PART II

DEFINITIONS

A. MINER

2. COAL DUST/COAL MINE DUST

The terms "coal dust" as found in 30 U.S.C. §902(d), 20 C.F.R. §§725.101(a)(26), 725.491, 725.492, and "coal mine dust", as found in 20 C.F.R. §725.202(a), both refer to airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine. There is no distinction between the two terms. *See* ***Pershina v. Consolidation Coal Co.***, 14 BLR 1-55 (1990)(*en banc*); ***George v. Williamson Shaft Contracting Co.***, 8 BLR 1-91 n.1, 1-93 (1985); ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309, 1-311 (1984); *see also* ***Morriston-Knudsen Co., Inc. v. Schaechterle***, No. 83-1777 (10th Cir., Oct. 9, 1984)(unpublished); ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985). In ***Crow v. Peabody Coal Co.***, 11 BLR 1-54 (1988)(Ramsey, CJ., concurring), however, the Board held that "disease caused by welding fumes or sand dust generated from the welding machine claimant used in his covered coal mine employment is not compensable under the Act," and that it was within the discretion of the administrative law judge to find that a medical report that failed to consider this non-covered exposure was due less weight. For a discussion of dust exposure as it pertains to responsible operator determinations *see* Part II. L. of the Desk Book.

CASE LISTINGS

[definition of coal mine dust not limited to dust generated from extraction/preparation of coal, but may include dust which arises from other activities such as coal mine construction work] ***George v. Williamson Shaft Contracting Co.***, 8 BLR 1-91 (1985).

DIGESTS

The Third Circuit held that 20 C.F.R. §725.202(a), which defines the term "miner" as including coal mine construction workers exposed to "coal mine dust," does not contravene the Act that makes coal mine construction workers miners to the extent they are exposed to "coal dust." The Court concluded that the terms had the same meaning

as Congress used the terms interchangeable throughout the legislative history of the Act. ***Williamson Shaft Contracting Co. v. Phillips***, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986).

Where invocation of the presumption at Section 718.305 was claimed based on 15 years of coal mine work in surface mining, the administrative law judge's finding of no comparability between the environmental conditions of the surface coal mine work and underground coal mine work was irrational where the administrative law judge reasoned that environmental conditions at the surface mine tipple where the miner worked were not as dusty as the conditions around a cutting machine, the most dusty area of an underground mine. The law only requires that the conditions existing at the surface coal mine be substantially similar to conditions in an underground coal mine. ***McGinnis v. Freeman United Coal Mining Co.***, 10 BLR 1-4 (1987).

Claimant, a surface miner, has a burden under Section 411(c)(4), 30 U.S.C. §921(c)(4), to establish sufficiently dusty conditions in the surface mine to meet the requirement of substantially similar conditions to underground mining. Claimant need not present evidence of conditions prevailing in underground mines, but may establish that conditions were "very dusty." This is a factual determination for the administrative law judge. ***Director, OWCP v. Midland Coal Co.***, [***Leachman***], 855 F.2d 509, BLR (7th Cir. 1988), *reversing and remanding*, 10 BLR 1-79 (1987).

The Seventh Circuit, in holding 20 C.F.R. §727.203(a) to be valid, rejected the argument that the absence of a requirement that dust conditions between surface and underground mine work be comparable impermissibly extended coverage beyond the Act's intent and purpose. ***Peabody Coal Co. v. Director, OWCP***, [***Huber***], 778 F.2d 358, 8 BLR 2-84 (7th Cir. 1985).

The Board held that "disease caused by welding fumes or sand dust generated from the welding machine claimant used in his covered coal mine employment is not compensable under the Act," and that it was within the discretion of the administrative law judge to find that a medical report that failed to consider this non-covered exposure was due less weight. ***Crow v. Peabody Coal Co.***, 11 BLR 1-54 (1988)(Ramsey, CJ., concurring).

The administrative law judge did not err in relying on claimant's uncontradicted testimony that, after December 31, 1969, he performed his duties for the employer in an office building eight to ten miles away from the nearest coal mine facility and was not exposed to any substantial amount of coal dust to find that claimant was not a miner under the Act. ***Kincell v. Consolidation Coal Co.***, 9 BLR 1-221 (1986); *see also* ***Musick v. Norfolk and Western Railway Co.***, 6 BLR 1-862 (1984); ***Skewes v. Consolidation Coal Co.***, 6 BLR 1-834 (1984).

In this case arising within the jurisdiction of the Eleventh Circuit, the Board applied the

Court's determination that coal dust and coal mine dust are the same, *i.e.*, dust from any substance arising from the extraction or preparation of coal, as enunciated in ***William Brothers, Inc. v. Pate***, 833 F.2d 216, 10 BLR 2-333 (11th Cir. 1987). The Board also reiterates its holding in ***George v. Williamson Shaft Contracting Co.***, 8 BLR 1-91 (1985), that coal mine dust is not limited to dust generated during the extraction or preparation of coal, but may also include dust arising from other activities such as coal mine construction work. ***Garrett v. Cowin & Co., Inc.***, 16 BLR 1-77 (1990).

The Board affirmed the administrative law judge's finding that in light of employer's new technology, the carbonaceous material from employer's culm bank has extractable anthracite coal in it. The Board affirmed the finding that the culm material processed by employer is coal based in part on the finding that employer operated a preparation plant to prepare the culm material for energy use, and that the preparation plant's operation was subject to safety regulations and operational safeguards mandated by MSHA, thus, its activities are subject to regulation under 30 U.S.C. §802(1). The Board specifically upheld as proper the finding that employer sells "anthracite waste material," a material "akin" to coal. Therefore, it was permissible for the administrative law judge to conclude, pursuant to ***Marshall v. Stoudt's Ferry Preparation Co.***, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1010 (1980), that "the carbonaceous material, which has coal in it, albeit a small amount, was rendered marketable by the Waste Management preparation facility, and therefore, covered under the Act and regulations." ***Schegan v. Waste Management and Processors, Inc.***, 18 BLR 1-41 (1994).

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