

BRB No. 13-0193 BLA

REGINA K. BUCKLEY)
(Widow of FRED A. BUCKLEY))
)
 Claimant-Respondent)
)
 v.)
)
 SHREWSBURY COAL COMPANY)
)
 and) DATE ISSUED: 01/31/2014
)
 VALLEY CAMP COAL 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 Granting Benefits of Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-5809) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a survivor's claim¹ filed 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 the miner had 21 years of coal mine employment in conditions at a surface mine that were substantially similar to those in an underground mine, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725.² The administrative law judge also found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013). The administrative law judge therefore found that claimant invoked the presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),³ and that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the presumption of death due to pneumoconiosis at amended Section 411(c)(4), contending that the administrative law judge erred in finding that the miner

¹ Claimant is the widow of the miner, who died on July 28, 2008. Director's Exhibit 9. The miner filed his claim on August 30, 2005. On October 1, 2008, Administrative Law Judge Thomas M. Burke (the administrative law judge) issued a Decision and Order denying benefits. Claimant filed her survivor's claim on August 9, 2010. Director's Exhibit 2.

² The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement amendments to the Black Lung Benefits Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

³ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the miner's death was due to pneumoconiosis if the claimant establishes that the miner suffered from a totally disabling respiratory or pulmonary impairment and worked at least 15 years in an underground coal mine, or in a coal mine other than underground in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4) (2012).

had 21 years of qualifying coal mine employment. Employer also challenges the administrative law judge's finding that it failed to establish rebuttal of the presumption. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to vacate the administrative law judge's determination that the conditions at the miner's surface mine employment were substantially similar to those in an underground mine. The Director also asserts that employer misinterpreted the standard for establishing "substantial similarity" in the conditions at the miner's surface mine with those in an underground mine. Employer filed a brief in reply to the Director's response, noting that the Director agreed with its contention that the administrative law judge failed to offer any analysis to support his determination that the conditions at the surface mine were substantially similar to those in an underground mine.⁴

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that claimant invoked the presumption of death due to pneumoconiosis at amended Section 411(c)(4), as he erroneously determined that the miner had 21 years of qualifying coal mine employment. Specifically, employer asserts that the administrative law judge erred in failing to render a determination as to whether the conditions at the miner's surface mine were substantially similar to those in an underground mine. Employer argues that "[the administrative law judge] mechanically avoided such an evaluation and presumed substantially similar conditions based on a finding of dust exposure." Employer Brief at 6. Employer also asserts that claimant failed to establish that the miner had 21 years of qualifying coal mine employment because "the evidence of record was insufficient to establish substantially similar conditions, as it suggests exposure to coal mine dust, without reference to the frequency, amount, or severity of the dust exposure." *Id.* at 10. Further, employer maintains that the administrative law judge misconstrued its acknowledgement that the miner had 21 years of coal mine employment as a concession

⁴ Because the administrative law judge's finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013) is not challenged on appeal, we affirm this finding. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

that the conditions of his work at a surface mine were substantially similar to those in an underground mine.

The Director argues that employer has misinterpreted the standard for determining substantial similarity by requiring claimant “to prove the types of conditions that prevail in an underground mine.” Director’s Letter Brief at 2. Nevertheless, the Director asserts that the Board should vacate the administrative law judge’s determination that the miner had 21 years of coal mine employment in conditions at a surface mine that were substantially similar to those in an underground mine, as “[the administrative law judge] did not address the issue of the miner’s dust exposure in sufficient enough detail.” *Id.* The Director maintains that there is adequate evidence in the record to support a finding of substantial similarity, as the miner’s testimony and the medical records that were submitted in the miner’s claim address the dusty conditions of his coal mine employment. The Director asserts that the Board should remand the case to the administrative law judge to fully consider this issue.

Claimant bears the burden of establishing comparability between dust conditions in a miner’s surface mine and an underground mine, but “must only establish that [the miner] was exposed to sufficient coal dust in his surface mine employment.” *Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). Contrary to employer’s assertion, however, claimant is not required to directly compare the miner’s work environment to conditions underground. Rather, claimant can establish substantial similarity by proffering “sufficient evidence of the surface mining conditions in which [the miner] worked,” whereupon it is the function of the administrative law judge, based on his expertise and knowledge of the industry, “to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines.”⁶ *Leachman*, 855 F.2d at 512.

After noting that the parties stipulated that the miner had 21 years of coal mine employment, the administrative law judge determined that all of the miner’s coal mine employment was aboveground, based on the employment history recorded on Form CM-911. The administrative law judge then considered whether the conditions at the miner’s

⁶ If credited, an administrative law judge may find that unrefuted testimony of a miner’s exposure to coal dust at a surface mine is sufficient to support a finding of “substantial similarity” to conditions in an underground mine. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). Moreover, exposure to any kind of coal mine dust, in sufficient quantity, may constitute qualifying coal mine employment. *See Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986); *Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990).

surface mine were substantially similar to those in an underground mine. The administrative law judge specifically stated:

In this case, there was no testimony on this subject, but the miner told Dr. Cohen that he had coughed up black sputum while working in the mines, and [c]laimant stated on her CM-911 form that the miner worked as a tipple operator transporting coal from an *underground* coal mine and at a preparation plant, and, in the column asking whether the miner was exposed to gas, dust, or fumes, she said “Yes” for both jobs. (DX 3).

Decision and Order at 16 (emphasis added). The administrative law judge further stated:

In addition, [e]mployer’s own records document that the miner worked from 1971 to 1974 as a “coal sampler,” and from 1974 to 1993 (with a three-month break) as a “tipple operator.” (DX 4). Finally, in its closing brief, [e]mployer acknowledges both of these documents and seems to concede that the miner worked in dust conditions substantially similar to underground employment. I therefore find that the miner’s coal mine employment was indeed performed in dust conditions substantially similar to underground work.

Id.

Thus, while the administrative law judge focused on the fact that the miner had jobs as a tipple operator and coal sampler, as well as the fact that the miner told Dr. Cohen that he had coughed up black sputum while working in the mines, he did not make detailed findings regarding the miner’s exposure to coal mine dust in his jobs at the surface mine. *See Leachman*, 855 F.2d at 512; *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Further, as the Director notes, the administrative law judge did not make a determination as to whether the miner’s job as a tipple operator was performed at an underground coal mine. The record indicates that the miner worked as a tipple operator, transporting coal from an underground coal mine from February 1974 to April 1993. Director’s Exhibit 3. Work aboveground at an underground mine constitutes qualifying coal mine employment for purposes of amended Section 411(c)(4). *See* 20 C.F.R. §725.101(a)(30); *Muncy v. Elkay Mining Co.*, 25 BLR 1-23, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-501 (1979). Because a surface worker at an underground coal mine is not required to establish that his working conditions aboveground were substantially similar to those in an underground mine, the administrative law judge erred in failing to consider whether the miner’s job was performed at an underground coal mine. *Muncy*, 25 BLR at 1-29; *Alexander*, 2 BLR at 1-

501. Consequently, we vacate the administrative law judge's determination that the miner had 21 years of qualifying coal mine employment, and remand the case to the administrative law judge for further consideration of the evidence related to the extent of the miner's dust exposure.

On remand, the administrative law judge must consider all of the relevant evidence of record in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Further, in view of our decision to vacate the administrative law judge's determination that the miner had 21 years of qualifying coal mine employment, we also vacate the administrative law judge's finding that claimant invoked the presumption of death due to pneumoconiosis pursuant to amended Section 411(c)(4).

If, on remand, the administrative law judge determines that claimant establishes that the miner had at least 15 years of qualifying coal mine employment and, having previously established total respiratory disability, that she is thereby entitled to the presumption at amended Section 411(c)(4), then the administrative law judge must determine whether the presumption is rebutted by employer establishing that the miner did not have pneumoconiosis or that the miner's death did not arise from his coal mine employment. 20 C.F.R. §718.305(d). However, if claimant is unable to establish that the miner had at least fifteen years of qualifying coal mine employment for purposes of amended Section 411(c)(4), he must determine whether claimant has established entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, without benefit of the presumption.

Finally, in the interest of judicial economy, we will address employer's specific contention that the administrative law judge erred in finding that employer failed to rebut the presumption of death due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by disproving the existence of pneumoconiosis, or by proving that the miner's death did not arise from his coal mine employment. Specifically, employer asserts that the administrative law judge erred in finding that the credentials of Drs. Cohen and Rasmussen were superior to those of Drs. Basheda and Rosenberg.

In considering whether employer met its burden to prove that the miner did not have legal pneumoconiosis,⁷ the administrative law judge considered the opinions of Drs. Basheda, Rosenberg, Cohen, and Rasmussen. The administrative law judge found that Drs. Basheda and Rosenberg diagnosed usual interstitial pneumonitis (UIP) not related to coal dust exposure. Decision and Order at 19-20; Employer's Exhibits 8-11. By

⁷ The administrative law judge found that employer established that the miner did not have clinical pneumoconiosis.

contrast, the administrative law judge found that “Drs. Cohen and Rasmussen disputed this diagnosis.” Decision and Order at 20; Claimant’s Exhibits 1, 10. The administrative law judge stated that “[Dr. Basheda’s and Dr. Rosenberg’s] argument [that the miner had UIP] fails because they did not show that the miner’s FVC was reduced enough for a diagnosis of UIP, nor did they show that coal mine dust exposure cannot produce a diffuse interstitial fibrosis, as the miner had before his death.” Decision and Order at 20. Further, in finding that the credentials of Drs. Cohen and Rasmussen were superior to those of Drs. Basheda and Rosenberg, the administrative law judge stated:

It is accordingly necessary to weigh the qualifications of the experts to determine who is more credible on the question of whether a “very severe” restrictive impairment is required for a diagnosis of UIP. While Drs. Basheda and Rosenberg are both well-qualified, their credentials cannot trump Dr. Rasmussen’s history as an authority in the field of coal dust-induced lung disease combined with Dr. Cohen’s extensive and recent history of lecturing and publishing on the topics of PFTs and the diagnosis of occupational coal dust-induced lung disease. I therefore credit the opinions of Drs. Cohen and Rasmussen on this question, and find that the miner’s FVC measurements were not reduced enough to uphold a diagnosis of UIP.

Id.

Because the administrative law judge permissibly considered the experience of Drs. Cohen and Rasmussen in diagnosing a chronic dust-related lung disease, *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), we reject employer’s assertion that the administrative law judge erred in finding that the credentials of Drs. Cohen and Rasmussen were superior to those of Drs. Basheda and Rosenberg. However, to the extent that the administrative law judge discredited the opinions of Drs. Basheda and Rosenberg “because they did not show that the miner’s FVC was reduced enough for a diagnosis of UIP,” Decision and Order at 20, we hold that the administrative law judge erroneously substituted his opinion for that of the medical experts. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Thus, if reached, on remand, the administrative law judge must reconsider all of the relevant medical opinion evidence on rebuttal in accordance with the APA.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge