BRB No. 13-0009 BLA

JETTIE DAUGHERTY (Widow of RALPH J. DAUGHERTY) Claimant-Respondent v. ISLAND CREEK COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/23/2013 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Benefits (2011-BLA-05677) of Administrative Law Judge Pamela J. Lakes, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp.

2011) (the Act). This case involves a survivor's claim filed on June 5, 2009.[1] Director's Exhibit 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge found that the miner had twenty-two years of coal mine employment, at least nineteen of which were underground.[2] Thus, the administrative law judge found that the miner had sufficient qualifying employment for purposes of amended Section 411(c)(4). The administrative law judge also found that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. Finally, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption, and in finding that employer failed to rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The

[1] Claimant is the widow of the miner, who died on March 10, 2008. Director's Exhibit 8. The miner's most recent claim for benefits, filed on August 12, 2004, was denied by Administrative Law Judge William S. Colwell on August 19, 2008. Claimant's request for modification of Judge Colwell's decision was denied by the district director on September 22, 2010.

[2] The record indicates that the miner's most recent coal mine employment was in Virginia. Hearing Transcript at 17-18; Living Miner's 2004 Claim, Director's Exhibit 7. Accordingly, the Board will apply the law 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).

Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its arguments on appeal.[3]

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).

Qualifying Coal Mine Employment

Employer first contends that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Specifically, employer contends that the administrative law judge failed to adequately explain her findings that the miner had twenty-two years of coal mine employment, and at least nineteen years of underground coal mine employment. Employer's Brief at 5-10. Employer's argument has merit.

The administrative law judge explained her findings as follows:

> Based upon my own review of the Social Security records, I find that Claimant has established 22 years of coal mine employment (as compared with the 20.83 found by the district director). As noted above, the Miner's wife testified his coal mine employment was all underground. A review of the evidence from the Miner's claim reflects that up to three years may have been above ground, although some of that was in underground coal mining. Thus, the Miner had at least 19 years of underground coal mine employment.

Decision and Order at 4-5 (citations and footnotes omitted).

Under the Administrative Procedure Act (APA), the administrative law judge must identify the evidence on which she relies and set forth her findings, and the underlying rationale, in adequate detail. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We agree with employer that the administrative law judge failed to comply with the requirements of the APA in this instance, because she did not explain how the miner's Social Security records, or any other evidence from the miner's claim, supports her findings of twenty-

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

two years of coal mine employment and nineteen years of underground coal mine employment.

Moreover, we cannot say that the administrative law judge's error was harmless. Employer asserts that the record indicates that the miner worked for at least six years in jobs that were either above ground, or at surface mines. Employer's Brief at 6-10. Work above ground at an underground mine constitutes qualifying coal mine employment for purposes of Section 411(c)(4). *See* 20 C.F.R. §725.101(a)(30); *Muncy v. Elkay Mining Co.*, 25 BLR 1-23, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979). Where employment took place at a surface mine, a claimant must establish that the work took place in dust conditions that were substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *Harris v. Cannelton Indus.*, 24 BLR 1-217, 1-223 (2011). Here, the administrative law judge did not determine which, if any, of the miner's jobs were at surface mines rather than underground mines, and which, if any, of the surface mining jobs were in conditions substantially similar to underground coal mine employment. As employer notes, if the miner had only 20.83 years of coal mine employment, as the district director concluded, and six of those years were not in underground coal mine employment or substantially similar conditions, the miner would have had less than fifteen years of qualifying coal mine employment, and claimant would not be able to invoke the Section 411(c)(4) presumption.

Therefore, we must vacate the administrative law judge's findings regarding the length of the miner's coal mine employment and his qualifying coal mine employment for purposes of Section 411(c)(4), and remand this case for further consideration. We must also vacate the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. On remand, the administrative law judge must reconsider the relevant evidence regarding the miner's coal mine employment to determine if it establishes that he had fifteen years of qualifying coal mine employment, and she must explain the rationale for her finding. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge finds that claimant has established that the miner had fifteen years of qualifying coal mine employment, she may reinstate her finding that claimant invoked the amended Section 411(c)(4) presumption. If claimant is unable to establish that the miner had at least fifteen years of qualifying coal mine employment, the administrative law judge must determine whether claimant has established entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, without benefit of the presumption.

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

In the interest of judicial economy, and to avoid any repetition of error on remand, should the administrative law judge again determine that claimant has invoked the

Section 411(c)(4) presumption, we will address employer's arguments regarding rebuttal of the Section 411(c)(4) presumption. To rebut the Section 411(c)(4) presumption, employer must establish either that the miner did not have pneumoconiosis, or that his death did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *Copley v. Buffalo Mining Co*., 25 BLR 1-81, 1-89 (2012); *see also* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305).

To rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis, employer must disprove the existence of both clinical and legal pneumoconiosis. *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that the evidence established that the miner had clinical pneumoconiosis,[4] and that employer therefore failed to rebut the presumption by disproving the existence of pneumoconiosis. Decision and Order at 9. Those findings are unchallenged by employer, and therefore are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Because she found that employer failed to disprove the existence of clinical pneumoconiosis, the administrative law judge concluded that it was "unnecessary to determine whether the Employer can disprove the existence of legal pneumoconiosis (i.e., whether the Miner's COPD/emphysema was caused, contributed to, or aggravated by coal mine dust exposure)," but acknowledged that the legal pneumoconiosis[5] issue remained "relevant with respect to the second method for rebuttal." Decision and Order at 9.

Turning to the second method of rebuttal, the administrative law judge considered whether employer could establish that the miner's death did not arise out of, or in connection with, his coal mine employment. The administrative law judge considered the autopsy reports and medical opinions of Drs. Dennis, Oesterling, Perper, Tuteur, Spagnolo, and Bush, but found each opinion to be flawed in some way.[6] Decision and

[4] Clinical pneumoconiosis is defined as "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).

[5] "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).

[6] Dr. Dennis, the autopsy prosector, opined that the miner died of "prominent pulmonary pathology," sixty to seventy percent of which he attributed to a malignant tumor, and thirty to forty percent of which he attributed to pneumoconiosis. Director's Exhibits 9, 11, 24. Dr. Oesterling, a pathologist, opined in an autopsy report that

Order at 12-13. She concluded that the "consensus" of the opinions was that the miner died due to pneumonia that resulted from lung cancer, but that "the actual mechanism by which the death occurred, and the part (if any) which his respiratory impairment may have played, is unclear. It is also unclear the extent to which the Miner's respiratory impairment was caused or contributed to by his coal mine dust exposure, either as a direct result of his pneumoconiosis or as a result of COPD [chronic obstructive pulmonary disease] that was caused or aggravated by coal mine dust exposure." *Id*. at 13. The administrative law judge thus found the evidence regarding whether clinical or legal pneumoconiosis contributed to the miner's death to be in equipoise. *Id*. Consequently, the administrative law judge found that employer failed to establish that the miner's death did not arise out of his coal mine employment, and therefore failed to rebut the Section 411(c)(4) presumption. *Id*.

Employer argues that the administrative law judge failed to adequately explain her resolution of the conflicting evidence on the issue of whether coal mine dust exposure caused or contributed to the miner's respiratory impairment and thus, on whether clinical or legal pneumoconiosis contributed to the miner's death. Employer's Brief at 10-12. We agree. The administrative law judge found that the autopsy and medical opinion evidence was unclear and in equipoise as to the cause of the miner's impairment and on whether pneumoconiosis contributed to his death. In so finding, the administrative law judge stated that Dr. Tuteur opined "that the [m]iner's death was unrelated to either [his] pneumoconiosis or his COPD, thus addressing the legal pneumoconiosis issue, but he did not explain why he reached that conclusion." Decision and Order at 13. Substantial evidence does not support the administrative law judge's finding, because she did not

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pneumonia, attributable to the miner's malignant tumor, was the main cause of death; although he diagnosed the miner as having had pneumoconiosis, Dr. Oesterling concluded that it did not hasten or contribute to the miner's death. Director's Exhibit 12. Dr. Perper, a pathologist, opined in his autopsy report that the miner had complicated pneumoconiosis and legal pneumoconiosis, and that they caused or hastened the miner's death. Claimant's Exhibit 7. Dr. Tuteur, a pulmonologist, opined in a medical report that the miner did not have clinical or legal pneumoconiosis that was severe enough to produce symptoms, and that coal mine dust exposure did not contribute to or hasten the miner's death, which he concluded was due to lung cancer. Employer's Exhibits 1, 2. Dr. Spagnolo, a pulmonologist, opined in his medical report that there was insufficient evidence to diagnose clinical or legal pneumoconiosis, but did not specifically address what caused the miner's death. Employer's Exhibit 3. Dr. Bush, a pathologist, opined in an autopsy report that the miner had a mild degree of simple pneumoconiosis, but that neither coal mine dust exposure nor pneumoconiosis contributed to or hastened the miner's death. Employer's Exhibit 6.

address Dr. Tuteur's explanation that the miner's clinical pneumoconiosis was too mild to cause any impairment or hasten his death,[7] or the doctor's explanation for concluding that the miner's COPD was unrelated to coal mine dust exposure, but was due solely to smoking. Employer's Exhibit 1 at 5-8. We therefore vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption and, if the issue is reached on remand, we instruct her to reconsider the autopsy report and medical opinion evidence, in its entirety, to determine whether employer has established that the miner's death did not arise out of, or in connection with, his coal mine employment.

[7] Dr. Bush also opined that the miner's clinical pneumoconiosis was "too limited in degree" to cause any impairment or contribute to the miner's death, Employer's Exhibit 6 at 3, and Dr. Oesterling opined that the miner's clinical pneumoconiosis "in no way" hastened his death. Director's Exhibit 12 at 6; Employer's Exhibits 5.

Accordingly, the administrative law judge's Decision and Order Granting 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

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

For the reasons set forth by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976), since there are no regulations currently in force applying the limitations on rebuttal set forth in 30 U.S.C. §921(c)(4) to employers, I would not instruct the administrative law judge to apply those limitations to the instant case. I concur with my colleagues in all other respects.

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JUDITH S. BOGGS
Administrative Appeals Judge