U.S. Department of Labor

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

BRB Nos. 19-0153 BLA
and 19-0269 BLA

BETTY RAE AKERS (o/b/o and Widow of LEROY AKERS) Claimant-Respondent v. DYNO EAST KENTUCKY, INCORPORATED and KENTUCKY EMPLOYERS' MUTAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/28/2020 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits in Miner's and Survivor's Claims of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Sarah M. Hurley (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits in Miner's and Survivor's Claims (2015-BLA-05012 and 2015-BLA-05706) of Administrative Law Judge John P. Sellers, III, issued pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The miner filed a subsequent claim on February 22, 2013[1] and claimant filed a survivor's claim on January 12, 2016.

The administrative law judge determined Mr. Akers was a "miner" under the Act and employer is the responsible operator. 20 C.F.R. §725.202(a). He found the miner had 16.8 years of underground coal mine employment or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge found claimant invoked the presumption that the miner was totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act,[2] established a

[1] The miner filed two prior claims that were denied for failure to establish pneumoconiosis and total disability. Living Miner's Claim (LM) Director's Exhibits 1, 2. On September 5, 2013, the district director denied the miner's current subsequent claim because the evidence did not establish the miner had pneumoconiosis or was totally disabled. LM Director's Exhibits 3, 38. The miner died on May 6, 2014, and claimant requested modification of the denial of his claim on behalf of his estate. LM Director's Exhibit 39. The district director granted modification and awarded benefits in the miner's claim. LM Director's Exhibit 54. At employer's request, the case was forwarded to the Office of Administrative Law Judges. LM Director's Exhibit 68.

[2] Under Section 411(c)(4) of the Act, claimant is entitled to a presumption the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground coal mine employment, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

change in an applicable condition of entitlement and therefore a basis for modification.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.305, 725.309; 725.310. He further determined employer did not rebut the presumption and awarded benefits in the miner's claim. In the survivor's claim, the administrative law judge found claimant was automatically entitled to benefits pursuant to Section 422(*l*) of the Act. 30 U.S.C. §932(*l*).[4]

On appeal, employer argues the administrative law judge erred in determining Mr. Akers was a "miner" and thus erred in finding it is the responsible operator. Employer also contends the administrative law judge erred in finding claimant established at least fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging affirmance of the administrative law judge's findings that Mr. Akers was a miner, employer is the responsible operator and claimant invoked the Section 411(c)(4) presumption.

The Board's scope of review is defined by statute. We must affirm the Decision and Order Awarding Benefits in Miner's and Survivor's Claims if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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, 361-62 (1965).

The Miner's Claim

Definition of a Miner/Responsible Operator:

[3] The administrative law judge concluded that claimant was entitled to modification based on a mistake in a determination of fact and further found that granting modification would render justice under the Act. 20 C.F.R. §725.310; Decision and Order at 39.

[4] Section 422(*l*) of the Act provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] The record reflects that the miner's last coal mine employment occurred in Kentucky. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200. 1-202 (1989) (en banc).

The responsible operator is the coal mine operator that most recently employed the miner for a cumulative period of not less than one year and is capable of assuming liability for the payment of benefits. 20 C.F.R. §§725.494(c), 725.495(a)(1); *see Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313, 25 BLR 2-521, 2-530 (6th Cir. 2014). Employer does not dispute it employed Mr. Akers for at least one year.[6] Instead, it argues the administrative law judge erred in finding his work for it constituted qualifying coal mine employment. Employer asserts it is not the responsible operator because Mr. Akers was not a "miner" as defined under the Act. We reject employer's arguments as without merit.

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of a "miner" includes a "situs" requirement (i.e., that he worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that he worked in the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). Whether an individual satisfies the definition of a miner is a factual determination for the administrative law judge. *Amigo Smokeless Coal Co. v. Director, OWCP*, 642 F.2d 68, 69-71 (4th Cir. 1981); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38, 1-40-41 (1992) (en banc).

As the administrative law judge noted, Mr. Akers worked for employer (previously known as Sandy Valley/Mountain Valley Explosives) from 1981 through 1996. Decision and Order at 5-6, 8, 11, 14-15. He first worked as a magazine keeper, delivering explosive powder to underground and surface coal mine operations. Decision and Order at 6; Director's Exhibit 40. He later became employer's sales and technical representative for the explosive powder delivered to the mine sites. *Id*.

Employer alleges Mr. Akers' job did not satisfy the situs test because he performed the bulk of his work either at the company's headquarters or in his vehicle. It relies on a November 15, 1996 letter from Mr. Cassidy, President of Mountain Valley Explosives, stating that while Mr. Akers was employed as a magazine keeper from 1981 to 1984, he "did not go inside mines and demonstrate powder to my knowledge." Living Miner's Claim (LM) Director's Exhibit 2 at 14-1. Mr. Cassidy also stated in a "work questionnaire" on September 23, 1996 that Mr. Akers was at a mine site "only when making sales calls." LM Director's Exhibit 2 at 13.

[6] The miner worked for Sandy Valley/Mountain Valley Explosives from 1981 through 1994, until employer purchased the company in 1995. Decision and Order at 5.

Contrary to employer's contention, the administrative law judge permissibly found "it is not clear whether Mr. Cassidy was in a position to observe everything the [m]iner did when he made a sales and technical call to the mines." Decision and Order at 11; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). He therefore rationally found Mr. Akers' statements and testimony more credible regarding the location of his job duties for employer. *See Rowe*, 710 F.2d at 255; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 11. Mr. Akers testified that in both positions as a magazine keeper/deliveryman and sales technician he regularly travelled to mine sites. LM Director's Exhibit 2 at 11-1, 14-1. As a deliveryman, he picked up powder at employer's warehouse, unloaded it at the mine site and put it in the mine's magazines. Director's Exhibit 40. As a sales technician, he visited the mine sites up to four times a week to demonstrate or supervise the use of the explosive powder.[7] LM 1 at 102, 113-119; 40-5. Claimant also testified that her husband had to go into the mine and shoot the explosives. May 3, 2018 Hearing Transcript at 32. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that Mr. Akers' work satisfied the situs test. *See Petracca*, 884 F.2d at 932; Decision and Order at 27- 28.

To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal, not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989) ("Those whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as 'miners.'"). Employer asserts the miner's work was not integral to the extraction of coal because any person could have picked up and/or delivered the explosive powder to the mine site. Employer's Brief at 8. Employer states "it can be argued that the use of explosive powder is simply an expedited manner for extracting coal and not necessarily the only method to extract coal."[8] *Id*. Employer's arguments are without merit.

The administrative law judge rationally found Mr. Akers' work satisfied the function test because it "was necessary for the mining operation to have explosive powder

[7] The administrative law judge noted that there were days when Mr. Akers did not go to any mine sites due to the low volume of sales but determined "more often than not he was either delivering powder to [a] mine or making sales or technical calls [to a mine site]." Decision and Order at 28.

[8] Employer notes more antiquated methods (mattocks and hand-picking) are available to extract coal but has not demonstrated why explosive powder is not integral to modern mining techniques. Employer's Brief in Support of Petition for Review at 8; Director's Brief at 5.

in order to extract coal." Decision and Order at 13; *see Falcon*, 873 F.2d at 922. Mr. Akers not only delivered explosives but had to demonstrate how to use the powder at mine sites. *Id.* Because substantial evidence supports the administrative law judge's finding that Mr. Akers' work satisfied the function test, it is affirmed. *See Forester*, 767 F.3d at 641; *Petracca*, 884 F.2d at 929-30. Thus, we affirm the administrative law judge's finding that Mr. Akers was a miner under the Act. Decision and Order at 13.

Additionally, we reject employer's contention it is not the responsible operator because it "is not a coal mine operator but merely a company selling explosive powder not only to mine but to other non-coal related industries." Employer's Brief at 11. The regulations define an operator as "any owner, lessee, or other person who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine." 20 C.F.R. §725.491(a)(1). We agree with the Director that employer is an "independent contractor performing services or construction" at a mine site that was integral to the production and extraction of coal. *Id.*; *Petracca*, 884 F.2d at 926; Director's Brief at 5-6. We therefore affirm the administrative law judge's determination employer is the responsible operator. Decision and Order at 15.

Invocation of the Section 411(c)(4) Presumption

To invoke the Section 411(c)(4) presumption, claimant must establish the miner worked at least fifteen years in underground or substantially similar surface coal mine employment and was totally disabled by a respiratory or pulmonary impairment.[9] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(ii). Claimant establishes substantial similarity if she proves the miner was regularly exposed to coal mine dust. 20 C.F.R. §718.305(b)(2); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 304 (6th Cir. 2018) (Kethledge, J., concurring); *Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 663 (6th Cir. 2015).

Although employer generally states claimant did not prove substantial similarity, it does not identify any specific error in the administrative law judge's finding the miner was regularly exposed to coal mine dust while working for employer. Employer's Brief at 4. Employer also generally asserts the administrative law judge erred in finding the miner was totally disabled but it also does not identify any specific error by the administrative law judge in weighing the evidence on this issue. *Id*.

[9] Employer's only challenge to the administrative law judge's finding on the length of the miner's coal mine employment was that Mr. Akers did not work as a miner. Having rejected employer's argument, we affirm the administrative law judge's determination claimant established 16.8 years of coal mine employment.

The Board must limit its review to contentions of error the parties specifically raise. *See* 20 C.F.R. §§802.211, 802.301; *Cox v. Benefits Review Board*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987). We therefore affirm the administrative law judge's findings claimant established the miner had at least fifteen years of qualifying coal mine employment and was totally disabled. Decision and Order at 29. Thus, we affirm his determination claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.204(b)(2); 718.309. We also affirm, as unchallenged, the administrative law judge's finding employer did not rebut the presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 32-38. Accordingly, we affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge found claimant established each element necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*) (2012); Decision and Order at 40. Because we have affirmed the award of benefits in the miner's claim, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits. 30 U.S.C. §932(*l*) (2012); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Miner's and Survivor's Claims is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge