**U.S. Department of Labor**

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

BRB No. 18-0273 BLA

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| ERMINE H. HAYES | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| COWIN AND COMPANY, INCORPORATED | ) | DATE ISSUED: 06/28/2019 |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Cecelia B. Freeman (Maples Tucker & Jacobs LLC), Birmingham, Alabama, for claimant.

Mary Lou Smith (Howe Anderson & Smith, P.C.), Washington, D.C., for employer.

Before: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-BLA-05412) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim 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 subsequent claim filed on January 23, 2015.[1]

The administrative law judge credited claimant with fifteen years of underground coal mine employment, and found claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). He therefore found claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309[2] and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge further found employer did not rebut the presumption and awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. Employer also contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the award of

[1] This is claimant's fourth claim for benefits. His most recent prior claim, filed on October 17, 2002, was denied by Administrative Law Judge Edward Terhune Miller on December 14, 2005, because he failed to establish pneumoconiosis arising out of coal mine employment and a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. Claimant took no further action until filing the present subsequent claim. Director's Exhibit 5.

[2] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the claim became final." 20 C.F.R. 725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R §725.309(c)(3). Because his most recent claim was denied for failure to establish pneumoconiosis and total disability, claimant had to demonstrate at least one of these elements of entitlement to obtain review of the subsequent claim on the merits. *White*, 23 BLR at 1-3.

[3] Under Section 411(c)(4) of the Act, claimant is presumed to be totally disabled due to pneumoconiosis if he 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) (2012); *see* 20 C.F.R §718.305.

benefits. Employer filed a reply brief, reiterating its contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[4]

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

**Invocation of the Section 411(c)(4) Presumption - Length of Coal Mine Employment**

Claimant bears the burden of establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984). As the regulations provide only limited guidance for the computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method of computation and supported by substantial evidence in the record. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-27 (2011); *Vickery v. Director, OWCP*, 8 BLR 1-430, 1-432 (1986); *Maggard v. Director, OWCP*, 6 BLR 1-285, 1-286 (1983).

The administrative law judge found that "the parties' stipulation of 12 to 15 years of coal mine employment" in the prior 2002 claim was binding in the current claim. Decision and Order at 7. Evaluating whether claimant established "12 years, or as many as 15 years of coal mine employment," the administrative law judge considered claimant's applications for benefits, employment history forms, description of employment in Director's Exhibit 9, and the Social Security Administration (SSA) earnings record. *Id*. at 7-8. The administrative law judge indicated that he was unable to determine the exact beginning and ending dates of claimant's employment because of "discrepancies concerning [his] length of coal mine employment." *Id*. at 9. Relying on the SSA earnings

[4] 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) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appels for the Eleventh Circuit as claimant's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

record, he applied the formula set forth at 20 C.F.R. §725.101(a)(32)(iii)[6] and, using Exhibit 610 of the *Coal Mine (Black Lung Benefits Act) Procedure Manual*, found that claimant worked fifteen years of coal mine employment. *Id*. at 10. He further found that claimant worked "sixteen months over various years, in addition to the 15 years previously identified." *Id*. at 11. Finding that claimant was regularly exposed to coal dust in underground mines, the administrative law judge determined that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Employer argues the administrative law judge mischaracterized "the parameters of the stipulation" of twelve to fifteen years of coal mine employment in the prior 2002 claim to include fifteen years as the end point.[7] Employer's Brief at 6. Employer's argument is misplaced. The Board held in *Styka v. Jeddo-Highland Coal Co.*, 25 BLR 1-61 (2012), that "fundamental fairness and due process would require relief from even a formal stipulation made prior to the change in law [under Section 411(c)(4)]." *Styka*, 25 BLR at 1-64-65. Thus, because the change in law at Section 411(c)(4) altered the legal significance of stipulations concerning length of coal mine employment, neither party is bound by the 2005 stipulation. But the administrative law judge's error in referencing the 2005 stipulation is harmless because he alternatively determined whether claimant established fifteen years of qualifying coal mine employment based on his review of the evidence of

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[6] The regulation states:

> (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 must 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)(iii).

[7] Claimant contests the administrative law judge's determination that the parties entered into a formal stipulation as to the length of claimant's coal mine employment. Claimant's Brief at 4 (unpaginated). He alternatively asserts that should the Board determine he is bound to a stipulation of between twelve and fifteen years of coal mine employment, a finding of fifteen years of coal mine employment is within that stipulation. *Id*. at 4-5 (unpaginated).

record. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 12 BLR 1-1276, 1-1278 (1984).

Employer next argues the administrative law judge's use of the formula at 20 C.F.R. §725.101(a)(32)(iii) to calculate claimant's coal mine employment due to discrepancies in the record was "unjustified" because he failed to consider all of the relevant evidence. Employer's Brief at 6-7. Specifically, employer asserts "[t]he employment documents included in [Director's Exhibit 9] are limited" and the administrative law judge did not scrutinize the more extensive employment records from the prior 2002 claim (located in Director's Exhibit 3) demonstrating that claimant worked in tunnel construction or other non-coal mine employment during the years omitted from the employment records in the current claim. *Id.* at 6.

Upon review, we are unable to determine whether substantial evidence supports the administrative law judge's finding that the discrepancies concerning claimant's length of coal mine employment made "it [] necessary to apply the formula set forth in 20 C.F.R. §725.101(a)(32)(iii)" because the administrative law judge has not adequately explained his finding. Decision and Order at 9. The administrative law judge found the Description of Coal Mine Work (Form CM-913)[8] and claimant's description of his employment history[9] indicate claimant worked for employer from 1958 through October 1986. Decision and Order at 7; Director's Exhibit 7, 9. He further noted that the SSA earnings record demonstrate work for employer from 1955 through 1987. Decision and Order at 8; Director's Exhibit 12. The administrative law judge concluded that the discrepancies in this evidence necessitated the application of the formula at 20 C.F.R. §725.101(a)(32)(iii) as a reasonable method of calculating the length of claimant's coal mine employment.

The administrative law judge acknowledged, however, claimant's concession that some of his work for employer was not in the coal mines and his assertion that the description of his employment history in Director's Exhibit 9 "is an accurate account of the 'qualifying' years he worked in coal mine employment" for employer.[10] Decision and

[8] We noted that the Description of Coal Mine Work (Form-913) indicates claimant started working for employer in March 1958 and May 1958. Director's Exhibit 7.

[9] Claimant's description of his employment identifies specific job sites, job descriptions, and job dates for employer, which begin on March 25, 1958 and end on October 17, 1986. Director's Exhibit 9.

[10] Referring to claimant's description of his coal mine employment in Director's Exhibit 9, the administrative law judge noted that claimant identified the years in which he worked for an entire year, or over 125 days of coal mine employment, as 1958, 1966, 1971

Order at 8. Thus the administrative law judge failed to explain why the discrepancies in the SSA earnings record and the description of claimant's employment history in Director's Exhibit 9 necessitated the application of the formula set forth at 20 C.F.R. §725.101(a)(32)(iii) to calculate the length of claimant's coal mine employment.[11] Consequently, his analysis does not comport with the requirements of the Administrative Procedure Act (APA), that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Therefore, we must vacate the administrative law judge's findings that claimant established fifteen years of underground coal mine employment and invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and remand the case for further consideration. 20 C.F.R. §718.305(b); Decision and Order at 12, 28, 32. On remand, the administrative law judge is instructed to determine the length of claimant's coal mine employment based on a reasonable method of calculation. In rendering his finding, the administrative law judge must consider all relevant evidence, resolve any conflicts, and set forth the underlying rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

**Rebuttal of the Section 411(c)(4) Presumption - Existence of Pneumoconiosis**

In the interest of judicial economy, we address employer's contention that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption, in the event that he again invokes the presumption. If claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither

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through 1980, and 1982 through 1984. Decision and Order at 10-11. He also noted that claimant identified an additional sixteen months of coal mine employment in 1959, 1964, 1965, 1970, and 1986. *Id*. at 11.

[11] The administrative law judge's table indicates that claimant worked the entire year for employer from 1955 through 1966, and from 1969 through 1986. Decision and Order at 9-10. We note, however, that the Social Security Administration (SSA) earnings record indicates claimant received wages from employer for less than four quarters from 1956 through 1965, in 1967, from 1969 through 1973, and in 1976 and 1977. Director's Exhibit 12.

legal nor clinical pneumoconiosis,[12] 20 C.F.R. §718.305(d)(1)(i), or by establishing 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)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.[13]

To establish that claimant does not suffer from legal pneumoconiosis, employer must demonstrate that claimant does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 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). In evaluating whether employer met its burden, the administrative law judge considered Dr. Goldstein's opinion that claimant does not have legal pneumoconiosis.[14] Employer's Exhibit 1. Dr. Goldstein diagnosed severe chronic obstructive pulmonary disease (COPD) related to smoking, and not coal dust exposure. Director's Exhibit 18; Employer's Exhibits 1, 11. Finding Dr. Goldstein's opinion not well-reasoned, the administrative law judge determined employer failed to disprove the existence of legal pneumoconiosis. Decision and Order at 37.

Employer contends the administrative law judge failed to provide a valid reason for discrediting Dr. Goldstein's opinion. We disagree. Dr. Goldstein acknowledged that "[claimant] was exposed to coal dust and rock dust" during the years he worked in mine construction. Director's Exhibit 18. The administrative law judge rationally determined, however, that "Dr. Goldstein summarily concludes Claimant's COPD is solely due to his 30-year smoking history with no further explanation as to how '33 years' of coal mine dust

[12] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[13] The administrative law judge found, however, that employer established claimant does not have clinical pneumoconiosis. Decision and Order at 35.

[14] The administrative law judge also considered Dr. O'Reilly's opinion. Decision and Order at 36-38. Dr. O'Reilly diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease caused by cigarette smoking and exacerbated by coal dust exposure. Director's Exhibits 15, 20.

exposure did not contribute to [his] COPD."[15] Decision and Order at 37. Given Dr. Goldstein's acceptance that claimant was exposed to coal mine dust, the administrative law judge legitimately questioned how Dr. Goldstein was able to eliminate claimant's coal mine dust exposure as a contributing factor to his COPD.[16] *See U.S. Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 992, 23 BLR 2-213, 2-238 (11th Cir. 2004); *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460, 12 BLR 2-371, 2-375 (11th Cir. 1989) ("The question of whether [a] medical report is sufficiently documented and reasoned is one of credibility for the fact finder."); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015) (the evidence must affirmatively establish the absence of pneumoconiosis).

As the administrative law judge permissibly discredited Dr. Goldstein's opinion, the only opinion supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to disprove the existence of legal pneumoconiosis. *See Jones*, 386 F.3d at 992, 23 BLR at 2-238; *Jordan*, 876 F.2d at 1460, 12 BLR at 2-375. Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). We therefore affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.

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.]

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[15] In supplemental reports dated February 7, 2017 and November 2, 2017, Dr. Goldstein referred to an attached summary about coal workers' pneumoconiosis that related to pulmonary function, but he did not explain how the summary applied to claimant's condition. Employer's Exhibits 1, 11. Rather, he stated, "This is included as I believe it supports my contention that [claimant] has pulmonary function abnormalities related to smoking and not to coal dust exposure." Employer's Exhibit 1.

[16] We reject employer's argument that the administrative law judge erred in discrediting Dr. Goldstein's opinion because, according to employer, he relied on claimant's "mistaken view of his work history." Employer's Brief at 8. Dr. Goldstein noted that claimant worked for employer in mine construction from 1953 to 1986. Director's Exhibit 18. Employer asserts that the record does not support a finding of fifteen years of underground coal mine employment. Employer's Brief at 5-7. Employer, however, does not challenge the administrative law judge's finding that claimant was "regularly exposed to coal dust in underground coal mines." Decision and Order at 12.

§718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discredited Dr. Goldstein's disability causation opinion because he did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease.[17] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); Director's Exhibit 38. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

**Remand Instructions**

On remand, the administrative law judge must determine the length of claimant's coal mine employment in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165. If the administrative law judge finds that claimant established at least fifteen years of coal mine employment, claimant will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In that case, in light of our affirmance of the administrative law judge's finding that employer did not rebut the presumption, the administrative law judge may reinstate the award of benefits.

Should the administrative law judge find that claimant has failed to establish the requisite years of qualifying coal mine employment, he must evaluate the evidence to determine if claimant has satisfied his burden to establish all elements of entitlement under 20 C.F.R. Part 718 by a preponderance of the evidence, without benefit of the presumption. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

[17] Dr. Goldstein did not offer an opinion on disability causation independent of his belief that claimant did not have legal pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015).

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge