**U.S. Department of Labor**

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

BRB No. 17-0022 BLA

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| MALCOLM WAYNE STOUT | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MANALAPAN MINING, INCORPORATED | ) | DATE ISSUED: 09/27/2017 |
| | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2015-BLA-05368) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on September 22, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation that claimant has thirty-one years of surface coal mine employment and noted employer's concession that claimant has a totally disabling respiratory or pulmonary impairment. Because the administrative law judge determined that claimant's above-

ground exposure was equivalent to at least fifteen years of underground coal mine employment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant satisfied his burden to establish regular exposure to dust in his surface coal mine employment, sufficient to show substantial similarity between his working conditions above-ground, and those found in an underground coal mine. Employer also asserts that the administrative law judge erred in finding that it did not establish rebuttal of the Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs.[2]

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

**Invocation of the Section 411(c)(4) Presumption - Substantial Similarity**

To be entitled to the Section 411(c)(4) presumption, claimant must establish that he worked for at least fifteen years either in "underground coal mines," or in "a coal mine

[1] Under Section 411(c)(4) of the Act, a miner is entitled to a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or surface 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.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-one years of surface coal mine employment and a totally disabling respiratory or pulmonary impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 8.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

other than an underground mine" in "substantially similar" conditions. 30 U.S.C. §921(c)(4). The implementing regulation provides that "[t]he 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 [he] was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *see Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, 25 BLR 2-725, 2-736 (6th Cir. 2015). Further, the Department of Labor has explained that claimant need only establish "the dust conditions prevailing at the non-underground mine or mines at which [he] worked. The objective of this evidence is to show that [claimant's] duties regularly exposed him to coal-mine dust, and thus that the miner's work conditions approximated those at an underground mine." 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013); *see* 20 C.F.R. §718.305(b)(2).

In this case, the administrative law judge credited claimant's hearing testimony in finding that claimant established at least fifteen years of qualifying surface coal mine employment for invocation of the Section 411(c)(4) presumption. The administrative law judge summarized the relevant aspects of claimant's hearing testimony:

> [Claimant] operated a bulldozer at the preparation plant and pushed coal into the feeder ([Hearing Transcript (TR)] 13-15). . . . He alleged that this was a dusty job (TR 15). He was around coal dust "[p]retty much every day" (TR 17). He did not wear a respirator, except for [m]aybe a time or two (TR 17). He occasionally helped the mechanic . . . to clean the tracks and grease the machine . . . (TR17). . . . He allegedly ran a dozer probably 95 percent of the time (TR 24). . . . He got his first air-conditioned unit around 1975, but it was hard to keep it running, and the companies "didn't care much about spending $3,000 or $4,000 fixing an air conditioner" (TR 25). The last four or five years, "federal man came on your machine" and if the air conditioner didn't work, he'd get it working (TR 26). It was "definitely better", but "no doubt you're from coal country", as your car would get a film of dust on it if you drove to the tipple where he worked, and "those dozer's doors and windows were rattling, you know" (TR 27). Some days, "you basically couldn't see anything" because of the dust when the coal came off the belt line, depending on how dry the air was (TR 39). He breathed dust every day, though in the mid-1980s the machines "would keep out a lot of dust". But he still could "wipe it several times a day inside and it would just be covered with fine dust" (TR 40). He was "constantly" exposed to dust every day (TR 43-44).

Decision and Order at 4-5; *see* Hearing Transcript at 13-17, 24-27, 39-40, 43-44.

The administrative law judge concluded that claimant's thirty-one years of surface coal mine employment was "equivalent to at least" fifteen years of underground coal mine employment. Decision and Order at 6. Employer asserts that the administrative law judge did not apply the correct analysis.[4] We disagree. The administrative law judge complied with the regulatory standard to the extent he found that claimant's testimony was "credible" to establish that claimant's work was "dusty" and that claimant "was constantly exposed" to coal dust during his surface coal mine employment. *Id*.; *see* 20 C.F.R. §718.305(b)(2); *Kennard*, 790 F.3d at 664, 25 BLR at 2-736.

It is well established that an administrative law judge has discretion to assess the credibility of the witnesses and evidence, and to draw his own inferences therefrom. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co*., 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). We see no error in the administrative law judge's finding that claimant's unrebutted testimony meets the standard of establishing "regular exposure" to coal mine dust under 20 C.F.R. §718.305(b)(2). *See Kennard*, 790 F.3d at 664, 25 BLR at 2-735-36 (claimant's testimony that he breathed the "dust [that] was flying around," along with his descriptions of "cloud[s] of smoke" from coal dust, "easily support[ed] a finding that [claimant] was regularly exposed to coal-mine dust"); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014) (claimant's testimony that the conditions throughout his employment were "very dusty" and that dust covered his clothes by the end of his shift met his burden); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17, 25 BLR 2-549, 2-564-66 & n.17 (10th Cir. 2014) (claimant's testimony that it was impossible to keep the dust out of the cabs of the vehicles he drove, and that he was exposed to "pretty dusty" conditions while performing other surface jobs, "provided substantial evidence of regular exposure to coal dust").

We therefore affirm the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment and that claimant invoked the Section 411(c)(4) presumption.

**Rebuttal of the Presumption**

[4] Employer states that "[t]he logic of the [administrative law judge's] conclusion presumes that one year of [claimant's] coal mines employment is equal to half a year of coal mines employment in an underground coal mines." Employer's Brief at 9.

Once the Section 411(c)(4) presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that claimant has neither legal[5] nor clinical[6] pneumoconiosis, or 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); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

The administrative law judge first found that employer failed to disprove the existence of clinical pneumoconiosis pursuant 20 C.F.R. §718.305(d)(1)(i)(B). Employer generally asserts that "substantial chest x-ray evidence" establishes that claimant does not have clinical pneumoconiosis, but does not specifically challenge any aspect of the administrative law judge's finding.[7] Employer's Brief at 13. Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). We therefore affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

[5] 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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] "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).

[7] The administrative law judge found that "four of the five films are positive for pneumoconiosis. The most recent evidence is positive, and the most numerous readings are positive and the most numerous readings by dually qualified readers are positive." Decision and Order at 8. The administrative law judge also concluded that the one CT scan, while not identifying pneumoconiosis, did not detract from the credibility of the x-ray evidence, as "the qualifications of the reader were not proffered." *Id*.

[8] It is not necessary that we address employer's assertion that the administrative law judge applied an incorrect legal standard in considering the issue of legal

We also affirm, as unchallenged by employer in this appeal, the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order 11-12. Thus, we affirm the administrative law judge's conclusion that employer did not rebut the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4) (2012).

Accordingly, the administrative law judge's Decision and Order Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

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pneumoconiosis, as employer's failure to disprove clinical pneumoconiosis precludes rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).