

BRB No. 13-0442 BLA

RICHARD DEAN KENNARD)
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 Claimant-Respondent)
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 v.)
)
 BRANDYWINE EXPLOSIVES & SUPPLY) DATE ISSUED: 05/12/2014
)
 and)
)
 KENTUCKY EMPLOYERS MUTUAL)
 INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton
PLLC), Pikeville, Kentucky, for employer.

Rita Roppolo (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05020) of Administrative Law Judge Joseph E. Kane with respect to a claim filed on August 18, 2009, 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 found that employer is the properly designated responsible operator and that claimant established twenty-one years and seven and one-half months of surface coal mine employment, with at least fifteen years in conditions substantially similar to those in underground coal mine employment. The administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718 and found that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).¹ The administrative law judge also determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's determination that it was the properly designated responsible operator. In addition, employer argues that the administrative law judge erred in applying the presumption at amended Section 411(c)(4) in this case, based on his finding of at least fifteen years of qualifying coal mine employment. Employer further asserts that, even assuming that the presumption was properly applied, the administrative law judge erred in determining that employer did not rebut the presumption. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), asserts that employer's arguments lack merit.²

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in

¹ Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes 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), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

² We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

I. Responsible Operator

In relevant part, the regulations define an operator as “any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine.” 20 C.F.R. §725.491(a)(1). In order to be designated a *responsible* operator, an employer must have, *inter alia*, employed claimant as a miner “for a cumulative period of at least one year.” 20 C.F.R. §725.494(c) (internal citation omitted). A miner is defined, in pertinent part, as “any individual who . . . has worked in or around a coal mine . . . in the extraction . . . of coal.” 20 C.F.R. §§725.101(a)(19), 725.202(a). Pursuant to 20 C.F.R. §725.202(a), there is a rebuttable presumption that any person working in or around a coal mine is a miner. This presumption “may be rebutted by proof that . . . the individual was not regularly employed in or around a coal mine” 20 C.F.R. §725.202(a)(2).

In considering whether employer was the properly designated responsible operator, the administrative law judge noted the regulatory definition of an operator and initially found, “blasting contractors, such as the Employer, which perform the blasting services at surface mines but do not actually own or operate a mine, are still considered operators under the Act.” Decision and Order at 3-4, citing 20 C.F.R. 725.491(a)(1). The administrative law judge then rejected employer’s allegation that, because claimant testified that he spent up to half of his working hours delivering explosives to strip mines and construction sites, he did not perform qualifying coal mine employment for employer for at least one year, as is required at 20 C.F.R. §725.494(c). Decision and Order at 4. The administrative law judge stated, “[e]ven assuming that the [e]mployer is correct that only one-fourth of the Claimant’s total employment with the [e]mployer qualifies as coal mine employment . . . the Claimant still has more than 125 days of coal mine employment with [e]mployer.” *Id.* The administrative law judge concluded, therefore, that employer is the properly designated responsible operator under 20 C.F.R. §725.494(c). *Id.*

Employer reiterates its contention that claimant did not spend enough time performing blasting duties at coal mine sites to support its designation as the responsible operator. Employer specifically maintains that there is “no evidence that employer meets

³ The record reflects that claimant’s coal mine employment was in Kentucky. Director’s Exhibits 3, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

the statutory definition to be considered an ‘operator’ under the Act.” Employer’s Brief at 14. The Director responds and urges the Board to hold that employer has not sufficiently invoked the Board’s review authority, as employer does not contest the administrative law judge’s finding that, as an independent contractor that performed services at a coal mine, it fell within the definition of an operator set forth in 20 C.F.R. §725.491(a)(1).

To the extent that employer challenges the administrative law judge’s finding that it satisfies the definition of an operator, we reject this challenge. The administrative law judge reviewed the evidence relevant to employer’s activities and rationally concluded that, in its role as a supplier of blasting services and supplies at mine sites, employer was an “independent contractor performing services or construction” at a mine, pursuant to 20 C.F.R. §725.491(a)(1). *See Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992). Because employer identifies no specific error in the administrative law judge’s calculation that claimant performed dynamite blasts at surface mines for periods totaling at least one calendar year, as defined in 20 C.F.R. §718.101(a)(32), we affirm the administrative law judge’s finding that claimant’s work for employer satisfied the requirements of 20 C.F.R. §725.494(c). *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff’d* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Consequently, we affirm the administrative law judge’s determination that employer is the properly designated responsible operator.

II. Invocation of the Amended Section 411(c)(4) Presumption – Length of Coal Mine Employment

To invoke the amended Section 411(c)(4) presumption, claimant must establish at least fifteen years of “employment 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), as implemented by 78 Fed. Reg. 59,102, 59, 115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(b)(1)(i); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). To prove that working conditions at a surface mine were substantially similar to those in an underground mine, a claimant must provide 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 for the administrative law judge “to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.” *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988); *see Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). A claimant’s un rebutted testimony can support a finding of substantial similarity. *Summers*, 272 F.3d at 479, 22 BLR at 2-275.

The administrative law judge initially found that claimant established more than fifteen years of coal mine employment at surface mines. Decision and Order at 14. The administrative law judge then considered claimant's testimony that he was exposed to "plenty" of coal dust and that there was "a lot of dust flying and it wasn't self-contained." *Id.*, quoting Hearing Transcript at 17. In addition, the administrative law judge indicated that claimant testified that, as a blaster, he was exposed to "a whole lot of dust. Dust would be flying because you're putting off a charge in the ground and you got a whole lot of dust comes in the air." Decision and Order at 14, quoting Hearing Transcript at 18. Based on claimant's testimony, the administrative law judge determined that claimant's work at the surface of coal mines was in conditions substantially similar to that of underground coal mine employment. Decision and Order at 14-15.

Employer argues that, claimant's "testimony alone should be insufficient as a matter of law to rely on for a substantially similar determination." Employer's Brief at 12. Employer asserts that claimant "would not have been in the vicinity of a blast and did not return to the blasting area until after receipt of an all clear signal," and that claimant's duties included sites other than coal mines. *Id.* at 13. Employer also contends that the administrative law judge relied on "very minimal testimony" from claimant, and that this evidence was insufficient to prove that claimant worked for at least fifteen years in conditions substantially similar to those in underground mines. *Id.* Therefore, employer maintains that the administrative law judge erred in finding that claimant invoked the amended Section 411(c)(4) presumption.

Contrary to employer's argument, claimant's testimony, standing alone, can establish the nature of the surface mining conditions that the administrative law judge then compares to the conditions known to occur in an underground mine. *See Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Muncy*, 25 BLR at 1-29. In addition, employer's description of claimant's location during blasting is consistent with claimant's testimony and contains nothing that contradicts his characterization of the dust conditions post-blasting. *See* Hearing Transcript at 17-18, 34-35. Therefore, the administrative law judge acted within his discretion as fact-finder in concluding that claimant's testimony was sufficient to establish that his surface mine work took place in conditions substantially similar to those in an underground mine. 78 Fed. Reg. 59,102, 59,114-115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(b)(2); *see Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995). Consequently, we affirm the administrative law judge's finding that claimant established at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine, and invoked the presumption at amended Section 411(c)(4).

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

Employer maintains that the administrative law judge erred in concluding that it did not rebut the presumed existence of legal pneumoconiosis,⁴ as “[a]t worse, an overwhelming preponderance of the evidence rules out legal pneumoconiosis and, at best, clearly establishe[s] that even if [the] same existed[,] pursuant to Dr. Alam’s opinions[,] that same is *de minimus* or infinitesimal.”⁵ Employer’s Brief at 10. Employer states that, of the three physicians offering opinions concerning the existence of legal pneumoconiosis, Drs. Dahhan and Broudy, who are Board-certified pulmonary specialists, did not diagnose the disease, while Dr. Alam indicated that only ten percent of claimant’s impairment was due to coal mine employment, with potentially one hundred percent being due to non-coal mine related cancer. Employer’s arguments lack merit.

The administrative law judge acted within his discretion as fact-finder in determining that Dr. Alam’s opinion regarding the existence of legal pneumoconiosis was entitled to little weight, as “[i]t is unclear if Dr. Alam considers coal dust exposure to have been a substantial cause of the Claimant’s emphysema,” because “[h]e stated that coal dust ‘could have done some aggravation’ of the emphysema.” Decision and Order at 23, quoting Employer’s Exhibit 27 at 17; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Based on this finding, the administrative law judge reasonably determined that Dr. Alam’s opinion was “equivocal and vague” and, therefore, was insufficient to rebut the presumed existence of legal pneumoconiosis.

⁴ 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment “significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” 20 C.F.R. §718.201(b).

⁵ The administrative law judge determined that, giving the most weight to the negative biopsy evidence, employer rebutted the presumed existence of clinical pneumoconiosis. Decision and Order at 22. However, in order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical or legal pneumoconiosis, or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

Decision and Order at 25; *see Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Consequently, we affirm the administrative law judge's finding. We further affirm the administrative law judge's determination that the opinions of Drs. Dahhan and Broudy were insufficient to establish rebuttal of the presumed existence of legal pneumoconiosis, as it is unchallenged by employer on appeal.⁶ *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Finally, we affirm the administrative law judge's finding that employer also did not rebut the amended Section 411(c)(4) presumption by establishing that claimant's total disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment, as employer reiterates its contention regarding Dr. Alam's opinion and does not otherwise specifically identify any error in the administrative law judge's finding.⁷ *See Cox*, 791 F.2d at 447, 9 BLR at 2-47; *Sarf*, 10 BLR at 1-120-21; *Skrack*, 6 BLR at 1-711; Decision and Order at 23-26. Thus, we further affirm the award of benefits.

⁶ The administrative law judge gave less weight to Dr. Broudy's opinion, as he found that Dr. Broudy did not adequately explain his conclusion that coal dust exposure was not a contributing cause of claimant's impairment. Decision and Order at 23-25; *see* Director's Exhibit 15; Employer's Exhibits 3, 7. The administrative law judge discredited Dr. Dahhan's opinion, that claimant's impairment was unrelated to pneumoconiosis for several reasons: the doctor was inconsistent in describing claimant's impairment and identifying its etiology; the doctor had excluded pneumoconiosis, in part, because claimant had been prescribed bronchodilators, although none of the pulmonary function studies exhibited a significant response to bronchodilators; and Dr. Dahhan did not sufficiently explain why claimant's coal dust exposure could not have contributed to the reduction in claimant's FEV1. Decision and Order at 24-25; *see* Employer's Exhibits 2, 5, 6.

⁷ Concerning total disability causation, the administrative law judge gave less weight to the opinions of Drs. Broudy and Dahhan, as he found that they did not diagnose legal pneumoconiosis, which was contrary to his finding. Decision and Order at 25-26.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge