U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0266 BLA

JAMES E. DUTY Claimant-Respondent v. LBJ ENERGY, INCORPORATED and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/27/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand in a Subsequent Claim of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Matthew J. Moynihan (Penn, Stuart & Eskridge), Bristol, Tennessee, for employer/carrier.

Sarah M. Hurley (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Remand in a Subsequent Claim (2010-BLA-05646) of Administrative Law Judge Christine L. Kirby rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, which is before the Board for the second time, involves a subsequent claim filed on April 15, 2010.[1]

In the last appeal, the Board affirmed the administrative law judge's finding of total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but vacated her finding that claimant established 18.72 years of underground coal mine employment because the administrative law judge failed to adequately consider the relevant evidence, resolve the conflicts, and fully explain how she arrived at her conclusion. Since at least fifteen years of qualifying coal mine employment were not established, the Board also vacated the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2]

[1] Claimant filed six previous claims, all of which were finally denied. Director's Exhibits 1-6. Claimant's most recent prior claim, filed on March 17, 2006, was denied by Administrative Law Judge Pamela Lakes Wood on January 9, 2009, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 7.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant establishes at least fifteen years in underground coal mine employment, or in surface 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.

In addition, the Board vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of clinical and legal pneumoconiosis, or by proving that no part of claimant's total disability was due to pneumoconiosis. Thus, the Board remanded the case for further consideration.

With respect to the issue of clinical pneumoconiosis, the Board instructed the administrative law judge to address employer's argument that the credibility of Dr. Alexander's analog and digital x-ray readings was undermined because he interpreted the May 15, 2012 chest x-ray as positive for pneumoconiosis, notwithstanding that it was obtained after claimant underwent a double lung transplant. The Board also instructed the administrative law judge to reevaluate the biopsy evidence of record, as she did not explain how Dr. Oesterling's failure to report claimant's employment and smoking histories diminished the credibility of his opinion. Further, the administrative law judge was instructed to determine the author of the September 13, 2011 pathology report, render an explicit determination as to whether the report was reliable, and specify the weight to which it was entitled. Because the administrative law judge's findings with respect to the x-ray and biopsy evidence affected her weighing of the medical opinion evidence, the Board vacated her decision to discredit the opinions of Drs. Rosenberg and Fino on the issue of clinical pneumoconiosis, but indicated that the administrative law judge could reinstate her findings if she found clinical pneumoconiosis established on remand.

With respect to the issue of legal pneumoconiosis, the Board instructed the administrative law judge to render a specific determination as to the duration and frequency of claimant's smoking history after addressing all relevant evidence, and to reconsider Dr. Rosenberg's opinion on remand to determine whether the physician had an accurate understanding of claimant's smoking history.[3] *Duty v. LBJ Energy, Inc.*, BRB No. 14-0084 BLA (Nov. 14, 2014) (unpub.). With respect to the issue of disability causation, because the administrative law judge relied on her findings regarding employer's failure to rebut the presumed existence of legal pneumoconiosis, the Board instructed the administrative law judge on remand to reassess the relevant evidence. Lastly, if the administrative law judge found on remand that claimant failed to invoke the

[3] With respect to the issue of legal pneumoconiosis, the Board affirmed the administrative law judge's discounting of Dr. Fino's opinion on the basis that Dr. Fino relied on "generalities from various medical studies without explaining why claimant could not represent the case of the unusual miner who deviated from the subjects set forth in the studies cited." *Duty v. LBJ Energy, Inc.*, BRB No. 14-0084 BLA, *slip op.* at 10 (Nov. 14, 2014) (unpub.), *citing* 2013 Decision and Order at 13.

Section 411(c)(4) presumption, she was instructed to consider whether claimant established entitlement pursuant to 20 C.F.R. Part 718 without benefit of the presumption.

On remand, the administrative law judge found 17.37 years of underground coal mine employment established and, therefore, reinstated her finding that claimant invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer failed to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis, or by proving that no part of claimant's total disability was due to pneumoconiosis. Accordingly, the administrative law judge again awarded benefits.

In the present appeal, employer argues that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment. Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, arguing that the record establishes at least fifteen years of qualifying coal mine employment and that the opinion of Dr. Habre diagnosing legal pneumoconiosis is not equivocal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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 & Grylls Associates, Inc*., 380 U.S. 359 (1965).

I. Invocation of the Section 411(c)(4) Presumption

A. Length of Coal Mine Employment

Employer initially challenges the administrative law judge's length of coal mine employment determination. Employer argues that the administrative law judge's finding of 17.37 years of underground coal mine employment is not supported by the evidence of record.

[4] The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

The administrative law judge's calculation of the number of years of coal mine work will be upheld when it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). In making this determination, the administrative law judge must explain what evidence she credits or rejects and set forth the underlying rationale. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *Fee v. Director, OWCP*, 6 BLR 1-11 (1984).

In assessing the length of claimant's coal mine employment on remand, the administrative law judge noted that employer revised its prior calculation of 13.72 years of coal mine employment, based on the Social Security earnings record (SSER), to 12.98 years. Decision and Order on Remand at 3. After reviewing the relevant evidence of record, the administrative law judge acknowledged that claimant was a poor historian whose testimony and reporting of his work history was inconsistent and contradictory. Decision and Order on Remand at 4-6. Consequently, for employers who reported earnings of more than $50 per quarter in the years prior to 1977, the administrative law judge relied on the SSER to credit claimant with 1.75 years of coal mine employment with Coal Field Community Action Program (Coal Field CAP) in 1970 and 1971; 0.50 years with Atomic Fuel Coal Company/Ruel Fuller in 1976; and 1.0 years with Pittston Company and Betty B Coal Company (Betty B) in 1977. Decision and Order on Remand at 6-8.

For the years in which the SSER showed that claimant worked for multiple employers in a calendar year or where the starting and ending dates of claimant's employment were uncertain, the administrative law judge relied on employer's calculations, based on claimant's June 2010 deposition testimony estimating his weekly wages for various employers. Thus, the administrative law judge credited claimant with 0.44 years of coal mine employment with Betty B in 1978; 0.70 years with Rocky Coal Company (Rocky Coal) and RDK Coal Corporation in 1979; 0.94 years with Rocky Coal, Coal Valley Mining, Jackson Coal Company and DL&P Coal Company (DL&P) in 1981; and 0.19 years with DL&P in 1982.[5] Decision and Order on Remand at 8-9. For the year 1980, where claimant worked for Rocky Coal during the entire calendar year, the

[5] While employer calculated that claimant worked 12.1 weeks for DL&P Coal Company in 1982, the administrative law judge credited a statement from LBJ Energy that it employed claimant from March 10, 1982 through April 11, 1988. Consequently, the administrative law judge adjusted employer's calculation to 9.4 weeks so that claimant would earn no more than one year of coal mine employment for 1982. Decision and Order on Remand at 9.

administrative law judge found that his earnings of $19,490.40 exceeded the coal mine industry's average earnings, as set forth in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*.[6] The administrative law judge therefore credited claimant with 1.0 years of coal mine employment in 1980. *Id.*

Finding that statements from claimant's most recent employers were most probative of the beginning and ending dates of claimant's employment with those companies, the administrative law judge credited claimant with 6.09 years of employment with Old Ralph Mining from March 10, 1982 through April 11, 1988, and 4.01 years with LBJ Energy, from September 11, 1989 through September 13, 1993. Decision and Order on Remand at 9. Lastly, the administrative law judge relied on claimant's 2012 hearing testimony to credit claimant with 0.75 years of coal mine employment with K&L Coal Company (K&L). Decision and Order on Remand at 7. Thus, the administrative law judge credited claimant with a total of 17.37 years of underground coal mine employment.

Employer contends that the administrative law judge erred in crediting claimant with 0.75 years of coal mine employment with K&L, based on claimant's 2012 hearing testimony. Employer notes that claimant failed to mention his employment with K&L prior to the 2012 hearing, despite twenty-five years of continuous litigation, and claimant testified at his 2010 deposition that he was not paid "illegal cash under the table." Further, employer maintains that claimant has reported an increasing number of years of coal mine employment in each of the claims he filed after he stopped mining in 1993, as well as to the various physicians over the years, and has inconsistently reported the names of his employers and/or dates of his employment in his multiple applications for benefits, his deposition testimony in 2010, and his hearing testimony in 2003, 2007, and 2012. In view of these inconsistencies and contradictions in the record, employer asserts that claimant's testimony is "wholly unreliable." Employer's Brief at 7-8.

The administrative law judge acknowledged the inconsistencies, omissions and alleged contradictions in the record regarding claimant's coal mine employment, noting that claimant's "recollection of dates is undoubtedly poor" and that it was not always possible to corroborate claimant's account of his employment with the documentary evidence in the record. Decision and Order on Remand at 3-6. Nevertheless, the administrative law judge found that claimant consistently alleged well over fifteen years of coal mine employment and credibly testified that he worked for some mines that did not report earnings. While she determined that claimant's "testimony on the dates he

[6] Exhibit 610, entitled "*Average Wage Base*," contains the coal mine industry's daily earnings data referenced in 20 C.F.R. §725.101(a)(32)(iii).

worked for K&L was speculative,"[7] and that claimant's "first mention" of his employment with K&L was during the 2012 hearing, the administrative law judge declined to discredit claimant's testimony in its entirety. Decision and Order on Remand at 7. Rather, the administrative law judge permissibly found claimant's testimony that he worked for three small mines that did not keep records, that he worked for K&L for a period of nine months before he began working at Coal Field CAP in 1970,[8] and that he "ran the miner" at K&L, a Wilcox mine, to be persuasive and credible. *Id.*; *see* 2012 Hearing Transcript at 24-25.

It is the role of the administrative law judge, as the trier-of-fact, to determine both the credibility of the evidence and the inferences to be drawn from it, and we may not substitute our judgment. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). As a miner's uncorroborated testimony may be used to establish the length of his employment if found credible, we affirm the administrative law judge's decision to credit claimant with 0.75 years of coal mine employment with K&L.[9] *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (crediting miner's uncorroborated testimony that employer characterized

[7] During the hearing on August 28, 2012, claimant testified that one of the first mines he worked for was K&L Coal Company (K&L), owned by Kaiser and Lawrence, for a period of nine months, and that he "[r]an the miner" there. 2012 Hearing Transcript at 24.

[8] After determining that claimant would have been seventeen or eighteen years old in 1970, the administrative law judge found that claimant's testimony that he left school in the ninth or tenth grade "increases the plausibility of [c]laimant's assertion that he worked for K&L around 1970." Decision and Order on Remand at 7; 2012 Hearing Transcript at 54.

[9] Our dissenting colleague reweighs the evidence on this point and concludes that claimant has not met his burden to establish his length of coal mine employment. While a reasonable trier-of-fact may come to that conclusion, it is not the only reasonable one on these facts. Claimant's testimony is hazy and inconsistent. But it is also unrebutted and not directly contradicted. The administrative law judge acknowledged the problems with claimant's testimony and provided valid reasons to credit it in spite of them. That is all the law requires. *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). In our view, we therefore cannot hold that her determination was wrong as a matter of law and remain consistent with our prior precedent. *See, e.g., Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) ("The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable.") (citation omitted).

as "hazy and contradictory"); *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).

Employer also contends that the administrative law judge erred in finding that claimant's employment with Coal Field CAP for 1.75 years constituted coal mine employment, arguing that Coal Field CAP is "a community action partnership that performs public services," and is not a coal mine. Employer's Brief at 8-9. Contrary to employer's argument, the administrative law judge reviewed claimant's testimony that "he worked for Coal Field CAP in underground coal mining in 1970 and 1971" and also did "just a little bit" of part-time work for the cooperative. Decision and Order on Remand at 7; 2012 Hearing Transcript at 26, 54. The administrative law judge rationally concluded that claimant's testimony "suggest[ed] that Coal Field CAP was comprised of both a coal mine and cooperative." *Id.* Finding that claimant's testimony was credible, she permissibly relied on claimant's SSER to credit claimant with 1.75 years of coal mine employment with Coal Field CAP.[10] *See Tackett*, 12 BLR at 1-14; Decision and Order on Remand at 7.

Because the administrative law judge permissibly based her length of coal mine employment determination on the evidence that she found reliable, and because her computations are supported by substantial evidence, we affirm the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment. *See Muncy*, 25 BLR at 1-27. Consequently, we affirm the administrative law judge's finding that claimant established invocation of the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4).

[10] In our view, our dissenting colleague once again extensively reweighs the evidence and substitutes his credibility determinations for that of the administrative law judge on this issue. Regardless, we note that claimant has established more than fifteen years of coal mine employment, given the administrative law judge's permissible finding regarding his time with K&L, even without his 1.75 years of employment with Coal Field CAP. Thus, any error in the administrative law judge's crediting of claimant with 1.75 years of employment with Coal Field CAP would be harmless. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Finally, as the district director found, and the Director, Office of Workers' Compensation Programs, explains in his response, we further note that the documentary evidence in this case establishes over fifteen years of coal mine employment. Director's Brief at 3.

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

A. Existence of Pneumoconiosis

Employer challenges the administrative law judge's finding that employer failed to disprove the presumed facts of both legal and clinical pneumoconiosis.[11]

1. Legal Pneumoconiosis

The administrative law judge followed the Board's remand instructions to consider all of the record evidence relevant to the extent of claimant's smoking history, render a specific finding on the issue, and then reconsider the medical opinion of Dr. Rosenberg on the issue of legal pneumoconiosis. The administrative law judge found that claimant had a twenty pack-year smoking history, and accorded less weight to Dr. Rosenberg's opinion to the extent that the physician relied on an inaccurate smoking history.[12] The administrative law judge additionally reinstated her previous reasons for discounting Dr. Rosenberg's opinion and stated that, even if credited, the opinion "would stand in equipoise" with the well-reasoned opinion of Dr. Habre that claimant has legal pneumoconiosis. Decision and Order on Remand at 12-13.

Employer contends that the administrative law judge erred in finding that claimant has a smoking history of twenty pack years and, therefore, erred in discounting Dr. Rosenberg's opinion on the ground that he relied upon an exaggerated smoking history. Employer argues that there is ample documentary evidence in the record showing that claimant has a "nearly (forty) year history of smoking more than one pack of cigarettes per day," including carboxyhemoglobin levels showing that claimant was smoking heavily at multiple times, as documented by physicians unaffiliated with claimant's black

[11] "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). "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).

[12] The administrative law judge acknowledged that Dr. Rosenberg recorded a smoking history of one-half pack per day for fifteen years, "but also observed that the treatment records outline an extensive smoking history dating back to [c]laimant's teenage years." Decision and Order on Remand at 13; Employer's Exhibit 1.

lung claims. Employer further maintains that "the only evidence that claimant did not smoke continuously from 1970 to 2009 is claimant's own, self-serving testimony," which was "consistently inconsistent." Employer's Brief at 12-22. Thus, employer asserts that the administrative law judge should have credited Dr. Rosenberg's opinion on the issue of legal pneumoconiosis rather than crediting the "equivocal" opinion of Dr. Habre that reported inaccurate smoking and employment histories. Employer's Brief at 22-23.

After reviewing the conflicting evidence of record, the administrative law judge acknowledged that claimant's memory is faulty and his testimony unreliable regarding the length and frequency of his smoking history, ranging from under one pack year to two-plus packs per day for thirty-five years. Decision and Order on Remand at 12. The administrative law judge addressed employer's assertion that the carboxyhemoglobin levels measured in claimant's three most recent claims were consistent with heavy smoking, but reasonably concluded that while those levels showed that claimant was smoking heavily at the particular points in time when the tests were taken, they did not establish continuous heavy smoking for a specific duration. *Id.* Due to the lack of consistency in both the reported duration of claimant's smoking history and the quantity that he smoked, the administrative law judge rationally determined that the highest and lowest reported histories were "outliers," and found that claimant had a twenty pack-year smoking history, based on the most frequently reported histories in the record. *Id.*

As the length and extent of claimant's smoking history is a factual determination to be made by the administrative law judge, *see Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988), we affirm the administrative law judge's finding of a twenty pack-year smoking history. Thus, the administrative law judge permissibly accorded less weight to Dr. Rosenberg's opinion to the extent that the physician relied on an inaccurate smoking history. *See Sellards v. Director, OWCP*, 17 BLR 1-77, 1-80-81 (1993); *Bobick*, 13 BLR at 1-54; Decision and Order on Remand at 13.

The administrative law judge additionally determined that although Dr. Rosenberg conceded that coal dust exposure can cause severe airflow obstruction, he opined that claimant's markedly reduced FEV1/FVC ratio was characteristic of obstruction related to smoking, not coal dust exposure. 2013 Decision and Order at 15. Finding that Dr. Rosenberg's opinion was inconsistent with the regulations and could not be reconciled with the Department of Labor's position set forth in the preamble to the 2001 regulations that coal dust exposure may cause chronic obstructive pulmonary disease, with associated decrements in FEV1 and the FEV1/FVC ratio, the administrative law judge permissibly discounted the opinion. *Id.*; *see* 20 C.F.R. §718.204(b)(2)(i)(C); 65 Fed. Reg. 79,943 (Dec. 20, 2000); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014). Further, while Dr. Rosenberg opined that

claimant's reduced diffusing capacity was characteristic of a diffuse form of emphysema related to smoking and not coal dust exposure, the administrative law judge rationally found that Dr. Rosenberg failed to adequately explain why claimant's emphysema was not aggravated by his significant history of coal dust exposure. 2013 Decision and Order at 16; *see* 20 C.F.R. §718.201(a)(2), (b); *Brandywine Explosives & Supply v. Director, OWCP*, [*Kennard*], 790 F.3d 657, 668, 25 BLR 2-725, 2-740 (6th Cir. 2015).

As substantial evidence supports the administrative law judge's credibility determination, we affirm her finding that Dr. Rosenberg's opinion does not rebut the presumed fact of legal pneumoconiosis. Because the Board previously affirmed the administrative law judge's discounting of Dr. Fino's opinion, and Dr. Habre's opinion diagnosing legal pneumoconiosis does not support employer's burden on rebuttal, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). Consequently, employer has failed to rebut the presumed fact of pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i), and we need not address employer's arguments on the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

As employer has not challenged the administrative law judge's finding that employer failed to rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii), that finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983. Thus, claimant has established his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand in a Subsequent Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that claimant established 17.37 years of coal mine employment.

The administrative law judge's calculation of the number of years of coal mine employment will be upheld when it is based on a reasonable method of computation and is supported by substantial evidence. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985). Here the administrative law judge's findings do not meet this threshold.

In crediting claimant with .75 years, or nine months, of coal mine employment with K&L sometime prior to 1970, the administrative law judge relied solely on claimant's testimony at the 2012 hearing.[13] Decision and Order on Remand at 7. The administrative law judge acknowledged that this testimony was speculative and conflicted with claimant's repeated assertions that he began working in coal mine

[13] Claimant initially testified that he "first started working in the mines" in 1974, but then later stated that the first mine he worked at was K&L for "like, [nine] months" in "[1970], I think." 2012 Hearing Transcript at 23-25.

employment in 1974.[14] *Id.* at 4, 5, 7. However, the administrative law judge found that the fact that claimant's first mention of any employment with K&L was at the 2012 hearing was "not . . . probative," in part, because claimant's testimony was "unrefuted by the objective evidence of employment in the record." *Id.* at 7. As employer asserts, however, the fact that claimant did not list employment with K&L in any of the six prior claims he filed, including claims closer in time to his alleged employment at K&L when events would have been fresher in his mind, is itself objective evidence that refutes his recent testimony. Moreover, claimant offered no explanation for this inconsistency.

It is understandable that a claimant's memory would be faulty as to employment that may have occurred more than forty years prior to the hearing, but that does not relieve claimant of his burden of establishing years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. *See Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985) (claimant bears the burden of establishing the length of his coal mine employment); *Hunt*, 7 BLR at 1-710. Claimant's speculative testimony regarding his employment with K&L sometime around 1970 is contradicted by the fact that, prior to the 2012 hearing, he did not allege any employment with K&L and consistently testified that he did not begin working in the coal mines until 1974. Therefore, I would hold that substantial evidence does not support the administrative law judge's finding that claimant established .75 years of coal mine employment with K&L. *See Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280-81.

I would similarly hold that substantial evidence does not support the administrative law judge's finding that claimant established 1.75 years of coal mine employment with Coal Field CAP in 1970 and 1971 based on claimant's Social Security records and his testimony. At the hearing, claimant acknowledged that Coal Field CAP is a community action project that performs public services and is not a coal mine. 2012 Hearing Transcript at 54. However, claimant then stated that he "also worked for C.O. Coal Company P," that "one's coalmines" and "the other one was [a] cooperative" consisting of "part-time work for the government through schools," and that he did "just a little bit of work" for the cooperative. *Id.* Based on this testimony, the administrative

[14] As the administrative law judge noted, claimant did not identify any employment with K&L, or any coal mine employment prior to the year 1974, in any of his six previous claims filed in 1987, 1994, 1996, 1998, 2001, and 2006. Decision and Order at 4; Director's Exhibits 1-6. Rather, as the administrative law judge found, "[c]laimant has consistently listed his coal mine employment as beginning in January 1974[.]" *Id.* Moreover, as employer points out, claimant did not mention his employment with K&L when he was deposed in the instant claim in 2010. Employer's Brief at 7.

law judge determined that "Coal Field CAP was comprised of both a coal mine and cooperative," and that claimant's work with Coal Field CAP was "minimal." Decision and Order on Remand at 7. Thus, the administrative law judge determined that the seven quarters of earnings with Coal Field CAP reflected on claimant's Social Security records constitutes 1.75 years of work as a coal miner. *Id.*

While claimant mentioned working for a company called C.O. Coal Company P, claimant did not testify that it was the same company as Coal Field CAP, or that the pay he received from Coal Field CAP was actually compensation for work as a miner for C.O. Coal Company P. Moreover, similar to his testimony that he did just a little bit of work for Coal Field CAP, claimant testified that he only worked "a little bit" for C.O. Coal Company P.[15] 2012 Hearing Transcript at 55. As substantial evidence does not

[15] The hearing transcript reflects the following exchange:

Q: Are you sure that this work you have listed for Coalfield CAP in 1970 and 1971 is coalmine related?

A: Well, now, well, the one you are talking about now?

Q: Yes.

A: Yeah, I worked for C.O. Coal Company P, something like that. One's coalmines, the other was cooperative, that was a part-time work for the government through schools, you know, and I done just a little bit of work for – not that much, you know?

Q: Okay, so you did some work for that –

A: Yes, a little bit.

Q: Okay.

A: Some of it was, yeah.

Q: Okay, so that was Coalfield CAP Community Action Project?

A. Some of it was, yeah.

Q: Okay.

support the administrative law judge's conclusion that the bulk of claimant's employment with Coal Field CAP was actually the work of a miner for C.O. Coal Company P, I would vacate the administrative law judge's finding that claimant established 1.75 years of coal mine employment with Coal Field CAP. *See Muncy*, 25 BLR at 1-27; *Clark*, 22 BLR at 1-280-81.

Further, for the period of employment beginning in 1976, for which there is some documentary evidence, the administrative law judge's findings are inadequately explained. Specifically, for 1978, 1979, and 1981, the administrative law judge relied on employer's calculations, based primarily on claimant's 2010 deposition testimony concerning his weekly wages, to credit claimant with .44, .70, and .94 years of coal mine employment, respectively, for a total of 2.08 years.[16] The administrative law judge relied on employer's calculations for the following reason:

A: But there's another coal company it was called C.O. Coal Company P, something like that, and I worked a little bit for them and it's been so long, it's hard to remember exact dates and everything.

Q: Okay, so you think that the company, when they've been asking about Coalfield CAP, you've been referring to a C.O. Coal Company? I mean, you're remembering work you did for a C.O. Coal Company?

A: Yeah, there's another one, coal company, C.O. Coal Company, but I don't - - they didn't stay busy for long, you know, about three mines, they stayed busy – show me the records and I couldn't hardly get the records.

Hearing Transcript at 54-55.

[16] Employer calculated these years of coal mine employment by dividing claimant's yearly income as reflected in his Social Security records by claimant's 2010 testimony concerning his weekly wages, thus establishing the number of weeks claimant worked. Employer's Brief on Remand at 14-15. Employer then divided the estimated number of weeks that claimant worked by 50, reflecting a presumed 50-week work year, to determine the fraction of the year that claimant worked. For example, in 1978 claimant's Social Security records reflect earnings of $8,778.42 with Betty B Coal Co., while claimant testified that he earned "about $10.00 an hour" or "about $400.00 a week." Director's Exhibits 11, 35 at 44. Thus, $8,778.42 in yearly income, divided by $400 per week, divided by 50 weeks, equals .44 year of coal mine employment.

> Against the backdrop of [c]laimant's faulty memory, I will no longer rely exclusively on [e]mployer's calculation of the length of coal mine employment which was based on the June 2010 deposition of [c]laimant and the [Social Security records]. Similar to [c]laimant's hearing testimony and applications for benefits, his testimony at the deposition was uncertain at times regarding what his likely weekly wages were for a particular employer in a specific year. I therefore find that [e]mployer's calculation of the length of [c]laimant's coal mine employment, based on [c]laimant's estimate as to his weekly wages for a particular employer as compared with his earnings as reported in the [Social Security records], is entitled to some, but not full, determinative weight regarding the entire length of [c]laimant's coal mine employment. It is the most useful evidence where there is no other means by which to ascertain the length of employment with a particular employer.

Decision and Order on Remand at 6 (citations omitted).

Although an administrative law judge may use any reasonable method to calculate a miner's coal mine employment, *see Muncy*, 25 BLR at 1-27, in this case the administrative law judge's findings that claimant has a "faulty memory" and that his testimony was "uncertain" regarding his weekly wages cannot be reconciled with her finding that employer's calculations, which are based on claimant's testimony, are "the most useful evidence" of claimant's employment in 1978, 1979, and 1981. Decision and Order at 6. Moreover, the Director argues that the formula set forth at 20 C.F.R. §725.101(a)(32)(iii),[17] together with claimant's Social Security records, results in calculations of .87, 1.0, and 1.0 years of employment, respectively, or a total of 2.87 years. In light of her finding that claimant has a "faulty memory" and his testimony was "uncertain," and because the difference between employer's calculations and the Director's calculations is determinative of whether claimant has established fifteen years

[17] 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 earning for that year, as reported by the Bureau of Labor Statistics (BLS) [which is published in Exhibit 610 of the BLBA Procedure Manual].

of qualifying coal mine employment,[18] the administrative law judge has not sufficiently explained why she determined that employer's calculations are "the most useful evidence where there is no other means by which to ascertain the length of employment with a particular employer." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

I concur, however, in the majority's affirmance of the administrative law judge's findings that employer failed to rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Specifically, I agree with the majority's holding that the administrative law judge rationally determined that claimant had a twenty pack-year smoking history, based on the most frequently reported histories in the record. Moreover, I further agree that the administrative law judge permissibly discounted Dr. Rosenberg's opinion as being inadequately explained and inconsistent with the Department of Labor's position set forth in the preamble to the 2001 regulations that coal dust exposure may cause chronic obstructive pulmonary disease, with associated decrements in FEV1 and the FEV1/FVC ratio.

In summary, I would vacate the award of benefits and remand the case for further consideration of whether claimant established at least fifteen years of qualifying coal mine employment for the years 1976 through 1993. If claimant on remand establishes the requisite fifteen years of qualifying coal mine employment, he will have again invoked Section 411(c)(4) presumption and the administrative law judge may reinstate the award of benefits.

Should the administrative law judge find that claimant has not established fifteen years of coal mine employment, claimant is not entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis and the administrative law judge must determine whether claimant can affirmatively establish entitlement to benefits, pursuant to Part 718.

[18] Excluding claimant's alleged employment with K&L and Coal Field CAP, the administrative law judge rationally determined that claimant established 12.79 years of coal mine employment with various employers in 1976 (.5 year), 1977 (1.0), 1980 (1.0), 1982 (.19), 1982-1988 (6.09), 1989 (0.0), and 1989-1993 (4.01). *See Muncy*, 25 BLR at 1-27; *Vickery*, 8 BLR at 1-432. Thus, the decision to credit employer's calculations with respect to 1978, 1979, and 1981 (2.08 years), over the Director's calculations based on the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) (2.87 years), is determinative of whether claimant has established fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption (14.87 years versus 15.66 years).

GREG J. BUZZARD
Administrative Appeals Judge