U.S. Department of Labor

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

BRB No. 17-0259 BLA

CAROL TEMPLIN (o/b/o PAUL R. TEMPLIN, SR., deceased) Claimant-Petitioner v. VALLEY CAMP COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2018 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: BUZZARD, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits (2012-BLA-05778) of Administrative Law Judge Drew A. Swank, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on December 28, 2010,[2] and is before the Board for the second time.

In a Decision and Order Awarding Benefits dated February 26, 2015 the administrative law judge initially determined that a previous administrative law judge's finding of fifteen years of coal mine employment, made in the decision denying the miner's first claim, was binding in the current claim under the doctrine of collateral estoppel. He further found that the miner's coal mine employment took place either in an underground mine or in conditions substantially similar to those in an underground mine, and that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Based on these findings, the administrative law judge found that the miner established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] Moreover, the administrative law judge found that employer did not rebut the presumption and awarded benefits. Thereafter, he summarily denied employer's motion for reconsideration.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings that the new evidence established total respiratory disability and thus a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309. *Templin v. Valley Camp Coal Co.*, BRB 15-0215 BLA (Feb. 29, 2016) (unpub). The Board vacated, however, the administrative law judge's application of collateral estoppel to preclude employer from contesting the miner's years of coal mine employment. *Id*.

[1] The miner died on September 23, 2013 while his case was pending before the administrative law judge. Employer's Exhibit 24. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[2] The current claim is the miner's fourth. Director's Exhibit 5. His most recent prior claim, filed on October 7, 2004, was denied by the district director on September 26, 2005, for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 3. The miner did not further pursue his prior claim.

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he worked at least fifteen years in underground coal mine employment or comparable surface coal mine employment, and had a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

Consequently, the Board further vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption and remanded the case for the administrative law judge to reconsider the length of the miner's coal mine employment.[4] *Id.*

The Board instructed the administrative law judge to consider any credible evidence[5] in determining the dates and length of the miner's coal mine employment and directed him to "consider [claimant's] testimony that, for about one year after employer closed its mine, the miner returned to the site with his truck to pick up coal stored there at the tipple or in 'bins,' and hauled it to businesses and consumers." *Templin, slip op.* at 5 n.9; [2014] Hearing Tr. at 17, 29-30. The Board noted that while the delivery of processed coal to consumers does not constitute coal mine employment, "the loading of coal at a preparation facility so that it can enter the stream of commerce is integral to the processing of coal." *Templin, slip op.* at 5 n.9, *citing* 30 U.S.C. §802(i), as implemented by 20 C.F.R. §725.101(13); *Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780, 18 BLR 2-35, 2-39 (4th Cir. 1993). The Board therefore instructed the administrative law judge to "address whether the record establishes that the miner performed a task integral to the loading of coal for any portion of the time that he was picking up coal at employer's mine site."[6] *Templin, slip op.* at 5 n.9.

[4] In addition to vacating the administrative law judge's Decision and Order denying benefits, the Board also vacated the administrative law judge's Order denying employer's motion for reconsideration. *Templin v. Valley Camp Coal Co.*, BRB 15-0215 BLA (Feb. 29, 2016) (unpub).

[5] The Board identified the evidence relevant to the issue of the length of the miner's coal mine employment, including: the miner's claim forms; employment history forms filed with each of his three claims; Social Security Administration earnings records; written statements by the miner and employer; and the formal hearing testimony of the miner and claimant. *Templin, slip op.* at 5 n.9, citing Director's Exhibits 1-3, 7, 9, 11; Employer's Exhibit 10 at 3, 5; [1987] Hearing Tr. at 10-11; [2014] Hearing Tr. at 16-17, 29-30.

[6] The Board noted that the record reflects that the miner initially worked underground for employer but later worked "outside" as a tipple attendant at the same underground mine site. *Templin, slip op.* at 7. Thus, the Board noted that claimant was not required to establish substantial similarity of the miner's working conditions for the aboveground work that he performed at employer's underground mine. *Id.*, *citing Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011).

In the interest of judicial economy, the Board addressed employer's remaining arguments, affirming the finding that employer did not rebut the Section 411(c)(4) presumption and therefore instructed the administrative law judge that if the record established at least fifteen years of qualifying coal mine employment, he could reinstate the award of benefits. Moreover, the Board instructed the administrative law judge that if the record did not establish that the miner had at least fifteen years of coal mine employment, he had to determine whether claimant established entitlement to benefits under 20 C.F.R. Part 718 without the benefit of the Section 411(c)(4) presumption. *Templin*, *slip op*. at 12.

On remand, the administrative law judge credited the miner with fourteen years and 346 days of qualifying coal mine employment,[7] which is "just 19 days less than the statutorily-relevant 15 years." Decision and Order on Remand at 6. In rendering this finding, the administrative law judge initially determined that the miner's work for employer from October 1, 1965 until the mine closed on September 11, 1980 constituted underground coal mine employment. The administrative law judge further found, however, that while the miner worked for "close to a year" as a coal truck driver after the mine closed, none of the miner's work loading coal at the tipple and hauling it offsite constituted the work of a miner under the Act. Decision and Order on Remand at 5. Relying on *Swinney v. Director, OWCP*, 7 BLR 1-524 (1984), the administrative law judge noted:

> . . . [T]he Board has clarified that it is insufficient to simply show that a given activity – such as loading coal – occurred at the preparation facility, the claimant must also establish that the specific activity was integral *to the extraction or preparation of coal*. … In *Swinney*, the Board found that a coal hauler's primary purpose was to deliver prepared coal to consumers, making '[t]he loading activities which he did engage in… ancillary to his transportation of coal to consumers.' … Thus, the Board held that a coal hauler loading processed coal for transportation directly to the consumers did *not* constitute coal mine employment.

Decision and Order on Remand at 5 [emphasis in original]. The administrative law judge found that the miner received orders for coal from customers before he went to the tipple to collect it from the silo, and "did not actually have to load the coal into the truck himself because 'there were boys that [shoveled it], and that's how they earned their

[7] The administrative law judge examined employment history forms, a written statement from employer, a letter from the United Mine Workers of America, Social Security Administration records, and the hearing testimony of the miner and claimant. Decision and Order on Remand at 4-6.

money.'" *Id*. He stated further that "even if the miner did shovel the coal himself, it had already been processed before the miner had any contact with it." *Id*. at 6. He additionally noted "most significantly" that the miner picked up coal "so that it could be delivered directly to the final consumer for personal use." *Id*. at 6. Consequently, the administrative law judge found that the miner's work hauling processed coal to consumers was indistinguishable from the work of the coal hauler in *Swinney* and, therefore, did not credit claimant with any additional coal mine employment for the miner's time spent driving a coal truck.

Because the miner had less than fifteen years of qualifying coal mine employment, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption. Considering whether claimant established entitlement to benefits without the aid of the presumption, the administrative law judge found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a). Accordingly, he denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the miner's work as a coal truck driver, loading and hauling coal, did not constitute coal mine employment, and thus erred in finding that claimant did not invoke the Section 411(c)(4) presumption.[8] Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, arguing that the miner's work as a coal truck driver constitutes coal mine employment. The Director therefore requests that the Board vacate the administrative law judge's finding that the miner had less than fifteen years of coal mine employment and remand the case for further consideration of this issue.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[9] 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).

---

[8] Claimant does not dispute the administrative law judge's determination that, excluding his work as a coal truck driver, the miner had fourteen years and 346 days of coal mine employment with employer from October 1, 1965 until the mine closed on September 11, 1980. Claimant's Brief at 2-3.

[9] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 9.

Length of Qualifying Coal Mine Employment

Because claimant established that the miner had a totally disabling respiratory or pulmonary impairment, she is entitled to the Section 411(c)(4) presumption if she establishes that the miner had at least fifteen years of qualifying coal mine employment. 30 U.S.C. §921(c)(4). Under the Act, a "miner" is:

> [A]ny 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); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., that the miner worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the miner worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42, 14 BLR 2-139, 2-143 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70, 2 BLR 2-68, 2-72-73 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97.

Claimant argues that the administrative law judge erred in determining that the miner's work as a coal truck driver, which included delivering his empty truck to the tipple of a mine site where it was loaded with processed coal for transport to customers, did not satisfy the function test. Claimant's Brief at 8. Claimant asserts that, in determining that the miner's work as a coal truck driver was not integral or necessary to the extraction or preparation of coal, the administrative law judge erroneously examined whether customers placed orders for coal, whether the coal was raw or processed, and whether claimant personally shoveled the coal into his truck. Claimant also maintains that he erred in relying on the Board's decision in *Swinney v. Director, OWCP*, 7 BLR 1-524 (1984), rather than the subsequent decisions of the United States Courts of Appeals for the Fourth, Sixth, and Seventh Circuits in *Shrader*, 5 F.3d at 780, 18 BLR 2-39; *Spurlin v. Director, OWCP*, 956 F.2d 163, 16 BLR 2-21 (7th Cir. 1991); *Norfolk & Western Ry. Co. v. Roberson*, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991); and *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891 (6th Cir. July 18, 1994).[10] Claimant's Brief at 8. Claimant notes that the courts'

[10] In *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891 (6th Cir. July 18, 1994), the United State Court of Appeals for the Sixth Circuit held that "the final

decisions in *Shrader*, *Spurlin*, and *Ratliff* held that coal does not enter the stream of commerce until the moment after it is loaded into a rail car or truck for transport to market. Claimant's Brief at 9. Thus, claimant asserts that all of the work done by the miner "prior to the processed coal being in the back of his truck" was coal mine employment because it was essential to the preparation of coal. *Id.* Claimant further notes that none of the miners in *Shrader*, *Spurlin*, or *Ratliff* shoveled the processed coal into the rail cars. *Id*.

The Director agrees with claimant that the miner's work as a coal truck driver constituted coal mine employment. The Director asserts that the administrative law judge overlooked the fact that the miner's work loading coal is presumed to be integral to coal extraction and preparation pursuant to 20 C.F.R. §725.202(a) because it occurred at the mine site. Citing *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988),[11] and *Ratliff*, the Director further asserts that "federal court of appeals precedent subsequent to *Swinney* supports the view that the miner's coal hauling work qualifies as coal mine employment." Director's Brief at 2 [unpaginated]. The Director contends that the miner's presence at the tipple facilitated the loading of the coal in his truck and that *Ratliff* stands for the proposition that the coal at a mine site is in the processing stage until it was fully loaded into the miner's truck bed. *Id*. at 2-3 [unpaginated]. The Director additionally asserts that because the miner began his day loading coal from the tipple into his truck, all of the miner's work that day constituted coal mine employment even though some of his work may have involved the transportation of coal that had already entered the stream of commerce. *Id*., *citing* 20 C.F.R. §725.101(a)(32) ("A 'working day' means any day or part of a day for which a miner received pay for work as a miner.").

---

step of processing the coal (or 'preparation') ended when the coal was loaded into the railroad cars at the tipple; *after that*, the coal entered the stream of commerce and was no longer being 'prepared.'" *Ratliff*, 1994 WL 376891 at *3 (emphasis added). Because the miner in *Ratliff* was involved in maintaining the rail spurs on which the railroad cars were brought to the tipple for loading, his work was held to be integral to the processing of coal and, therefore, to be the work of a miner. *Id*.

[11] In *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988), the United States Court of Appeals for the Third Circuit held that the loading of coal at the tipple was a necessary part of the processing of coal; therefore, the transportation worker in that case was a coal miner as his "participation in the removal of coal from the tipple was a step, if only the very last step, in the preparation of coal." *Hanna*, 860 F.3d at 93, 12 BLR at 2-23.

We agree with claimant and the Director that the miner's work loading coal at the tipple constituted the work of a miner under the Act. The administrative law judge mistakenly focused on the end result of the miner's work – delivering coal to customers – rather than the specific job that the miner performed in and around the coal mine site. The facts of this case are consistent with those in *Shrader*, where the Fourth Circuit held that the delivery of empty railroad cars to a coal preparation facility to be loaded with processed coal is integral to the process of loading coal at the preparation facility. Further, the loading of coal is included in the statutory definition of coal preparation which, as noted *supra*, is among the tasks that defines the work of a miner under Section 402(d) of the Act.[12] *Shrader*, 5 F.3d at 780, 18 BLR at 2-39; *see* 30 U.S.C. §802(i), as implemented by 20 C.F.R. §725.101(13). Consequently, we vacate the administrative law judge's finding that the miner's work loading coal from the tipple of the mine prior to hauling it to customers did not constitute coal mine employment and remand this case for the administrative law judge to determine the length of the miner's coal mine employment, to include any time he worked as a coal truck driver after September 11, 1980.[13]

Because we have vacated the administrative law judge's finding that the miner had less than fifteen years of qualifying coal mine employment, we must also vacate his finding that claimant did not invoke the Section 411(c)(4) presumption. Further, because it is unchallenged on appeal, we affirm the administrative law judge's finding that

[12] In *Shrader*, the miner did not assist in loading the empty railroad cars he delivered to the preparation facility. *See Norfolk & Western Ry. Co. v. Director, OWCP* [*Shrader*], 5 F.3d 777, 780, 18 BLR 2-35, 2-39 (4th Cir. 1993).

[13] Employer asserts that the record does not definitively establish that the miner worked in or around a coal mine after September 11, 1980, when the mine closed down. Employer's Brief at 8-10, 13. Employer further asserts that, even assuming the miner worked loading and hauling coal after September 11, 1980, there is no evidence in the record to establish how often the miner performed such work. Employer's Brief at 14. Contrary to employer's assertion, however, claimant's testimony that the miner performed these duties for about a year, if credited, can constitute such evidence. 20 C.F.R. §725.101(a)(32)(ii). Moreover, as the Director asserts, the miner noted on his Employment History Form CM-911a that after the mine closed, he was self-employed as a truck driver, delivering coal. Director's Exhibit 7. Further, Dr. Saludes noted that from 1970 to 1981, in addition to his coal mine work, the miner would deliver coal to private homes and businesses by dumping coal from the tipple into a chute and then into his dump truck. Director's Exhibit 16 at 51. Finally, in his 1986 opinion, Dr. Altmeyer noted that after the mine closed, the miner "drove his own truck for about one year hauling coal." Director's Exhibit 1 at Director's Exhibit 35.

without the benefit of the presumption claimant did not establish the existence of clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Remand Instructions

On remand, the administrative law judge must determine the length of the miner's coal mine employment as a coal truck driver in accordance with the definition of "working day." 20 C.F.R. §725.101(a)(32). If the administrative law judge finds that the miner had at least fifteen years of coal mine employment, claimant will have invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In that case, in light of the Board's previous affirmance of the administrative law judge's finding that employer did not rebut the presumption, *Templin*, *slip op.* at 7-12, the administrative law judge may reinstate the award of benefits. If claimant cannot invoke the Section 411(c)(4) presumption, the administrative law judge may reinstate the denial of benefits based on his finding that claimant did not establish the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge