

BRB No. 13-0265 BLA

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| JACQUELINE J. KEENE (Widow of NORMAN KEENE) |) |
| Claimant-Petitioner |) |
| v. |) |
| CONSOLIDATION COAL COMPANY |) DATE ISSUED: 12/18/2013 |
| 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 Denying Benefits of Pamela J. Lakes,
Administrative Law Judge, United States Department of Labor.

Darrell Dunham, Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for
employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-BLA-05148) of
Administrative Law Judge Pamela J. Lakes, rendered on a survivor's claim¹ filed on
January 3, 2005, pursuant to the provisions of the Black Lung Benefits Act, as amended,
30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the

¹ Claimant is the widow of the miner, Norman Keene, who died on July 27, 2004. Director's Exhibit 45.

second time.² This survivor's claim was previously consolidated with the miner's claim. Director's Exhibit 39. In a Decision and Order dated December 31, 2008, Administrative Law Judge Edward Terhune Miller denied benefits in both claims, and the Board affirmed those denials. *Keene v. Consolidation Coal Co.*, BRB Nos. 09-0352 BLA & 09-0403 BLA (Feb. 26, 2010) (unpub.). In consideration of claimant's appeal, the United States Court of Appeals for the Seventh Circuit³ affirmed the denial of benefits in the miner's claim and found no reversible error with regard to the denial of benefits in the survivor's claim, pursuant to 20 C.F.R. §718.205(c). However, the court remanded the case for consideration of the survivor's claim under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).⁴ See *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). On remand, the case was reassigned to Judge Lakes (the administrative law judge). Although the administrative law judge credited the miner with thirty-nine years of surface coal mine employment, she determined that the evidence was insufficient to establish that he worked at least fifteen of those years in conditions substantially similar to those found in an underground coal mine. Therefore, the administrative law judge concluded that claimant was unable to invoke the amended Section 411(c)(4) presumption. The administrative law judge also determined that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant contends that the administrative law judge erred in requiring that she establish that the miner's surface coal mine work was substantially similar to underground coal mine employment. Claimant maintains that the approach taken by the administrative law judge was unfair, under the circumstances of her case, and that she is

² We incorporate the procedural history of the case as set forth in *Keene v. Consolidation Coal Co.*, BRB Nos. 09-0352 BLA & 09-0403 BLA (Feb. 26, 2010) (unpub.).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment was in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 4.

⁴ Under amended Section 411(c)(4), if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and that the miner suffered from a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010); see 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725).

entitled to the amended Section 411(c)(4) presumption, based solely on the miner's lengthy coal mine employment history. Alternatively, claimant requests the case be remanded for the purpose of introducing evidence to establish the conditions of her husband's surface coal mine work. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief, unless specifically requested to do so by the Board.

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. 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 invoke the amended Section 411(c)(4) presumption, claimant must first establish that the miner "engaged in coal mine employment for fifteen years, either in one or more underground coal mines, or in coal mines other than underground mines in conditions substantially similar to those in underground mines, or in any combination thereof." 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. 20 C.F.R. §718.305(b)(1)(i)).

Claimant argues on appeal that she is entitled to invocation of the amended Section 411(c)(4) presumption, based on the significant number of years the miner worked in surface coal mine employment. Claimant notes that the miner worked for employer for more than 27.5 years, which is 12.5 more than the 15 year presumption period, and states, "27.5 years above ground should be the equivalent of 15 years below ground." Claimant's Brief at 3. Claimant also contends that "[i]n cases such as the instant one, finding witnesses who can testify as to substantial equivalency is virtually impossible." *Id.* at 5.

Contrary to claimant's argument, the regulation at 20 C.F.R. §718.305(b)(2) specifically states that the "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates *that the miner was regularly exposed to coal-mine dust while working there.*" 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. 20 C.F.R. §718.305(b)(2)) (emphasis added). The Seventh Circuit has also explained that claimant cannot meet that burden of proof "by showing that [the miner] was in or around a coal mine for at least [fifteen] years, without any further discussion of his employment conditions."⁵ *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479-80, 22

⁵ Claimant's reliance on *Taylor v. Hawkins Coal Company*, BRB Nos. 12-0275 BLA and 12-0276 BLA (Feb. 21, 2013) (unpub.) to support her argument is misplaced. In *Taylor*, the Board affirmed an administrative law judge's reliance on the miner's

BLR 2-265, 2-275 (7th Cir. 2001). Claimant must proffer sufficient evidence of the conditions in which the surface miner worked. *Id.* It is then the responsibility of the administrative law judge, based on his expertise, knowledge of the industry and appropriate objective factors, “to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.” *Id.*; see *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988).

In this case, the administrative law judge conducted the proper inquiry. The administrative law judge found that “the preponderance of the evidence establishes that substantially all of the [m]iner’s employment was in the strip mines.” Decision and Order at 7 n. 9. She determined that the miner’s work with employer extended from 1937 to 1981. *Id.* at 7. She considered claimant’s testimony about the miner’s employment, and noted that claimant did not indicate “what types of work [the miner] performed in the mines, or whether he was exposed to dust of any kind.” *Id.* at 8. She also noted that there was no testimony from the miner in the record. *Id.*

With regard to the documentary evidence of record, the administrative law judge also found that it was insufficient to establish the conditions of the miner’s surface coal mine employment. Decision and Order at 8. The administrative law judge summarized a type-written Employment History (Form CM-911a), a hand-written employment history by the miner, and letters from employer with regard to the miner’s employment. Decision and Order at 7-8; Employer’s Exhibits 14-17. The Form CM-911a indicates that the miner worked at the tipple for six years between 1937 and 1943, that he worked as a coal driller and welder for fourteen years between 1945 and 1959 and that he worked as a bull dozer operator for fifteen years between 1966 and 1981. Employer’s Exhibit 14. The miner’s hand-written statement indicates that he worked as a “welder-peanut gang” for twenty-two years between 1937 and 1959, as a welder for seven years between 1959 and 1966, and as a “cat operator/welder” for fourteen years between 1967 and 1981. Employer’s Exhibit 15. An October 24, 2001 letter from employer indicates that the miner worked as a shovel oiler from 1966 to 1974, as a tractor operator from 1974 to 1979 and 1980 to 1981, and as a tipple tractor operator from 1979 to 1980. Employer’s Exhibit 17.

The administrative law judge found that the “well-recognized heavy dust conditions prevailing at the tipple would allow the seven years of employment at the

answers to interrogatories, along with the testimony of the surviving widow and the miner’s co-worker, to establish the conditions of the miner’s surface coal mine employment. In this case, unlike *Taylor*, the record is devoid of evidence to support claimant’s burden of proof.

tipple to be considered the equivalent of underground mining.” Decision and Order at 8. She noted that the miner alleged work *both* as a coal driller, and a welder from December 1945 to September 1959. *Id.* Although she found that the miner’s work as a coal driller “could be considered to involve heavy dust exposure,” she was unable to quantify the number of years the miner worked as a coal driller as opposed to a welder. *Id.* The administrative law judge rationally concluded that, other than the miner’s work at the tipple, “it would be speculative for [her] to determine that any portion of the [m]iner’s employment was in underground mining or conditions that ‘were substantially similar to conditions in an underground mine,’ as required to invoke the [fifteen]-year presumption.” *Id.*, quoting 30 U.S.C. §921(c)(4); *see Summers*, 272 F.3d at 482-83; 22 BLR at 2-280; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989).

Claimant has not identified any evidence that the administrative law judge failed to consider in determining the length of the miner’s qualifying coal mine employment. Because the administrative law judge’s findings are in accordance with the regulations and case law, *see* 20 C.F.R. §718.305(b)(2); *Leachman*, 885 F.2d at 512, we affirm her finding that claimant failed to establish that the miner worked at least fifteen years in surface coal mine employment in conditions that were substantially similar to those of an underground mine. Consequently, we affirm the administrative law judge’s finding that claimant failed to invoke the presumption at amended Section 411(c)(4). In addition, because it is unchallenged, we affirm the administrative law judge’s finding that the evidence is insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We, therefore, affirm the denial of survivor’s benefits.⁶

⁶ We deny claimant’s request for a remand. Claimant, however, may submit new evidence before the district director in conjunction with a request for modification pursuant to 20 C.F.R. §725.310.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge