



BRB No. 17-0507 BLA

JERRY W. EVANS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/28/2018
	)	
APOLLO FUELS, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Tighe Estes and Brian W. Davidson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2015-BLA-05536) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on August 21, 2013, 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 accepted employer's "stipulation" that claimant established twenty-three years and seven months of surface coal mine employment and found claimant worked at least fifteen years in conditions that were

“equivalent” to those found in underground mines. Decision and Order at 5-6. The administrative law judge further found that claimant established a totally disabling respiratory or pulmonary impairment and therefore invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).<sup>1</sup> The administrative law judge further determined that employer did not rebut the presumption and he awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding claimant’s testimony established that he worked in conditions “substantially similar” to those in an underground coal mine. Employer’s Brief at 5. Neither claimant nor the Director, Office of Workers’ Compensation Programs, has filed a response brief.<sup>2</sup>

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>3</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).

Conditions at a surface mine will be considered “substantially similar” to those in an underground mine if claimant demonstrates that he was “regularly exposed to coal-mine dust while working there.” 20 C.F.R. §718.305(b)(2); see *Brandywine Explosives & Supply v. Director, OWCP [Kennard]*, 790 F.3d 657, 664-65, 25 BLR 2-725, 2-734-36 (6th Cir. 2015); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001).

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis if claimant 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

<sup>2</sup> We affirm, as unchallenged on appeal, the administrative law judge’s findings that claimant established “more than” fifteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 8.

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant’s last coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibit 3.

Employer generally asserts that the administrative law judge erred in finding that claimant's testimony was sufficient to establish that he was regularly exposed to coal-mine dust for at least fifteen years of his surface coal mine employment. Employer maintains that claimant was not regularly exposed to coal-mine dust because he worked in an enclosed air-conditioned cab. Employer's argument is without merit.

Employer deposed claimant on January 10, 2014. Director's Exhibit 16. Claimant testified that he worked for employer from March 1981 through August 2003 as an above-ground heavy equipment operator,<sup>4</sup> moving dirt, rock and coal. *Id.* at 17-19. When asked how close he worked to the face of the mine, claimant testified:

Sometimes it was – in the coal pit working where they loaded the coal at. *Sometimes I would run a coal sweeper. That's where it got – you've got a farm tractor with a big broom on the front of it and where they sweep the debris off the coal to make it cleaner. I've done that quite a bit.*

*Id.* at 19-20 (emphasis added).

During the hearing held on January 24, 2017, claimant testified that for twenty-two years, he ran heavy equipment for employer, but was "pulled off to do different things, trucks, back dump, bolter, back hoe, grader, coal sweeper." Hearing Transcript at 14-15. Claimant answered "Yes," when asked whether those "were those dusty jobs." *Id.* He further explained that the *coal sweeper was a closed cab*, but he had to operate it "*with the doors open so it was a very dusty job.*" *Id.* at 16 (emphasis added). Claimant testified that sometimes he used a mask, but stated "[i]t's hard to breathe in those things when it's 90 degrees. You're inhaling hot air into that mask and it makes it much harder so it was really hard to wear those things." *Id.* Claimant also indicated that of his twenty-two years spent operating heavy equipment for employer, the last fifteen years he worked in cabs that had air-conditioning. *Id.* at 19; Employer's Brief at 4.

Contrary to employer's assertion, we see no error in the administrative law judge's conclusion that claimant worked in dusty conditions that were comparable to those in underground mines. The administrative law judge considered claimant's uncontradicted testimony that all his jobs as a heavy equipment operator were dusty, that "a lot of the times" he would not wear a mask because it was hard to breathe with one, and that he operated a coal sweeper with the cab doors open. Decision and Order at 5; Hearing Transcript at 15. Further, in uncontradicted deposition testimony, claimant explained that

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<sup>4</sup> Claimant testified he operated dozers, loaders, road graders and trucks. Director's Exhibit 16 at 19.

he operated the coal sweeper at the pit where the coal is loaded, running it to sweep the debris off the coal to make it cleaner and that he did that “quite a bit.” Director’s Exhibit 16 at 19-20. The administrative law judge therefore permissibly determined that claimant’s uncontradicted testimony was credible and that it established exposure “equivalent” to fifteen years of underground mine employment. Decision and Order at 6; *see Kennard*, 790 F.3d at 664, 25 BLR at 2-735-36; *Cent. Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44 & n.17, 25 BLR 2-549, 2-564-66 & n.17 (10th Cir. 2014).

Because it is supported by substantial evidence, we affirm the administrative law judge’s determination that claimant established at least fifteen years of qualifying coal mine employment for purposes of Section 411(c)(4) invocation. *Kennard*, 790 F.3d at 664, 25 BLR at 2-735-36. We therefore affirm the administrative law judge’s determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). As employer raises no other allegations of error, we further affirm the administrative law judge’s determination that employer failed to rebut the Section 411(c)(4) presumption and we affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge