**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0388 BLA
and 19-0292 BLA

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| ZELDENIA D. STILTNER (Widow of and o/b/o WILLIAM D. STILTNER) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| A & K TRANSPORTATION, INCORPORATED | ) | DATE ISSUED: 07/19/2019 |
| and | ) | |
| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | |
| Employer/Carrier-Petitioners | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeals of the Decisions and Orders of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Evan B. Smith, Appalachian Citizens' Law Center, Whitesburg, Kentucky, for claimant.

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

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decisions and Orders (2011-BLA-05546, 2019-BLA-05303) of Administrative Law Judge John P. Sellers, III, awarding benefits on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's request for modification of a claim filed on July 7, 2008, and is before the Board for the third time.[1] It also involves a survivor's claim filed on May 15, 2018.[2] The Board consolidates these appeals for purposes of decision only.

In the most recent appeal in the miner's claim, the Board vacated the administrative law judge's finding that the miner failed to establish at least fifteen years of qualifying coal mine employment[3] to invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] *Stiltner v. A & K Transp., Inc.*,

[1] We incorporate the procedural background of the miner's claim as set forth in the Board's prior decisions. *Stiltner v. A & K Transp., Inc.*, BRB No. 16-0081 BLA, slip op. at 2-4 (Aug. 31, 2017) (unpub.); *Stiltner v. A & K Transp., Inc.*, BRB No. 14-0010 BLA, slip op. at 2 n.1 (Aug. 29, 2014) (unpub.).

[2] The miner died on July 25, 2013. Miner's Claim (MC) Decision and Order on Second Remand at 1 n.1. Claimant, the widow of the miner, is pursuing the miner's claim on behalf of his estate. *Id*.

[3] The record indicates that the miner'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).

[4] Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an

BRB No. 16-0081 BLA, slip op. at 6-13 (Aug. 31, 2017) (unpub.). The Board agreed with the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge erred in finding the time the miner worked as a truck driver loading coal at tipples and hauling it offsite did not constitute coal mine employment. *Id.* Reversing the administrative law judge's finding, the Board held that all of the time the miner spent as a coal truck driver constituted the work of a miner under the Act.[5] *Id.* Additionally, the Board reversed the administrative law judge's finding that only seventeen months of the miner's twenty-year work history occurred in dust conditions substantially similar to those underground.[6] *Stiltner*, BRB No. 16-0081 BLA, slip op. at 10-11. The Board remanded the case for the administrative law judge to calculate the specific number of years the miner worked as a coal truck driver[7] and to determine whether the miner was

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underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[5] Applying *Hanna v. Director, OWCP*, 860 F.2d 88, 93 (3d Cir. 1988), the Board explained that "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." *Stiltner*, BRB No. 16-0081 BLA, slip op. at 7 (internal quotations omitted). Moreover, the Board explained that the Sixth Circuit "has recognized that the definition of coal preparation includes 'the loading of bituminous coal, lignite, or anthracite.'" *Id. quoting Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 930-35 (6th Cir. 1989).

The Board also explained that a miner need not engage in coal mine employment for an entire day in order to be credited with a full day of mining work. *See* 20 C.F.R. §725.101(a)(32). The Board therefore held that the administrative law judge erred in crediting the miner with coal mine employment for only part of each day in which he worked as a coal truck driver. *Stiltner*, BRB No. 16-0081 BLA, slip op. at 10.

[6] The Board held that applying the proper standard to the miner's uncontradicted testimony found credible by the administrative law judge establishes that the miner was "regularly exposed" to coal mine dust during all his years of coal trucking work. *Stiltner*, BRB No. 16-0081 BLA, slip op. at 12-13.

[7] In his Decision and Order on Remand issued on October 30, 2015, the administrative law judge credited the miner with only twelve years and ten and one-half months of underground coal mine employment. Decision and Order on Remand at 5-6, 8-11. The Board noted that the miner alleged approximately twenty additional years of coal mine employment as a coal truck driver. *Stiltner*, BRB No. 16-0081 BLA, slip op. at 13 n. 22.

totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 13-14.

In his Decision and Order on Second Remand, which is the subject of this appeal, the administrative law judge found the miner had at least fifteen years of qualifying coal mine employment, had a totally disabling respiratory impairment, and thus claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). He further found employer did not rebut the presumption and awarded benefits in the miner's claim.

In a separate Decision and Order in the survivor's claim, the administrative law judge found that because the miner was determined to be eligible to receive benefits at the time of his death, claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[8] Accordingly, he awarded benefits in the survivor's claim.

On appeal in the miner's claim, employer contends the administrative law judge erred in crediting the miner with at least fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption.[9] Employer also asserts the administrative law judge erred in finding it failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director did not file a response to employer's appeal in the miner's claim.

In the survivor's claim, employer argues the administrative law judge erred in awarding benefits under Section 422(*l*) before the award of benefits in the miner's claim became final. Claimant responds, urging affirmance of the award of benefits. The Director responds, urging the Board to reject employer's allegation of error.

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,

[8] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that his death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[9] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); MC Decision and Order on Second Remand at 25-28.

and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

**Length of Coal Mine Employment**

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of employment "in one or more underground coal mines," or in conditions "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).

On remand, the administrative law judge reiterated his finding that the miner had twelve years and ten and one-half months of underground coal mine employment. Miner's Claim (MC) Decision and Order on Second Remand at 22. He also found that the miner had twenty years of employment as a truck driver loading coal at tipples and hauling it offsite. *Id*. at 21. Further, pursuant to the Board's instructions, he found that all twenty years were in conditions "substantially similar to conditions in an underground mine." *Id*. at 21, 25.

Employer argues that claimant is not entitled to the Section 411(c)(4) presumption because she did not establish that the miner's employment as a truck driver loading coal was in conditions substantially similar to those underground. Employer's Brief at 5-6 (unpaginated). As noted above, however, the Board considered this issue in the prior appeal and held that the miner "should be credited with qualifying coal mine employment for all of his time as a truck driver" based on his uncontradicted testimony, found credible by the administrative law judge, establishing regular exposure to coal mine dust.[10] *Stiltner*,

[10] Contrary to employer's argument, the record is not "devoid" of evidence regarding the miner's dust exposure. Employer's Brief at 6 (unpaginated). In the previous appeal, the Board reasoned:

> Here, [the miner's] testimony, found to be credible by the administrative law judge, Decision and Order on Remand at 10, indisputably establishes that [he] was "regularly exposed to coal-mine dust" while working as a coal truck driver. The administrative law judge credited [his] testimony that he was exposed to coal mine dust while loading coal outside the truck, for approximately fifteen minutes several times per day . . . . [The miner] 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. Tr. at 17, 33. [He] explained that he could

BRB No. 16-0081 BLA, slip op. at 11-13. Because employer has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Because claimant established at least fifteen years of qualifying coal mine employment and that the miner was totally disabled, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. MC Decision and Order on Second Remand at 28.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner had neither legal nor clinical pneumoconiosis,[11] or that "no part of [his] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

**Legal Pneumoconiosis**

To prove that the miner did not have legal pneumoconiosis, employer had to establish that he did not have a chronic lung disease or impairment that was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[12] 20

> see the dust in the sunlight. Tr. at 34. Additionally, [he] 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 [the miner], his face, body, and clothing were "very, pretty dirty" and covered with coal dust after he drove the coal truck. Tr. at 17, 35.

*Stiltner*, BRB No. 16-0081 BLA, slip op. at 12.

[11] "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).

[12] We reject employer's argument that it rebutted the Section 411(c)(4) presumption based on the administrative law judge's prior finding that the miner failed to meet his burden to establish pneumoconiosis under 20 C.F.R. §718.202(a) without the benefit of any presumptions. Employer's Brief at 8-10 (unpaginated). Because claimant invoked the

C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). Dr. Broudy opined that the miner had an obstructive respiratory impairment due to cigarette smoking and obesity, not coal mine dust exposure. Director's Exhibits 22, 25, 27, 33; Employer's Exhibit 1. The administrative law judge found his explanations unpersuasive and inconsistent with the regulations and the medical science accepted by the Department of Labor (DOL) in the preamble to the 2001 revised regulations. MC Decision and Order on Second Remand at 34-37. He therefore discredited Dr. Broudy's opinion.

Employer generally alleges that Dr. Broudy's opinion is well-reasoned and documented, but does not identify any specific error by the administrative law judge in discrediting the doctor's opinion. Employer's Brief at 8-10. We therefore affirm his finding that Dr. Broudy's opinion is not credible on the issue of legal pneumoconiosis.[13]

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Section 411(c)(4) presumption, the burden shifted to employer to establish that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *Griffith v. Terry Eagle Coal Co.*, 25 BLR 1-223, 1-227-28 (2017); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

[13] Even if employer's brief could be read as having raised a specific argument, substantial evidence supports the administrative law judge's credibility determinations. He noted Dr. Broudy attributed the miner's respiratory impairment to cigarette smoking alone because of "the obstructive nature of the defect." MC Decision and Order on Second Remand at 34; *see* Director's Exhibit 25 at 4. He rationally rejected this reasoning as inconsistent with the definition of legal pneumoconiosis, which recognizes "that coal [mine] dust can cause an obstructive impairment." MC Decision and Order on Second Remand at 34-35; *see* 20 C.F.R. §718.201(a)(2); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 487-88 (6th Cir. 2012). Dr. Broudy further excluded legal pneumoconiosis because the miner's pulmonary function testing exhibited a reduced FEV1/FVC value. Director's Exhibit 25 at 7. The administrative law judge permissibly discredited this reasoning because it conflicts with the medical science accepted by the Department of Labor (DOL) that coal mine dust exposure can cause clinically significant obstructive disease that can be shown by a reduction in the FEV1/FVC ratio. *See Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491 (6th Cir. 2014); 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); MC Decision and Order on Second Remand at 34, 36-37. Dr. Broudy also opined the miner did not have legal pneumoconiosis because the miner's respiratory impairment could be explained by his cigarette smoking alone. Director's Exhibit 22 at 6. The administrative law judge permissibly found this reasoning unpersuasive because the studies found credible by the DOL recognize that the risks associated with cigarette smoking and coal mine dust are additive, and Dr. Broudy did not explain why the obstructive impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Sterling*, 762 F.3d at 491; *Crockett Colleries*,

*See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983); *see also A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 488 (6th Cir. 2012). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer failed to establish that the miner did not have legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(A).[14] MC Decision and Order on Second Remand at 37.

**Disability Causation**

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption 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). He rationally discounted Dr. Broudy's opinion that the miner's disability was not due to pneumoconiosis because the doctor did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); MC Decision and Order on Second Remand at 37-38. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). Additionally, we affirm, as unchallenged on appeal, the administrative law judge's finding that granting modification would render justice under the Act. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order on Second Remand at 38-39.

**Survivor's Claim**

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she

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*Inc. v. Barrett*, 478 F.3d 350, 356 (6th Cir. 2007); 20 C.F.R. §718.201(b); 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); MC Decision and Order on Second Remand at 34-35.

[14] Because we affirm the finding that employer failed to rebut legal pneumoconiosis, we need not address its challenges to the administrative law judge's determination that it also failed to establish that the miner did not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Survivor's Claim Decision and Order at 1-2.

We reject employer's argument that claimant did not satisfy the eligibility criteria under Section 422(*l*) because the award of benefits in the miner's claim was not yet final when the administrative law judge awarded benefits in the survivor's claim. An award of benefits in a miner's claim need not be final for a claimant to receive survivor's benefits pursuant to Section 422(*l*). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-46 (2014). Because we have affirmed the award of benefits in the miner's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(*l*). 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decisions and Orders awarding benefits are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

I concur in the result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge