U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 16-0677 BLA and
16-0678 BLA

ANNA B. LAWSON (Widow of and on behalf of JAMES A. LAWSON) Claimant-Respondent v. WESTMORELAND COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/06/2017 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Morris D. Davis, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for employer.

Helen H. Cox (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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

BOGGS, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06148, 2014-BLA-05861) rendered by Administrative Law Judge Morris D. Davis on a miner's subsequent claim and a survivor's claim filed pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] In considering the miner's claim, the administrative law judge credited the miner with nineteen years of coal mine employment in an underground coal mine or in conditions substantially similar to those in an underground coal mine. The administrative law judge found that the miner had a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge therefore determined that the rebuttable presumption of total disability due to pneumoconiosis set forth in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), was invoked.[2] The administrative law judge found that employer did not rebut the presumption and awarded benefits in the miner's claim. Based on the award in the miner's claim, the administrative law judge found that claimant is automatically entitled to survivor's benefits pursuant to Section 432(*l*) of the Act, 30 U.S.C. §932(*l*) (2012).[3]

---

[1] The miner filed an initial claim for benefits on November 23, 1981, which was denied by Administrative Law Judge Stuart A. Levin on September 22, 1987, because the miner did not establish that he had a totally disabling respiratory or pulmonary impairment. Miner Director's Exhibit 1. The miner filed the current claim for benefits on May 21, 2010. Miner Director's Exhibit 2. The miner died on April 12, 2014, while his claim was pending. Miner Director's Exhibit 75. Claimant is the widow of the miner and filed her claim for survivor's benefits on April 25, 2014. Survivor Director's Exhibit 3. The miner's claim and the survivor's claim were consolidated before the Office of Administrative Law Judges. Miner Director's Exhibits 75, 76; Survivor Director's Exhibit 12. Claimant is pursuing the miner's claim on behalf of his estate. *Id.*

[2] Under Section 411(c)(4) of the Act, a miner's total disability is presumed to be due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] Under Section 432(*l*) of the Act, a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

On appeal, employer argues that the administrative law judge erred in finding that the miner's above ground coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in finding that it did not rebut the presumed existence of clinical or legal pneumoconiosis. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), filed a limited brief, maintaining that the administrative law judge reasonably found that the miner had the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.[4]

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.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act 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 Presumption – Qualifying 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 coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(b)(1)(i). 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).

---

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner had a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, established a change in an 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); Decision and Order at 20-21.

[5] The record reflects that the miner's last coal mine employment was in Virginia. Miner Director's Exhibit 4. Accordingly, we 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).

The administrative law judge first rendered a finding regarding the length of the miner's coal mine employment, noting that employer stipulated to twelve years[6] while claimant alleged 20.82 years. Decision and Order at 7, *citing* August 11, 2015 Hearing Transcript at 51. The administrative law judge credited the miner with 15.25 years of coal mine employment from the third quarter of 1961 through the fourth quarter in 1977, based on his Social Security Administration (SSA) Earnings Statement showing earnings of more than fifty dollars per quarter. Decision and Order at 7-8; Miner Director's Exhibit 10. For the period from January 1, 1978 to September 17, 1981, the administrative law judge credited the miner with 3.75 years of coal mine employment, based on a letter from employer reporting that the miner worked for it full-time during this period. Decision and Order at 9; Miner Director's Exhibit 10. Accordingly, the administrative law judge credited the miner with a total of nineteen years of coal mine employment, without differentiating between underground and above ground work. Decision and Order at 9.

To determine whether the miner's above ground coal mine employment was in substantially similar conditions to those in an underground mine, the administrative law considered claimant's statement that when the miner worked above ground "he would come home covered in dust," such that claimant's children did not recognize him. Decision and Order at 9. He also considered the miner's testimony "about the work he did driving coal from the mines to the tipples and operating tipples where the coal was crushed into smaller pieces and into dust."[7] *Id*. The administrative law judge concluded,

---

[6] At the hearing, employer stipulated to twelve years of coal mine employment but indicated that "anything beyond that I'd like a decision on." August 11, 2015 Hearing Transcript at 51. In a letter dated February 27, 1997, employer's manager of human resources and labor relations stated that the miner was a full-time and continuous employee from November 30, 1970 until September 17, 1981. Miner Director's Exhibit 10. Employer concedes in its brief on appeal that that the miner worked for it at an underground coal mine for eleven years and nine and one-half months. Employer's Brief at 15.

[7] The administrative law judge noted, in particular, the miner's testimony during the hearing on his prior claim:

> Q: And in this tipple you say you crushed it, you crushed the coal and sized it?
>
> A: Yes, and graded it out. You know, there'd be a block coal, what they call block coal, there'd be coal, and then what they call a stoker, and then a dust, a real fine powder, all the little parts of the coal, the real dust part would go in another, you know, would go into another grade.
>
> Q: And was this coal shipped?

"the conditions described by Miner along with Claimant's personal observations of what she saw when he came home from work while he was employed above[]ground establishes that Miner's surface coal mine employment was comparable to underground coal mining." *Id*. at 10 (citations omitted).

Employer alleges that claimant's testimony cannot constitute substantial evidence that the miner was regularly exposed to coal dust in his above ground employment because claimant provided her testimony thirty-five years after the miner's coal mine employment ceased. Employer further contends that the administrative law judge erred in failing to separately consider whether the evidence was sufficient to establish that the miner's work as a coal truck driver, as opposed to his work at the tipple, was in conditions substantially similar to those in an underground mine. Employer also argues that contrary to the administrative law judge's determination, "the exact dates of employment as an underground miner coupled with the dates of employment in work which the Judge found 'comparable' still does not add up to fifteen years." Employer's Brief at 15. In response, the Director asserts that claimant provided uncontradicted evidence that the miner's work at the tipple and hauling coal occurred in dust conditions substantially similar to those in an underground mine. Therefore, the Director states that the administrative law judge properly determined that claimant established at least the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Employer's arguments have merit, in part. As an initial matter, we reject employer's contention that the testimony of claimant was inherently of little probative value because she described the miner's appearance in the distant past. Assessing the credibility of witness testimony is committed to the discretion of the administrative law judge as fact-finder, and we will not disturb his findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988). Because claimant's recall of her husband's appearance was uncontradicted and her testimony was not specifically shown not to be credible, we hold that the administrative law judge acted within his discretion in crediting claimant's testimony as probative of the extent to which the miner was covered with coal dust when he returned from work. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989).

However, employer is correct in asserting that the administrative law judge did not render the necessary findings or resolve the inconsistencies in the record concerning the

---

> A: I don't know where it was shipped to. We loaded it in railroad cars.

Decision and Order at 9, *quoting* Director's Exhibit 1 (July 28, 1987 Hearing Transcript at 29).

length of the miner's above ground employment at the tipple and as a coal truck driver, and the extent to which he was exposed to coal dust in each. Director's Exhibits 1, 4, 10. Regarding the length of the miner's above ground employment, the miner testified in his initial claim that he worked for Dean Jones Coal Company for "about" three years running a tipple, but on the Form CM-911a (Employment History) submitted in the present subsequent claim, the miner indicated that he worked as a coal truck driver for Dean Jones Coal Company from 1963 to 1965.[8] Director's Exhibits 1 (July 28, 1987 Hearing Transcript at 28), 4. The miner also testified that he worked for six years for Sargent Coal Company running a tipple, but on the Form CM-911a filed in the subsequent claim, he indicated that he worked for Sargent Coal Company as a truck driver hauling "raw coal" from 1966 to 1970. *Id*. The miner further stated in his hearing testimony that he drove a coal truck for General Trucking Company for approximately three or four years, but did not list General Trucking Company on Form CM-911a in his prior or current claim. *Id*. Instead, the miner reported on the Form CM-911a in his prior claim that he worked for C&S Darby Limited from 1966 to 1969 as a truck driver. Director's Exhibit 1. The miner's SSA Earnings Statement reflects that the miner was employed by General Trucking Company from 1956 to 1958 and for Dean Jones Coal Company from 1964 to 1966. Director's Exhibit 10. During the period of time that the miner reported he worked for Sargent Coal Company – 1966 to 1970 – the SSA Earnings Statement shows that he was employed by C&S Darby Limited.[9] *Id*. Further, on the report of the Department of Labor-sponsored examination performed in conjunction with the miner's initial claim, Dr. Taylor indicated that the miner was employed by C&S Darby Limited from 1966 to 1970 as a truck driver, and in that job he "hauled [and] loaded coal[.]" Director's Exhibit 1. We note further that on both CM-911a forms, the miner listed his coal mine jobs prior to his work with employer as coal truck driver or truck driving. Director's Exhibits 1, 4.

With respect to the extent to which the miner was exposed to coal dust, the administrative law judge erred in failing to explain how the miner's testimony regarding his tipple work established that this work occurred in conditions substantially similar to those in an underground mine, and in applying this finding to the miner's job as a truck driver. *See* Decision and Order at 9-10. We agree with employer that the administrative law judge did not explain how the miner's testimony that when separating different grades of coal at the tipple, "a dust, a real fine powder, all the little parts of the coal, the real dust part would go in another, you know, would go into another grade," established

[8] The miner did not report employment with Dean Jones Coal Company on the Form CM-911a filed in his initial claim. Director's Exhibit 2.

[9] It is not clear from the record what relationship, if any, Sargent Coal Company and C&S Darby Limited have.

that the miner was regularly exposed to coal dust as required by 20 C.F.R. §718.305(b)(2). Further, the administrative law judge did not explain the basis on which he applied that testimony to qualify the miner's other above ground employment. In addition, we note that the administrative law judge credited claimant's testimony that the miner was covered with coal dust when he returned home as relevant to all of the miner's above ground work, although the portions of claimant's testimony quoted by the administrative law judge pertained to the miner's work as a truck driver. Decision and Order at 9; August 11, 2015 Hearing Transcript at 38.

Thus, the administrative law judge's findings under 20 C.F.R. §718.305(b)(2) do not satisfy the Administrative Procedure Act (APA), which requires every adjudicatory decision to 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 . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Accordingly, we vacate the administrative law judge's findings that the miner worked above ground at the tipple and as a truck driver in conditions substantially similar to those in an underground mine, and that he had at least fifteen years of qualifying coal mine employment. *See Wojtowicz*, 12 BLR at 1-165.

On remand, the administrative law judge must reconsider whether claimant has established that the miner's above ground employment was in conditions substantially similar to those in an underground mine pursuant to 20 C.F.R. §718.305(b)(2) and that the miner's underground and above ground work totaled at least fifteen years of qualifying coal mine employment. First, the administrative law judge must make explicit findings as to the length of time that the miner worked underground and the length of time he worked above ground. The administrative law judge must also render specific findings as to how long the miner was employed as a coal truck driver and as a tipple worker, respectively. The administrative law judge must then reconsider whether the miner's jobs at the tipple and as a coal truck driver were in conditions substantially similar to those in an underground mine.

In the event that the administrative law judge finds that the requirement of substantial similarity has been met, he must determine whether the miner's combined tenure as a truck driver, a tipple worker, and an underground miner totals at least fifteen years of qualifying coal mine employment pursuant to 20 C.F.R. §718.305(b)(1)(i), (2). 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 her 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). If he determines that the miner had at least fifteen years of qualifying coal mine

employment, he may reinstate his finding that claimant established invocation of the Section 411(c)(4) presumption. Finally, in rendering his findings on these issues on remand, 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.

B. Rebuttal of the Presumption – Existence of Legal Pneumoconiosis

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. The burden would then shift to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[10] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer submitted the medical opinions of Drs. Rosenberg and Castle in support of its contention that the miner did not have legal pneumoconiosis. Director's Exhibit 40; Employer's Exhibits 6, 7, 13A, 13B. The administrative law judge determined that these opinions were not well-reasoned because Drs. Rosenberg and Castle did not adequately explain their determination that the miner's obstructive impairment was unrelated to coal dust exposure. Decision and Order at 29-31.

Employer argues that the administrative law judge erred in finding that Dr. Rosenberg's opinion is insufficient to rebut the existence of legal pneumoconiosis at 20

---

[10] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition "includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* 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).

C.F.R. §718.305(d)(1)(i)(A).[11] However, employer does not identify any specific error in the administrative law judge's finding that Dr. Rosenberg's opinion[12] was not well reasoned because his statement that coal dust contribution was ruled out by the miner's return to "near normal" results after bronchodilator administration was not consistent with the fact that the miner had two qualifying[13] post-bronchodilator pulmonary function studies.[14] Decision and Order at 30. We therefore affirm the discrediting of Dr. Rosenberg's opinion by the administrative law judge as a permissible exercise of his discretion as fact-finder.[15] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th. Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x. 227, 237 (4th Cir. 2004) (unpub.); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986). Thus, we further affirm the administrative law judge's finding that employer did not rebut the existence of legal pneumoconiosis and, therefore, did not rebut the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i).[16] *See Bender*, 782 F.3d at 137, 25 BLR at 2-699; *Minich*, 25 BLR at 1-154-56.

---

[11] Because employer has not challenged the administrative law judge's discrediting of Dr. Castle's opinion at 20 C.F.R. §718.305(d)(1)(i)(A), we affirm this finding. *See Skrack*, 6 BLR at 1-711.

[12] Dr. Rosenberg stated that the miner's "marked bronchodilator response with near normalization is not consistent with obstruction related to coal mine dust exposure." Miner Director's Exhibit 54; Miner Employer's Exhibit 7. Dr. Rosenberg also testified that "[the miner] was able in a sense, in essence [to] nearly normalize his [pulmonary function studies] at some point," which Dr. Rosenberg said "really sort of rules out the presence of a coal mine dust-related disorder." Miner Employer's Exhibit 13B at 6.

[13] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

[14] The pulmonary function studies were performed on October 14, 2010 and May 10, 2011. Director's Exhibit 19; Employer's Exhibit 6.

[15] Because the administrative law judge provided a valid basis for discrediting Dr. Rosenberg's opinion, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded to this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[16] Employer must disprove *both* legal and clinical pneumoconiosis to establish rebuttal of the Section 411(c)(4) presumption under 20 C.F.R. §718.305(d)(1)(i). *See W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015). Employer challenges the administrative law judge's weighing of the relevant evidence in

C. Rebuttal of the Presumption – Total Disability Causation

Pursuant to 20 C.F.R. §718.305(d)(1)(ii), the administrative law judge determined that the opinions of Drs. Castle and Rosenberg are insufficient to establish rebuttal by showing that the miner was not totally disabled due to pneumoconiosis because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding. *See Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83-84 (4th Cir. 1995); Decision and Order at 33. Employer raises no separate allegations of error with respect to the administrative law judge's finding that employer failed to disprove the presumed causal relationship between claimant's total disability and pneumoconiosis. We therefore affirm the administrative law judge's determination that employer failed to rebut the presumption by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis under 20 C.F.R. §718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711. Consequently, if on remand the administrative law judge determines that claimant invoked the Section 411(c)(4) presumption, he may reinstate his findings that employer failed to establish rebuttal and further reinstate the award of benefits in the miner's claim.

II. The Survivor's Claim

In light of our decision to vacate the award of benefits in the miner's claim, we must further vacate the administrative law judge's finding that claimant was automatically entitled to receive survivor's benefits under Section 932(*l*). We note, however, that employer has not separately challenged the award of benefits in the survivor's claim, nor do we detect any error in the administrative law judge's findings. The administrative law judge determined correctly that claimant established the prerequisites for application of Section 932(*l*) by proving that: 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*); Decision and Order at 34. Therefore, in the event that the administrative law judge awards benefits in the miner's claim on remand, he may reinstate his determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013); *Skrack*, 6 BLR at 1-711. If the administrative law

---

finding that employer did not prove that the miner did not have clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(B). However, we decline to address employer's allegations because, under the facts of this case, error, if any, is harmless in light of our affirmance of the administrative law judge's determination that employer failed to rebut the existence of legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

judge denies benefits in the miner's claim, however, he must separately consider whether claimant can affirmatively establish, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis.[17] *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(b); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993).

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

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

I concur:

RYAN GILLIGAN
Administrative Appeals Judge

---

[17] A miner's death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(b)(1), (2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(b)(6); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80, 16 BLR 2-90, 2-92 (4th Cir. 1992).

HALL, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to vacate the administrative law judge's finding that the miner's above ground coal mine employment was qualifying for purposes of invoking the Section 411(c)(4) presumption. In order to prove that the miner's above ground work is substantially similar to underground coal mine employment, claimant need only show that the miner was regularly exposed to coal mine dust in his working conditions. *See* 78 Fed. Reg. at 59,102, 59,105 (Sept. 25, 2013).

Employer conceded that the miner had eleven years and nine months of qualifying coal mine employment in an underground coal mine. *See* Employer's Brief at 15; Miner Director's Exhibit 10. The administrative law judge credited the miner's testimony that he worked an additional seven years in above ground jobs running coal tipples and driving coal trucks which were in conditions "substantially similar" to those experienced working underground. Decision and Order at 9-10. Consequently, the only question in determining whether the Section 411(c)(4) presumption is invoked in this case is whether claimant established that at least three years and three months of the miner's above ground coal mine employment was in conditions substantially similar to those in underground mines.

The administrative law judge considered the miner's testimony from the July 28, 1987 hearing in his prior claim where he addressed working in the tipple and hauling coal from a strip mine to a tipple. Director's Exhibit 1 (July 28, 1987 Hearing Transcript at 28-31). Specifically, the administrative law judge considered the miner's statements that in his work at the coal tipple he "was processing the coal, you know, grading the coal out, crushing it, and making stoker. . . . They have a crusher there that they take good size coal and break it down to make stoker out of." *Id*. at 28. The miner also explained that he drove a truck on a "strip job" where he hauled coal from the extraction site to the tipple. *Id*. at 30-31. In addition, the administrative law judge evaluated the testimony of claimant, who was married to the miner for sixty-two years, from the August 11, 2015 hearing concerning the miner's appearance when he returned from his coal mine employment both underground and above ground driving coal trucks. Decision and Order at 9-10; August 11, 2015 Hearing Transcript at 27-28, 36, 38. The administrative law judge focused on claimant's statement that when the miner worked above ground "he would come home covered in dust to the extent that he 'looked like he had been inside the mines when he done that,'" such that claimant's children did not recognize him. Decision and Order at 9, *quoting* August 11, 2015 Hearing Transcript at 38. Claimant further provided that "[h]e was always covered in coal dust. . . . [a]ll you could do is see his eyes and his mouth." August 11, 2015 Hearing Transcript at 27. Claimant also testified that she had to wash the miner's work clothes separately and multiple times in order to get them clean. *Id*. at 28.

Based on this uncontradicted testimony by the miner and claimant, the administrative law judge permissibly determined that claimant met her burden of proving that the miner's above ground employment was in conditions substantially similar to an underground mine. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); 20 C.F.R. §718.305(b)(2); *see also Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 732-33, 25 BLR 2-405, 2-421-22 (7th Cir. 2013) (miner's uncontradicted testimony of being exposed to coal dust "all the time" sufficient to establish substantial similarity); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988) (claimant "bears the burden of establishing comparability" but "must only establish that [the miner] was exposed to sufficient coal dust in his surface mine employment"). Thus, I would affirm the administrative law judge's determination that the miner worked for nineteen years in an underground coal mine or in conditions substantially similar to an underground mine. Consequently, I would further 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 at the time of his death, and that employer failed to rebut the presumption. Accordingly, I would affirm the awards of benefits in the miner's subsequent claim and the survivor's claim.

BETTY JEAN HALL, Chief
Administrative Appeals Judge