

BRB No. 11-0248 BLA

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| LEROY SISK |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| FREEMAN UNITED COAL MINING |) | |
| COMPANY |) | |
| |) | |
| and |) | |
| |) | |
| WELLS FARGO DISABILITY |) | DATE ISSUED: 10/28/2011 |
| MANAGEMENT |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Julie A. Webb (Craig & Craig), Mt. Vernon, Illinois, for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05566) of Administrative Law Judge Jeffrey Tureck on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Based on claimant's April 16, 2008 filing date, the administrative law judge adjudicated this claim under 20 C.F.R. Part 718. However, noting the recent amendments to the Act, the administrative law judge initially considered the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4).¹ The administrative law judge found that, although the parties stipulated to twenty-three years of coal mine employment, encompassing both underground and aboveground employment, claimant did not establish that the conditions of his aboveground coal mine employment were substantially similar to those of underground coal mine employment. Therefore, the administrative law judge found that claimant did not establish the fifteen years of *qualifying* coal mine employment requisite to the application of amended Section 411(c)(4). The administrative law judge then turned to the merits of the subsequent claim, and found that the newly submitted medical evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, the administrative law judge found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).² Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that claimant failed to establish at least fifteen years of *qualifying* coal mine employment

¹ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner has at least fifteen years of *qualifying* coal mine employment, and has a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Qualifying coal mine employment is defined as work in an underground mine or coal mine work in conditions substantially similar to conditions in an underground mine. 30 U.S.C. §921(c)(4); *see Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509 (7th Cir. 1988).

² Claimant's first claim, filed on November 23, 1998, was denied by the district director on June 1, 1999, because claimant failed to establish the existence of pneumoconiosis. *See* Decision and Order at 1, 5.

and, therefore, erred in finding that the rebuttable presumption set forth at amended Section 411(c)(4) is not applicable in this claim. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits, as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's denial of benefits and remand the case for further consideration of whether claimant established at least fifteen years of *qualifying* coal mine employment pursuant to amended Section 411(c)(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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Coal Mine Employment/Section 411(c)(4)

Claimant contends that the administrative law judge erred in finding that claimant did not establish at least fifteen years of *qualifying* coal mine employment, arguing that the evidence is sufficient to establish that his aboveground coal mine employment was in very dusty conditions. Claimant, therefore, contends that the evidence is sufficient to establish that his seventeen years of aboveground coal mine employment were in conditions substantially similar to underground coal mine employment. The Director agrees, arguing that the administrative law judge erred in stating that claimant did not discuss whether he was exposed to coal dust in his job as a top truck driver, as claimant stated, in his coal mine employment history forms, that he was exposed to dust and fumes. Director's Letter Brief at 3. The Director, therefore, contends that, because this evidence is not contradicted, claimant has met his burden. *Id.*

In order for a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is only required to proffer sufficient evidence of dust exposure in his or her work environment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment was in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1, 4.

mines.” See *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988). However, a surface worker at an underground mine site is not required to show the comparability of the conditions, as the definition of an underground coal mine encompasses not only the underground mine shaft, but also all land, buildings and equipment. 20 C.F.R. §725.101(a)(30); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979).

Herein, the record reflects that claimant worked for employer from 1969 to 1992. Specifically, claimant worked underground from 1969 to 1975 in various jobs, including laborer and continuous miner operator; he then worked aboveground from 1975 to 1992 as a top truck driver and heavy equipment operator, as well as occasionally shoveling around the silo when the mine was shut down. Director’s Exhibits 4, 5; Hearing Transcript at 19, 21-23. In setting forth his coal mine employment history at the time of his application for benefits, claimant stated that from 1975 to 1992, he was a heavy equipment operator and was exposed to dust, gases and fumes. Director’s Exhibit 4. Moreover, in describing his last coal mine employment on Department of Labor Form CM-913, claimant stated that he was a heavy equipment operator, which entailed pushing coal with a bulldozer, during which he was exposed to heavy dust. Director’s Exhibit 5. At the hearing, claimant described his aboveground coal mine employment as a top truck driver, which included moving waste material out of the processing plant to the gob pile. Hearing Transcript at 22. Claimant also testified that when the plant would shut down, he had to go to the silo and shovel under the silo in very dusty conditions. *Id.*

In considering the evidence, the administrative law judge found that the record established twenty-three years of coal mine employment. The administrative law judge also found that claimant worked “in underground mines” from 1969 to 1975, but found that claimant still must establish that at least nine years of claimant’s aboveground employment were substantially similar to underground mining. Decision and Order at 4. The administrative law judge then found that, although claimant testified that the shoveling he performed at the silo was in extremely dusty conditions, claimant did not provide any indication of what the conditions were like at the preparation plant. *Id.*; Hearing Transcript at 22. Because the administrative law judge found that claimant did not provide sufficient evidence about the conditions at the preparation plant, or provide evidence as to how much time he spent as a laborer between 1975 and 1992, he found that claimant failed to prove that the conditions of his aboveground mining were substantially similar to those of underground mining. *Id.*

Based on the facts of this case, we hold that the contentions of claimant and the Director, that the administrative law judge failed to fully consider the relevant evidence regarding claimant’s coal mine employment, have merit. While the administrative law judge properly credited claimant with the six years of underground coal mine employment from 1969 to 1975, the administrative law judge did not fully consider the

employment histories provided by claimant, specifying heavy dust exposure and exposure to dust, gases and fumes. Director's Exhibits 4, 5; *see Summers*, 272 F.3d at 479-80, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512. Additionally, the administrative law judge failed to account for the fact that claimant's entire coal mine employment history, underground and aboveground, was with employer at its underground mine facility. *Alexander*, 2 BLR at 1-501. Consequently, because the administrative law judge has not fully considered all of the relevant evidence, we vacate his finding that claimant failed to prove that the conditions of his aboveground mining were substantially similar to those of underground mining, and remand the case for further consideration of this issue. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see Summers*, 272 F.3d at 479-80, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512; *Alexander*, 2 BLR at 1-501.

If, on remand, the administrative law judge credits claimant with at least fifteen years of *qualifying* coal mine employment, he must assess whether the evidence establishes the presence of a totally disabling respiratory impairment.⁴ If the administrative law judge finds that both fifteen years of *qualifying* coal mine employment and a totally disabling respiratory impairment are established, claimant would be entitled to invocation of the presumption of totally disabling pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). If claimant establishes that he is entitled to invocation of the Section 411(c)(4) presumption, the administrative law judge must then consider whether employer has satisfied its burden to rebut the presumption. 30 U.S.C. §921(c)(4).

⁴ The administrative law judge did not reach the issue of whether the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge