



BRB Nos. 16-0372 BLA
and 16-0373 BLA

RUBY L. ALLEN)
(Widow of and o/b/o JEWELL HART)
ALLEN))

Claimant-Respondent)

v.)

CROWN ENERGY CORPORATION)

and)

DATE ISSUED: 05/10/2017

AMERICAN RESOURCES INSURANCE)
COMPANY)

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 Joseph E. Kane, Administrative
Law Judge, United States Department of Labor.

H. Brett Stonecipher and Cameron Blair (Fogle Keller Purdy, PLLC),
Lexington, Kentucky, for employer/carrier.

Rebecca J. Fiebig (Nicholas C. Geale, Acting Solicitor of Labor; Maia
Fisher, 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals
Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders (11-BLA-5768, 13-BLA-6127) of Administrative Law Judge Joseph E. Kane awarding benefits on claims filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim¹ filed on June 3, 2010, and a survivor's claim² filed on July 23, 2013.

Considering the miner's claim, the administrative law judge accepted the parties' stipulation that the miner had twenty-eight years of coal mine employment,³ and noted that the miner worked exclusively in surface coal mine employment. Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),⁴ the administrative law judge found that all of the

¹ The miner's first claim for benefits, filed on December 19, 2002, was denied by Administrative Law Judge Robert L. Hillyard on October 25, 2005, because the evidence did not establish total disability. Miner's Claim (MC) Director's Exhibit 1 at 2, 746. The miner filed his current claim on June 3, 2010. MC Director's Exhibit 3. It was pending when he died on June 20, 2013. Survivor's Claim (SC) Director's Exhibit 6.

² Claimant filed her claim for survivor's benefits on July 23, 2013, and is also pursuing the miner's claim on his behalf. SC Director's Exhibit 5. The claims were consolidated and sent to the Office of Administrative Law Judges for a hearing, which was conducted on June 25, 2015. Subsequently, the administrative law judge issued separate decisions in the miner's claim and the survivor's claim.

³ The miner's most recent coal mine employment was in Kentucky. MC Director's Exhibit 8. 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, 1-202 (1989) (en banc).

⁴ Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more 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 impairment are established. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

miner's surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge further found that the new evidence established 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 therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim.

In a separate Decision and Order in the survivor's claim, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2012), under which the 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 the miner's death was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits in the survivor's claim.

On appeal in the miner's claim, employer argues that the administrative law judge failed to consider all relevant evidence when he found that the miner had at least fifteen years of qualifying⁵ coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Specifically, employer argues that the administrative law judge did not address the report of its "mining expert, who found that the [miner's] dust exposure, save for his first 11 years in the industry, was not substantially similar to [that of] an underground miner." Employer's Brief at 15-16. Employer argues further that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Based on the errors alleged in the miner's claim, employer argues that the award of benefits in the survivor's claim should be vacated. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response. However, in a footnote to his letter to the Board, the Director argues that the administrative law judge's failure to consider employer's report was "likely harmless" error.⁶ Director's Letter at 1 n.1.

⁵ "Qualifying" coal mine employment refers to the underground or substantially similar coal mine employment that must be established to invoke the Section 411(c)(4) presumption.

⁶ We affirm, as unchallenged, the administrative law judge's findings that the miner had twenty-eight years of coal mine employment, and that the evidence in the miner's claim established total disability at 20 C.F.R. §718.204(b)(2) and a change in an

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. 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. THE MINER'S CLAIM

A. Invocation of the Section 411(c)(4) Presumption

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

The administrative law judge considered claimant's hearing testimony that the miner came home from work covered with coal dust and his face was black, and that claimant would sometimes have to wash the miner's clothes more than once to get them clean. Miner's Claim Decision and Order at 5; Hr'g Tr. at 19-20. Finding no contrary evidence in the record, the administrative law judge determined that claimant "established the requisite . . . coal mine employment to trigger the [Section 411(c)(4)] presumption." Miner's Claim Decision and Order at 5.

Employer contends that the administrative law judge failed to consider the report of Mr. Lamb, "an engineer with a specialty in the coal mining industry," who reviewed each job the miner held during his surface mining career, and offered an opinion as to whether the miner's employment took place in conditions substantially similar to those in an underground coal mine. Employer's Brief at 15-19, discussing Employer's Exhibit 12. Employer notes Mr. Lamb's conclusion that, at most, eleven years of the miner's surface coal mine employment were substantially similar to underground coal mine employment. The Director acknowledges that the administrative law judge failed to

applicable condition of entitlement at 20 C.F.R. §725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

address Mr. Lamb's report, but suggests that a remand is unnecessary because Mr. Lamb's report "has minimal probative value."⁷ Director's Letter at 1 n.1.

The Board "is not empowered to engage in a de novo proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301. Where the administrative law judge fails to consider relevant evidence, and thereby fails to make appropriate factual findings and credibility determinations, the proper course for the Board is to remand the case for such determinations, instead of filling in the gaps in the administrative law judge's decision. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Therefore, we must vacate the administrative law judge's findings that the miner had at least fifteen years of qualifying coal mine employment and that claimant invoked the Section 411(c)(4) presumption. We remand this case for the administrative law judge to consider all of the relevant evidence, and determine whether at least fifteen years of the miner's surface coal mine employment took place in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4).

The administrative law judge must determine on remand whether claimant has established that "the miner was regularly exposed to coal-mine dust" during his surface coal mine employment. 20 C.F.R. §718.305(b)(2); see *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 663, 25 BLR 2-725, 2-730 (6th Cir. 2015); *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 489-90, 25 BLR 2-633, 2-642-43 (6th Cir. 2014). In considering that issue, the administrative law judge should consider Mr. Lamb's report in conjunction with the miner's testimony regarding the dust conditions at the surface mines where he worked,⁸ as well as claimant's hearing

⁷ The Director, Office of Workers' Compensation Programs (the Director), contends that "Mr. Lamb's analysis is premised on the view that surface conditions can never compare to underground conditions because surface miners work outside." Director's Letter at 1 n.1. The Director states that Mr. Lamb's "position is contrary to the Act, which plainly assumes that surface dust conditions can be substantially similar to those underground." *Id.* Additionally, the Director argues that Mr. Lamb focused on general mining conditions, rather than the miner's specific working conditions. *Id.* Finally, the Director argues: "by focusing only on which of [the miner's] various positions . . . were 'high exposure' positions, the report does not speak to the true issue here, which is whether [the miner] was regularly exposed to coal mine dust in the course of his employment." *Id.*

⁸ The miner's January 2, 2013 deposition testimony is contained in Claimant's Exhibit 7, and his April 19, 2005 hearing testimony is contained in MC Director's Exhibit 1 at 432-441.

testimony, and any other relevant evidence in the record. *See* 30 U.S.C. §923(b). The administrative law judge should also consider the Director’s arguments regarding the credibility of Mr. Lamb’s report. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

B. Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer’s contention that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, in the event that the administrative law judge again finds the Section 411(c)(4) presumption invoked. Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,⁹ 20 C.F.R. §718.305(d)(1)(i), or 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). The administrative law judge found that employer failed to establish rebuttal by either method.¹⁰

Employer’s sole contention is that the administrative law judge applied an improper standard in considering whether employer rebutted the presumed fact of disability causation.¹¹ Employer’s Brief at 19-21. Employer argues that the administrative law judge erred in requiring it to establish that no part of the miner’s disability was caused by pneumoconiosis, rather than determining whether it could prove

⁹ “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).

¹⁰ The administrative law judge found that employer established that the miner did not have clinical pneumoconiosis, but failed to establish that he did not have legal pneumoconiosis because its physicians’ opinions were unreasoned on that issue. Miner’s Claim Decision and Order at 15-20. The administrative law judge further found that employer’s physicians’ opinions were not sufficiently credible to establish that no part of the miner’s total disability was caused by pneumoconiosis. *Id.* at 20.

¹¹ We affirm, as unchallenged, the administrative law judge’s determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have legal pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(i)(A). *See Skrack*, 6 BLR at 1-711.

that pneumoconiosis was not a substantially contributing cause of the miner's disability. *Id.* at 21. Employer's argument lacks merit. See *Kennard*, 790 F.3d at 667, 25 BLR at 2-739 (rejecting identical argument); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1070-71, 25 BLR 2-431, 2-445-47 (6th Cir. 2013)(same). The administrative law judge properly required employer to prove 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). We therefore reject employer's allegation of error and affirm the administrative law judge's finding that employer did not rebut the presumed fact of disability causation pursuant to 20 C.F.R. §718.305(d)(1)(ii).

On remand, if the administrative law judge finds that claimant has established that the miner had at least fifteen years of qualifying coal mine employment, claimant will have invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. In that case, in light of our affirmance of the finding that employer failed to rebut the presumption, the administrative law judge may reinstate the award of benefits in the miner's claim. If the administrative law judge does not find at least fifteen years of qualifying coal mine employment, he must consider whether entitlement is established in the miner's claim under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption.

II. THE 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 her entitlement under Section 932(l): she filed her claim after January 1, 2005; she 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); Survivor's Claim Decision and Order at 3-4. Employer argues that the award of survivor's benefits must be vacated because the administrative law judge erred in awarding benefits in the miner's claim.¹² Employer's Brief at 21-22.

Because we have vacated the award of benefits in the miner's claim, we must vacate the administrative law judge's determination that claimant is automatically entitled to survivor's benefits under Section 932(l). On remand, if the administrative law judge awards benefits in the miner's claim, he may reinstate the award of benefits in the survivor's claim. 30 U.S.C. §932(l); *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). If the administrative law judge denies benefits in the miner's claim, he must determine whether claimant has established entitlement to survivor's benefits pursuant to

¹² Employer does not otherwise challenge claimant's entitlement under Section 422(l) of the Act, 30 U.S.C. §932(l) (2012). See *Skrack*, 6 BLR at 1-711.

20 C.F.R. §718.205(a),(b) by establishing that the miner's death was due to pneumoconiosis. *See Conley v. Nat'l Mines Corp.*, 595 F.3d 297, 302, 24 BLR 2-257, 2-263 (6th Cir. 2010).

Accordingly, the administrative law judge's Decisions and Orders awarding miner's and survivor's benefits are affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge