BRB Nos. 13-0447 BLA
and 14-0134 BLA

JUANITA OSLONIAN (o/b/o and Widow of JOHN B. OSLONIAN) Claimant-Respondent v. METEC, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 06/26/2014 DECISION and ORDER

Appeals of the Decision and Order on Remand and the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Maia S. Fisher (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2007-BLA-5960) and the Decision and Order (2011-BLA-5821) of Administrative Law Judge Alice M. Craft awarding benefits on claims[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on September 26, 2006, and a survivor's claim filed on January 27, 2011,[2] and is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with at least eighteen years of coal mine employment,[3] finding that the miner's work as a salesman for employer qualified as the work of a miner pursuant to 20 C.F.R. §§725.101(a)(19), 725.202(a). The administrative law judge also found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board rejected employer's argument that the miner's work as a salesman did not qualify as the work of a miner. *Oslonian v. Metec, Inc.*, BRB No. 10-0288 BLA (Jan. 31, 2011) (unpub.). The Board also affirmed the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), as unchallenged on appeal. *Id.* However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* The Board also vacated the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board, therefore, vacated the administrative law judge's award of benefits. *Id.*

The Board further noted that Congress had enacted amendments to the Act, which

[1] Employer's appeal in the miner's claim was assigned BRB No. 13-0447 BLA, and its appeal in the survivor's claim was assigned BRB No. 14-0134 BLA. By Order dated March 13, 2014, the Board consolidated these appeals for purposes of decision only.

[2] Claimant is the surviving spouse of the miner, who died on December 31, 2010. Director's Exhibit 7 (survivor's claim).

[3] The miner's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). In light of the potential applicability of the Section 411(c)(4) presumption, the Board instructed the administrative law judge, on remand, to determine whether the miner was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption.

Applying Section 411(c)(4) on remand, the administrative law judge found that, because the miner established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), he invoked the rebuttable presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge found that the miner was entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4). The administrative law judge subsequently denied employer's motion for reconsideration.

In a Decision and Order dated June 4, 2013, the administrative law judge considered claimant's survivor's claim. The administrative law judge noted that the amendments revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge held that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that the administrative law judge erred in finding that the miner had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in finding that the miner's coal mine employment occurred in conditions substantially similar to those in an

[4] Employer concedes that claimant would be entitled to survivor's benefits if the Board affirms the administrative law judge's award of benefits in the miner's claim. Employer's Brief at 4 n.1.

underground mine and was, therefore, qualifying employment for purposes of the Section 411(c)(4) presumption.

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).

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that the miner established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. It is employer's contention that the administrative law judge's finding is erroneous in two respects: first, in finding that the miner's coal mine employment covered fifteen years; and second, in finding that his work as a surface miner exposed him to dust conditions substantially similar to those existing underground.

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act, nor the regulations, provides specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

In the initial decision, the administrative law judge explained how she calculated the length of the miner's coal mine employment:

> According to the employment histories the [miner] submitted to the Department of Labor and Social Security records, the [miner] began working in the mines in 1970, and he left the mines in 1990. Although no earnings were reported to Social Security for some years between those dates, I credit the [miner's] statements in his deposition and his work history that he was working in the mines during those years. The [miner] also consistently reported approximately 20 years of coal mine employment to his treating physicians, and to physicians who examined him in connection with his claim. Based on the testimony at hearing, work histories submitted to the Department of Labor and physicians, Social Security records, and my calculations regarding the [miner's] work as a

> salesman, I find that the [miner] had at least 18 years of coal mine employment.

Decision and Order at 7.

On remand, the administrative law judge addressed whether the miner established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption, stating that the she had "found and the Board affirmed that the [m]iner had at least 18 years of coal mine employment." Decision and Order on Remand at 5. Although the Board affirmed the administrative law judge's determination that the miner's work as a salesman constituted that of a "miner," the Board did not otherwise address the administrative law judge's finding regarding the length of the miner's coal mine employment. However, on remand, the administrative law judge again credited the miner with at least eighteen years of coal mine employment, thereby effectively incorporating the reasoning that she put forward in support of her finding in the initial decision.

Employer currently argues that the miner should have been credited with only twelve years and three months of coal mine employment. Employer's Brief at 5, 14. In making this calculation, employer contends that the administrative law judge erred in crediting the miner with any coal mine employment in 1976, or from 1978 to 1980. *Id.* Noting that the miner's Social Security records reflect no earnings for these four years, employer asserts that the administrative law judge "failed to recognize the discrepancy in the evidence and failed to explain why [she] credited [the miner's] general testimony over the specific documentary evidence." *Id.* We disagree. The administrative law judge was aware that "no earnings were reported to Social Security" for the four years in question, but elected to credit the miner's testimony, noting that the miner's testimony was bolstered by the fact that he "consistently reported approximately [twenty] years of coal mine employment to his treating physicians, and to physicians who examined him in connection with his claim." Decision and Order at 7. The administrative law judge further found that the miner's testimony was supported by the work history that he submitted to the Department of Labor. *Id.* We, therefore, hold that the administrative law judge acted within her discretion in crediting the miner's sworn testimony that he was working in the mines in 1976, and from 1978 to 1980. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988).

Employer argues that the administrative law judge erred in not resolving the conflict in the evidence, but employer fails to identify any discrepancy between the miner's testimony and his Social Security records. Although the miner's Social Security records do not corroborate the miner's testimony that he worked in coal mine employment in 1976, and from 1978 to 1980, the records do not contradict the miner's

testimony. The miner's Social Security records merely reflect no reported earnings from any employer during this time period.[5] Despite two opportunities to do so (the miner's November 16, 2006 deposition, and the August 28, 2008 hearing), employer did not ask the miner to explain why his Social Security records did not reflect any reported earnings in 1976, and from 1978 to 1980. Employer also did not question the miner regarding any possible gaps in his coal mine employment during this time.

Based on the miner's sworn testimony, as supported by the work histories that the miner submitted to his physicians and the Department of Labor, the administrative law judge credited the miner with a total of four years of coal mine employment during 1976, and from 1978 to 1980. Because it is supported by substantial evidence, we affirm the administrative law judge's decision to credit the miner with four years of coal mine employment during this period. *See Dawson*, 11 BLR at 1-60. In light of this affirmance, and employer's concession that the miner was entitled to at least an additional twelve years of coal mine employment from 1970 to 1975 and from 1981 to 1990, we hold that the administrative law judge properly credited the miner with over sixteen years of coal mine employment.

Employer next argues that the miner failed to prove that, during his years as a surface miner, he was exposed to dust conditions substantially similar to those existing underground. Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,102 (Sept. 25, 2013). Those regulations provide that "[t]he 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."[6] 78 Fed. Reg. at 59,114 (to be

[5] Employer asserts that the miner "never identified who he worked for in 1976, or 1978 [to] 1980." Employer's Brief at 14. Contrary to employer's assertion, the miner testified that he worked for B & R Coal Company from 1975 to 1977, and for Blazer Coal Company from 1977 to 1981. Director's Exhibit 16 at 8. The miner also listed his employment with B & R Coal Company and Blazer Coal Company on the work history form that he submitted to the Department of Labor. Director's Exhibit 3.

[6] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term

codified at 20 C.F.R. §718.305(b)(2)); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988). As summarized by the administrative law judge, the miner indicated on his work history form, and testified during his deposition, that he was exposed to coal mine dust in all of his mining jobs. Decision and Order on Remand at 4; Director's Exhibits 3; 16 at 8, 12. The administrative law judge also noted that the miner testified, at the hearing, that he was exposed to a lot of dust as a salesman, and that when he demonstrated machinery as a salesman he would be covered in dust. Decision and Order on Remand at 4-5; Hearing Transcript at 21-22.

In this case, the administrative law judge permissibly relied upon the miner's uncontradicted testimony in finding that the miner was regularly exposed to coal mine dust in all of his coal mining jobs. 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)); *see Leachman*, 855 F.2d at 512-13. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the miner established at least fifteen years of employment in mining with dust conditions substantially similar to those found in underground mines.

In light of our affirmance of the administrative law judge's findings that the miner established at least fifteen years of qualifying coal mine employment, and our previous affirmance of the administrative law judge's finding of the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that the miner invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

Rebuttal of the Section 411(c)(4) Presumption

Because the miner invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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). The administrative law judge found that

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> "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditons regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,102, 59,105 (Sept. 25, 2013).

employer failed to establish rebuttal by either method. Specifically, the administrative law judge found that while employer disproved the existence of clinical pneumoconiosis,[7] it failed to disprove the existence of legal pneumoconiosis.[8] The administrative law judge also found that employer failed to rule out a causal relationship between the miner's total disability and his pneumoconiosis.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Dahhan and Rosenberg. Dr. Dahhan diagnosed a disabling restrictive respiratory impairment due to marked obesity, sleep apnea, and congestive heart failure. Director's Exhibit 13; Employer's Exhibits 6, 7. Dr. Dahhan opined that the miner's restrictive respiratory impairment "was contributed to by an added obstructive defect secondary to his previous smoking habit." Director's Exhibit 13. Dr. Rosenberg opined that the miner's severe disabling impairment was due to smoking-related chronic obstructive pulmonary disease (COPD), and marked obesity. Employer's Exhibits 1, 8. Drs. Dahhan and Rosenberg each opined that the miner's respiratory impairment was not due to his coal mine dust exposure. Director's Exhibit 13; Employer's Exhibits 1, 6-8.

In addressing whether the miner established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), in her initial decision, the administrative law judge discounted the opinions of Drs. Dahhan and Rosenberg because she found that their opinions were inconsistent with the premises underlying the regulations. Decision and Order at 22-23. Pursuant to employer's appeal, the Board specifically held that the administrative law judge rationally accorded little weight to Dr. Dahhan's opinion "because he opined that coal mine dust exposure does not cause a clinically significant drop in FEV1 values, a position contrary to the findings accepted by the [Department of Labor] when drafting the revised definition of legal pneumoconiosis to include "any chronic . . . obstructive pulmonary disease arising out of coal mine employment." *Oslonian*, slip op. at 12. The Board further held that the administrative law judge "permissibly found Dr. Rosenberg's opinion, that smoking-related forms of obstructive

[7] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

lung disease are associated with a reduction in the FEV1/FVC ratio, while impairments related to coal dust exposure generally do not affect this value, to be contrary to the regulations." *Oslonian*, slip op. at 13.

On remand, the administrative law judge considered whether the opinions of Drs. Dahhan and Rosenberg were sufficient to establish that the miner did not suffer from legal pneumoconiosis. The administrative law judge again found that the opinions of Drs. Dahhan and Rosenberg, that the miner did not have legal pneumoconiosis, were unreasoned because they were inconsistent with the premises underlying the regulations. Decision and Order on Remand at 24; Employer's Exhibits 1, 6-9. The administrative law judge also found that Drs. Dahhan and Rosenberg failed to adequately explain how they eliminated coal dust exposure as a cause of the miner's obstructive pulmonary impairment.[9] *Id.* at 23-24. The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Rosenberg. We disagree. For the reasons previously set forth in the Board's 2011 Decision and Order, we affirm the administrative law judge's finding that the reasoning of Drs. Dahhan and Rosenberg is inconsistent with the premises underlying the regulations. Moreover, the administrative law judge permissibly questioned the opinions of Drs. Dahhan and Rosenberg, that the miner's obstructive pulmonary impairment was due solely to smoking, because neither physician adequately explained how they eliminated the miner's over fifteen years of coal mine dust exposure as a source of his obstructive impairment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 24. The administrative law judge, therefore, properly discounted the opinions of Drs. Dahhan and Rosenberg. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Dahhan and Rosenberg, we affirm her finding that employer failed to disprove the

[9] The administrative law judge noted that employer submitted a supplemental report from Dr. Rosenberg on remand, but concluded that it "suffers from the same flaws" as Dr. Rosenberg's original opinion, because it was contrary to the Department of Labor's position that an obstructive impairment due to coal mine dust exposure may be detected by decreases in FEV1 and the FEV1/FVC ratio, and because it failed to adequately explain why the miner's history of coal dust exposure did not contribute to his obstructive impairment. Decision and Order on Remand at 24.

existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that the miner did not suffer from pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that the miner's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge rationally discounted the opinions of Drs. Dahhan and Rosenberg, that the miner's disabling pulmonary impairment did not arise out of his coal mine employment, because Drs. Dahhan and Rosenberg, contrary to the administrative law judge's finding, did not diagnose legal pneumoconiosis. *See Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Because the miner established invocation of the Section 411(c)(4) presumption that he was totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits in the miner's claim is affirmed.

Having awarded benefits in the miner's claim, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner had been determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*). We, therefore, affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(*l*). 30 U.S.C. §932(*l*).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits on the miner's claim and Decision and Order awarding benefits on the survivor's claim are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge