BRB No. 13-0246 BLA

THERMAN McKAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BEECH GROVE PROCESSING COMPANY	)	DATE ISSUED: 02/20/2014
	)	
Employer-Petitioner	)	
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2011-BLA-06058) of Administrative Law Judge Daniel F. Solomon with respect to a claim filed on May 3, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge acknowledged the parties' stipulation that claimant had twenty-one years and ten months of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant had one and one-half years of underground coal mine employment and that his twenty years of surface mine employment were equivalent to thirteen and one-half years of underground coal mine employment. Therefore, the administrative law judge credited claimant with at least fifteen years of employment in underground coal mines, or in conditions substantially similar to those in an underground mine. The administrative law judge also found that

claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and that he invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the fifteen years of qualifying coal mine employment necessary for invocation of the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

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.[2] 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).

Employer argues that the administrative law judge erred in finding that claimant's twenty years of surface coal mine employment was the equivalent of thirteen and one-half years of underground coal mine employment and, when combined with the miner's eighteen months of underground coal mine employment, was sufficient to support invocation of the amended Section 411(c)(4) presumption.[3] Employer alleges that the administrative law judge's reference to statements made by a legislator in support of making the original Section 411(c)(4) presumption available to surface miners "suggests

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305).

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established one and one-half years of underground coal mine employment and a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

he also relied upon a situs test that required him to presume a heavy coal dust exposure."[4] Employer's Brief at 12. Employer also maintains that claimant did not prove that, during his twenty years as a surface miner, he was exposed to dust conditions substantially similar to those existing in underground mines. Employer's Brief at 12.

Contrary to employer's contention, the administrative law judge did not rely on the comments from the legislative history of the Act to determine that claimant had sufficient coal dust exposure aboveground. Rather, the administrative law judge merely cited the comments in support of his finding that claimant's testimony was sufficient to establish that conditions at the strip mine were substantially similar to those in an underground mine. Decision and Order at 3.

We also hold that there is no merit to employer's argument that the administrative law judge erred in finding that claimant had at least fifteen years of qualifying coal mine employment. The regulations promulgated to implement amended Section 411(c)(4), which became effective on October 25, 2013, provide that "[t]he 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." 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(b)(2)); *see Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). In this case, the administrative law judge accurately noted that claimant testified that he worked on a coal crusher at the strip mine, and that "crushing coal at the belt line was a 'dusty' job . . . . The coal crusher put a lot of dust in the air. He never wore a respirator. He worked a [forty] hour week for many years in this capacity." Decision and Order at 3, quoting Hearing Transcript at 11.

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[4] Employer refers to the following passage from the administrative law judge's Decision and Order:

> I accept that the twenty years of surface mining is an equivalent to 13.5 years of underground exposure. *Luker v. Old Ben Coal Co.*, 2 BLR 1-304, 1-310 (1979) (quoting Senate Comm. on Labor and Public Welfare, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part 2 at 1967 (Statement of Senator Randolph)). Senator Randolph commented that the extension was intended to reach "those strip miners who have worked in extremely dusty situations – at the tipple, for example – for long periods of time. . . ."

Decision and Order at 3; Employer's Brief at 12.

Based on this testimony, the administrative law judge acted within his discretion in determining that claimant "is credible that he worked in extremely dusty jobs for an excess of 15 years." Decision and Order at 3; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge further rationally determined that claimant's description of his working conditions aboveground was sufficient to establish that he was regularly exposed to coal dust – a finding that accords with the "substantially similar" requirement of Section 411(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)). *See Leachman*, 855 F.2d at 512-13; *Harris v. Cannelton Indus.*, 24 BLR 1-217 (2011); Decision and Order at 3. We, therefore, affirm the administrative law judge's determination that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Id*.

Because employer does not otherwise challenge the administrative law judge's findings, we also affirm the administrative law judge's determinations that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) and that employer did not rebut it. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge