

U.S. Department of Labor

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



BRB No. 21-0614 BLA

JOHNNY L. RAMEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 02/16/2023
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Reversing Denial of Benefits and Remanding Case of Evan H. Nordby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BOGGS and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals Administrative Law Judge (ALJ) Evan H. Nordby's Decision and Order Reversing Denial of Benefits and Remanding Case (2019-BLA-05453) on a claim filed on October 5, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found, contrary to the district director's determination, that Claimant's work for the Virginia Department of Transportation (VDOT) constituted work as a coal miner under the Act.<sup>1</sup> He further found VDOT was immune from liability under the Act. 20 C.F.R. §725.491(f). Thus, he concluded that the Black Lung Disability Trust Fund was liable for benefits and remanded the case to the district director for further development of medical evidence.

On appeal, the Director argues the ALJ erred in finding Claimant's work maintaining state roads for VDOT constitutes coal mine employment under the Act. Claimant responds, urging affirmance of the ALJ's determination.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

### **Definition of a Miner**

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). The Act's implementing regulations provide "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).<sup>3</sup> The Fourth Circuit has held duties that meet situs

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<sup>1</sup> The district director issued an order to show cause on October 11, 2018 for why the claim should not be denied based on the preliminary finding that Claimant's work for VDOT was not covered coal mine employment under the Act. Director's Exhibit 11. Claimant responded, asserting he was exposed to coal mine dust while working on public roads used by trucks hauling raw coal. Director's Exhibit 12. On December 12, 2018, the district director issued a proposed decision and order denying the claim because Claimant did not establish he worked as a "miner" as defined by the Act. Director's Exhibit 16.

<sup>2</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant's alleged coal mine employment was performed in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 9, 20; Director's Exhibit 2.

<sup>3</sup> The regulations define a "miner" as:

[A]ny person who . . . worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who . . . worked in coal mine construction or maintenance in or around

and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [Krushansky], 923 F.2d 38, 41 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Amigo Smokeless Coal Co. v. Director, OWCP* [Bower], 642 F.2d 68, 70 (4th Cir. 1981). 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. *Krushansky*, 923 F.2d at 41-42.

Claimant testified he worked for VDOT maintaining and “ditching”<sup>4</sup> public state roads in Coeburn and Wise, Virginia. Hearing Transcript at 9-10, 20-23, 33-35. He stated the roads were available for use by the general public, that the roads were used by trucks hauling raw coal from coal mine extraction sites to preparation plants, and that “close to [eighty] percent” of the traffic was coal mine related. *Id.* at 9-10, 22-23. Moreover, he explained that multiple mines were within a few miles of where he worked and that some of the roads he maintained came within 150 to 500 feet of a coal mine.<sup>5</sup> *Id.* at 19-22, 24-

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a coal mine or coal preparation facility. There shall be 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). The regulations define the term “coal mine” as:

[A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. §725.101(a)(12).

<sup>4</sup> Claimant described “ditching” as using a motor grader to make roads smooth. Hearing Transcript at 11, 18, 32-33.

<sup>5</sup> Claimant testified that when conducting ditching activities on State Road 72, he could see the coal mines at the end of the state-maintained road and they were approximately four hundred or five hundred feet away. Hearing Transcript at 24. On State Road 58, Claimant indicated “there was an access road that c[a]me off of it that went right behind the coal mines and that is the road that the trucks came out of.” *Id.* He estimated that those mines were approximately three hundred feet away from the public road. *Id.* When conducting ditching activities on Guest River State Road, Claimant said that the

25. He testified he spent forty to fifty percent of his work time maintaining and ditching public roads and performed this work at least three days per week. *Id.* at 15, 18; Director’s Exhibit 12 at 3. In regard to his assertion that he was exposed to coal mine dust, he testified that VDOT would dispatch him, sometimes at the request of coal mine operators, to clean coal spills on public roads four to five times per week. Hearing Transcript at 28-30. He explained the coal spills would make the roads impassable and that he would pile up the coal on the side of the road so the operators could retrieve it. *Id.* at 12, 29-30. Further, Claimant testified he came in contact with a significant amount of coal dust performing his job duties and, at the end of a workday, he would be covered in rock and coal dust. *Id.* at 11, 13-15, 28-30; Director’s Exhibit 12 at 3-4.

Jennifer Chenault, the Statewide Disability Program Administrator for VDOT, provided the district director with written answers to written questions the district director asked about Claimant’s work.<sup>6</sup> Director’s Exhibit 4. She confirmed Claimant regularly performed maintenance on public state roads, some of the roads were utilized for hauling coal, and Claimant did not work on mine sites, property or roads owned and operated by coal mines. *Id.* at 2-3. She further explained that “VDOT employees have no job functions related to the extraction, preparation, or transportation of coal.” *Id.* at 2. She did generally acknowledge that Claimant could have been exposed to coal dust while conducting maintenance work. *Id.* at 2. In addition, she stated Claimant performed roadway maintenance approximately eight days per month and that “[a] [m]ine entrance is about [five] to [six] miles from the mine property line that adjoins certain state-maintained roads.” *Id.*

The ALJ found Claimant’s testimony credible and gave it great weight. Decision and Order at 5. He credited Claimant’s explanation of his work over Ms. Chenault’s generalized description of Claimant’s job at points where their accounts diverged because Ms. Chenault had limited knowledge of Claimant’s actual work and her account did not rely on Claimant’s personnel file. *Id.* at 6; Director’s Exhibit 4 at 1. Specifically, the ALJ credited Claimant’s “detailed explanation” of why he had to perform maintenance on the public roads used for hauling coal more frequently than Ms. Chenault indicated. Decision and Order at 6.

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state-maintained road “went up to the gate going into the mines” and was approximately fifty yards from the mine site. *Id.*

<sup>6</sup> Ms. Chenault noted Claimant’s personnel file was not available and that her information was gathered from other employees with the same position and work location as Claimant during the same period of time. Director’s Exhibit 4 at 1.

The ALJ found Claimant's work for VDOT qualified as the work of a miner under the Act. *Id.* at 12. Specifically, the ALJ found Claimant's work met the situs prong because he found his testimony credible that his work brought him within 150 feet of an actual mine site and thus occurred "in or around" a coal mine as the Act requires. *Id.* He also found Claimant's work ditching and maintaining public roads met the function prong because the roads were used to transport raw coal from actual mine sites to preparation plants and their usability was integral to the preparation of coal. *Id.* at 10-11. Thus, he found Claimant's work was necessary for the preparation of coal. *Id.* at 11.

The Director argues the ALJ erred in interpreting "in or around a coal mine" to mean near a coal mine rather than at a coal mine site. Director's Brief at 5-6, *citing* 30 U.S.C. §902(d). In addition, the Director argues Claimant's work was not integral to the extraction and preparation of coal but rather integral to the maintenance of state roads which were used for multiple purposes, including hauling coal. *Id.* at 8-9. We agree with the Director's arguments.

To meet the situs test, Claimant's work for VDOT must have occurred "in or around a coal mine or coal preparation facility." 30 U.S.C. §902(d); *Krushansky*, 923 F.2d at 41-42. The ALJ stated that workers are not required to "enter coal mine property" to qualify as miners under the Act. Decision and Order at 12, *citing* 20 C.F.R. §725.202(a); *Roberts v. Weinberger*, 527 F.2d 600, 602 (4th Cir. 1975) ("[T]he boundaries of the mine extend at least to the point where the coal is processed and loaded for further shipment."); *Stroh v. Director, OWCP*, 810 F.2d 61, 64-65 (3d Cir. 1987); *Freeman v. Califano*, 600 F.2d 1057, 1059 (5th Cir. 1979); *see also Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144 (4th Cir. 1990); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). He found Claimant's work brought him within 150 feet of an actual mine site, that he worked on public roads used for hauling coal at least three times per week, and that he cleaned coal spills three to five times per week. *Id.* at 11-12. Thus, the ALJ found Claimant's work occurred "in or around" a coal mine as the Act requires. *Id.* at 12.

The Director contends the ALJ's reliance on *Roberts*, *Stroh*, *Freeman*, *Wilt*, and *Roberson* is misplaced. Director's Brief at 5-8. In *Roberts*, the "[claimant] operated a truck hauling coal from the immediate *site of its extraction in a strip mine to a tippie . . .*" *Roberts*, 527 F.2d at 601 (emphasis added). In *Stroh*, the court rejected "[a] rule that transportation workers could be miners under the BLA only if they did not transport coal on public roads;" however, the court found the claimant's work hauling coal required him to travel to the extraction site to load coal and the preparation plant to unload coal. *Stroh*, 810 F.2d at 62, 64-65. In *Freeman*, the court remanded the case to the ALJ to determine whether the claimant's work as a railroad worker was qualifying work of a miner and the court stated "[t]here is little evidence concerning the nature of his work and almost none that indicates how much of it was conducted *within* a 'coal mine.'" *Freeman*, 600 F.2d at

1060 (emphasis added). In *Wilt*, the claimant worked at a machine shop on mine property and visited the extraction site several times per month. *Wilt*, 14 BLR at 1-73. In *Roberson*, the claimant was a railroad employee who delivered empty train cars to the mine site, collected raw coal, then hauled the coal to the preparation plant. The court found the claimant “spent a significant portion of his workday *actually at the mines and preparation plant*, and that Roberson was engaged in hauling raw coal between two statutory ‘mines.’” *Roberson*, 918 F.2d at 1149 (emphasis added).

While the Act does not specify how far “in or around” a coal mine extends, in each case discussed above, whether the work being considered took place *in part* on mine property and at the extraction site or preparation plant were material facts. See Director’s Brief at 5-8; see also *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926, 935 (6th Cir. 1989) (discussing the “inherently elastic terms . . . ‘around’ and ‘area’” in determining what constituted an “on-site” facility). Additionally, the Director points out that in applying the situs test, courts have consistently required work to be performed on the mine site, not near the mine site. *Id.* at 8, citing *Krushansky*, 923 F.2d at 42; *Bower*, 642 F.2d at 71; *Spurlin v. Director, OWCP*, 956 F.2d 163, 164 (7th Cir. 1992); *Petracca*, 884 F.2d at 932-33.

In the present case, the ALJ determined Claimant’s work maintaining public roads for VDOT on “roads immediately abutting mine property and within 150 feet of actual mine sites” satisfied the situs test. Decision and Order at 11-12. Claimant’s work, however, did not bring him onto mine property or involve any actual work at the tippie or the extraction site.<sup>7</sup> Decision and Order at 12. Mere proximity is not the same as conducting work “in or around a coal mine or coal preparation facility.” See 30 U.S.C. §902(d). Thus, we agree with the Director’s position and therefore reverse the ALJ’s determination that Claimant satisfied the situs prong.

Further, the ALJ erred in his analysis and application of the function test. To satisfy the function requirement, Claimant’s work must be integral or necessary to the extraction or preparation of coal, not merely incidental or ancillary. See *Krushansky*, 923 F.2d at 41-42. The ALJ found that the usability of public state roads between the coal extraction site and the preparation plant was integral for the production of coal. Decision and Order at 10-11. He thus found Claimant’s maintenance work necessary for the production of coal. *Id.* At 11.

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<sup>7</sup> Claimant testified he would sometimes cross onto mine property to turn his grader around. Hearing Transcript at 25. This is not sufficient to establish the situs prong.

The ALJ erred in concluding that Claimant’s job duties were integral to the production or extraction of coal. As the Director accurately notes, the primary function of Claimant’s work was related to the safety of public roads, which had the incidental benefit of allowing coal-hauling trucks to pass from the extraction sites to the preparation plants. Director’s Brief at 8-9. Jobs that are merely “convenient” or “helpful” to the extraction and preparation of coal do not meet the function test if they are not vital or essential to the production or extraction of coal. *See Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 922-23 (6th Cir. 1989); *see also Krushansky*, 923 F.2d at 41-42. We agree with the Director’s contention that while Claimant’s work was helpful to the coal mine operators that were utilizing the public roads, his duties were conducted for the governmental purpose of keeping the roads open for use by the public. *See generally Clemons*, 873 F.2d at 922-23; *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016). We therefore reverse the ALJ’s determination that Claimant satisfied the function prong.

Accordingly, the ALJ’s Decision and Order Reversing Denial of Benefits and Remanding Case is reversed.

SO ORDERED.

DANIEL T. GRESH, Chief  
Administrative Appeals Judge

JUDITH S. BOGGS  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge