BRB No. 12-0175 BLA

BEULAH MATNEY (Widow of DELFORD MATNEY) Claimant-Respondent v. S & M COAL COMPANY, INCORPORATED and SUN COAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/22/2013 DECISION and ORDER

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

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

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington, D.C., for employer/carrier.

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

Employer/Carrier (Employer) appeals the Decision and Order Granting Benefits (2009-BLA-05605) of Administrative Law Judge Pamela J. Lakes, rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] During his lifetime, the miner filed one application for benefits on May 1, 1980, which was ultimately denied by Administrative Law Judge Giles J. McCarthy on August 16, 1990, because the miner failed to establish that he suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The Board affirmed the denial of benefits. *See Matney v. S & M Coal Co.*, BRB No. 90-2263 BLA (Dec. 16, 1992) (unpub). Following the death of the miner, claimant filed a survivor's claim on July 2, 2008. The district director awarded benefits and employer requested a hearing, which was held on March 22, 2011.

In her Decision and Order Granting Benefits dated December 6, 2011, Judge Lakes (the administrative law judge) credited the miner with sixteen and one-half years in underground coal mine employment, and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Based on the filing date of the claim and the fact that the miner had fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the administrative law judge determined that claimant was entitled to the rebuttable presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge also found that employer failed to rebut the amended Section 411(c)(4) presumption by establishing either that the miner did not have pneumoconiosis or that his death was not caused by pneumoconiosis. Accordingly, survivor's benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that the miner had fifteen years of qualifying coal mine

[1] Claimant is the widow of the miner, Delford Matney, who died on December 29, 2007. Director's Exhibits 6, 8.

[2] On March 23, 2010, amendments to the Act contained in the Patient Protection and Affordable Care Act (PPACA) were passed, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). In pertinent part, amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption that the miner's death was due to pneumoconiosis, if a survivor 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 establishes that the miner had a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4).

employment and a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. Employer also challenges the administrative law judge's finding that it failed to rebut the presumption by proving that the miner's death did not arise out of, or in connection with, coal mine employment. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board. Employer has filed a reply brief reiterating its arguments on 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.[3] 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 AMENDED SECTION 411(c)(4) PRESUMPTION

A. Length of Coal Mine Employment

We first address employer's contention that the administrative law judge erred in calculating the length of the miner's coal mine employment. In order to invoke the amended Section 411(c)(4) presumption, claimant must first establish that the miner worked fifteen years in underground coal mine employment or in surface coal mine employment, in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). Claimant bears the burden of proof to establish the number of years the miner actually worked in coal mine employment. *See Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984).

Under the relevant terms of 20 C.F.R. §725.101(a)(32):

> (i) If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act.
>
> * * *

[3] Because the miner's last coal mine employment was in Virginia, 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's Exhibit 4.

> (ii) To the extent the evidence permits, the beginning and ending dates of all periods of coal mine employment shall be ascertained. The dates and length of coal mine employment may be established by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony. If the evidence establishes that the miner's employment lasted for a calendar year or partial periods totaling a 365-day period amounting to one year, it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment.
>
> * * *
>
> (iii) If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mining 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 average daily earnings for that year, as reported by the Bureau of Labor Statistics (BLS). A copy of the BLS table shall be made a part of the record if the adjudication officer uses this method to establish the length of the miner's work history.

20 C.F.R. §725.101(a)(32)(i)-(iii); *see* 20 C.F.R. §725.301. An administrative law judge may rely on any credible evidence to determine the dates and length of coal mine employment, and any reasonable method of computation will be upheld, if it is supported by substantial evidence in the record considered as a whole. 20 C.F.R. §725.101(a)(32)(ii); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In this case, the administrative law judge observed that the miner alleged eighteen years of coal mine employment when he filed his claim. Decision and Order at 3. She also acknowledged Judge McCarthy's finding in the miner's claim that the miner established sixteen and one-quarter years of coal mine employment, based on Social Security Administration [SSA] earnings records dating from 1962 to 1979. *Id*. With respect to the current survivor's claim, the administrative law judge noted that the district director found "15.69 years of coal mine employment based upon the [SSA] earnings records and the average earnings during the relevant periods." *Id*. The administrative law judge then stated: "Based upon my own review of the [SSA] records *and other pertinent evidence*, I find that [c]laimant has established [sixteen and one-half] years of coal mine employment, all of which was underground, based upon the quarters of coal mine employment between 1962 and September 1979." *Id*. at 6.

Employer contends that the administrative law judge's "conclusory reference" to the SSA earnings records fails to satisfy the Administrative Procedure Act (APA), as she "did not validly explain" how those records supported her finding that the miner worked sixteen and one-half years in coal mine employment.[4] Employer's Brief in Support of Petition for Review at 6-8. Employer also asserts that the administrative law judge erred in failing to consider the miner's hearing testimony, which "reflects that there were periods of time during which the miner was not employed underground but was working outside" and periods of time "when he was hauling processed coal." *Id*. at 8, *citing* Director's Exhibit 1; June 14, 1990 Hearing Transcript at 15, 20, 27-28. Employer asserts that because the SSA earnings record does not distinguish between underground and surface coal mine employment, the administrative law judge was required to consider the miner's testimony and make a specific finding as to whether claimant established that the miner's surface coal mine work was comparable to underground coal mine employment. *Id.* at 9. Employer states, "When the [six] quarters of outside work (and non-qualifying hauling work) with Goff Coal [Company] during 1962 and 1964 are deducted and the outside work with Southwest Virginia Coal in 1968 is deducted, claimant cannot establish at least [fifteen] years of underground coal mine work." *Id*. Employer further contends that the administrative law judge on remand must take into account "the low earnings [the miner] had during many of the quarters" listed in the SSA earnings records and modify her length of coal mine employment finding accordingly. *Id*. Employer also urges the Board to direct the administrative law judge to apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of the miner's coal mine employment.[5]

We agree with employer that the administrative law judge's length of coal mine employment finding does not satisfy the APA, as the administrative law judge did not identify the specific quarters in the SSA record that she counted in finding that the miner worked sixteen and one-half years in underground coal mining. Decision and Order at 6; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). Furthermore, although the administrative law

[4] The Administrative Procedure Act (APA), 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), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[5] Contrary to employer's contention, there is no regulatory requirement that an administrative law judge apply the formula at 20 C.F.R. §725.101(a)(32)(iii) in determining the length of a miner's coal mine employment. Rather, the use of the formula is discretionary. *See* 20 C.F.R. §725.101(a)(32)(iii).

judge stated that she relied on "other pertinent evidence" to support her length of coal mine employment calculation, she did not identify the evidence. Additionally, the administrative law judge did not properly resolve the conflicts in the record regarding whether all of the miner's coal mine work was underground coal mine employment, or address whether the SSA earnings record reflects income the miner received from work unrelated to coal mining. *See* June 14, 1990 Hearing Transcript at 13-15, 26-28; Employer's Brief in Support of Petition for Review at 8-10. Thus, because the administrative law judge has not identified the bases for her calculation and she did not address all of the relevant evidence, we vacate her length of coal mine employment finding and her determination that claimant is entitled to the presumption at amended Section 411(c)(4). S*ee Leachman*, 855 F.2d at 512; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Wojtowicz*, 12 BLR at 1-165; *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). We, therefore, vacate the award of benefits and remand the case for further consideration.

B. Total Disability

In the interest of judicial economy, we also address employer's arguments that the administrative law judge erred in finding that the miner was totally disabled by a respiratory or pulmonary impairment. Pursuant to 20 C.F.R. §718.204(b)(2)(i)-(ii), the administrative law judge found that none of the pulmonary function studies or arterial blood gas tests were qualifying for total disability. Decision and Order at 6-7. Relevant to 20 C.F.R. §718.204(b)(2)(iii), she also found that claimant failed to prove that the miner had cor pulmonale with right-sided congestive heart failure.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the reports of Drs. Dennis, Caffrey, Oesterling, Perper and Tuteur. The administrative law judge found that Drs. Dennis, Caffrey and Oesterling "did not squarely address the total disability issue." Decision and Order at 8. The administrative law judge found that Dr. Perper reviewed the miner's autopsy slides and prepared a report dated March 13, 2010. The administrative law judge found that Dr. Perper "did not specifically address the issue of total disability, but his remarks support a finding of total disability." *Id*. at 7. The administrative law judge explained:

> For example, Dr. Perper referenced "[o]bjective findings of respiratory insufficiency" and "[s]ymptomatic inability to perform because of shortness of breath, cough and other respiratory symptoms" which required supplemental oxygen, and worsening of pulmonary findings with hypoxemia "resulting ultimately in end-stage pulmonary failure."

Id., *quoting* Claimant's Exhibit 6.

The administrative law judge found that Dr. Tuteur reviewed the miner's medical records and prepared a report dated January 22, 2010, wherein he described that the miner had "intermittent impairment of oxygen gas exchange attributable to fluid overload, congestive heart failure and pulmonary edema all associated with acute [chronic renal failure]." Employer's Exhibit 1; *see* Decision and Order at 8. In a supplemental report dated February 18, 2001, Dr. Tuteur opined that "from a pulmonary standpoint, [the miner] did not clearly have respiratory symptomatology." Employer's Exhibit 4. The administrative law judge observed, "What Dr. Tuteur was actually saying is not that the [m]iner did not have a respiratory impairment; rather, he was saying that it was not pulmonary in origin." *Id*. The administrative law judge then stated:

> On balance, I find that the medical opinion evidence tends to support a finding of total disability under 20 C.F.R. §718.204(b)(2)(iv). In fact, no physician has expressed the opinion that the [m]iner would be capable of working as a coal miner on a pulmonary or respiratory basis if that factor could be isolated.

Decision and Order at 8. Additionally, the administrative law judge noted that, while the medical treatment records do not indicate any "degree of impairment with respect to [the miner's] ability to perform his last coal mine job," they show that the [m]iner's respiratory function was declining, to the point where he required the administration of oxygen[.]" *Id*. She also noted the miner's death certificate listed "acute respiratory failure" as the cause of death. *Id*.

The administrative law judge concluded:

> After taking all of the above evidence into consideration, and considering it along with the nature of the [m]iner's underground coal mine employment, I find that the [m]iner was totally disabled on a respiratory basis prior to his death. The [m]iner's last or usual coal mine employment was working underground operating a joy or motor and working on the belt, jobs that required heavy manual labor. After reviewing all of the evidence of record, I find that the [m]iner was not capable of performing his last or usual coal mine work from a pulmonary or respiratory standpoint.

Decision and Order at 8.

Employer asserts that, based on this record, the administrative law judge erred in finding total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv), as no physician "specifically [made] a determination as to whether the miner would have been capable of performing his usual coal mine employment duties from a respiratory standpoint." Employer's Brief in Support of Petition for Review at 13. Contrary to

employer's assertion, however, a physician need not phrase his opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("[i]t is not essential for a physician to state specifically that an individual is totally impaired. . . ."). Medical opinion evidence can support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his last coal mine job. *See Freeman*, 897 F.2d at 894, 13 BLR at 2-356. The administrative law judge may infer disability by considering together the doctor's description of the miner's condition, and the exertional requirements of the miner's former coal mine employment. *See Scott v. Mason Coal Co*., 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is claimant's burden to establish the exertional requirements of the miner's usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *Id.; see also Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc); *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

In this case, the administrative law judge found that the miner's usual coal mine work involved heavy manual labor.[6] Decision and Order at 8. The administrative law judge then properly considered the physicians' opinions in relation to the miner's work requirements. *See Poole*, 897 F.2d at 894, 13 BLR at 2-356. The administrative law judge found that Dr. Perper identified "[s]ymptoms of worsening shortness of breath on *minor* exertion [and] cough and coughing spells[.]" Claimant's Exhibit 6 (emphasis added); *see* Decision and Order at 7. Dr. Perper also noted that the miner suffered from "respiratory insufficiency" and "*severe hypoxemia*" for which he was prescribed supplemental oxygen and bronchodilator treatment. *Id*. (emphasis added). Based on the respiratory symptoms and limitations described by Dr. Perper, we affirm the administrative law judge's rational determination that Dr. Perper's opinion is supportive of a finding of total disability, in light of the exertional requirements of the miner's usual coal mine work, which required him to perform heavy manual labor. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-722, 23 BLR 2-250, 2-259 (7th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Budash*, 9 BLR at 1-51; Decision and Order at 8.

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the miner's usual coal mine employment required heavy manual labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

However, we agree with employer that the administrative law judge erred in concluding that Dr. Oesterling's opinion "did not squarely address the issue of total disability." Decision and Order at 9. In a report dated January 17, 2011, Dr. Oesterling reviewed the miner's autopsy slides and specifically stated that "interstitial macular changes of coal workers' pneumoconiosis" present on the autopsy slides were "*insufficient to alter* [*lung*] *function* because of their limited structural change." Employer's Exhibit 3 (emphasis added). He further stated that "[w]ithout alterations in function, this disease *should not have produced lifetime respiratory symptomatology*" in the miner. *Id*. (emphasis added). In addition, Dr. Oesterling specifically stated that the miner's emphysema was "insufficient to have produced significant alterations in pulmonary function." *Id.* Because the administrative law judge did not weigh Dr. Oesterling's opinion, prior to concluding that the miner was totally disabled, we vacate her finding at 20 C.F.R. §718.204(b)(2)(iv).

With regard to Dr. Tuteur, employer asserts that the administrative law judge erred in construing his opinion to be that the miner was not totally disabled. Employer argues that the administrative law judge improperly substituted her opinion for that of Dr. Tuteur, insofar as she stated, "what Dr. Tuteur was actually saying is not that the miner did not have a respiratory impairment but that it was not pulmonary in origin[.]" Decision and Order at 8; *see* Employer's Brief in Support of Petition for Review at 16. Employer's argument has merit, in part.

Contrary to employer's contention, the administrative law judge has discretion, as the trier-of-fact, to determine the weight and credibility of the medical experts, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997), and to assess the evidence of record and draw her own conclusions and 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). However, based on Dr. Tuteur's description of the miner's "*intermittent* impairment of gas exchange," we instruct the administrative law judge to reconsider on remand whether Dr. Tuteur's opinion weighs against a finding that the miner's respiratory impairment was, in fact, totally disabling.[7]

[7] Employer also argues that the administrative law judge did not give proper consideration to Dr. Caffrey's opinion. Employer's Brief in Support of Petition for Review at 17. We instruct the administrative law judge on remand to address whether Dr. Caffrey's belief, that the miner's chronic obstructive pulmonary disease was not "any significant medical problem," weighs against a finding of total disability. Director's Exhibit 21.

II. REMAND INSTRUCTIONS

In summary, we vacate the administrative law judge's determination that claimant is entitled to the amended Section 411(c)(4) presumption[8] and remand this case for a finding as to whether claimant established that the miner had fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. On remand, the administrative law judge should ascertain the beginning and ending dates of the miner's coal mine employment and identify the evidence and method by which she calculates the length of time the miner worked in either underground or comparable surface coal mine employment. *See Muncy*, 25 BLR at 1-27. If the administrative law judge finds that the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment or she finds that any of the miner's work lasted less than a calendar year, the administrative law judge may apply the formula at 20 C.F.R. §725.101(a)(32)(iii), or any reasonable method, in calculating the length of the miner's coal mine work. Although the administrative law judge may apply any reasonable method in calculating the length of the miner's coal mine employment, she must address all relevant evidence on remand and explain the basis for her findings in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. In considering whether the miner was totally disabled, the administrative law judge must address all of the relevant evidence, discussed *supra*, and explain the bases for her credibility determinations in accordance with the APA. *Id*.

[8] Because we have vacated the administrative law judge's finding that claimant is entitled to the amended Section 411(c)(4) presumption, employer's arguments relevant to rebuttal of the presumption are not ripe for consideration and we decline to address them in this appeal.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge