U.S. Department of Labor

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

BRB No. 16-0081 BLA

WILLIAM D. STILTNER Claimant-Petitioner v. A & K TRANSPORTATION, INCORPORATED and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 08/31/2017 DECISION and ORDER

Appeal of the Decision and Order on Remand of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Rebecca J. Fiebig and 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.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2011-BLA-05546) of Administrative Law Judge John P. Sellers, III, denying benefits 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 involves claimant's request for modification of the denial of a claim filed on July 7, 2008, and is before the Board for the second time.[1]

In a Decision and Order Denying Benefits dated September 27, 2013, the administrative law judge considered claimant's assertion that he worked as a coal miner for forty-three years, including twenty-three years underground. The administrative law judge credited claimant with no more than sixteen years of coal mine employment,[2] seven years and ten months of which he found to be underground coal mine employment. The administrative law judge found that none of claimant's remaining coal mine employment constituted either underground coal mine employment or employment in conditions substantially similar to those in an underground mine.[3] Therefore, the administrative law judge concluded that claimant did not establish the fifteen years of qualifying coal mine

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[1] The Board set forth the full procedural history of this case in its prior decision. *Stiltner v. A & K Transp., Inc.*, BRB No. 14-0010 BLA, slip op. at 2 n.1 (Aug. 29, 2014)(unpub.).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3; Hearing Transcript at 12. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] In its previous decision, the Board noted that claimant alleged forty-three years of coal mine employment, twenty-three years of which were spent in underground coal mine employment. *Stiltner*, BRB No. 14-0010 BLA, slip op. at 4. The Board also noted that employer stipulated to sixteen years of coal mine employment, but disputed whether any of that employment was underground coal mine employment, or employment in conditions substantially similar to those in an underground mine. *Id.* at 2 n.2.

employment necessary to invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that claimant did not establish entitlement to benefits under 20 C.F.R. Part 718 because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[5] Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated, in part, the administrative law judge's finding as to the length of claimant's coal mine employment,[6] and remanded the case for further consideration. *Stiltner v. A & K Transp., Inc.*, BRB No. 14-0010 BLA (Aug. 29, 2014)(unpub.). With respect to several periods of alleged coal mine employment not credited to claimant, the Board held that the administrative law judge erred in failing to consider whether claimant's Social Security Administration earnings records or an affidavit in the record documented the alleged coal mine employment. *Id*. at 5. Additionally, the Board held that the administrative law judge erred in calculating the length of claimant's coal mine employment with two additional employers and needed to recalculate those periods. *Id*. at 5-7.

Further, the Board held that the administrative law judge erred in determining that none of claimant's work as a truck driver loading and hauling coal from underground and surface mines for delivery elsewhere constituted coal mine employment. *Stiltner*, BRB No. 14-0010 BLA, slip op. at 8. Specifically, the administrative law judge found that, because he could not determine whether the coal that claimant worked with was still in some stage of preparation rather than in the stream of commerce, claimant failed to prove

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[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the miner worked fifteen or more years in underground coal mine employment or in surface coal mine employment in conditions substantially similar to those in an underground mine and has a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] The administrative law judge discredited the medical opinions from the physicians who diagnosed claimant with pneumoconiosis, because he determined that those physicians relied on inflated coal mine employment histories. Decision and Order Denying Benefits at 36-41.

[6] The Board affirmed the administrative law judge's finding that claimant established a total of five years and three months of underground coal mine employment with Pikeville Coal Company/Chisholm Mine, Crescent Coal Company, Collins & Stiltner Coal Company, and LTV Steel Company. *Stiltner*, BRB No. 14-0010 BLA, slip op. at 4-5.

that his trucking work was coal mine employment. The Board instructed the administrative law judge to reconsider the relevant evidence, bearing in mind that "the loading and removal of coal from the tipple has been held to be a 'necessary part of the preparation of coal for transport into the stream of commerce.'" *Id.*, *quoting Hanna v. Director, OWCP*, 860 F.2d 88, 93, 12 BLR 2-15, 2-23 (3d Cir. 1988). Further, the Board instructed the administrative law judge to reconsider claimant's transportation employment under the situs and function tests set out in *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989), and in light of the rebuttable presumption of 20 C.F.R. §725.202(b)(1) that claimant was exposed to coal dust during his transportation employment.[7] *Id.*

On remand, the administrative law judge reconsidered the evidence and credited claimant with an additional 7.63 years of underground coal mine employment.[8] The administrative law judge also credited claimant with 4.43 years of coal mine employment for reclamation work he performed with Jimco Incorporated and Jasper Iron & Metal, but found that the evidence did not establish that this work constituted qualifying coal mine employment for purposes of Section 411(c)(4).[9] Decision and Order on Remand at 6-8.

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[7] Additionally, because the administrative law judge's findings as to the length of claimant's coal mine employment affected his weighing of the evidence on the existence of pneumoconiosis, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a), and instructed him to reassess the medical evidence after he reconsidered the length of claimant's coal mine employment.

[8] Specifically, the administrative law judge credited claimant with five years of underground coal mine employment with Stiltner & Salyers Coal Company, and 2.63 years of underground coal mine employment with Thermo Coal Corporation, but declined to credit claimant with the three years of underground coal mine employment he alleged with Taylor Hill Coal Company. Decision and Order on Remand at 5-6, 8-11.

[9] The administrative law judge determined that the record contained no evidence as to whether this work took place at underground mines or at surface mines. Decision and Order on Remand at 7. Assuming the reclamation work took place at surface mines, the administrative law judge found that, because there was no evidence the work constituted coal mine construction, claimant was not entitled to the presumption at 20 C.F.R. §725.202(b)(1) that he was exposed to coal mine dust during that work. *Id.* at 18-19. Additionally, the administrative law judge found that there was no evidence of the dust conditions in which claimant worked during his 4.43 years of mine reclamation. *Id.*

Turning to claimant's years of alleged coal mine employment as a truck driver loading coal at tipples and hauling it offsite, the administrative law judge again found that none of that work constituted the work of a miner under the Act, distinguishing *Hanna*. Decision and Order on Remand at 11-17, 19-22. Specifically, the administrative law judge determined that because the claimant in *Hanna* loaded coal from the tipple at his employer's mines onto barges bound for steel mills also owned by his employer, the court's holding was "heavily swayed by [the employer's] dual role as the producer and consumer," and by the fact that the claimant was employed by the mine operator. *Id.* at 15. In contrast, the administrative law judge noted that here claimant worked for independent trucking companies when he drove his truck to the tipples at the operators' mines to load coal and haul it away. *Id.* at 16. The administrative law judge thus again concluded that there was insufficient evidence to establish that the coal claimant handled was not already in the stream of commerce. *Id.* at 15-16.

The administrative law judge therefore did not credit claimant with any additional coal mine employment for his years of driving coal trucks. Concluding that claimant established twelve years and ten and one-half months of underground coal mine employment, and no additional qualifying coal mine employment,[10] the administrative

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[10] Assuming that claimant's loading coal at the tipple constituted coal mine employment, the administrative law judge found no reliable way to calculate the length of that employment, because it was unclear how long claimant was at the tipple during each working day of his approximately twenty years of hauling coal. Decision and Order on Remand at 19. Alternatively, the administrative law judge noted "for the sake of appellate review" that a "loose calculation" would yield a total of approximately seventeen months of coal mine employment over the course of twenty years. *Id.* at 19 n.7. Adding those seventeen months to claimant's underground coal mine employment, and noting claimant's testimony that he was exposed to coal dust while loading, the administrative law judge found fourteen years and four months of qualifying coal mine employment, less than the fifteen years required by Section 411(c)(4). *Id.* By Order dated December 8, 2016, the Board requested that the Director, Office of Workers' Compensation Programs (the Director), file a brief addressing this alternative finding. *Stiltner v. A & K Transp., Inc.*, BRB No. 16-0081 BLA, slip op. at 2-3 (Dec. 8, 2016)(Order)(unpub.). The Director filed his supplemental brief on February 16, 2017, and employer filed a response. The issues discussed in the parties' supplemental briefs will be addressed in the Board's remand instructions, *infra*. The Board also requested that the Director set forth his position on the applicability of the presumption of coal mine dust exposure at 20 C.F.R. §725.202(b)(1) for coal mine construction and transportation workers, in determining whether claimant's trucking work, to the extent it occurred at surface mines, constituted qualifying coal mine employment under Section

law judge found that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order on Remand at 22. Applying 20 C.F.R. Part 718, the administrative law judge again found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* at 22-26. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in crediting him with less than fifteen years of qualifying coal mine employment, and thus erred in finding that he is not entitled to the Section 411(c)(4) presumption.[11] Employer responds in support of the administrative law judge's denial of benefits.

The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that the administrative law judge erred in finding that claimant's work as a truck driver did not constitute coal mine employment pursuant to *Hanna* and the Board's prior remand instructions in this case. The Director asserts that substantial evidence does not support the administrative law judge's finding that claimant's work of loading coal for transportation offsite did not constitute coal mine employment. The Director requests that the Board vacate the administrative law judge's finding and remand the case for the administrative law judge "to credit [claimant] with the years that he spent hauling coal from underground and surface mines," and to "reconsider his evaluation of the medical evidence in light of an accurate coal mining history."[12] Director's Brief at 4.

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

411(c)(4). *Stiltner*, slip op. at 2. For the reasons that will be set forth, *infra*, the Board has determined that it need not address that issue in this case.

[11] In his brief, however, claimant does not set forth a specific argument regarding any particular periods of alleged coal mine employment that the administrative law judge did not find established. Claimant's Brief at 1-5, 20; 20 C.F.R. §802.211(b).

[12] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish three years of underground coal mine employment with Taylor Hill Coal Company, and that claimant's 4.43 years of mine reclamation work with Jimco Incorporated and Jasper Iron & Metal was not a period of qualifying coal mine employment for purposes of Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Under the Act, 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. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "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). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014); *Petracca*, 884 F.2d at 929-30, 13 BLR at 2-41-42. To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989). The definition of "coal preparation" specifically includes the loading of coal. 20 C.F.R. §725.101(a)(13).

We agree with the Director that the administrative law judge erred in finding that the rationale from *Hanna* does not apply to claimant's truck driving work under the Act. Director's Brief at 2-3. As the Third Circuit recognized, the loading of coal at the tipple is "a 'necessary' part of the preparation of coal" as it is "the very last step[] in the preparation of the coal." *Hanna*, 860 F.2d at 93, 12 BLR at 2-23. And since "the appropriate characterization of [claimant's] work for the purpose of entitlement under the Act is determined by evaluation of what he did, and not by who employed him[,]" *Hanna*, 860 F.2d at 92, 12 BLR at 2-22, the administrative law judge did not provide a valid reason for declining to apply *Hanna* in assessing whether claimant's work loading coal at mine tipples met the function test.

The administrative law judge additionally determined that claimant's work loading coal at the tipple was not coal mine employment under *Petracca* because, according to the administrative law judge, the Sixth Circuit did not suggest that a "truck driver who drove up to the tipple, after the coal had been processed and sold, for the purpose of delivering the coal to a customer, constituted work involved in the . . . preparation of coal." Decision and Order on Remand at 16. The court, however, did not address whether a truck driver who loads coal at the tipple on a mine site, for transport offsite, has participated in the preparation of coal.[13] Moreover, although loading coal at the

[13] In *Petracca*, the claimant worked as a painter, laborer, and mechanic in the central machine shop. The primary issue was not whether the claimant's machine repair work met the function test, but whether the central machine shop in which he worked was

tipple of a mine site was not at issue, the Sixth Circuit recognized that the definition of coal preparation includes "the loading of bituminous coal, lignite, or anthracite . . . ." *Petracca*, 884 F.2d at 929, 13 BLR at 2-41, *quoting* 30 U.S.C. §802(i). Therefore, *Petracca* does not support the administrative law judge's determination that claimant's loading of coal was not coal mine employment.

Additionally, the administrative law judge cited unpublished Sixth Circuit decisions for the proposition that "working with processed coal already in the stream of commerce does not satisfy the function requirement." Decision and Order on Remand at 15, *citing Ratliff v. Chessie Sys. R.R.*, No. 93-3535, 1994 WL 376891 (6th Cir. July 18, 1994), and *Ray v. Brushy Creek Trucking Co.*, 50 F.App'x 659 (6th Cir. 2002). These cases, however, do not support the administrative law judge's determination that claimant's work did not meet the function test. They are consistent with the principle that loading coal from a tipple on or around the site of a mine is a step in the preparation of coal.[14]

"in or around a coal mine" for purposes of the situs test. *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 930-35, 13 BLR 2-38, 2-43-51 (6th Cir. 1989).

[14] In *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891 (6th Cir. July 18, 1994), a case involving a railway worker who maintained spur lines near tipples, the Sixth Circuit specifically held that "the final step of processing the coal (or 'preparation') ended when the coal was loaded into the railroad cars at the tipple; *after that,* the coal entered the stream of commerce and was no longer being 'prepared.'" *Ratliff*, 1994 WL 376891 at *3 (emphasis added). Since the claimant in *Ratliff* was involved with maintaining the rail spurs on which the railroad cars were brought to the tipple for loading, his work was held to be integral to the processing of coal and, therefore, to be the work of a miner. *Id*. Thus, *Ratliff* supports rather than undercuts a finding that claimant's loading of coal at the tipple was part of the preparation of coal. In *Ray v. Brushy Creek Trucking Co.*, 50 F.App'x 659 (6th Cir. 2002), although the Sixth Circuit held that the claimant's work of loading coal onto barges was not covered coal mine employment, the court explained that the claimant worked at a transfer station distant from the mine, with coal that had already been processed and brought by train to the transfer station. *Ray*, 50 F.App'x at 662. Here, it is undisputed that claimant loaded coal at tipples and trucked it away from actual coal mine sites. Therefore, *Ray* does not support a finding that claimant's trucking work was not coal mine employment.

Therefore, on the undisputed facts of this case, we agree with the Director that claimant's work of loading coal at the tipples and hauling it from the mines constitutes the work of a miner under the Act. It is undisputed that claimant loaded coal from the tipples at mine sites, thus meeting the situs requirement of work as a miner. *See Petracca*, 884 F.2d at 929-30, 13 BLR at 2-41-42. As was further found by the administrative law judge, claimant testified that he hauled coal from the mines, most often loading it himself outside the cab, before taking it away. Hearing Transcript (Tr.) at 15, 17, 28-32, 35; Employer's Exhibit 2 at 7; Director's Exhibit 42 at 7, 8. Thus, on the facts found by the administrative law judge, claimant also met the function test in that he worked in the final step of the preparation of coal by loading it and removing it from the mine site. *See Hanna*, 860 F.2d at 93, 12 BLR at 2-23; *see also Ratliff*, 1994 WL 376891 at *3; 20 C.F.R. §725.101(a)(13).

We therefore vacate the administrative law judge's finding that claimant's coal trucking work did not constitute coal mine employment and remand this case for the administrative law judge to determine the length of claimant's coal mine employment, to include the time he worked in trucking as a coal hauler.[15]

The administrative law judge noted that although he found that none of claimant's time as a coal truck driver constituted coal mine employment, if he nonetheless credited claimant with coal mine employment for the portion of each day that he was loading coal at the tipple, the total additional coal mine employment would amount to approximately seventeen months. Decision and Order on Remand at 19 & n.7. Specifically, the administrative law judge relied upon claimant's testimony that he was exposed to coal mine dust while loading, which took approximately ten to fifteen minutes and occurred five to seven times a day. The administrative law judge estimated that the loading time thus totaled fifty to 105 minutes per day, resulting in twenty-six to fifty-four days of coal mine employment a year over the course of approximately twenty years, for a total of 520 to 1,080 days.[16] Selecting the lower amount, 520 days, the administrative law judge

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[15] The administrative law judge did not render a specific finding on the number of years that claimant worked in coal trucking. However, the administrative law judge noted that claimant alleged approximately twenty years of coal trucking work, and the chart in the administrative law judge's Decision and Order in which he summarized those periods of work reflects approximately twenty years. Decision and Order on Remand at 11-12, 19.

[16] The administrative law judge assumed 250 working days in a year, and eight-hour shifts. Decision and Order on Remand at 19.

found that his "loose calculation" yielded approximately seventeen months of coal mine employment.[17] Decision and Order on Remand at 19 & n.7.

The Director alleges that the administrative law judge erred in his calculation method, because under the regulations, "miners are entitled to credit for a full day of mining work on any day where they receive pay for work as a miner." Director's Brief at 3, *citing* 20 C.F.R. §725.101(a)(32)("A 'working day' means any day or part of a day for which a miner received pay for work as a miner."). The Director's argument has merit. Given the definition of a "working day," the administrative law judge erred in crediting claimant with coal mine employment for only the part of each day in which the administrative law judge found that claimant was engaged in coal mine employment. *See Griffith v. Director, OWCP*, 868 F.2d 847, 849, 12 BLR 2-185, 2-188 (6th Cir. 1989). We therefore vacate the administrative law judge's finding of seventeen additional months of coal mine employment, and instruct the administrative law judge to determine the length of claimant's coal mine employment in coal trucking in accordance with the definition of "working day." 20 C.F.R. §725.101(a)(32); *see Griffith*, 868 F.2d at 849, 12 BLR 2-188.

We next address the administrative law judge's finding that claimant's trucking work included only seventeen months of qualifying coal mine employment under Section 411(c)(4). To invoke the Section 411(c)(4) presumption, claimant must establish at least fifteen years of employment either "in one or more underground coal mines," or in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). The "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). A miner who works aboveground at the site of an underground mine need not establish that the conditions there were substantially similar to those in an underground mine. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058-59, 25 BLR 2-453, 2-468 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

The administrative law judge noted claimant's testimony that some of the mines from which he picked up coal were underground mines while others were surface mines. The administrative law judge, however, explained that because claimant did not specify

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[17] The administrative law judge further found that, because claimant was exposed to coal mine dust during those seventeen months, that time also constituted the extent of claimant's qualifying coal mine employment for purposes of Section 411(c)(4). Decision and Order on Remand at 19 n.7.

any particular amount of time he spent hauling coal from underground mines, he would consider whether claimant's duties during all his time as a coal truck driver exposed him to dust conditions that were substantially similar to those in an underground mine. Decision and Order on Remand at 22.

Based on claimant's testimony that he was exposed to coal dust for approximately fifteen minutes each time he loaded coal, up to seven times per day over a twenty-year period, the administrative law judge credited claimant with a fraction of each day in trucking work as qualifying coal mine employment. Decision and Order on Remand at 19 n.7. Using this method, the administrative law judge found that claimant had seventeen months of qualifying coal mine employment during his time as a coal truck driver.[18]

In his Supplemental Brief, the Director contends that the administrative law judge erred in so finding, because claimant need not establish that he was exposed to coal mine dust for the entire day in order for that day to be counted as qualifying coal mine employment. Director's Supplemental Brief at 11; *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001).[19] The Director notes that the "evidence suggest[s] that [claimant] loaded coal every working day and often multiple times per day" for twenty years. *Id*. The Director therefore argues that claimant should be credited with qualifying coal mine employment for all of the years he spent as a coal truck driver. *Id*. Employer contends that the administrative law judge's finding was permissible, because claimant's testimony was too vague and inconsistent to establish that his work conditions were substantially similar to those in an underground mine. Employer's Supplemental Brief at 7-8 (unpaginated).

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[18] The administrative law judge found that the seventeen additional months of qualifying coal mine employment, when added to the twelve years and ten and one-half months of underground coal mine employment found established, left claimant with fourteen years and four months of qualifying coal mine employment for purposes of Section 411(c)(4). Decision and Order on Remand at 19 n.7.

[19] In *Summers*, the United States Court of Appeals for the Seventh Circuit rejected a coal mine operator's argument that the miner could not establish at least fifteen years of qualifying coal mine employment under the originally-enacted Section 411(c)(4) because he could not show that he was exposed to coal mine dust for the same number of hours that an underground miner would have accrued in fifteen years. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 481, 22 BLR 2-265, 2-278 (7th Cir. 2001).

On the facts of this case, we agree with the Director that claimant should be credited with qualifying coal mine employment for all of his time as a truck driver. To establish the substantial similarity of his working conditions, claimant must establish that he was "regularly exposed to coal-mine dust" while working as a coal truck driver at surface mines. 20 C.F.R. §718.305(b)(2). He need not establish that his work conditions as a truck driver were identical to those underground, *see* 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013), "nor [does] he have to prove that he was around surface coal dust for a full eight hours on any given day for that day to count . . . ." *Summers*, 272 F.3d at 481, 22 BLR at 2-278. As the Department of Labor has explained, claimant need only establish "the dust conditions prevailing at the non-underground mine or mines at which [he] worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine." 78 Fed. Reg. at 59,105.

Here, claimant's testimony, found to be credible by the administrative law judge, Decision and Order on Remand at 10, indisputably establishes that claimant was "regularly exposed to coal-mine dust" while working as a coal truck driver. The administrative law judge credited claimant's testimony that he was exposed to coal mine dust while loading coal outside the truck, for approximately fifteen minutes several times per day, and found that only this portion of each day was qualifying coal mine employment.[20] However, claimant also testified, without contradiction, that he was exposed to coal dust even while inside his truck with the windows closed, because the dust entered through cracks that could not be sealed.[21] Tr. at 17, 33. Claimant explained

[20] The administrative law judge found that claimant's testimony was otherwise "insufficient to establish that claimant's dust exposure was anything more than sporadic or incidental, unless he was actually present at the tipple." Decision and Order at 21.

[21] Claimant elaborated:

> Well, when they pick a load or bucket of coal up and put it in your truck and drop it in there the dust boils out of the truck, do you see what I'm saying? And it does get on you. It even comes in the truck if you roll the windows up and you breathe it and you go home you're still dirty as . . . a coal miner.

Tr. at 30. Claimant explained further that while his surface dust exposure in trucking was "[n]ot as bad" as the conditions he encountered underground, it was still "bad" because "[y]ou still get dirty and you breathe a lot of dust, fine dust in the air, and sometimes it even comes in the truck on you . . . it's not as bad as underground . . . . It is bad, though, I mean, the surface is too." *Id.*

that he could see the dust in the sunlight. Tr. at 34. Additionally, claimant testified, without contradiction, that "many times" the loading took longer than fifteen minutes, such that he was outside the truck and exposed to dust from the loading process for a greater portion of the day. Tr. at 35. As a result, according to claimant, his face, body, and clothing were "very, pretty dirty" and covered with coal dust after he drove the coal truck. Tr. at 17, 35.

Claimant further testified that he worked under these conditions every day over the course of approximately twenty years. Tr. at 15-17, 28, 30-33; *see also* Director's Exhibit 3. As noted, the administrative law judge found him to be a "credible witness" and explicitly acknowledged that his testimony was uncontradicted. Decision and Order on Remand at 10, 20. Claimant's unrebutted testimony thus meets the standard of establishing "regular exposure" to coal mine dust under 20 C.F.R. §718.305(b)(2). *See, e.g.*, *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, 25 BLR 2-725, 2-735-36 (6th Cir. 2015)(holding that claimant's testimony that he breathed the "dust [that] was flying around," along with his descriptions of "cloud[s] of smoke" from coal dust, "easily support[ed] a finding that [claimant] was regularly exposed to coal-mine dust"); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014)(holding that claimant's testimony that the conditions throughout his employment were "very dusty" and that dust covered his clothes by the end of his shift, met claimant's burden to establish that he was regularly exposed to coal mine dust); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17, 25 BLR 2-549, 2-564-66 & n.17 (10th Cir. 2014)(holding that claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove, and that he was exposed to "pretty dusty" conditions while performing other surface jobs, "provided substantial evidence of regular exposure to coal mine dust"). We therefore reverse the administrative law judge's finding and hold, as a matter of law, that applying the "regularly exposed" standard to claimant's "credible," uncontradicted testimony establishes that claimant was regularly exposed to coal mine dust during his years of coal trucking work. *See Kennard,* 790 F.3d at 664, 25 BLR at 2-735-36; *Sterling*, 762 F.3d at 490, 25 BLR at 2-643-44; *Goodin*, 743 F.3d at 1343-44 & n.17, 25 BLR at 2-564-66 & n.17; 20 C.F.R. §713.305(b)(2).

The administrative law judge must still make a specific finding on the length of claimant's coal mine employment, to include his years of coal trucking. However, given our holding that all of claimant's work as a coal truck driver constituted qualifying coal mine employment, claimant will establish more than fifteen years of qualifying coal mine employment for purposes of Section 411(c)(4).[22] Thus, after determining the total length

[22] The administrative law judge has credited claimant with twelve years and ten and one-half months of underground coal mine employment. Decision and Order on

of claimant's coal mine employment, the administrative law judge must determine whether claimant has established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). If claimant establishes total disability, he will have invoked the Section 411(c)(4) presumption. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[23] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). If claimant does not establish total disability, entitlement will be precluded because claimant will have failed to establish a necessary element of entitlement under 20 C.F.R. Part 718.

Remand at 22. Claimant alleges approximately twenty additional years of coal mine employment as a coal truck driver. Decision and Order on Remand at 11-12, 19; Director's Exhibit 3.

[23] "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). "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).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed in part, vacated in part, and reversed in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge