BRB No. 00-0476 BLA

GEORGE ANTONIK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OHIO EDISON COMPANY	)	
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:_____
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

George Antonik, New Martinsville, West Virginia, *pro se*.

Douglas M. Kennedy (Roetzel & Andress), Columbus, Ohio, for employer.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:
Claimant,[1] without the assistance of counsel,[2] appeals the Decision and Order (98-

[1]Claimant is George Antonik, the miner, who filed his claim for benefits on August 2, 1994. Director's Exhibit 1.

[2]Claimant was also unrepresented by counsel before the administrative law judge. The

BLA-0840) of Administrative Law Judge Gerald M. Tierney denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[3] The administrative law judge found that claimant's employment with Ohio Edison Company does not qualify as coal mine employment under the Act and regulations. Decision and Order at 3-4. Accordingly, benefits were denied.

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administrative law judge asked claimant if he wanted to be represented by an attorney, gave claimant the opportunity to object to and admit evidence, to testify, and to call witnesses. 1999 Hearing Transcript at 4-13, 25. Therefore, we hold that claimant voiced a knowing and voluntary waiver of his right to be represented by counsel pursuant to 20 C.F.R. §725.362(b), and that the hearing was conducted in accordance with *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

[3]The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

On appeal, claimant contends that the administrative law judge erred in failing to find that he was a miner as defined under the Act. Claimant's Letter at 1-2. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds stating "whether Claimant is a 'miner' or not is a moot issue. . .because the medical evidence as a matter of law is insufficient to establish entitlement."[4] Director's Brief at 3.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates*, Inc., 380 U.S. 359 (1965).

Initially, Administrative Law Judge Michael P. Lesniak found that claimant was not a miner and, therefore, denied benefits. Director's Exhibit 23 at 3. On December 20, 1996, the Board, citing *Director, OWCP v. Consolidation Coal Co.* [Petracca], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989), affirmed Judge Lesniak's finding that claimant was not a miner because his employment at Ohio Edison did not satisfy the two-prong situs-function test. Director's Exhibit 30 at 2-3. The Board denied claimant's motion for reconsideration on March 14, 1997. Director's Exhibits 32, 35. Claimant, thereafter, requested modification on August 6, 1997. Director's Exhibit 42. The district director denied modification, and claimant

[4]The Director asserts that claimant is not entitled to benefits because the medical evidence as a matter of law fails to establish a totally disabling respiratory impairment. Director's Brief at 3-4. The administrative law judge did not render any findings regarding 20 C.F.R. §718.204, and, therefore, we decline to hold that claimant failed to establish total respiratory disability inasmuch as the Board is unable to engage in a *de novo* review of the evidence. *See* 20 C.F.R. §802.301(a); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

requested a hearing with the Office of Administrative Law Judges. Director's Exhibits 51, 52.

In his consideration of this case, the administrative law judge did not discuss whether or not claimant established modification pursuant to 20 C.F.R. §725.310, but, instead, considered all the evidence to determine if claimant was a coal miner. Decision and Order at 2-4. The administrative law judge considered claimant's employment at Ohio Edison under the situs-function test, which has been adopted by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[5] to determine whether claimant's work was that of a miner under the Act. 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(26) (2000); *see Petracca, supra*. The "situs prong" of the test requires that claimant's work occurred in or around a coal mine or coal preparation facility. *See Whisman v. Director, OWCP*, 8 BLR 1-96 (1985); *see also Slone v. Director, OWCP*, 12 BLR 1-92 (1988). The "function prong" requires that the work be integral to the extraction or preparation of coal and not merely ancillary to the delivery and commercial use of processed coal. *See Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989); *see also Whisman, supra*.

The administrative law judge stated that the ultimate issue in this case "is whether the electric company, Ohio Edison Company, is a coal processing facility under the Black Lung Act." Decision and Order at 3. The administrative law judge stated that the Board held in *McKee v. Director, OWCP*, 2 BLR 1-804 (1980), that Congress "did not intend to include the consumer's processing of coal for its own use," and that the Board also held that "coal production activities are deemed completed when the producer uses or consumes the coal as part of a separate industrial process." *Id.* The administrative law judge stated:

> [t]he coal delivered to and used by Ohio Edison was completely utilized in the process of producing electricity. Thus, the coal was purchased by Ohio Edison for its own purposes, to use in the production of electricity, making Ohio Edison a consumer of the coal. Because this coal was used in the separate

[5]The administrative law judge noted that this case comes under the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Decision and Order at 2. However, claimant's last employment was in Ohio. Director's Exhibit 2. Therefore, the Board will apply the law of the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

> industrial process of electricity production by the Claimant's employer, the Claimant. . .did not work at a "coal mine."

Decision and Order at 3.

Next, the administrative law judge considered whether the processing activities engaged in by Ohio Edison and performed by claimant could be considered as part of the preparation of coal. *Id.* The administrative law judge noted, from the legislative history of the Act, that Congress clearly intended for the Act to cover "those workers in the coal producing industry and not consumers of coal who might be involved in preparation of coal for their use." Decision and Order at 4.

Claimant worked at the Burger Plant at Ohio Edison. Director's Exhibit 2. The administrative law judge noted that the coal was delivered to the plant and placed in a large raw coal pile. Decision and Order at 4. The administrative law judge further noted that claimant moved the coal from the "raw coal pile" and placed it into a pulverizer, which crushed the coal so that it could fit into the plant's boilers,[6] 1999 Hearing Transcript at 12, 19-20. Decision and Order at 4. Accordingly, the administrative law judge found that claimant was not a coal miner "because he was involved in the preparation of coal, for Ohio Edison's use in a separate industrial process." Decision and Order at 4. The administrative law judge reasoned that "Claimant's activities at Ohio Edison were an integral part of the production of electricity and not an integral part of the extraction and preparation of coal." *Id.* The administrative law judge stated that although claimant may have been around the coal and even handled it, "the coal was already prepared coal that was extracted from the ground" and was used as a raw material by Ohio Edison to produce electricity. *Id*. Therefore, the administrative law judge concluded that the "two prong test" is not met and claimant is not covered by the Act because he was "not a miner at a coal mine as defined under the regulations." *Id.*

Claimant and the Director assert that claimant's employment with Ohio Edison should be considered coal mine employment because he was involved in the preparation of coal, and it does not matter that this preparation was done by the consumer of the coal, Ohio Edison. Claimant's Letter at 1-2; Director's Brief at 1-3. Specifically, the Director contends that claimant's employment is covered because his duties involved two of the enumerated functions, *i.e.*, crushing and loading coal, found in the regulatory definition of "coal preparation," *see* 30 U.S.C. §802(I); 20 C.F.R. §725.101(25) (2000). Director's Brief at 2.

[6]Additionally, the administrative law judge noted that claimant "was never involved in transporting the coal from a coal mine to the facility at Ohio Edison," 1999 Hearing Transcript at 11. Decision and Order at 4.

Contrary to the Director's assertion, claimant's work at Ohio Edison is not covered under the Act merely because he loaded and crushed coal to be burned for power. As the cases cited by the Director clearly state, the delivery of processed coal to the ultimate consumer is not covered under the Act. *See RNS Services, Inc. v. Secretary of Labor*, 115 F.3d 182 (3d 1997); *United Energy Services, Inc. v. Federal Mine Safety & Health Administration*, 35 F.3d 971 (3d Cir. 1994); *Pennsylvania Electric Co. v. Federal Mine Safety and Health Review Commission*, 969 F.2d 1501 (3d Cir. 1992). Therefore, because Ohio Edison was a **consumer** of coal that purchased raw coal and processed it for its own use, claimant's employment with it is not covered under the Act. *See Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1078 (8th Cir. 1999)(a utility that receives processed coal from a mine does not itself become a "mine" by further processing the coal for combustion); *Fox v. Director, OWCP*, 889 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989)(coal preparation activities involved in the use a consumer makes of the coal it acquires is not covered under the Act); *see also Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Accordingly, we reject claimant's and the Director's assertion. As the administrative law judge considered all the evidence in this case and rationally, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), determined that claimant was not a miner under the Act and regulations, we affirm his finding. *See Petracca, supra*; *Clemons, supra*; *Southard, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.[7]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[7]If claimant possesses new evidence necessary to the adjudication of this claim, he may seek modification with the district director. 33 U.S.C. §922; 20 C.F.R. §725.310 (2000).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge