BRB Nos. 12-0139 BLA
and 12-0259 BLA

JENNIE LOU ROBERTS (Widow of and on behalf of OTIS ROBERTS)	)	
Claimant-Respondent	)	
v.	)	
MOUNTAIN CLAY INCORPORATED, c/o TRANSCO ENERGY COMPANY	)	DATE ISSUED: 12/20/2012
and	)	
TRANSCO ENERGY COMPANY, c/o JAMES RIVER COAL COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits in Miner's Estate Claim and the Decision and Order – Award of Survivor's Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in Miner's Estate Claim (2010-BLA-5325) and the Decision and Order – Award of Survivor's Benefits (2010-BLA-5140) of Administrative Law Judge Larry S. Merck, rendered on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The relevant procedural history of this case is as follows: The miner filed a subsequent claim for benefits on May 12, 2008.[1] Director's Exhibit 4. The district director issued a Proposed Decision and Order awarding benefits on January 14, 2009. Director's Exhibit 31. On January 17, 2009, the miner died and claimant, the miner's widow, filed her survivor's claim on February 17, 2009. Director's Exhibits 47, 39. The district director issued a Proposed Decision and Order awarding benefits in the survivor's claim on September 9, 2009. Director's Exhibit 67. Pursuant to employer's request, the claims were forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on January 5, 2011. Thereafter, the administrative law judge issued separate decisions awarding benefits in both the miner's claim and the survivor's claim on November 14, 2011.

Based on the filing date of the miner's subsequent claim, the administrative law judge considered the miner's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] which provides for a rebuttable presumption of total disability due to

[1] The miner filed an initial claim for benefits on September 14, 1989, which was denied by the district director on March 7, 1990. Director's Exhibit 1. On May 26, 1994 the miner filed a second claim, but it was later withdrawn. Director's Exhibit 2. On May 31, 2001, the miner filed a third claim for benefits. *Id*. In a Decision and Order dated January 20, 2006, Administrative Law Judge Daniel J. Roketenetz denied benefits, finding that the miner failed to establish any element of entitlement. *Id*. The denial was affirmed by the Board in *Roberts v. Mountain Clay, Inc.*, BRB No. 06-0424 BLA (Oct. 31, 2006) (unpub.). *Id*. No further action was taken by the miner until he filed the present subsequent claim.

[2] On March 23, 2010, amendments to the Black Lung Benefits Act, contained in Section 1556 of the Patient Plan and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), were enacted, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010.

pneumoconiosis, if 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 he also suffered from a totally disabling respiratory impairment. The administrative law judge credited the miner with at least twenty years of coal mine employment, based upon a stipulation of the parties, and determined that claimant established at least fifteen years of qualifying coal mine employment. Because the newly submitted evidence was sufficient to establish that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and that she was entitled to the presumption at amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut that presumption by proving either that the miner did not have pneumoconiosis or that his disability did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded in the miner's claim. Additionally, based on the filing date of the survivor's claim, and because the miner was found entitled to benefits on his lifetime claim, the administrative law judge concluded that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).[3] Thus, the administrative law judge awarded benefits in the survivor's claim

On appeal, employer argues that the amendments contained in the Patient Protection and Affordable Care Act are unconstitutional.[4] In addition, employer argues that because the administrative law judge misinterpreted claimant's hearing testimony, he erred in finding that the miner's surface coal mine employment was performed in conditions substantially similar to underground coal mine employment and erred in finding that claimant invoked the amended Section 411(c)(4) presumption. Employer maintains that the miner's claim must be denied because claimant did not satisfy her burden to establish that the miner was totally disabled due to pneumoconiosis. With respect to the survivor's claim, employer argues that claimant is not entitled to benefits pursuant to amended Section 932(*l*), and that she is unable to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205.

[3] Section 1556 of the PPACA also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis.

[4] We reject employer's arguments regarding the constitutionality of the amendments contained in the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

Claimant responds, urging affirmance of the administrative law judge's award of benefits in each claim. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that claimant satisfied her burden to show that the miner's surface coal mine employment was in conditions substantially similar to those in an underground mine. Employer has also filed a reply brief, reiterating its arguments that benefits were erroneously awarded in both claims.[5]

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.[6] 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).

The Miner's Claim

In order to invoke the amended Section 411(c)(4) presumption, a miner must initially establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required only to proffer sufficient evidence of dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988); *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then the function of the administrative law judge, "with his expertise and knowledge of the industry, to compare [the miner's] working conditions to those prevalent in underground mines." *Summers*, 272 F.3d at 480, 22 BLR at 2-726.

In this case, the parties stipulated to twenty years of coal mine employment. The administrative law judge relied on the coal mine employment histories that the miner provided to Drs. Rasmussen and Broudy and found that "the [m]iner had at least [eleven] years in underground coal mine employment." Decision and Order at 8; *see* Director's

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and that a change in an applicable condition of entitlement has been established pursuant to 20 C.F.R. §725.309. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibits 1-52, 5.

Exhibits 14, 16. The administrative law judge determined that the remainder of the miner's coal mine work was in surface coal mines.[7] *Id*. The administrative law judge noted that the miner worked at the surface mines as a heavy equipment operator, operated a dozer, and drove miners in and out from the area where the coal was cut. *Id*.

In considering whether the miner's surface coal mine employment was performed in conditions comparable to an underground mine, the administrative law judge highlighted claimant's testimony regarding the miner's appearance after work, as follows:

> Q. What did [the miner] look like when he came home [from the surface mines]?
> A. Well, black. He looked black. His ears and everything and the little corners up in here, they'd be filled with black. (Witness points to her left ear). Soot and things in his nostrils, everything. He would just be real black and everything, his hair and everything, his nostrils, his ears and everything and his neck would be just black.
> Q. Did you launder his work clothes?
> A. Yes, sir.
> Q. Did you ever have to run them through twice to get them clean or anything like that?
> A. Yeah and sometimes they still didn't look to[o] clean.

Decision and Order at 8-9, *quoting* January 5, 2011 Hearing Transcript at 29.

The administrative law judge found that "claimant's testimony establishes that while the miner worked in surface mines as a heavy equipment operator he was exposed to a heavy amount of coal mine dust." Decision and Order at 9. The administrative law judge observed that claimant's description of the miner's appearance when he returned home from the mines "is typical testimony by underground coal miners and their wives, who similarly complain about being surrounded by dust and becoming so covered in dust that it is difficult to remove from their skin and clothes." *Id*. Accordingly, based on "the uncontradicted descriptions of [the miner's] coal mine employment to Drs. Rasmussen and Broudy, and [c]laimant's uncontradicted testimony regarding [the miner's] dust exposure," the administrative law judge concluded that the miner worked in surface coal

[7] As noted by the administrative law judge, Dr. Broudy stated that the miner "worked in underground coal mining for twelve years on a cutting machine and loading coal." Director's Exhibit 16. Dr. Broudy also indicated that the miner worked "eighteen years in strip mining operations running heavy equipment including a dozer and a highlift." *Id.*

mine conditions that were substantially similar to those of an underground mine and, thus, found that claimant established at least fifteen years of qualifying coal mine employment, sufficient for invocation of the amended Section 411(c)(4) presumption.

Employer argues that the administrative law judge misinterpreted claimant's testimony. Employer asserts that, contrary to the administrative law judge's finding, when claimant described the miner's appearance upon returning home from work, she was referring to the miner's appearance after working in underground mines, not the strip mines. Employer contends that an "examination of the testimony surrounding the excerpted section relied upon by the [administrative law judge] clearly demonstrates that [c]laimant was discussing [the miner's] *underground* employment." Employer's Corrected Brief in Support of Petition for Review at 12-13.

The pertinent portion of claimant's hearing testimony is as follows:

> Q: Okay. Do you know how much of the time that while you were all married, how much of that he was underground?
> A: No, I don't.
> Q: Okay. Do you know what sorts of jobs he did in the mines? Did he talk to you about it?
> A: Yes, he drove a Jeep, he cut coal and he loaded coal.
> Q: When you say he drove a Jeep, did he explain to you what that meant?
> A: Yes, he said that the Jeep he got in, he laid on his side and he drive the miners in and out to where they cut the coal and everything.
> Q: Did he ever call it the mantrip?
> A: I'm not sure.
> Q: Okay, that's okay. Alright, did they have a bathhouse where he worked or did he come home dirty?
> A: No, he come home dirty.
> Q: What did he look like when he came home?
> A: Well, black. He looked . . . .

January 5, 2011 Hearing Transcript at 28-29.

Employer asserts that claimant is describing the miner's work in underground mines because she referenced equipment used in underground mining:

> One example of this is the "jeep." A jeep is a wheeled vehicle, commonly used in underground coal mines that do not have rail-based mantrips. Claimant did not provide explicit testimony that the jeep was driven in only underground environments, but she certainly implied that it was. . . . If [the miner] had been operating the jeep in an above-ground environment, he

> would have no need to lie down, or to drive other miners "in and out" to the coal.

Employer's Corrected Brief in Support of Petition for Review at 14. Employer contends that when claimant's testimony is reviewed in its entirety, the Board must conclude that the administrative law judge erred in finding that claimant is entitled to the amended Section 411(c)(4) presumption.

The Director asserts that claimant's description of the miner "as covered with dust at the end of a shift" is sufficient to establish that the miner worked in dusty conditions. Director's Brief at 5. Furthermore, the Director asserts that "other uncontradicted evidence" establishes that the miner's surface coal mine employment was comparable and qualifying employment for purposes of amended Section 411(c)(4), which is summarized as follows:

> The miner indicated on his coal-mine employment histories in each of his claims that he was exposed to dust throughout his employment at both underground and surfaces mines. DX 1-52, 2-802, 5; DX 2-571, 47. Further, the miner testified on deposition and at the hearing in his 2001 claim that he worked on the surface as a coal sweeper and heavy equipment operator, primarily in unenclosed cabs. DX 2-6132, 2-240. He testified that he was exposed to dust every day of his work on the surface, even when he had the advantage of a closed cab (albeit with less dust than in an open cab). DX 2-614, 2-241. Notably employer produced no evidence that the miner was not exposed to dust during his above-ground work.

Director's Brief at 5.

Based on our review of the hearing transcript, we reject employer's argument that the administrative law judge mischaracterized claimant's hearing testimony. We agree with the Director that the administrative law judge acted rationally in relying on claimant's statements and his own understanding of the coal mine industry to find that the miner worked in dusty conditions in his surface coal mine employment that were comparable to those of an underground mine. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Summers*, 272 F.3d at 480, 22 BLR at 2-726; *Leachman*, 855 F.2d at 512; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Furthermore, we consider employer's argument, that the administrative law judge misinterpreted claimant's testimony as pertaining to the miner's surface coal mine employment, to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge has discretion to assess the credibility of the witnesses and evidence and draw his own inferences therefrom. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We, therefore, affirm the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because employer does not challenge the administrative law judge's finding that the miner suffered from a totally disabling respiratory or pulmonary impairment, we also affirm the administrative law judge's determination that claimant invoked the amended Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to rebuttal of the amended Section 411(c)(4) presumption, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge found that the x-ray evidence[8] was "inconclusive," since the Board-certified radiologists and B readers disagreed as to whether the miner had clinical pneumoconiosis.[9] Decision and Order at 21-22. He also found that certain negative x-rays contained in the treatment records were of little probative value because it was

[8] The administrative law judge noted that the newly submitted evidence consisted of seven readings of two chest x-rays dated June 19, 2008 and September 9, 2008, of which there was an equal number of positive and negative readings for simple pneumoconiosis and one positive reading for complicated pneumoconiosis. Decision and Order at 21-22.

[9] The definition of clinical pneumoconiosis is set forth at 20 C.F.R. §718.201(a)(1):

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

unclear whether that evidence was obtained for purposes of diagnosing pneumoconiosis. *Id*. at 22. Additionally, the administrative law judge found the sole medical opinion supportive of employer's burden of proof, by Dr. Broudy, was not well-reasoned to establish either that the miner did not have clinical or legal pneumoconiosis or to prove that the miner's disability was unrelated to his coal mine employment. *Id*. at 27-28, 32. Thus, the administrative law judge found that employer did not rebut the amended Section 411(c)(4) presumption.

Employer argues that because the administrative law judge erred in finding invocation of the amended Section 411(c)(4) presumption, the case should be remanded and considered under 20 C.F.R. Part 718. However, because we have affirmed the administrative law judge's finding that claimant is entitled to the amended Section 411(c)(4) presumption, we deny employer's request. As employer has not raised any specific allegation of error regarding the administrative law judge's findings that the x-ray and medical opinion evidence fails to disprove the existence of clinical pneumoconiosis, they are affirmed. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

With regard to the administrative law judge's findings as to the existence of legal pneumoconiosis[10] and the cause of the miner's respiratory disability, employer alleges error in the weight accorded claimant's evidence but does not specifically challenge the administrative law judge's credibility determination with regard to Dr. Broudy's opinion. As it is employer's burden to affirmatively show that claimant's disabling respiratory or pulmonary impairment is unrelated to coal dust exposure, the sufficiency of claimant's evidence is not at issue. *See Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. We affirm the administrative law judge's finding that Dr. Broudy's opinion is insufficient to establish either that the miner did not have clinical or legal pneumoconiosis or that his disability did not arise out of or in connection with coal mine employment. *See Skrack*, 6 BLR at 1-711; Decision and Order at 27-28, 31-32. Consequently, the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption is affirmed.

---

[10] The definition of legal pneumoconiosis is set forth at 20 C.F.R. §718.201(a)(2):

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §718.201(a)(2).

The Survivor's Claim

Pursuant to amended Section 932(*l*), the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 932(*l*). Decision and Order at 3-4. Because we have affirmed the administrative law judge's finding that the miner was entitled to benefits under amended Section 411(c)(4), there is no merit to employer's argument that claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. As the survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to survivor's benefits pursuant to amended Section 932(*l*).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in Miner's Estate Claim and the Decision and Order – Award of Survivor's Benefits are affirmed.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge