BRB No. 11-0786 BLA

JOHN DOUGLAS WEST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 08/08/2012
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (07-BLA-5747) of Administrative Law Judge Daniel F. Solomon rendered on a 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). This case, involving a subsequent claim[1] filed on July 10, 2006, is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with at least twenty-four years of surface coal mine employment, based on the parties' stipulation. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *West v. Peabody Coal Co.*, BRB No. 10-0103 BLA, slip op. at 5-11 (Oct. 21, 2010) (unpub.).[2] The Board, however, vacated the administrative law judge's determination that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), noting that, after the administrative law judge's decision, an amendment to the Act was enacted that affected the claim. *West*, slip op. at 2-4, 12. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 the evidence establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). Because claimant established the existence of a totally disabling respiratory impairment, and at least twenty-four years of surface mine employment, the Board vacated the denial of benefits and remanded the case for the administrative law judge to determine whether claimant's coal mine employment

[1] Claimant's initial claim, filed on November 25, 2002, was finally denied on June 8, 2004, because claimant failed to establish the existence of pneumoconiosis or disability causation. Director's Exhibit 1.

[2] The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty-four years of coal mine employment and that he has a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that his total respiratory disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *West v. Peabody Coal Co.*, BRB No. 10-0103 BLA, slip op. at 2 n.3 (Oct. 21, 2010) (unpub.).

occurred in conditions substantially similar to those in an underground mine, thereby establishing invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *West*, slip op. at 12. The Board further instructed the administrative law judge that if he found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, he was then to determine whether employer rebutted the presumption, by establishing that claimant does not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id*. The Board also instructed the administrative law judge to allow for the submission of additional evidence by the parties to address the change in law, consistent with the evidentiary limitations at 20 C.F.R. §725.414. *Id*.

On remand, the administrative law judge considered the claim under amended Section 411(c)(4),[3] and found that claimant failed to establish that at least fifteen years of his surface coal mine employment took place in conditions substantially similar to those in an underground mine. Decision and Order on Remand at 3. Therefore, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption, and thus, did not establish a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he did not establish at least fifteen years of coal mine employment in conditions substantially similar to those in an underground mine and therefore, erred in finding that he did not invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant that the administrative law judge erred in finding that claimant did not establish the requisite qualifying coal mine employment. Employer responds in support of the administrative law judge's denial of benefits. In a reply brief, claimant reiterates his previous contentions.

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

[3] In view of the potential applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge, on remand, reopened the record so that the parties could submit evidence in response to the change in the law. The parties submitted no new evidence.

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding that he did not invoke the Section 411(c)(4) presumption. Specifically, claimant asserts that the administrative law judge applied an improper standard in determining that claimant did not provide evidence sufficient to establish that the conditions in which he worked were substantially similar to those in an underground mine. Claimant's contention has merit.

To establish that his work was substantially similar to underground coal mine employment pursuant to Section 411(c)(4), a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 480, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). 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 mines." *Leachman*, 855 F.2d at 512.

At the hearing, claimant described the work conditions in his twenty-four years of coal mine employment, during which he worked mostly as a welder.[5] He testified that for the first five and one-half years, he worked as a welder at a tipple, or preparation plant, where it was "extremely" dusty. Hearing Tr. at 10-11. He stated that when he left the tipple, he became a shop welder, repairing the equipment used in the strip mining operation, including stripping shovels, haul trucks, and drills. Hearing Tr. at 12. He testified that most of those repairs were performed "on site," either in the mine pit or wherever the equipment was located, and that sometimes the equipment was in operation as he welded. *Id.* He further stated that he had to remove dust from the equipment to be welded before he could begin, which would create dust that he inhaled, and that he had no protection from the dust. *Id.* He added that while welding in the shop was not as dusty as welding work at the tipple, when he was done for the day his appearance was still "extremely dusty," and that even after showering, he "blew dust out of [his] nose and coughed up black." Hearing Tr. at 14-15. He testified further that he was exposed to

---

States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[5] Claimant provided coal mine employment histories indicating that he worked as a drill helper from 1962 to 1963, and as a welder from 1969 to 1993, and that he was exposed to dust, gas, and fumes at both jobs. Director's Exhibits 4, 6.

coal mine dust "pretty much continuous[ly], because [he] worked seven days a week most of the time." Hearing Tr. at 15. Claimant's wife confirmed his testimony, stating that when he returned home from work he was a "[n]asty, dirty mess," despite having showered at the mine, and that he was "always blowing his nose . . . and coughing," whether he was working at the tipple or as a shop welder. Hearing Tr. at 49-50.

The administrative law judge noted that there was no contrary evidence. The administrative law judge, however, found that, with the exception of claimant's five and one-half years of work at the tipple, where conditions are known to be very dusty, claimant did not "provide[] a sufficient report . . . . to s[h]ow that the exposure was an equivalent to 15 years of underground mining." Decision and Order on Remand at 3. Specifically, the administrative law judge noted that, "[a]lthough it is plausible that [nineteen] years as a shop welder at an open pit are the equivalent to ten years of underground mining," claimant's testimony was not sufficient to establish comparability, because it would require the administrative law judge "to speculate how a comparison might have been rendered." *Id*.

Contrary to the administrative law judge's analysis, claimant is not required to compare his working conditions to those underground. *See Leachman*, 855 F.2d at 512. Claimant's testimony that he was exposed to coal mine dust on a daily basis, if credited, is sufficient under *Leachman* to satisfy the "substantially similar" requirement of Section 411(c)(4). *See Summers*, 272 F.3d at 480, 22 BLR at 2-276. Therefore, the administrative law judge erred in determining that claimant did not provide evidence sufficient to establish that he had at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine.

The Director asserts that since claimant provided uncontradicted evidence that he worked for twenty-four years in dust conditions substantially similar to those in an underground mine, the Board should reverse the administrative law judge's finding, and remand the case for him to consider whether employer has rebutted the Section 411(c)(4) presumption. Director's Brief at 5-6. The Board is not empowered to weigh the evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989). Therefore, we must vacate the administrative law judge's finding and remand this case for him to make a specific finding as to whether claimant worked in surface conditions substantially similar to conditions in an underground mine, for at least fifteen years. *Summers*, 272 F.3d at 479, 22 BLR at 2-275; *Leachman*, 855 F.2d at 512.

If, on remand, the administrative law judge determines that claimant's coal mine employment occurred in conditions substantially similar to those in an underground mine, thereby establishing invocation of the Section 411(c)(4) presumption, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), the administrative law

judge must then determine whether employer has rebutted the presumption. Contrary to employer's contention, the administrative law judge's prior finding, that claimant did not meet his burden to establish the existence of pneumoconiosis, does not preclude his entitlement. Employer's Brief at 15. If claimant establishes invocation of the Section 411(c)(4) presumption, it will be presumed that he has pneumoconiosis and is totally disabled by the disease. The burden will then shift to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge