



BRB Nos. 14-0237 BLA
and 14-0238 BLA

VERONICA L. TREADWAY o/b/o and)
Survivor of DANNY H. TREADWAY)

Claimant-Petitioner)

v.)

GOALS COAL COMPANY)

and)

A.T. MASSEY c/o WELLS FARGO)
DISABILITY MANAGEMENT)

Employer/Carrier-Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 02/13/2015

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits in Miner's Claim and Denying Benefits in Claimant's Survivor's Claim of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, Virginia, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits in Miner’s Claim and Denying Benefits in Claimant’s Survivor’s Claim (2011-BLA-5521 and 2011-BLA-5521) of Administrative Law Judge Adele Higgins Odegard with respect to a miner’s claim filed on April 24, 2009, and a survivor’s claim filed on April 21, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).¹ The administrative law judge credited the miner with 26.42 years of coal mine employment, consisting of 12.82 years of underground work and 13.60 years of preparation plant work, and adjudicated the claims pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish that the miner’s 13.60 years of work at a coal preparation plant constituted qualifying coal mine employment for purposes of the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) and, thus, claimant was not entitled to invocation of the presumption.² Absent benefit of the presumption, the administrative law judge found that the evidence was sufficient to establish simple clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish that the miner’s disability was due to his clinical pneumoconiosis pursuant to 20 C.F.R. §718.204(c), or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Accordingly, the administrative law judge denied benefits in both the miner’s claim and the survivor’s claim.

On appeal, claimant maintains that the evidence establishes that the conditions in the miner’s surface work were similar to those in underground coal mine employment. Thus, claimant asserts that the presumption at amended Section 411(c)(4) is applicable to these claims, and that the evidence is insufficient to establish rebuttal of the presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers’ Compensation Programs, has declined to file a response brief in this appeal.³

¹ Claimant is the widow of the miner, Danny H. Treadway, who died on March 4, 2010. Director’s Exhibit 9. The miner was receiving black lung benefits at the time of his death, pursuant to a proposed Decision and Order dated November 4, 2009. Decision and Order at 3, 43.

² Relevant to these claims, reinstated Section 411(c)(4) of the Act provides a rebuttable presumption of total disability or death due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. Both underground coal mine employment and surface coal mine employment in conditions that are substantially similar to those in an underground mine constitute “qualifying” coal mine employment pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4)(2012).

³ We affirm, as unchallenged on appeal, the administrative law judge’s findings with regard to the length of coal mine employment, and her findings that the evidence

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.⁴ 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).

In order to establish entitlement to benefits in the miner's claim under 20 C.F.R. Part 718, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. To establish entitlement in her survivor's claim pursuant to 20 C.F.R. Part 718, claimant must demonstrate, 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, that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, that the miner's death was caused by complications of pneumoconiosis, that the miner suffered from complicated pneumoconiosis, or that the presumption at 20 C.F.R. §718.305 is invoked and not rebutted. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202(a), 718.203, 718.205, 718.304, 718.305; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). 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, 16 BLR 2-90 (4th Cir. 1992). Failure to establish any one of the required elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

In order to invoke the presumption at amended Section 411(c)(4), claimant must establish that the miner had at least fifteen years of "employment in one or more

was sufficient to establish simple clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), but insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2), but insufficient, absent the benefit of the presumption at amended Section 411(c)(4), to establish disability causation at 20 C.F.R. §718.204(c), or death due to pneumoconiosis at 20 C.F.R. §718.205. *Id.*

⁴ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

underground coal mines,” or “employment in a coal mine other than an underground mine,” in conditions that were “substantially similar to conditions in an underground mine.” 30 U.S.C. §921(c)(4); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). For a surface miner to prove that his or her work conditions were substantially similar to those in an underground mine, the miner is required to proffer only sufficient evidence of dust exposure in his or her work environment. *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988); see *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001); see also *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 876 (3d Cir. 1986)(“The term ‘substantially similar conditions’ refers to conditions in which a worker inhales a similar quantity of dust from the coal mine environment as do miners.”). A claimant is not required to directly compare the miner’s work environment to conditions underground, but can establish similarity by proffering “sufficient evidence of the surface mining conditions in which he worked.” *Leachman*, 855 F.2d at 512. The administrative law judge, based on her expertise and knowledge of the industry, must then “compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.” *Id.*

In this case, the administrative law judge found that the record established “at most” 12.82 years of underground coal mine employment, and 13.60 years of above-ground coal mine work at a coal preparation plant. Decision and Order at 9-10. The administrative law judge determined that the record did not reveal whether the preparation plants at which the miner worked were on the sites of underground mines, and that “there is no record evidence regarding the dust conditions in the miner’s coal preparation work, other than his answers to the yes/no question ‘exposure to dust, gases, or fumes?’” Decision and Order at 10; Director’s Exhibit 3 (Miner’s Claim). As the miner’s response did not indicate “whether his exposure to ‘dust, gases or fumes’ was regular or sporadic,” the administrative law judge found that the miner did not state, nor did the record otherwise demonstrate, that his preparation plant work regularly involved exposure to coal mine dust. *Id.* Thus, the administrative law judge found that the miner’s preparation plant employment did not constitute “qualifying” coal mine employment for purposes of the Section 411(c)(4) presumption, and concluded that claimant was not entitled to invocation of the presumption at Section 411(c)(4) in either the miner’s claim or the survivor’s claim. Decision and Order at 10, 36, 40.

Claimant asserts that “there is considerably more evidence to demonstrate that [the miner] was continually exposed to coal mine dust throughout his coal mine career than statements that he was exposed to ‘dust, gases, or fumes’ throughout his coal mine career.” Claimant’s Brief at 6.⁵ Claimant relies on the miner’s job description regarding his last five years of coal mine employment: “I worked at a coal prep plant I was

⁵ Claimant’s brief is unpaginated.

responsible for loading railroad cars with coal. If none were at the load out, I would have other duties such as shoveling coal from belt lines, operating heavy equipment, maintaining supply yards. Most of the time I was standing up to 8 hours a day.” *Id.*; Director’s Exhibit 4 (Miner’s Claim). Claimant also cites evidence referencing coal mine employment histories of 25.01, 27 and 28 years, as well as work histories from Drs. Rasmussen and Zaldivar identifying the miner’s preparation plant jobs operating an end loader and loading railroad cars,⁶ and coal mine industry work histories recorded by Drs. Caffrey, Oesterling and Basheda. Claimant’s Brief at 6-9. Claimant thus contends that the administrative law judge erred in finding that claimant was not entitled to invocation of the amended Section 411(c)(4) presumption. We disagree.

The administrative law judge correctly determined that the miner’s affirmative response to the question of whether he was exposed to dust, gases, or fumes did not indicate whether he was *regularly* exposed to dust, gases, or fumes.⁷ Thus, she rationally found that this evidence failed to carry claimant’s burden of establishing that the miner’s plant preparation work involved regular exposure to coal dust conditions similar to those in an underground mine. Decision and Order at 9-10; Director’s Exhibit 3 (Miner’s Claim). Nor does the evidence identified by claimant contain relevant details or otherwise depict the degree or incidence of dust, gases, or fumes dispersed in the miner’s work environment. We therefore reject claimant’s assignment of error.⁸ Based on the lack of relevant testimony or additional evidence in the record, we conclude that the administrative law judge properly found that claimant did not meet her burden of

⁶ Claimant asserts that Dr. Zaldivar’s work history documents the miner’s description of his coal preparation plant work loading and unloading cars with an end loader, stating that: “the end loaders did not have any air conditioning and the cab had to remain open. For the last 7 or 8 years he was in an enclosed office and he operated the shoot [sic] by pushing a button.” Claimant’s Brief at 7.

⁷ The administrative law judge correctly recognized that exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment, *see Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 876 (3d Cir. 1986); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990), as the definition of coal mine dust is not limited to dust that is generated during the extraction or preparation of coal, but encompasses “the various dusts around a coal mine.” *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55, 1-57 (1990).

⁸ Claimant’s citation to cases involving comparability findings premised on credited testimony is inapposite here, as claimant identifies no testimony relevant to the degree and incidence of dust, fumes, and gases prevalent in the miner’s coal preparation plant work. *See* Claimant’s Brief at 8-9; Decision and Order at 4; Hearing Transcript at 7, 24, 25-26.

showing that the miner was exposed to a sufficient amount of coal mine dust to establish the requisite similarity between the miner's coal mine dust exposure in surface mining and dust conditions underground. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); *see also Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). As substantial evidence supports the administrative law judge's findings, they are affirmed.

Because claimant established less than the requisite fifteen years of qualifying coal mine employment, we affirm her finding that claimant is not entitled to invocation of the amended Section 411(c)(4) presumption in either claim. Thus, claimant's remaining argument, that the medical opinions of record are insufficient to establish rebuttal of the Section 411(c)(4) presumption is rejected.⁹ As claimant did not challenge the administrative law judge's finding that the evidence failed to establish that the miner's total disability and death were due to his clinical pneumoconiosis pursuant to Sections 718.204(c), 718.205, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we affirm the denial of benefits in both the miner's claim and the survivor's claim.

⁹ According to claimant, the various medical opinions "cannot rebut the legal presumption that [the miner] was disabled by his pneumoconiosis;" hence, "the evidence is insufficient as a matter of law to rebut the presumption." Decision and Order at 10-11. Claimant does not challenge the administrative law judge's determination that the opinion of Dr. Rasmussen, "the only physician to have opined that the [m]iner's disabling impairment was at all related to coal mine employment," was not well-reasoned and merited "little weight." Decision and Order at 34-37.

Accordingly, the Decision and Order Denying Benefits in Miner's Claim and Denying Benefits in Claimant's Survivor's Claim, is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge