BRB No. 12-0442 BLA

TERRY FORESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVISTAR NKA INTERNATIONAL TRUCK & ENGINE CORPORATION	)	DATE ISSUED: 06/27/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

H. Kent Hendrickson (Rice & Hendrickson), Harlan, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5666) of Administrative Law Judge John P. Sellers, III, rendered on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Finding that claimant's work as a federal coal mine inspector constituted work as a "miner" under the Act, and that employer's stipulation to seventeen years of coal mine employment was binding and not contrary to law,[2] the administrative law judge adjudicated the claim, filed on May 1, 2008, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[3] and that

[1] Claimant's original claim, filed on December 17, 1993, was denied by Administrative Law Judge Robert D. Kaplan for failure to establish the existence of pneumoconiosis, and the Board affirmed the denial of benefits on November 27, 1998. *Forester v. Navistar, Inc.*, BRB No. 98-0378 BLA (Nov. 27, 1998)(unpub.); Director's Exhibits 1-336, 1-93, 1-42, 1-2.

Claimant's second claim, filed on July 11, 2000, was denied by the district director on November 16, 2000, because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibits 2-75, 2-5. No further action was taken on this claim.

[2] At the hearing, employer stipulated to seventeen years of coal mine employment, Hearing Transcript at 47, but later attempted to withdraw its stipulation. Employer argued in its closing brief that, under relevant case law of the United States Court of Appeals for the Fourth Circuit, claimant's work as a federal coal mine inspector could not be counted in determining the length of his coal mine employment. Thus, employer maintained that its stipulation was not binding, as it was contrary to law. Decision and Order at 4.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

employer failed to establish rebuttal by proving either that claimant did not have pneumoconiosis, or that his totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. Accordingly, the administrative law judge awarded benefits.

On appeal, employer's sole contention is that the administrative law judge erred in crediting claimant with seventeen years of underground coal mine employment, arguing that claimant's work as a federal coal mine inspector does not constitute qualifying coal mine employment under the Act. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer's position, that work as a federal mine inspector should not be counted in determining the length of claimant's coal mine employment. Acknowledging that the Board has held to the contrary, the Director notes his continued objection to coverage of federal mine inspectors under the Act.[4]

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.[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 (1965).

Employer maintains that a federal coal mine inspector is not a "miner" under the Act. Thus, employer contends that the administrative law judge erred in crediting claimant with seventeen years of coal mine employment, rather than with just five years of coal mine employment with employer.[6] Citing case law from the United States Court of Appeals for the Fourth Circuit, employer argues that, because claimant's exclusive remedy for benefits arising out of his federal mine inspector's job is under the Federal Employees' Compensation Act (FECA), claimant's years of employment as an inspector

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1-334, 1-203.

[6] Employer concedes that claimant's five years of employment with employer, from October 1970 to September 1975, constitutes qualifying coal mine employment. Employer's Brief at 2; Hearing Transcript at 19, 24.

"should be a nullity" in a claim for black lung benefits under the Act. Employer's Brief at 2-4. Employer further maintains that the FECA's offset provisions bolster this conclusion, as dual benefits from both FECA and from an employer under the Act are forbidden. Employer's Brief at 4.

In finding that employer's stipulation to seventeen years of qualifying coal mine employment was binding, the administrative law judge noted that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has not issued a decision on the issue of whether a federal mine inspector is a "miner" under the Act, but has applied a two-prong, situs-function test in determining whether a claimant meets the definition of a "miner." Decision and Order at 6-7; *see Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). As the Board applied "essentially the same test" in *Moore v. Duquesne Light Co*., 4 BLR 1-40 (1981)(Smith and Miller, JJ., concurring), holding that the duties of a federal mine inspector satisfied the "situs" and "function" prongs of the test to meet the definition of a "miner," the administrative law judge permissibly concluded that *Moore*, rather than Fourth Circuit case law, was controlling. Decision and Order at 7. Applying *Moore*, the administrative law judge determined that claimant's work as a federal mine inspector, requiring that he spend a significant portion of his day inspecting underground coal mines, was integral to the functioning of the mine and bore a "reasonable relationship to the overall process of coal mining." Decision and Order at 8, *citing Moore*, 4 BLR at 1-44. Finding that claimant's duties satisfied the Sixth Circuit's situs-function test, the administrative law judge appropriately exercised his discretion in concluding that employer's stipulation to seventeen years of coal mine employment was not contrary to law and was binding. *Id.; see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(en banc). As we discern no abuse of discretion, we affirm the administrative law judge's finding that claimant had seventeen years of coal mine employment. We further affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), and his determination that employer failed to establish rebuttal of the presumption. 30 U.S.C. §921(c)(4); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we affirm the administrative law judge's award of benefits.

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

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