

U.S. Department of Labor

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



BRB Nos. 18-0484 BLA  
And 19-0017 BLA

KAREN OLIVER (Widow of and o/b/o	)	
RONALD R. OLIVER)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
W-P COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	DATE ISSUED: 08/30/2019
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decisions and Orders Awarding Benefits of Drew A. Swank,  
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton,  
Virginia, for claimant.

Andrea Berg, Ashley M. Harman and Kathy L. Snyder (Jackson Kelly  
PLLC), Morgantown, West Virginia, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders Awarding Benefits (2017-BLA-06091, 2017-BLA-05564) of Administrative Law Judge Drew A. Swank, issued pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).<sup>1</sup> This case involves a deceased miner's claim filed on April 22, 2015, and a survivor's claim filed on January 17, 2017. The administrative law judge found the miner had at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment. Thus, he found claimant<sup>2</sup> invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>3</sup> He further found employer did not rebut the presumption and awarded benefits in the miner's claim. In a separate Decision and Order issued in the survivor's claim, the administrative law judge awarded derivative benefits to claimant pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l) (2012).<sup>4</sup>

On appeal, employer challenges the administrative law judge's finding the miner had fifteen years of underground coal mine employment sufficient to invoke the Section 411(c)(4) presumption. Employer also argues the administrative law judge erred in finding

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<sup>1</sup> We have consolidated for decision employer's appeals of the awards in the miner's claim and the survivor's claim.

<sup>2</sup> Claimant is the widow of the miner, who died on October 15, 2016. Miner's Claim (MC) Director's Exhibit 53. She is pursuing the miner's claim on his behalf, along with her own survivor's claim.

<sup>3</sup> Under Section 411(c)(4) of the Act, claimant is entitled to a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, if he had at least 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) (2012); 20 C.F.R. §718.305(b).

<sup>4</sup> Under Section 422(l) of the Act, the survivor of a miner who was eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

it did not rebut the presumption. Additionally, employer asserts that because the miner's claim was erroneously awarded, claimant is not entitled to derivative benefits in the survivor's claim. Claimant responds, urging affirmance of the awards of benefits in both claims. Employer has filed a reply to claimant's brief, reiterating its arguments. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in either appeal.

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.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Because the miner had a total respiratory disability,<sup>6</sup> claimant is entitled to the Section 411(c)(4) presumption if he had at least fifteen years of underground or substantially similar surface coal mine employment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. Conditions at a surface coal mine are "substantially similar" if the miner was "regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). Claimant bears the burden of proof to establish the number of years the miner worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985). The Board will uphold an administrative law judge's determination on length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011).

On his CM-911a Employment History form, the miner alleged twenty-three years of coal mine employment from 1972 to 1994, which the administrative law judge found is "generally support[ed]" by his Social Security Administration (SSA) earnings records.

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<sup>5</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

<sup>6</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that the miner was totally disabled. 20 C.F.R. §718.204(b)(2); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); MC Decision and Order at 16-17.

Miner's Claim (MC) Decision and Order at 4; MC Director's Exhibit 3. Relying on the SSA records, the administrative law judge found the miner worked for W&P Coal Corporation from 1974 to 1983, Deep Ford Mining Company from 1981 to 1989, Rocky Creek Mining, Incorporated from 1987 to 1989, and Lo-Ming Coal Corporation (Lo-Ming) from 1989 to 1996. MC Decision and Order at 4; MC Director's Exhibits 6, 7. He noted all of the miner's coal mine employment was underground "with the exception of his work at Lo-Ming, which took place at a 'surface load out' facility." MC Decision and Order at 4; MC Director's Exhibit 3. The administrative law judge found the miner worked for twenty-two years in coal mine employment with at least fifteen years spent in an underground mine.<sup>7</sup> MC Decision and Order at 4; MC Director's Exhibits 6, 7. Thus, he found claimant invoked the Section 411(c)(4) presumption.

Employer contends that the administrative law judge's finding of fifteen years of underground coal mine employment<sup>8</sup> does not satisfy the Administrative Procedure Act.<sup>9</sup> We agree. To credit the miner with a year of coal mine employment the administrative law judge must first determine whether he was engaged in coal mine employment for a period of one calendar year, or partial periods totaling one year. 20 C.F.R. §725.101(a)(32)(i). Employer correctly notes the SSA records do not provide the beginning or ending dates of the miner's employment for each year<sup>10</sup> and the administrative law judge did not address

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<sup>7</sup> The administrative law judge noted the miner's statements that he was exposed to coal dust while working at Lo-Ming Mining Corporation, MC Decision and Order at 4, *citing* MC Director's Exhibit 12, but he did not make a specific determination as to whether the miner had substantially similar surface coal mine employment. 20 C.F.R. §718.305(b)(2).

<sup>8</sup> Employer alleges the miner had no more than 16.64 years of total coal mine employment, and less than fifteen years of underground coal mine employment. Employer's Brief at 8.

<sup>9</sup> The Administrative Procedure Act (APA), 5 U.S.C. §§500-591, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

<sup>10</sup> Under the applicable regulations, the administrative law judge must first determine the beginning and ending dates of all periods of coal mine employment to the

whether the miner worked for a calendar year for each of the years he received earnings in coal mine employment.<sup>11</sup> Employer's Brief at 7; MC Director's Exhibits 6, 7. Because the administrative law judge did not explain his method of calculating fifteen years of underground coal mine employment from the SSA records, we are unable to review his determination. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (Board lacks the authority to render factual findings to fill in gaps in the administrative law judge's opinion). Thus, we vacate the administrative law judge's finding that claimant established fifteen years of underground coal mine employment and invoked the Section 411(c)(4) presumption. We therefore vacate the award of benefits in the miner's claim.<sup>12</sup>

On remand, the administrative law judge is instructed to determine the length of the miner's underground coal mine employment based on a reasonable method of calculation. *Muncy*, 25 BLR at 1-27. The administrative law judge should ascertain the beginning and ending dates of the miner's coal mine employment and identify the evidence and method by which he calculates the length of time the miner worked in either underground or surface coal mine employment.<sup>13</sup> 20 C.F.R. §725.101(a)(32)(ii). If the evidence is insufficient to

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extent the evidence permits. 20 C.F.R. §725.101(a)(32)(ii). The length and dates may be established "by any credible evidence." *Id.*

<sup>11</sup> The administrative law judge credited the miner with underground coal mine employment with Rocky Creek Mining, Incorporated, based on the SSA earnings record, although the miner did not list this company on his employment history, Form CM-911a. Director's Exhibit 3. Further, the administrative law judge did not explain his calculation in view of fact that the miner had earnings with both W&P Coal Company and Deep Ford Mining Company in the years 1981 and 1982. We are unable to discern if the administrative law judge gave the miner credit for duplicate periods of employment with these companies.

<sup>12</sup> Because we have vacated the award of benefits in the miner's claim, we decline to address employer's argument the administrative law judge erred in finding it did not rebut the Section 411(c)(4) presumption.

<sup>13</sup> If the evidence is insufficient to establish the beginning and ending dates of the miner's coal mine employment, or the miner's employment lasted less than a calendar year, the administrative law judge may use the formula at 20 C.F.R. §725.101(a)(32)(iii), by

establish that the miner had fifteen years of underground coal mine employment, the administrative law judge should determine whether his surface coal mine employment at Lo-Ming was performed in conditions substantially similar to those of an underground mine. 20 C.F.R. §718.305(b)(2); *see Muncy*, 25 BLR at 1-29 (claimant need not establish that the dust conditions were substantially similar if the miner's above-ground work was at the site of an underground mine). If claimant establishes fifteen years of qualifying coal mine employment on remand, she will invoke the Section 411(c)(4) presumption and the administrative law judge must determine whether employer rebutted it. Alternatively, if claimant is unable to establish fifteen years of qualifying coal mine employment, the administrative law judge must consider her entitlement under 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc). In rendering his findings on remand, the administrative law judge must consider all relevant evidence and explain his underlying rationale in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

### **The Survivor's Claim**

The administrative law judge found that claimant established each fact necessary to demonstrate her entitlement under Section 422(l): she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010;<sup>14</sup> and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Survivor's Claim (SC) Decision and Order at 2. Because we have vacated the award of benefits in the miner's claim, however, we vacate the administrative law judge's finding that claimant is entitled to derivative benefits.<sup>15</sup> SC Decision and Order at 2.

On remand, if the administrative law judge awards benefits in the miner's claim, claimant is entitled to survivor's benefits under Section 422(l). 30 U.S.C. §932(l). If the

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comparing the miner's reported income with the mine industry's average daily earnings as reported in Exhibit 610 of the BLBA Procedural Manual. 20 C.F.R. §725.101(a)(32)(iii).

<sup>14</sup> We affirm the administrative law judge's determinations regarding these three facts as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

<sup>15</sup> Employer challenges the constitutionality of Section 422(l) of the Act and the Board's holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014). Employer's Brief at 14. We decline to address employer's arguments in light of our disposition of the survivor's claim.

administrative law judge denies benefits in the miner's claim, he must determine whether claimant has established that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(b).

Accordingly, the administrative law judge's Decisions and Orders Awarding Benefits are affirmed in part and vacated in part, and the cases are remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge