BRB No. 04-0534 BLA

JOSEPH A. MARASKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATED RAIL CORPORATION	)	
	)	DATE ISSUED: 02/28/2005
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 – Denial of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Joseph A. Maraski, Wilkes-Barre, Pennsylvania, *pro se*.

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

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denial of Benefits (2003-BLA-5837) of Administrative Law Judge Ralph A. Romano 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). The administrative law judge adjudicated this claim under 20 C.F.R. Part 718, based on claimant's July 1, 2002 filing date. Initially, the administrative law judge denied benefits based on a finding that claimant was not engaged in qualifying coal mine employment and, thus, not a miner within meaning of the Act. Decision and Order at 6. The administrative law judge rendered additional findings, assuming *arguendo* that claimant was a miner, and found the medical evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 11-13. In addition, he found the evidence sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 13-14. However, the administrative law judge found the evidence insufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(c) and that claimant's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order at 13, 14. Consequently, the administrative law judge also found that claimant failed to establish entitlement to benefits on the merits. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director) has filed a Motion to Remand, requesting that the Board remand this case to the administrative law judge for reconsideration of whether claimant was a miner within the meaning of the Act and regulations. In addition, the Director contends that the administrative law judge erred in his weighing of the medical evidence of record. The Director also argues that because the Department of Labor physician, Dr. Corazzo, relied on an inaccurate length of coal mine employment history, the Director has not fulfilled his obligation of providing claimant with a complete pulmonary evaluation and, therefore, requests that the case be remanded for the Director to fulfill this obligation. In response to the Director's Motion to Remand, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[1]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge

[1] The parties do not challenge the administrative law judge's findings that employer was the properly named responsible operator, and that claimant established the existence of pneumoconiosis, 20 C.F.R. §718.202(a), and a totally disabling respiratory impairment, 20 C.F.R. §718.204(b)(2). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965).

The Act defines a miner as "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); 20 C.F.R. §§725.101(a)(19), 725.202(a). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises,[2] has held that this definition contains two elements, each of which must be satisfied. First, the "situs" test requires work in or around a coal mine or coal preparation facility. Second, the "function" test requires performance of coal extraction or preparation work. *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987); *Wisor v. Director, OWCP*, 748 F.2d 176, 7 BLR 2-46 (3d Cir. 1984). Thus, in order to satisfy both prongs, a claimant must have performed work in or around a coal mine or coal preparation facility and have been exposed to coal dust as a result thereof, and, the work must have been integral to the extraction or preparation of coal, and not merely ancillary to the delivery and use of prepared coal. *Id*.

In this case, the administrative law judge found that claimant's jobs as a trainman and flagman for Jersey Central Railroad, Lehigh Valley Railroad and Consolidated Railroad Corporation (Conrail) from 1959 through 1988 were not qualifying coal mine employment because the evidence was insufficient to establish the situs prong of the test to determine whether claimant was a miner.[3] Decision and Order at 4-6. Initially, the administrative law judge found that claimant's work during the "Wanamie runs," which involved hauling raw coal to a breaker, satisfied the function prong of the test. Decision and Order at 6. However, he found that claimant failed to establish the situs prong of the test, because the evidence was insufficient to establish that claimant spent a significant portion of his time at the coal mines. *Id*. In finding that claimant did not meet his burden

[2] The administrative law judge found that this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as claimant's coal mine employment took place in the Commonwealth of Pennsylvania. Decision and Order at 4, n.3; s*ee Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] On an "Employment History" form, claimant listed his coal mine employment as being with Jersey Central Railroad from 1959 to 1972, Lehigh Valley Railroad from 1972 to 1975, and Consolidated Rail Corporation (Conrail) from 1975 until his retirement in 1988. Director's Exhibit 3.

of establishing the situs prong of the test, the administrative law judge focused only on claimant's testimony regarding the time he spent around unprocessed coal. Specifically, the administrative law judge found that claimant was unable to quantify the amount of time he spent working with raw coal, but indicated any amount of time was minimal. *Id*. The administrative law judge, therefore, found that the evidence was insufficient to meet claimant's burden of establishing that he was engaged in qualifying coal mine employment.

On appeal, the Director contends that the administrative law judge erred in finding that claimant is not a miner within the meaning of the Act and regulations. In particular, the Director contends that the administrative law judge erred in focusing on the status of the coal, raw or processed, that was being transported by claimant rather than on the specific jobs claimant performed in and around the coal mine facilities. Based on criteria set forth by the Third Circuit court in *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988), the Director contends that this case must be remanded to the administrative law judge for further consideration of all relevant evidence. The Director argues that the administrative law judge erred in failing to determine whether claimant's work with processed coal involved the last step in the coal preparation process, or the first step in the stream of commerce or manufacturing process. Director's Motion to Remand at 6-7. Additionally, the Director contends that the administrative law judge erred in finding that claimant spent an insignificant amount of time at a coal mine and, thus, failed to establish the situs prong of the test because the administrative law judge considered only claimant's work with raw coal. These contentions have merit.

As the Director correctly contends, the administrative law judge erred in focusing on the status of the coal with which claimant was involved and not on the specific duties in the jobs claimant performed for Conrail and its predecessors. The appropriate inquiry is whether the work claimant performed falls within the definition of coal preparation, which includes loading coal at the coal preparation facilities.[4] Director's Motion to Remand at 4-6; 30 U.S.C. §802(i); 20 C.F.R. §725.101(a)(13). Specifically, the Third Circuit court has held that the definition of a miner includes loading coal because the "removal of coal from the tipple is a 'necessary' part of the preparation of coal for transport into the stream of commerce...participation in the removal of the coal from the tipple [is] a step, if only the very last step, in the preparation of the coal." *Hanna*, 860 F.2d at 93, 12 BLR at 2-22-23.

[4] The definition of coal preparation includes "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading" of coal. 20 C.F.R. §725.101(a)(13).

In addition, work leading up to the actual loading of the coal from the tipple has been held to be integral to the preparation of coal, such as cleaning out the coal cars prior to re-loading, *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988), or spotting (parking) the empty cars that coal mine employees would then release for loading, *Spurlin v. Director, OWCP*, 956 F.2d 163, 16 BLR 2-21 (7th Cir. 1991). Similarly, the delivery of empty railroad cars to a preparation facility was found to be an integral part of the process of loading coal. *Norfolk & Western Ry. Co. v. Director, OWCP* [*Schrader*], 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993). Because the administrative law judge in this case considered only that the majority of the coal claimant handled in and around the tipple was processed, and did not consider whether claimant's job duties were part of the process of loading coal at the coal preparation facilities, we vacate his finding that claimant is not a miner within the meaning of the Act and remand the case for him to further consider all of the relevant evidence. In particular, the administrative law judge must determine whether claimant's work with processed coal constitutes qualifying coal mine employment as involving the loading of the coal and, thus, integral to the last step of the preparation process. *Hanna*, 860 F.2d at 93, 12 BLR at 2-22-23.

On remand, the administrative law judge must consider all of the relevant evidence and testimony to determine whether claimant's duties constituted qualifying coal mine employment and the length of time claimant spent at these duties.[5] If, on remand, the administrative law judge finds the evidence of record sufficient to establish that claimant is a miner as defined by the Act and regulations, he must then address the Director's contention that the Director has not fulfilled his obligation of providing claimant with a complete pulmonary evaluation under 20 C.F.R. §725.406. Specifically, the Director contends that the opinion of Dr. Corazzo is based on an inaccurate picture of claimant's length of coal mine employment and, therefore, does not credibly address all of the necessary elements of entitlement. Director's Motion to Remand at 8-9. Thus, the administrative law judge must address the Director's contention that the case should be remanded to allow the Department to clarify Dr. Corazzo's opinion. 20 C.F.R. §725.456(e); Director's Exhibit 11.

Furthermore, if, on remand, the administrative law judge addresses the merits of entitlement, he must reassess the medical evidence in light of his findings regarding the length of claimant's coal mine employment. In particular, the administrative law judge must reconsider the relevant evidence at Section 718.203 and determine whether claimant is entitled to the benefit of the presumption that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b).

[5] A "working day" for determining the length of claimant's coal mine employment is defined as "any day or *part of a day* for which a miner received pay for work as a miner." 20 C.F.R. §725.101(a)(32) (emphasis added).

In addition, if the administrative law judge finds the evidence sufficient to establish that claimant's pneumoconiosis arose out of his coal mine employment, he must then reassess the medical evidence regarding the cause of claimant's disability. The administrative law judge should consider Dr. Levinson's opinion regarding the cause of claimant's respiratory disability, in light of the fact that the physician did not diagnose the existence of pneumoconiosis, contrary to the administrative law judge's findings on this issue, *see* discussion, *supra* at n.1. Employer's Exhibits 1, 4; 20 C.F.R. §718.204(c); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge