U.S. Department of Labor

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

BRB No. 21-0593 BLA

SYLVESTER C. SHREWSBURY, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK SOUTHERN RAILWAY COMPANY	)	
	)	
	)	DATE ISSUED: 11/29/2022
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Cameron Blair and Joseph Wolfe (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

J. Lawson Johnston (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for Employer

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

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, administrative appeals judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Denying Benefits (2020-BLA-05721) rendered on a claim filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§ 901-944 (2018) (Act).[1]

The ALJ found Claimant did not work as a "miner" under the Act and denied benefits. 20 C.F.R. §§725.101(a)(19), 725.202(a)-(b).

On appeal, Claimant argues the ALJ erred in concluding he did not work as a miner. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, filed a response, arguing the ALJ erred in concluding Claimant did not work as a miner. Claimant replied to Employer's response, reiterating his contentions.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

In order to be eligible for black lung benefits, Claimant must have worked as a "miner." Under the Act:

> The term miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held work duties that meet situs 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); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70

[1] Claimant filed three prior claims which he withdrew and thus are considered not to have been filed. 20 C.F.R. § 725.306(b); Director's Exhibits 1-3. Claimant filed the current claim on July 25, 2019. Director's Exhibit 5.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 53.

(4th Cir. 1981); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986). 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 and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 41-42.[3]

Claimant worked as a utility brakeman from 1986 to 2009. Director's Exhibit 7. His job duties included driving a train with one hundred rail cars from the railroad yard to various mine sites. Hearing Transcript at 16-17. He placed the empty cars behind the mine sites for loading, transferred processed coal from the tipple belt line to the coal cars, and drove "the train back to Elmore Yard at Mullins, West Virginia, or down the river to Gilbert, West Virginia." *Id.* at 17-20, 26, 41.

The ALJ found Claimant's "job was to transport prepared coal to Elmore or Gilbert Yard," which was subsequently sent to customers. Decision and Order at 9. She found Claimant satisfied the situs prong because he worked five hours, six to seven days per week at a mine site.[4] *Id.* at 8. Nevertheless, despite crediting Claimant's testimony that his working conditions were "very dusty from coal mine dust and that he looked like a miner at the end of the day," *id.* at 9 n.12 (citing Hearing Transcript at 24), the ALJ determined he was not a miner under the Act because his work was ancillary and not integral to the coal production process and, therefore, did not satisfy the function requirement. *Id.* at 8-9.

[3] Additional provisions apply to transportation workers. Transportation workers are considered miners under the Act to the extent they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility and their work is integral to the extraction or preparation of coal. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted by evidence which demonstrates: 1) that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) that the individual did not work regularly in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

[4] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant satisfied the situs requirement. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8; Employer's Brief at 6 (not disputing length of coal mine employment and entitlement as at issue if Claimant's work delivering empty rail cars to mine sites was integral to the coal preparation process).

Claimant argues the ALJ erred in finding that none of his employment satisfies the function prong. Claimant's Brief at 8-11. We agree.

Claimant's job duties involved taking empty rail cars to the mines to be loaded with processed coal, in addition to transporting the coal. Hearing Transcript at 16-20, 26, 41. The ALJ correctly acknowledged the Fourth Circuit's precedent that "the delivery of empty coal cars is part of coal preparation." Decision and Order at 9 (citing *Norfolk and Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780 (4th Cir. 1993) (explaining that "the delivery of empties to be loaded with processed coal is integral to loading coal at preparation plants, which is also part of coal preparation")); *see also* 30 U.S.C. §802(i) (including loading coal within the definition of preparation). Nevertheless, when analyzing whether Claimant's work satisfies the function prong, the ALJ focused solely on the aspect of Claimant's job that involved transporting processed coal. Decision and Order at 9. She failed to properly consider that Claimant's taking the empty rail cars to the mines to be loaded with coal satisfies the function prong as set forth by Fourth Circuit precedent.[5] We therefore reverse the ALJ's finding that Claimant failed to establish that his job duties satisfy the function prong[6] and her conclusion that Claimant failed to establish that he worked as a miner.[7] *Shrader*, 5 F.3d at 780.

Moreover, we reject Employer's argument, citing *Amigo Smokeless Coal Company v. Director, OWCP*, 624 F2d 58 (1981), that the amount of time Claimant spent delivering empty rail cars was not significant enough to bring him into the purview of coverage under

[5] We reject Employer's assertion that Claimant overstates the similarities between his duties delivering empty cars to preparation facilities and the duties at issue in *Shrader*. The Director correctly notes this aspect of Claimant's work was virtually identical to the claimant's work in *Shrader*. Director's Brief at 5.

[6] The Director and Employer correctly assert Claimant's work transporting processed coal to the rail yard was not covered employment. *Eplion v. Director, OWCP*, 794 F.2d 935, 937, (4th Cir. 1986); Director's Brief at 5; Employer's Brief at 5. However, we reject Employer's assertion that this aspect of Claimant's job precludes him from showing his other job duties satisfy the function test.

[7] Employer does not identify any facts in its response brief that would support its burden to rebut the presumption Claimant was exposed to coal mine dust during all periods that he worked in or around a coal mine. 20 C.F.R. §725.202(b)(1). Indeed, Employer does not dispute length of coal mine employment and entitlement are at issue in the event Claimant's work delivering empty rail cars is integral to the coal preparation process. Employer's Brief at 6.

the Act. Employer's Brief at 6. Although the Fourth Circuit in *Amigo* noted that the Claimant spent 85 percent of his time in covered employment activities, it did not hold that any minimum amount of time was required to be spent in such activities, nor has Employer identified any provision in the Act or regulations to support its contention. Accordingly, we find its argument unpersuasive.

Therefore, we vacate the denial of benefits and remand the case to the ALJ to reconsider Claimant's entitlement to benefits.

Remand Instructions

On remand, the ALJ must consider whether Claimant has established disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Statutory presumptions may assist Claimant in establishing these elements if certain conditions are met, but failure to establish any element precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Accordingly, the ALJ's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge