U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0472 BLA

DAVIE SMITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELMO GREER & SONS, LIMITED LIABILITY COMPANY	)	DATE ISSUED: 08/27/2021
	)	
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 Awarding Benefits of Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Oliver B. Rutherford (Smith & Smith Attorneys), Louisville, Kentucky, for Employer.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

Employer appeals Administrative Law Judge Peter B. Silvain, Jr.'s Decision and Order Awarding Benefits (2017-BLA-05588) rendered on a claim filed on April 17, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge determined Employer is the responsible operator. He credited Claimant with 17.01 years of coal mine employment and found he has complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §718.304. The administrative law judge further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203(b).

On appeal, Employer argues the administrative law judge erred in finding it is the responsible operator.[1] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Benefits Review Board to affirm the administrative law judge's responsible operator finding.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[3] 20 C.F.R.

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant performed his last coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3; Hearing Transcript at 19-20.

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must

§725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a potentially liable operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer argues the administrative law judge erred in finding it is the responsible operator because its business involved constructing roads and not coal mining. Employer's Brief at 6-7. It contends the administrative law judge mistakenly found Claimant's work for it as a drill operator on road construction projects constitutes the work of a miner. *Id.* Employer's argument is without merit.

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). A coal mine is an "an area of land . . . used in, or to be used in, . . . the work of extracting" coal. 20 C.F.R. §725.101(a)(12). There is "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, has held duties that meet situs and function requirements constitute the work of a miner as defined in the Act. *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989); *Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). Under the situs requirement, the work must take place in or around a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Forester*, 767 F.3d at 641.

Employer first asserts it is not the responsible operator because "the intended use of the land over which it performed services was for roadways and not the extraction of coal." Employer's Brief at 6. Contrary to Employer's contention, the statutory definition of a "coal mine" does not require coal mining to be the "intended" use of the land but rather the land must be "used in, or to be used in, . . . the work of extracting" coal. 30 U.S.C. §802(h)(2); *see Petracca*, 884 F.2d at 934 (the phrase "around a coal mine" must be given a broad interpretation); 20 C.F.R. §725.101(a)(12); Employer's Brief at 7. As the administrative law judge observed, Claimant testified coal was extracted at the road

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be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

construction sites where he worked. Decision and Order at 5-6, *citing* Hearing Transcript at 13-16, 41-43. Claimant specifically stated he was exposed to coal or rock dust every day he worked for Employer. Hearing Transcript at 20. Moreover, he testified there was no difference between a road job and a strip mine job at these sites as far as drilling was concerned. *Id*. at 17. In addition, Employer has conceded coal was extracted from the sites in question. Employer's Post-Hearing Brief at 3. Thus, the administrative law judge rationally found Claimant worked at a coal mine. 30 U.S.C. §802(h)(2); *Petracca*, 884 F.2d at 934; 20 C.F.R. §725.101(a)(12).

We also reject Employer's argument it is not a responsible operator because it is "a road contractor" and "did not control or supervise a coal mine." Employer's Brief at 6. In a recent case also involving a road construction employer, the Sixth Circuit held where the employer's primary business is not coal mining, the situs requirement is met if it had a "considerable economic interest" in the coal generated from the road construction projects such that coal mining was a substantial part of the miner's work.[4] *Bizzack Constr., LLC v. Fannin*, 764 Fed. App'x 486, 492 (6th Cir. 2019) (unpub.); *see Montel v. Weinberger*, 546 F.2d 679, 680 (6th Cir. 1976); Decision and Order at 6-7. Despite Employer's allegation to the contrary, in the current case, similar to *Fannin*, coal mining did not occur "by happenstance" at Employer's road construction sites. Employer's Brief at 7. The work that Claimant described involved using loaders to "clean down to the coal," picking it up, and loading it in trucks to be sold. Decision and Order at 6, *quoting* Hearing Transcript at 13. The administrative law judge also noted a mining permit that Employer held "demonstrates that coal removal was an anticipated part of the construction process for [Employer]." *Id.* at 7 n.18, *citing* Claimant's Exhibit 2. Based on these factors, the administrative law judge permissibly found Employer had a significant economic interest in coal mining. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 6. We therefore affirm the administrative law judge's finding Claimant's employment with Employer satisfies the situs requirement. *See Petracca*, 884 F.2d at 934; *Montel*, 546 F.2d at 680; *Fannin*, 764 Fed. App'x at 492; 20 C.F.R. §725.101(a)(12); Decision and Order at 6-7.

Employer also generally contends Claimant's work did not satisfy the function requirement because he did not have any involvement in the extraction and preparation of

[4] In *Fannin*, the Sixth Circuit held that although the employer's primary business was building roads, it had a "considerable economic interest" in mining the coal it encountered during road construction, and coal mining was a substantial part of the claimant's work as a driller operator because he spent a significant amount of time extracting and cleaning the coal. *Bizzack Constr., LLC v. Fannin*, 764 Fed. App'x 486, 492 (6th Cir. 2019) (unpub.).

coal. Employer's Brief at 7. Contrary to its contention, however, the function requirement "does not require that an individual be engaged in the actual extraction or preparation of coal" but only that his or her work be integral to those functions. *Clemons*, 873 F.2d at 922; *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991). The administrative law judge noted Claimant drilled down to or through the coal seam in order for Employer to extract and sell the coal, and thus rationally found his work to be "an integral and necessary part of the coal extraction process." Decision and Order at 7; *see Clemons*, 873 F.2d at 922; *Fannin*, 764 Fed. App'x at 493 ("drilling down to the coal seam, assisting in the removal of the overburden, and cleaning the coal" was an integral part of extracting and preparing coal); *Skewes v. Consolidation Coal Co.*, 2 BLR 1-705, 1-709 (1979) (core drilling to identify potential mining sites held to be an integral part in extraction of coal). We therefore affirm the administrative law judge's finding Claimant's employment with Employer satisfies the function requirement. Decision and Order at 7. Consequently, we affirm the administrative law judge's conclusion that Claimant was employed as a miner for Employer.[5]

Employer next argues Claimant worked for Bizzack Construction, LLC (Bizzack), after working for Employer, and Bizzack similarly employed Claimant as a driller on road construction projects involving coal extraction for a cumulative period of not less than one year. Employer's Brief at 3-5. Thus it argues the administrative law judge should have named Bizzack the responsible operator. *Id*. Employer's argument has no merit.

On an employment history form, Claimant identified his work with Bizzack as "coal mine, construction" work and indicated he shoveled and cleaned coal, and "ran [a] drill that shot the rock to remove the coal." Director's Exhibit 6. As the administrative law judge accurately summarized, however, Claimant testified that his work for Bizzack did not did not involve coal mining:

> When questioned about his employment at Bizzack, the Claimant stated the company was a road builder and that he worked there as a drill operator. When asked whether he drilled any coal for Bizzack, he replied that he did not remember 'any coal on the jobs.' Counsel for the Employer also questioned the Claimant on an employment history form he completed for his attorney, which stated that, at Bizzack, he 'helped shovel and clean[] coal' and 'ran [a] drill that shot the rock to remove the coal.' When asked about

[5] Employer does not challenge the administrative law judge's finding that it employed Claimant for a cumulative period of not less than one year. 20 C.F.R. §725.494(c); Decision and Order at 6-7. Thus we affirm this finding. *Skrack*, 6 BLR at 1-711.

> his answer, the Claimant stated, '[Bizzack] may have took some coal up on some of the other ends of the jobs [] that I wasn't working on.' He explained that he could not 'remember being around coal [] with Bizzack and that he 'probably mixed up [Bizzack] with [the Employer].'[6]

Decision and Order at 4, *quoting* Director's Exhibit 6; Hearing Transcript at 24, 26 (citations omitted).

Considering this conflicting evidence, the administrative law judge found Claimant testified consistently throughout the hearing that he did not work with coal when employed by Bizzack. Decision and Order at 4 n.10. He found a letter from Bizzack to the claims examiner corroborated Claimant's testimony.[7] Decision and Order at 4, *citing* Director's Exhibit 8. On the basis of these findings,[8] the administrative law judge rationally found Claimant's hearing testimony consistent, reliable and the most probative on the nature of his work with Bizzack. *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996) (because the administrative law judge personally observes the demeanor of a witness, "his conclusions with respect to credibility should not be discarded lightly and should be accorded deference."); Decision and Order at 4. In light of Claimant's testimony, the administrative law judge permissibly found Claimant's employment with Bizzack was not coal mine work. *Crisp*, 866 F.2d at 185; Decision and Order at 4. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that Employer failed to establish Claimant's work for Bizzack constituted coal mine work

[6] Addressing the inconsistency between his testimony and his employment history form, Claimant stated he found the employment form confusing, did not remember writing the description of his work at Bizzack, and may have mixed up his work at Bizzack with his work for Employer. Director's Exhibit 6 at 26-27.

[7] The letter from Bizzack Vice-President Lester Wimpy summarized the projects Claimant worked on and the job he performed on each project. Director's Exhibit 8. Mr. Wimpy indicated Claimant "worked exclusively on government-funded highway and road construction projects and would not have been exposed to coal or coal dust." *Id.* He noted Claimant, during his employment with Bizzack, "did not engage in the extraction, preparation, or transportation of coal." *Id.*

[8] The administrative law judge also noted the hand writing outlining Claimant's job duties on the employment history form did not match Claimant's signature on the form. Decision and Order at 4 n.10, *citing* Director's Exhibit 6. Employer does not challenge this finding. Thus we affirm it. *Skrack*, 6 BLR at 1-711.

and his finding Employer is the properly designated responsible operator. 20 C.F.R. §§725.407, 725.494, 725.495(a)(1); Decision and Order at 7.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge