

U.S. Department of Labor

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



BRB Nos. 21-0474 BLA  
and 21-0476 BLA

ROSEMARY M. STEPHEN )  
(o/b/o and Widow of DAVID E. STEPHEN) )  
 )  
 Claimant-Petitioner )

v. )

CONSOLIDATION COAL COMPANY )  
 )  
 Employer-Respondent )

DATE ISSUED: 9/27/2022

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

Party-in-Interest )

DECISION and ORDER

Appeal of the Decisions and Orders Denying Benefits of Drew A. Swank,  
Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick, & Long),  
Ebensburg, Pennsylvania, for Claimant.

Kara L. Jones (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for  
Employer.

Steven Winkelman (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: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge (ALJ) Drew A. Swank's Decisions and Orders Denying Benefits (2020-BLA-05727 and 2020-BLA-05787) rendered on claims filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on May 9, 2017, and a survivor's claim filed on March 3, 2020.<sup>1</sup>

The ALJ found that the Miner's work for Employer, which constituted the entirety of his alleged coal mine work, did not constitute coal mine employment because his duties did not satisfy the definition of a miner under the Act.<sup>2</sup> Thus, he denied benefits in both the miner's and survivor's claims.

On appeal, Claimant argues the ALJ erred in finding her husband did not work as a miner for Employer. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing the ALJ applied the wrong legal standard when evaluating whether some of the Miner's work qualified as coal mine employment. Employer responds in support of the denial of benefits in both claims.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.<sup>3</sup> 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).

### **Definition of a Miner**

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<sup>1</sup> Claimant is the widow of the Miner, who died on January 8, 2018, while his claim was pending. Miner's Claim (MC) Director's Exhibit 14; Survivor's Claim (SC) Director's Exhibit 3. She is pursuing the miner's claim on his behalf as well as her own survivor's claim. SC Director's Exhibits 1, 3-5.

<sup>2</sup> See MC Director's Exhibit 2.

<sup>3</sup> This case arises within jurisdiction of the United States Court of Appeals for the Sixth Circuit because the Miner performed his work for Employer in Ohio. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); MC Director's Exhibits 4, 10.

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). 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 definition of “miner” comprises a “situs” requirement (i.e., the work was performed in or around a coal mine or coal preparation facility) and a “function” requirement (i.e., the work involved the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014); *Petracca*, 884 F.2d at 929-30, 13 BLR at 2-41-42. To satisfy the function requirement, the miner’s work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

The Miner worked for Employer as a weighmaster from July 12, 1965 to June 30, 1980; as a shipping clerk from July 1, 1980 to August 30, 1984; and as a watchman from September 1, 1984 to April 30, 1985. MC Director’s Exhibits 4, 5, 10. The ALJ found the Miner’s “work took place in the proximity of an operating strip mine” and, therefore, “meets the situs requirement.” MC Decision and Order at 5; SC Decision and Order 5. However, he found that none of the Miner’s positions satisfy the function requirement. MC Decision and Order at 5-6; SC Decision and Order at 6.

### **Watchman**

Claimant argues the ALJ erred in finding the Miner’s work as a watchman fails to meet the function requirement.<sup>4</sup> Claimant’s Brief at 9. We disagree.

Employer submitted an affidavit from Dennis Ewedosh, Manager of Occupational Health & Wellness at Consol Energy, Inc., stating the Miner’s watchman work “was performed in a guard shack.” MC Director’s Exhibit 7. On December 11, 2019, Claimant submitted a handwritten note in response to the district director’s request that she describe the nature of the Miner’s work for Employer. MC Director’s Exhibit 8. Concerning the Miner’s work as a watchman, Claimant wrote that the Miner “let trucks hauling unwashed coal in and out at the crossing. Coal would be washed and loaded into rail cars to be weighed at the prep plant by the weighmaster.” *Id.*

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<sup>4</sup> The Director notes that “[w]ith respect to the Miner’s work as a watchman, the ALJ [considered] the specific duties [he] performed and assessed whether those duties were integral to the extraction or production of coal.” Director’s Brief at 2 n.2. The Director identifies no error in the ALJ’s finding that this position did not constitute work as a miner.

At the hearing, Claimant similarly testified that the Miner's work as a watchman "was like a guard" and that he would open a gate to let trucks hauling coal through. Hearing Transcript at 26, 31.

Contrary to Claimant's contention, we see no error in the ALJ's determination that the Miner's duties as a watchman, while helpful to Employer's operations, did not meet the function requirement and therefore did not qualify as coal mine work. MC Decision and Order at 6; SC Decision and Order at 6. As the ALJ noted, the Sixth Circuit, within whose jurisdiction this case arises, held in *Clemons* that the duties of a night watchman did not constitute coal mine work because it was not sufficiently integral to the extraction or preparation of coal. See *Clemons*, 873 F.2d at 922-23. In contrast, the court held in an unpublished decision, *Sammons v. EAS Coal Co.*, 980 F.2d 731 (Table), 1992 WL 348976 (6th Cir. Nov. 24, 1992), that a security guard could be considered a miner where his work also involved operational, safety, and repair duties. Because the ALJ permissibly found that Miner's watchman duties were similar to that of the night watchman in *Clemons*, without any additional duties integral to the extraction or preparation of coal like that of the security guard in *Sammons*, we affirm his conclusion that the Miner's work in this position did not satisfy the function test. See *Price v. Peabody Coal Co.*, 7 BLR 1-671, 1-674 (1985) (whether a worker is a miner is a factual finding to be made by the ALJ); MC Decision and Order at 5-6; SC Decision and Order at 6. We therefore affirm the ALJ's finding that the Miner's position as a watchman does not constitute coal mine employment.

### **Weighmaster and Shipping Clerk**

Regarding the ALJ's consideration of the Miner's work as a weighmaster and shipping clerk, however, we agree with the arguments of Claimant and the Director that the ALJ did not adequately explain his findings that this work did not constitute coal mine employment.

On Form CM-913, Description of Coal Mine Work and Other Employment, the Miner described that when working as a weighmaster/shipping clerk, his office "was beside the prep plant" and he "weighed the coal cars and separated them," and "built up the train numbers on the computer." MC Director's Exhibit 5. Mr. Ewedosh stated on Employer's behalf that the Miner worked as a weighmaster "in a shack down by the railroad tracks and weighed the trains and trucks carrying processed coal," and as a shipping clerk "in an enclosed business office" doing "billing work." MC Director's Exhibit 7. Claimant indicated that when her husband was a weighmaster, the "coal was washed before being loaded into train cars to be weighed." MC Director's Exhibit 8. At the hearing, Claimant testified that she was not sure whether the coal was processed before the Miner weighed it. Hearing Transcript at 19-20, 27.

The ALJ found that because the Miner's work as a weighmaster and shipping clerk dealt with the delivery of processed coal, it did not meet the function requirement and thus Claimant failed to establish the Miner was engaged in coal mine employment. MC Decision and Order at 5; SC Decision and Order at 5.

We agree with the Director's argument that the ALJ applied the wrong legal standard because he focused on the condition of the coal - whether the Miner worked with raw or processed coal - and not whether the Miner's specific job duties were integral to coal preparation before the coal entered the stream of commerce.<sup>5</sup> 30 U.S.C. §802(i); 20 C.F.R. §725.101(a)(13).<sup>6</sup> *Ray v. Brushy Creek Trucking Co.*, 50 F. App'x 659, 662 (6th Cir. 2002) citing *Hanna v. Director, OWCP*, 860 F.2d 88 (3d Cir. 1988) ("loading processed coal from a processing tipple onto a barge was a necessary step in the preparation of the coal for entry into the stream of commerce" and thus "satisfied the 'function' element of the definition of miner"); *Director, OWCP v. Consolidation Coal Co. [Krushansky]*, 923 F.2d 38, 41 (4th Cir. 1991) (once coal enters the stream of commerce, it is beyond the preparation stage); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986) (when coal leaves the tipple, extraction and preparation are complete, and it is entering the stream of commerce).

Because the ALJ did not properly consider whether the Miner's duties as a weighmaster and shipping clerk occurred before the coal entered the stream of commerce and whether it was either necessary to coal preparation under 20 C.F.R. §725.101(a)(13), we vacate his finding that the Miner's duties fail to establish the function requirement. MC Decision and Order at 5; SC Decision and Order at 5. Consequently, we vacate the ALJ's denial of benefits in the miner's and survivor's claims.

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<sup>5</sup> Employer contends *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988) is "[m]ost instructive" in the current case. Employer's Brief at 7. In *Johnson*, the Board held the ALJ permissibly determined that a miner's work weighing trucks that hauled processed coal "was ancillary to the delivery or preparation of coal." *Johnson*, 12 BLR at 1-55. The current case is distinguishable, however, for contrary to Employer's assertions, the ALJ focused on whether the coal was processed or unprocessed instead of on whether the work was integral to the extraction or preparation of coal. MC Decision and Order at 5; see Employer's Brief at 8-10.

<sup>6</sup> The regulation at 20 C.F.R. §725.101(a)(13) provides that "[c]oal preparation means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine."

## Remand Instructions

On remand, the ALJ must reconsider the relevant evidence and testimony to determine whether the Miner's duties as a weighmaster and shipping clerk were necessary to coal preparation under 20 C.F.R. §725.101(a)(13) and therefore satisfy the function requirement. *Ratliff*, 30 F.3d 134; *Eplion*, 794 F.2d at 937. If the ALJ finds the Miner's work does not satisfy the function test, he may reinstate the denial of benefits as Claimant will have failed to show that the Miner worked in coal mine employment with Employer. However, if he finds the Miner's work for Employer does constitute coal mine employment, he must then consider Claimant's entitlement to benefits in both the miner's and survivor's claims.<sup>7</sup> 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.305. The ALJ is required to set forth all of his findings in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).<sup>8</sup> See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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<sup>7</sup> If the ALJ awards benefits in the miner's claim on remand, Claimant would be automatically entitled to survivor's benefits under Section 422(l) of the Act. 30 U.S.C. §932(l) (2018).

<sup>8</sup> The APA provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the ALJ's Decisions and Orders Denying Benefits are vacated, and the case is remanded to the ALJ for further consideration consistent with this decision.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge

MELISSA LIN JONES  
Administrative Appeals Judge