Brief at 12-13, *citing Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979)(Smith, Chairman, dissenting). He maintains, therefore, that the administrative law judge erred in excluding that time from the total of claimant's qualifying coal mine employment under Section 411(c)(4), which should have been found to exceed fifteen years. The Director agrees with claimant, arguing that *Alexander* is "controlling authority," and obviates the need for claimant to demonstrate substantial similarity for his work on the surface at Buffalo Mining's underground mine. Director's Letter at 2.

In *Alexander*, the Board, interpreting the originally enacted Section 411(c)(4), held that a surface worker "at an underground [coal] mine is not required to show comparability of environmental conditions in order to take advantage of [the Section 411(c)(4)] presumption." *Alexander*, 2 BLR at 1-504. In so holding, the Board determined that the dichotomy drawn in Section 411(c)(4) is "between types of mines (strip mines and underground mines) rather than work locations (above ground, below ground)." *Alexander*, 2 BLR at 1-503-04. The Board based that determination on both the language of Section 411(c)(4) referring to employment in an "underground mine" and in "a mine other than an underground mine," and the regulatory definitions of "coal mine" and "underground coal mine," which include the land and structures above the mine.[6] *Alexander*, 2 BLR at 1-501-04. The Board concluded that Section 411(c)(4)

[6] Specifically, the Board reasoned that proof of "substantially similar" conditions was not required for employment at the surface of an underground mine, based on the statutory language that substantially similar conditions were to be determined when the miner worked "in a coal mine other than an underground mine." *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-502 (1979)(Smith, Chairman, dissenting). Further, the Board reasoned that the statutory language "in one or more underground coal mines" included the land and buildings at an underground mine site, because the

distinguishes between "'an underground mine' and a 'mine other than an underground mine,'" thereby making "clear that the type of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), is the element which determines whether a claimant is required to show comparability of conditions."[7] *Alexander*, 2 BLR at 1-502.

Amended Section 411(c)(4), as reinstated by Section 1556 of Public Law No. 111-148, contains the identical language that was interpreted by the Board in *Alexander*. 30 U.S.C. §921(c)(4). Additionally, the definitions of "coal mine" and "underground coal mine" remain the same in all relevant respects. *See* 20 C.F.R. §725.101(a)(12),(30). Further, *Alexander* has not been overruled by a court or superseded by later Board precedent.[8] Therefore, *Alexander* continues to apply in cases arising under amended Section 411(c)(4). Accordingly, where a miner has worked aboveground at an underground coal mine, he or she need not demonstrate that the work conditions there were substantially similar to conditions in an underground mine to have the benefit of the Section 411(c)(4) presumption. *Alexander*, 2 BLR at 1-504.

Here, the record contains evidence that claimant's eleven months of aboveground coal mine employment with Buffalo Mining took place at an underground mine. Hearing

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regulatory definitions of "underground coal mine" and "coal mine" included all property on or above the mine site. *Id*. at 1-501-02. Additionally, the Board found support for its reading of Section 411(c)(4) in the legislative history of the 1972 amendments to the Act, in which the Senate Committee on Labor and Public Welfare recommended extending the Act's coverage to strip miners, since the existing Act covered only underground miners and miners who worked aboveground at underground mines. *Id*. at 1-503-04.

[7] Chairman Smith indicated that he would not reach the issue of the interpretation of Section 411(c)(4), because he would not hold that the claimant was a miner within the meaning of the Act. *Alexander*, 2 BLR at 1-507 (Smith, Chairman, dissenting).

[8] Employer relies on *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), in support of its argument that a surface worker at an underground coal mine must prove substantial similarity of conditions under Section 411(c)(4). Employer's Brief at 9-11. While *Summers* involved a miner who worked aboveground at an underground mine for part of his career, and who was found to have demonstrated substantial similarity of conditions, the United States Court of Appeals for the Seventh Circuit affirmed that finding without addressing whether the language of Section 411(c)(4) requires an aboveground worker at an underground mine to demonstrate substantial similarity. *Summers*, 272 F.3d at 479-80, 22 BLR at 2-274-76. Therefore, *Summers* is not persuasive authority that is contrary to *Alexander*.

Tr. at 27; Director's Exhibit 5. Consequently, we vacate the administrative law judge's finding that claimant did not establish fifteen years of qualifying coal mine employment sufficient to invoke the presumption under amended Section 411(c)(4), and remand this case to the administrative law judge for further consideration. On remand, the administrative law judge must review the coal mine employment evidence with regard to Buffalo Mining in light of the holding in *Alexander*, and determine whether claimant has established at least fifteen years of qualifying coal mine employment under amended Section 411(c)(4). *See Alexander*, 2 BLR at 1-504. If the administrative law judge finds that claimant is entitled to the presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4), the administrative law judge must then determine whether the medical evidence rebuts the presumption. In view of our disposition of this case, we need not address claimant's arguments regarding the administrative law judge's analysis of the medical opinion evidence in finding that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge