



BRB Nos. 18-0393 BLA
and 18-0394 BLA

RUBY L. ALLEN)
(Widow of and o/b/o JEWELL HART)
ALLEN))

Claimant-Respondent)

v.)

CROWN ENERGY CORPORATION)

and)

AMERICAN RESOURCES INSURANCE)
COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 06/18/2019

DECISION and ORDER

Appeals of the Decisions and Orders on Remand of Joseph E. Kane,
Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for
claimant.

H. Brett Stonecipher (Fogle Keller Purdy, PLLC), Lexington, Kentucky, for
employer/carrier.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decisions and Orders on Remand (2011-BLA-05768, 2013-BLA-06127) of Administrative Law Judge Joseph E. Kane awarding benefits on claims 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 subsequent claim filed on June 3, 2010, and a survivor's claim filed on July 23, 2013, and is before the Board for the second time. Director's Exhibits M-3, S-2.¹

In his initial decision,² the administrative law judge accepted the parties' stipulation that the miner had twenty-eight years of surface coal mine employment.³ Additionally, finding no contrary evidence in the record, he credited claimant's hearing testimony to find that all of the miner's employment took place in conditions substantially similar to those in an underground coal mine.⁴ He also found the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) and therefore found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309 and invoked the rebuttable presumption that the miner was totally disabled due

¹ The evidence in the miner's claim is identified with an "M" and the evidence in the survivor's claim is identified with an "S."

² The miner's initial claim, filed on December 19, 2002, was denied on October 25, 2005, because he did not establish total disability. Director's Exhibit M-1 at 2, 746. The miner died on June 20, 2013; claimant, his widow, is pursuing his 2010 subsequent claim. Director's Exhibit S-6; 2015 Hearing Transcript at 16.

³ The miner's most recent coal mine employment was in Kentucky. Director's Exhibit M-8. Accordingly, the Board will apply the law 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).

⁴ The administrative law judge considered claimant's testimony that the miner came home from work covered with coal dust and his face was black, and that she would sometimes have to wash his clothes more than once to get them clean. *Allen v. Crown Energy Corp.*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 4 (May 10, 2017) (unpub.).

to pneumoconiosis at Section 411(c)(4) of the Act.⁵ 30 U.S.C. §921(c)(4) (2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits. Based on the award in the miner's claim, he found that claimant is automatically entitled to benefits in her survivor's claim pursuant to Section 422(l) of the Act.⁶ 30 U.S.C. §932(l) (2012).

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's findings that the miner had twenty-eight years of coal mine employment and was totally disabled. *Allen v. Crown Energy Corp.*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 3 n.6 (May 10, 2017) (unpub.). The Board, however, held that the administrative law judge failed to consider all relevant evidence when he found that the miner had at least fifteen years of qualifying coal mine employment. Specifically, he failed to address employer's report from Mr. Lamb, an engineer who reviewed each job the miner held during his surface mining career and opined that, at most, eleven years took place in conditions substantially similar to those in an underground coal mine. *Allen*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 4. Because the administrative law judge failed to consider all relevant evidence, the Board vacated his findings that the miner had at least fifteen years of qualifying coal mine employment and that claimant invoked the Section 411(c)(4) presumption and remanded the case for further consideration. The Board instructed him to consider Mr. Lamb's report together with the miner's deposition testimony, claimant's hearing testimony, and any other relevant evidence to determine whether the miner was "regularly exposed to coal-mine dust" during his surface coal mine employment.⁷ *Allen*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 5-6, *quoting* 20 C.F.R. §718.305(b)(2).

⁵ Section 411(c)(4) of the Act provides a rebuttable presumption of total disability due to pneumoconiosis where the miner had 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

⁶ Under Section 422(l) of the Act, the survivor of a miner who was determined to be 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).

⁷ The Board further instructed the administrative law judge to consider the arguments of the Director, Office of Workers' Compensation Programs, that Mr. Lamb's

In the interest of judicial economy, the Board considered employer's challenge to the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption. Employer's sole contention was that the administrative law judge applied an improper standard on rebuttal of the presumed fact of disability causation. Finding no merit in that argument, the Board affirmed the administrative law judge's determination employer failed to rebut the Section 411(c)(4) presumption. *Allen*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 7. Because the Board had vacated the administrative law judge's award in the miner's claim, the Board also vacated the award in the survivor's claim. *Id.* at 7-8.

In a Decision and Order on Remand dated March 20, 2018, the administrative law judge found that at least fifteen years of the miner's surface coal mine employment took place in conditions "substantially similar to conditions in an underground mine." He therefore found that claimant invoked the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4). As the Board had affirmed his finding that the presumption was not rebutted, he awarded benefits in the miner's claim. Based on the award in the miner's claim, he found that claimant is automatically entitled to survivor's benefits pursuant to Section 422(l) of the Act.

On appeal, employer contends that the administrative law judge erred in crediting the miner with fifteen years of qualifying coal mine employment and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Based on the error alleged in the miner's claim, employer argues that the award of benefits in the survivor's claim should also be vacated. Claimant responds in support of the awards. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To invoke the Section 411(c)(4) presumption, claimant must establish that the miner had at least fifteen years of employment either "in one or more underground coal mines," or in conditions "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). 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." 20 C.F.R.

opinion should not be found credible. *Allen*, BRB Nos. 16-0372 BLA and 16-0373 BLA, slip op. at 6.

§718.305(b)(2). On remand, the administrative law judge considered Mr. Lamb's report, the miner's deposition testimony, and claimant's hearing testimony.

After reviewing the miner's work history and deposition testimony, Mr. Lamb prepared an August 22, 2013 report. Employer's Exhibit 12. He explained that the scope of his report was to evaluate the miner's job duties and the similarity of those duties to those encountered in underground mining. *Id.* Mr. Lamb noted that the miner's employment from 1976 to 1986 involved a supervisory position that "limits ones [sic] exposure to respirable coal mine dust." Employer's Exhibit 12 at 4. He noted that the miner worked as dozer and loader operator from 1973 to 1976 and from 1989 to 1991. *Id.* He also noted that this work occurred during a time when pressurized cabs were standard, and that the miner was involved in reclamation activities for a portion of this time. *Id.* at 4-5.

Based on his twenty-five years of experience as an engineer in mining and construction, Mr. Lamb noted that the miner's work as a driller from 1962 to 1973 "can create dust exposure conditions" and "is considered by many to have the highest potential exposure to conditions that could lead to the development of silicosis."⁸ Employer's Exhibit 12 at 2, 5. He noted that the remainder of the miner's jobs, however, are "not generally considered high exposure occupations." *Id.* at 5.

During a January 2, 2013 deposition, the miner provided testimony regarding his coal mine dust exposure. He testified that he wore a mask only during the last month of his surface coal mine employment. Claimant's Exhibit 7 at 30. He also explained that the loader he operated did not have an air conditioner. *Id.* at 16. After operating the dozer and loader, the miner indicated that he would be so dusty that "if anybody didn't know [him] to start with, they'd have to ask who [he] was." *Id.* at 32. When coal blasting took place, the miner testified it would stir up so much coal dust that he "couldn't hardly see for a little bit." *Id.* at 33. He further testified that coal dust would get inside the cab on his dozer. *Id.* at 34. He explained that the shop where he worked as a supervisor was dusty even when the doors were closed. *Id.* at 41. As a pit foreman, the miner testified that he was down in the pit where the coal was being stripped and loaded onto trucks. *Id.* He testified that when he went home he was covered in dust. *Id.* at 51; 2005 Hearing Transcript at 13.

At the June 25, 2015 hearing, claimant testified that when the miner came home from work his face was "usually black," except for his eyes and mouth. 2015 Hearing

⁸ Mr. Lamb, however, indicated that the miner's work as a driller was "not substantially similar to underground employment due to direct exposure to atmospheric conditions." Employer's Exhibit 12 at 2.

Transcript at 19. She could not recall a time that he was clean when he came home from the mines. *Id.* at 20. She testified that the miner usually had coal dust all over his clothes and she would sometimes have to wash them more than once to get them clean. *Id.*

The administrative law judge accorded little weight to Mr. Lamb's report because he found it was based on generalizations, rather than an analysis of the actual conditions at the miner's specific job locations. Decision and Order on Remand at 4. He noted that Mr. Lamb did not speak to the miner directly or inspect any of the sites where he worked.⁹ *Id.* He further found that Mr. Lamb's analysis was contrary to the Act because it was premised on the view that certain surface dust conditions cannot be substantially similar to underground employment. *Id.* Conversely, the administrative law judge accorded great weight to the testimony of the miner and claimant because they had "more knowledge of the conditions the [m]iner actually endured during his employment" and were "in the best position . . . to testify to the day to day exposure of the [m]iner." *Id.* at 4-5.

Employer argues that the administrative law judge erred in finding that the miner had at least fifteen years of qualifying coal mine employment. We disagree. The administrative law judge permissibly questioned Mr. Lamb's opinion because he found it based on generalizations regarding the miner's coal mine dust exposure, rather than an analysis of the miner's specific work conditions. *See Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 726 (7th Cir. 2008); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order on Remand at 4. He also permissibly questioned Mr. Lamb's analysis because it was based on an improper assumption that certain surface coal mine employment cannot be substantially similar to coal mine employment. He properly found this position contrary to the Act, which plainly assumes that surface dust conditions can be substantially similar to those underground. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(2).

The administrative law judge found the miner's testimony, along with that of claimant, establish that the miner was regularly exposed to coal mine dust for at least fifteen years of his surface coal mine employment. Decision and Order on Remand at 4-5. It is

⁹ Mr. Lamb noted that the miner's work as a shop foreman occurred inside a building, a position that he noted "historically has a low exposure to dust." Decision and Order on Remand at 4. The administrative law judge found that Mr. Lamb concluded that "this activity [was] in no way substantially similar to underground coal mine employment" without addressing the actual conditions of the miner's working conditions. Notably, Mr. Lamb did not take into account the miner's testimony that the doors to the shop were open seventy-five to eighty percent of the time and the shop was dusty even when the doors were closed. Claimant's Exhibit 7 at 37-45.

the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477 (6th Cir. 2012); *Gray v. SLC Coal Co.*, 176 F.3d 382 (6th Cir. 1999). The Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because it is based on substantial evidence,¹⁰ we affirm the administrative law judge's determination that claimant established that the miner had at least fifteen years of qualifying coal mine employment. 20 C.F.R. §718.305(b)(2); *see Central Ohio Coal Co. v. Director, OWCP [Sterling]*, 762 F.3d 483, 490-91 (6th Cir. 2014) (claimant need only establish regular exposure to coal dust to prove substantially similar conditions); Decision and Order on Remand at 4-5.

Because claimant established at least fifteen years of qualifying coal mine employment and that the miner was totally disabled, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis. Because we previously affirmed the administrative law judge's determination that employer did not rebut the presumption, we affirm his award of benefits in the miner's claim. Consequently, we also affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l).

¹⁰ Employer argues that the administrative law judge erred in not addressing each of the miner's jobs separately in determining whether he was regularly exposed to coal mine dust. Employer's Brief at 14. We disagree. The miner's testimony regarding his dust exposure in each of his coal mine jobs, his statement that he was covered in dust when he went home after working at the mines, and claimant's testimony that she could not recall a time when he came home from work not covered in coal dust is sufficient to establish regular exposure during the entirety of his surface coal mine employment. Mr. Lamb's opinion is not to the contrary, as it was found not credible.

Accordingly, the administrative law judge's Decisions and Orders on Remand awarding benefits in both the miner's and survivor's claims are affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge