BRB No. 04-0634 BLA

BRICE D. BYRD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 02/11/2005
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Brice D. Byrd, Adamsville, Alabama, *pro se*.

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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2003-BLA-5935) of Administrative Law Judge Daniel L. Leland 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).[1] The administrative law judge, after

[1]Claimant filed his claim for benefits on November 2, 2001, which was denied by the district director on March 31, 2003, as claimant failed to establish that he was a coal miner, that his pneumoconiosis arose from coal mine employment or that he was totally disabled due to pneumoconiosis. Director's Exhibits 2, 15. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 16.

reviewing the testimony and documentary evidence of record, concluded that claimant failed to establish that he was a miner within the meaning of the Act. Decision and Order at 3. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly considered the evidence of record and substantial evidence supports the denial of benefits.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. 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." *See* 30 U.S.C. §902(d). The regulations provide that in order to qualify as a "miner", an individual must have worked in or around a coal mine or coal preparation plant and must have been involved "in the extraction or preparation of coal." *See* 20 C.F.R. §§725.101(a)(19) and 725.202(a).[2]

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[2]The regulation at Section 725.202 provides in pertinent part:

> (a) A "miner" ... is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation or transportation of coal.... There shall be a rebuttal presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:

The administrative law judge fully addressed all the documentary and oral evidence to determine if claimant was a miner. Decision and Order at 2-3. He considered claimant's employment at Chetopa Mines as a night watchman under the situs-function test, which has been adopted by the United States Court of Appeals for the Eleventh Circuit,[3] to determine whether claimant's work was that of a miner under the Act as set forth in 30 U.S.C. §902(d) and 20 C.F.R. §725.202(a). *See Fox v. Director, OWCP*, 889 F.2d 1037, 13 BLR 2-156 (11th Cir. 1989); *Baker v. United States Steel Corp.*, 867 F.2d 1297, 12 BLR 2-213 (11th Cir. 1989); *Foreman v. Director. OWCP*, 794 F.2d 569, 9 BLR 2-90 (11th Cir. 1986). The "situs prong" of the test requires that claimant's work occurred in or around a coal mine or coal preparation facility. *See Baker*, 867 F.2d 1297, 12 BLR 2-213. 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 Fox*, 889 F.2d 1037, 13 BLR 2-156; *Baker*, 867 F.2d 1297, 12 BLR 2-213; *Foreman*, 794 F.2d 569, 9 BLR 2-90; *see also Tobin v. Director*, OWCP, 8 BLR 1-115 (1985).

The administrative law judge considered claimant's testimony that he worked as a night watchman at Chetopa Mines for one or two years, that he was stationed in the supervisor's office and that he patrolled the mines. Decision and Order at 2-3; Hearing Transcript at 8-10. The administrative law judge also considered the written statements by claimant that his job was to control and watch the entire mines, which meant he had to enter the mines from time to time and that he helped to load material and assisted in whatever capacity he could while at the mines. Decision and Order at 3; Director's Exhibits 10, 13. The administrative law judge, in a proper exercise of his discretion, concluded that claimant's statements were insufficient to establish that his position was integral to the coal production

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> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. §725.202(a).

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit as claimant alleges that he was last employed in the coal mine industry in the State of Alabama. *See* Director's Exhibits 3, 10; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

process or that his job entailed anything more than providing security to the coal mines.[4] *See Slone v. Director, OWCP*, 12 BLR 1-92 (1988); *Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985); *see also Falcon Coal Co. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989). As the administrative law judge considered all the evidence in this case and rationally determined that claimant was not a miner under the Act and regulations, we affirm his finding. *See Fox*, 889 F.2d 1037, 13 BLR 2-156; *Baker*, 867 F.2d 1297, 12 BLR 2-213; *Foreman*, 794 F.2d 569, 9 BLR 2-90; *Slone*, 12 BLR 1-92; *Price*, 7 BLR 1-671; *Tobin*, 8 BLR 1-115; *see also Clemons*, 873 F.2d 916, 12 BLR 2-271.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge permissibly concluded that the evidence of record does not establish that claimant is a miner, claimant has not met his initial burden of proof under the Act and regulations. *See* 20 C.F.R. §§725.101(a)(19), 725.202(a); *Fox*, 889 F.2d 1037, 13 BLR 2-156; *Baker*, 867 F.2d 1297, 12 BLR 2-213; *Foreman*, 794 F.2d 569, 9 BLR 2-90; *Slone*, 12 BLR 1-92. The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish that claimant is a miner under the Act and regulations as it is supported by substantial evidence and is in accordance with law.

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[4]We note that the administrative law judge's findings establish rebuttal of the presumption contained in Section 725.202(a) as claimant was not engaged in the extraction or preparation of coal while performing his job of night watchman at the mine site. *See* 20 C.F.R. §725.202(a)(1); *Slone v. Director, OWCP*, 12 BLR 1-92 (1988); *see also Falcon Coal Co. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge