U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 24-0357 BLA
and 24-0358 BLA

HELEN JUNE RUSSELL (o/b/o and Widow of ROGER JAY RUSSELL)	)	
Claimant-Respondent	)	
v.	)	
BURLIN HOWARD TRUCKING	)	**NOT-PUBLISHED**
and	)	
KENTUCKY EMPLOYERS' MUTUAL INSURANCE	)	DATE ISSUED: 04/29/2025
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 in Miner's Claim and Awarding Benefits in Survivor's Claim of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe William & Austin), Norton, Virginia, for Claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for Employer and its Carrier.

Jeffrey S. Goldberg (Jonathan Snare, Deputy Solicitor of Labor; Jennifer Feldman Jones, Acting Associate Solicitor; William M. Bush, Acting Counsel for Administrative Appeals), Washington, D.C., for the Acting Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits in Miner's Claim and Awarding Benefits in Survivor's Claim (2020-BLA-05285, 2021-BLA-05923) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on June 15, 2018,[1] and a survivor's claim filed on April 9, 2020.

The ALJ initially found Employer is the properly designated responsible operator. He further credited the Miner with twenty-eight years of coal mine employment which involved a combination of underground coal mine employment and surface coal mine employment in conditions substantially similar to those in an underground mine. He determined the Miner had a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Therefore, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4) (2018). He concluded Employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim, he determined that because the Miner was entitled

[1] The Miner, Roger Jay Russell, died on January 5, 2020. Survivor's Claim (SC) Director's Exhibit 20. Claimant, the Miner's widow, is pursuing the miner's claim on behalf of his estate and her survivor's claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner was totally disabled due to pneumoconiosis if he had fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

to benefits at the time of his death, Claimant is automatically entitled to survivor's benefits pursuant to Section 422(*l*) of the Act,[3] 30 U.S.C. §932(*l*) (2018).

On appeal, Employer argues the ALJ erred in finding it is the responsible operator. It also argues the ALJ erred in finding Claimant established at least fifteen years of qualifying coal mine employment and total disability, thereby invoking the Section 411(c)(4) presumption. Claimant and the Acting Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order 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 Assocs., Inc.*, 380 U.S. 359 (1965).

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1).[5] Once the district director properly identifies a potentially liable operator, it may be relieved of liability only if it shows either that it is financially incapable of paying

[3] Section 422(*l*) of the Act provides that the survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

[4] We will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 16-17.

[5] The regulation at 20 C.F.R. §725.494 requires that the miner's disability or death must have arisen at least in part out of employment with the operator; the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; the operator must have employed the miner for a cumulative period of not less than one year; the miner's employment included at least one working day after December 31, 1969; and the operator is capable of assuming liability for benefits. 20 C.F.R. §725.494(a)-(e).

benefits or that another financially capable operator more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

If the responsible operator that the district director designates is not the operator that most recently employed the miner, the district director is required to explain the reasons for such designation. 20 C.F.R. §725.495(d). If the reasons include the most recent operator's inability to assume liability for the payment of benefits, the record must include a statement that the Office of Workers' Compensation Programs has no record of insurance coverage for that operator or of its authorization to self-insure. *Id*. "Such a statement shall be prima facie evidence that the most recent employer is not financially capable of assuming its liability for a claim." *Id*. In the absence of such a statement, "it shall be presumed that the most recent employer is financially capable of assuming its liability for a claim." *Id.*

Employer does not challenge that it meets the criteria of a potentially liable operator at 20 C.F.R. §725.494(a)-(e). Thus we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Rather, it argues two more recent operators are financially capable of assuming liability. Employer's Brief at 14-20 (unpaginated). It asserts the district director did not properly investigate whether Ricky Lefevers Trucking (Ricky Lefevers) or Barry Jackson Trucking (Barry Jackson), two entities that more recently employed the Miner for more than one year, are financially capable of paying benefits.[6] *Id*. Thus, Employer asserts liability should transfer to the Black Lung Disability Trust Fund. *Id.* at 20 (unpaginated). The Director asserts the district director conducted its responsible operator investigation in accordance with the Act and Employer did not meet its burden to show a different operator

[6] Relying on the Board's decision in *England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-144 (1993), Employer argues the Director always bears the burden of establishing more recent operators are not financially capable of assuming liability. Employer's Brief at 18-20 (unpaginated). Employer's reliance on *England* is misplaced. *England* arose under the former version of the responsible operator regulations. Moreover, as the Director points out, the 2001 regulatory revisions established that after the Director meets his initial burden of establishing that the designated responsible operator is a potentially liable operator, the burden "shifts to the designated responsible operator to prove either that it is financially incapable of assuming liability for the payment of benefits or that another potentially liable operator (i.e., an operator that meets the criteria in § 725.494) employed the miner more recently." 65 Fed. Reg. 79,920, 80,009 (Dec. 20, 2000); *see* 20 C.F.R. §725.495(d); 62 Fed. Reg. 3,338, 3,363-65 (Jan. 22, 1997); Director's Brief at 6 n.4

is capable of paying benefits. Director's Brief at 5-7. We agree with the Director's assertion.

Insofar as the district director did not name Ricky Lefevers or Barry Jackson as the responsible operator based on their inability to assume liability, the district director provided the required regulatory statement pursuant to 20 C.F.R. §725.495(d). With an assumed last date of employment of "2011" for Ricky Lefevers and "October 2017" for Barry Jackson, the statement indicates the Department of Labor "has no record of insurance coverage for [either entity], or of authorization to self-insure . . . that was effective on the date on which [either] operator last employed the" Miner. (Miner's Claim) MC Director's Exhibits 22, 23. Thus, contrary to Employer's argument, having put forward prima facie evidence that Ricky Lefevers and Barry Jackson are not financially capable of assuming liability, the district director met its obligation and the burden shifted to Employer to show that either Ricky Lefevers or Barry Jackson possesses sufficient assets to pay benefits.[7] 20 C.F.R. §725.495(c), (d); *see Lester v. Mack Coal Co*., 21 BLR 1-126 (1999) (en banc); *see also Mitchem v. Bailey Energy, Inc*., 21 BLR 1-161, 1-169-70 (1999) (en banc).

Nor do we discern any error in the ALJ's finding that Employer failed to meet its burden of proof. The record contains Barry Jackson's tax returns for the years 2015 to 2017, but the Miner filed this claim in 2018. Director's Exhibits 2, 27. Thus Barry Jackson's revenue from 2015 to 2017 does not address whether the entity can pay black lung benefits in 2018.

Further, in response to the district director's inquiry, Barry Jackson submitted a workers' compensation policy with a handwritten note indicating Barry Jackson was insured with Imperium insurance in 2014 and 2015. Director's Exhibit 27. And the record includes a workers' compensation policy that Barry Jackson had with Imperium insurance with a coverage date of April 1, 2017. Director's Exhibit 66 at 74. But there is no indication that the workers' compensation policy was effective on the Miner's last date of employment in October 2017 or that there is coverage for federal black lung benefits. Director's Exhibit 27.

During his deposition, the Miner testified that Barry Jackson is still operating his business and that he has no more than seven employees. Director's Exhibit 66 at 36-37. Further, the Miner testified that Ricky Lefevers sold his coal trucks when the Miner left his position at Ricky Lefevers. *Id.* at 29. The Miner testified Ricky Lefevers left the coal

[7] In addition to satisfying 20 C.F.R. §725.495(d), the district director attempted to get more information from Ricky Lefevers and Barry Jackson regarding their financial capabilities. Director's Exhibits 25-27.

business and now operates in the cattle hauling business under the name Black Rock Trucking. *Id.* at 30.

The ALJ rationally found that while "the record contains some information about the income of" Ricky Lefevers and Barry Jackson, Employer did not provide any information as to whether such income would be sufficient to establish either entity is financially capable of assuming liability. Decision and Order at 11; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998).

Because Employer failed to establish either Ricky Lefevers or Barry Jackson is capable of assuming liability, we affirm the ALJ's finding that Employer is the responsible operator as it is supported by substantial evidence. *See Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 322-23 (6th Cir. 2014).

The Miner's Claim - Invocation of the Section 411(c)(4) Presumption - Coal Mine Employment

To invoke the Section 411(c)(4) presumption, Claimant must establish the Miner had at least fifteen years of employment in underground coal mines or surface coal mines in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4) (2018); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The conditions in a surface mine are "substantially similar" to those underground if "the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The ALJ found the Miner was engaged in coal mine employment in a combination of underground and surface mines for twenty-eight years and that he was regularly exposed to coal mine dust throughout his surface coal mine employment. Decision and Order at 7-9.

Employer's only argument is the ALJ adopted a flawed standard with respect to the Miner's surface coal mine employment because Claimant is required to show the Miner was exposed to an "equivalent amount" of coal dust as an underground miner would experience. Employer's Brief at 20 (unpaginated). Contrary to Employer's argument, Claimant is not required to prove the dust conditions aboveground were identical to those underground.[8] *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790

[8] Moreover, Claimant is not required to establish regular dust exposure working aboveground at an underground coal mine site. The type of mine (underground or surface), rather than the location of the particular worker (below ground or aboveground), determines whether a miner is required to show comparability of conditions. *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1058 (6th Cir. 2013); *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-28-29 (2011). Thus, a miner who worked aboveground at an underground

F.3d 657, 664-65 (6th Cir. 2015); *Director, OWCP v. Midland Coal Co.*, 855 F.2d 509, 512 (7th Cir. 1988) ("a surface miner must only establish that he was exposed to sufficient coal dust in his surface coal mine employment" in order to qualify for the Section 411(c)(4) presumption); 78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013). Rather, Claimant need only establish he was "regularly exposed to coal-mine dust" while working at surface mines. 20 C.F.R. §718.305(b)(2). Therefore, we reject Employer's argument.

As Employer raises no separate argument, we affirm, as supported by substantial evidence,[9] the ALJ's finding the Miner had twenty-eight years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. *Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(b); Decision and Order at 9.

Total Disability

A miner is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The ALJ must weigh all relevant supporting evidence against all relevant contrary evidence. *See Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-28-29 (1988); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

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mine site need not otherwise establish that his working conditions were substantially similar to those in an underground mine. *Ramage*, 737 F.3d at 1058-59; *Muncy*, 25 BLR at 1-29.

[9] With respect to the Miner's surface coal mine employment, the ALJ considered the Miner's responses to Employer's interrogatories that stated he was exposed to coal dust every day it did not rain while working for Tennco, Employer, Ricky Lefevers, and Barry Jackson. MC Director's Exhibit 66 at 89-91. The ALJ found the Miner's uncontradicted, "fully credible" testimony establishes he was regularly exposed to coal mine dust during his surface coal mining employment. Decision and Order at 9; *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018).

The ALJ found Claimant established total disability based on the arterial blood gas studies, medical opinions, and evidence as a whole.[10] 20 C.F.R. §718.204(b)(2)(ii), (iv); Decision and Order at 14-19.

We affirm the ALJ's finding the blood gas study evidence supports total disability, as it is unchallenged. 20 C.F.R. §718.204(b)(2)(ii); Decision and Order at 14.

Employer argues the ALJ erred in finding the medical opinions support total disability. Employer's Brief at 12-13 (unpaginated). Before weighing the medical opinions, the ALJ found "the Miner's usual coal mine work" as a truck driver "involved heavy labor, because on occasion he was required to lift tires weighing at least 100 pounds, either alone or with assistance." Decision and Order at 9-10. He then noted that Drs. Tuteur, Nader, Dahhan, and Green all opined the Miner was totally disabled from his job as a coal truck driver. Decision and Order at 18-19; MC Director's Exhibit 17; Employer's Exhibits 1, 2; Claimant's Exhibit 13. He found their opinions reasoned and documented and credited them because they understood the exertional requirements of the Miner's usual coal mine employment. Decision and Order at 18-19.

Employer argues the ALJ erred in finding the Miner's usual coal mine employment required heavy labor because he had to lift 100 pounds only once a week or once a month. Employer's Brief at 12-13 (unpaginated). Contrary to Employer's argument, in evaluating the exertional requirements of a miner's usual coal mine employment, an ALJ must determine the exertional requirements of the most difficult job the miner performed. *Eagle v. Armco Inc.*, 943 F.2d 509, 512 n.4 (4th Cir. 1991). As it is supported by substantial evidence, we affirm the ALJ's finding that the Miner's usual coal mine work required heavy labor. *See Martin v. Ligon Preparation Coal Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion); Decision and Order at 9-10.

As Employer does not otherwise challenge the ALJ's finding that the medical opinions of Drs. Tuteur, Nader, Dahhan, and Green support total disability and are reasoned and documented, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 18-19. We thus affirm the ALJ's finding that the medical opinion evidence supports a finding of total disability. 20 C.F.R. §718.204(b)(2)(iv).

We further affirm the ALJ's finding that Claimant established total disability based on the evidence as a whole. 20 C.F.R. §718.204(b)(2); *Rafferty*, 9 BLR at 1-232; *Shedlock*,

[10] The ALJ found Claimant did not establish total disability based on the pulmonary function studies, or evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i), (iii); Decision and Order at 12-14.

9 BLR at 1-198; Decision and Order at 19. Thus, we affirm his finding that Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §718.305. As Employer raises no arguments concerning rebuttal, we also affirm the ALJ's finding that it did not rebut the presumption. *See Skrack*, 6 BLR at 1-711; 20 C.F.R. §718.305(d)(1); Decision and Order at 19-40. We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

Because we have affirmed the award of benefits in the miner's claim and Employer raises no specific challenge to the survivor's claim, we affirm the ALJ's determination that Claimant is derivatively entitled to survivor's benefits. 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.

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

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge