BRB No. 09-0179 BLA

ELDON HANSEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THE WACKENHUT CORPORATION	)	
	)	DATE ISSUED: 11/27/2009
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 Denying Miner's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Eldon Hansen, Gillette, Wyoming, *pro se*.

Stephenson D. Emery (Williams, Porter, Day & Neville, P.C.), Casper, Wyoming, for employer.

Rita Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

SMITH, J., Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Miner's Benefits (2003-BLA-5945) of Administrative Law Judge William S. Colwell on a claim filed on July 16, 2001, 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). In his Decision and Order issued on October 15, 2008, the administrative law judge found that claimant failed to meet the statutory definition of a miner under the Act. The administrative law judge specifically determined that claimant's duties as a security guard were merely convenient and not integral or essential to the actual extraction, preparation or transportation of coal pursuant 20 C.F.R. §725.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in concluding that he was not a "miner" within the meaning of the Act. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter on appeal, asserting that the administrative law judge erred in finding that claimant failed to satisfy the function requirement of 20 C.F.R. §725.202(a). The Director urges the Board to reverse the administrative law judge's finding that claimant is not a miner and remand the case for consideration of the merits of entitlement.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director*, *OWCP,* 9 BLR 1-36 (1986). 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.[1] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The statutory definition of a "miner" includes "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," and "any person who works or has worked in coal mine construction or maintenance in or around a coal mine preparation facility." 20 C.F.R. §718.202(a). The Board has adopted a two-pronged situs and function test in determining whether the duties performed by a claimant satisfy the definition of a "miner." *See Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). To meet the "situs" test, a claimant must have worked in or around a coal mine or coal preparation facility, and to meet the "function" test, a claimant must have been involved in coal extraction or preparation. *Id*. Both tests must be satisfied for a claimant to be considered a "miner"

[1] The record indicates that claimant's employment occurred in Wyoming. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*).

under the Act. *Id*. Moreover, there is a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. *See* 20 C.F.R. §725.202(a). This presumption may be rebutted by proof that:

> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in the 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. §718.202(a)(1), (2).

In this case, claimant worked as a security officer for employer (a security company) and was assigned primarily to the Black Thunder mine (a surface coal mine) from February 1, 1984 until his retirement on July 1, 1994.[2] On Form CM-913, "Description of Coal Mine Work and Other Employment," claimant described his duties as the "site supervisor" for security at Black Thunder mine. Director's Exhibit 3. He stated that he would check in all mine supervisors and check all non-mine employees for required safety equipment; patrol the mine site both before and after hours, checking for safety violations, trespassers, and fires; check and refill fire extinguishers; and direct emergency procedures. *Id.*

On April 19, 2002, claimant prepared a work description of "Additional Duties Assigned to Security," in which he described four aspects of his job. Claimant's Exhibit 4. Under "Pit Patrol," claimant noted that he had to "patrol the pit (an active mining area), every hour looking for fires in the coal," inspect shovels, drills and power cables for any fires, and inspect the water pumps "to make assure that they were working properly to keep from flooding." *Id*. Under "Conveyer and Storage Facilities," claimant stated that four times per shift he had to "patrol the conveyor (Tubes) checking for dust build-up and fire hazards and methane build-up;" inspect coal storage areas for "same

[2] Claimant prepared a work summary dated February 28, 2002, in which he stated that he worked for employer at Belle Ayr mine from January through April 1984, "patrolling the mine site in an open windowed vehicle" and "checking contractors in and out of the mine gate entrance." Director's Exhibit 5. He worked at the Eagle Butte mine for the month of May performing "the same duties" as he did at Belle Ayr mine. *Id*. Claimant then worked at Cabello Rojo mine from June 1984 through January 1985, and "patrolled the coal conveyer tubes, checking for fire in the coal dust, once every shift" and "worked the mine gate checking everyone in and out." *Id*. Thereafter, claimant went to the Black Thunder mine on February 1, 1985 through July 1, 1994. *Id*.

hazards as in tubes" and patrol the conveyor belts. *Id*. In addition, under "Loading Coal Trains," claimant indicated that he would call the trains onsite to be loaded, weigh the empty incoming train cars to verify that they were empty, reweigh the cars once they were loaded with coal, and remove coal if the cars were overloaded. *Id*.

The record includes a copy of employer's "Post Orders" for the security officer stationed at Black Thunder mine.[3] Director's Exhibit 28. According to the Post Orders, the security officer was required to: enforce traffic regulations and control traffic; report the location of all material piled or stored in a hazardous manner; watch for open valves or excessive water coming from water lagoons or tanks at the water storage area; make regular patrols of the mine site[4] and report problems to the plant supervisor on shift; watch for anything that could be blocking the railroad tracks; check buildings for fire and smoke, damage to equipment, power outages and water, air, oil, or fuel leaks on equipment; and check the pit and equipment for downed powers lines or excessive water around the equipment, power cables and power station. *Id*. The security officer was also required to "become familiar with all evacuation routes . . . and know the location of fire-fighting equipment." *Id*.

At the hearing held on December 6, 2007, claimant clarified that his title at Black Thunder mine was Site Supervisor of Security, that he supervised eleven security guards, and worked a three-day shift from 6:00 a.m. to 6:00 p.m. and one shift from 6:00 a.m. until noon. *See* Hearing Transcript (HT) at 23-24. In the morning, claimant described checking in supervisors, contractors and vendors at the guard shack. *Id*. at 23-24. He would then begin his patrol of the ten acre mine site by truck. *Id*. at 25-26. Claimant also described having to go into "the pit" with the mine supervisor to check equipment. *Id*. at 26. On cross-examination, claimant clarified that he weighed and loaded train cars while he worked at Belle Ayr mine for a six month period of time. *Id*. at 44.

A branch manager for employer's Wyoming office also testified at the hearing. Hearing Transcript at 50-55. The branch manager indicated that he began working for employer in July of 2006, which is twelve years after claimant's employment, and that he

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[3] This document is titled *Black Thunder Mine Security Officer Training*. Director's Exhibit 28.

[4] The security officer was required to patrol and inspect various areas, including the administration building, computer room, boilers and silos, an "Area 85 Quonset Hut, Water, Weather, and Fuel Stations," water storage area, transformers, an "Area 17." which included an electrical generator, "changehouse," railroad spur, coal slot, explosives area, scoria pit, plant operations building, and other areas as necessary. *Id*.

did not have the opportunity to meet claimant. *Id*. at 51. He stated that the security officers who work at the Black Thunder mine "only work at the gate and process vehicles in and out of the mine." *Id*. at 51. The branch manager testified that "[a]s far as [he] know[s], [they] have never done any patrols in that area, and [there is] only one person on duty, so [they] can't leave the gate." *Id*. at 51. He also testified that he had no personal knowledge of whether claimant patrolled the site. *Id*. at 52.

In determining whether claimant qualified as a "miner" pursuant to 20 C.F.R. §725.202(a), the administrative law judge reviewed claimant's testimony and the documentary evidence of record. The administrative law judge noted that there was no disagreement among the parties that claimant worked as a supervisory security guard, which position was located on the mine property and satisfied the situs requirement.[5] Decision and Order at 4.

In considering whether claimant's job duties satisfied the "function" requirement of 20 C.F.R §725.202(a), the administrative law judge first addressed the holding of the United States Court of Appeals for the Sixth Circuit in *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989). In *Clemons*, the claimant was a night watchman who patrolled the grounds of the coal mine in his truck and worked inside of a guardhouse. *Clemons*, 873 F.2d at 918-19, 12 BLR at 2-272, 2-274. The Sixth Circuit explained that "[a]lthough workers performing duties incidental to the extraction or preparation of coal have met the function requirements and have been considered to be coal miners, these incidental duties must be an 'integral' or 'necessary' part of the coal mining process." *Clemons*, 873 F.2d at 922, 12 BLR at 2-278. The Sixth Circuit further explained as follows:

> [T]hose individuals who handle raw coal or who perform tasks necessary to keep the mine operational and in repair are generally classified as "miners." Those whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as "miners."

Clemons, 873 F.2d at 922-23, 12 BLR at 2-279. Accordingly, the Sixth Circuit held that "[a]lthough Clemons may have been convenient or helpful to Falcon's operation, he was not necessary to procure coal. Falcon might just as well have installed alarms or other security devices instead of hiring a security guard, because the type of security system

[5] The administrative law judge's finding that claimant satisfied the "situs" requirement, as claimant worked in or around a coal mine or coal preparation facility, is affirmed, as it is unchallenged on appeal and is not adverse to claimant. *See Coen v. Director, OWCP,* 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

used does not affect extraction methods at the mine." *Clemons*, 873 F.2d at 923, 12 BLR at 2-281.

Applying the *Clemons* rationale to the facts of this case, the administrative law judge determined that "[n]one of the duties mentioned in the 'Post Orders' pertains to the extraction, preparation, or transportation of coal at the mine site." Decision and Order at 8. He noted that "[w]hile the duties include visually checking equipment for fires, leaks, or other malfunctions, the guard's responsibility in all instances was to report the problem to a 'maintenance supervisor,' or 'plant supervisor,' or the like." *Id*. at 8. Based on claimant's testimony and written statements, the administrative law judge concluded:

> While the job duties were very important to securing property and contributed to ensuring the safety of the employees at the mine site, the duties were not integral or essential to the actual extraction, preparation, or transportation of coal. Even considering [c]laimant's work weighing coal cars to ensure that they did not exceed the weight limitations does not qualify him as a 'miner' under the Act and implementing regulations. Merely checking the weight of coal cars does not constitute a basis for finding that the miner engaged in the extraction, preparation, or transportation of coal.

Id. at 8-9. Thus, the administrative law judge determined that claimant failed to satisfy the "function" requirement of 20 C.F.R. §725.202(a), and was not a miner under the Act. *Id*. at 9.

On appeal, the Director argues that the administrative law judge erred in finding that claimant's job duties do not satisfy the "function" requirement.[6] Director's Brief at 3. The Director initially notes that, in *Clemons*, the Sixth Circuit court focused on whether the task performed by the claimant was necessary to keep the mine operational or was merely convenient, but not vital or essential, to the production of coal. *Id*. at 4. The Director distinguishes the facts of this case from *Clemons*, explaining that the night watchman's "exclusive duties [in *Clemons*] were to occasionally patrol the mine site in a truck when he was not inside a guardhouse" while, in this case, claimant "maintained the

[6] The Director, Office of Workers' Compensation Programs (the Director), notes that he previously took the position, while the case was pending before the administrative law judge, that claimant's work did not qualify as a miner, but after further consideration of the facts and law, has concluded that claimant's work duties satisfy the definition of a miner pursuant to 20 C.F.R. §725.202(a). The Director also apologizes "to the [administrative law judge] and the other parties for any inconvenience this oversight may have caused." *See* Director's Brief at 3 n.3.

fire extinguishers; checked the coal mine area for fire, fire hazards, or methane leaks; checked the readiness of the mine's fire trucks; monitored the weight of the train cars to be loaded; and inspected the water pumps in the coal pit to ensure no leaking." *Id*. According to the Director, all of these tasks were "necessary to ensure that the coal mine operation ran smoothly and safely." *Id*. at 4.

To further support his position, the Director cites *Sammons v. EAS Coal Co*., 1992 WL 348976, at *2 (6th Cir. Nov. 24, 1992), an unpublished decision in which the Sixth Circuit made a distinction between those security guards who do traditional security work, as in *Clemons*, and those who perform duties that are necessary to ensure the safe operation of the mine. Director's Brief at 4. In *Sammons*, the claimant's job title was night watchman, but the Sixth Circuit concluded that his actual job duties included work as a miner:

> [The] undisputed evidence also shows that [Sammons] worked part of each shift as a fire boss, checking the mine for safety and repairing and replacing pipes and pumps. Such work is vital and essential to the production and extraction of coal, as it keeps the mine operational, safe, and in repair.

Sammons, 1992 WL 348976, at *2. The Director maintains that claimant's work is also vital and essential to the production and extraction of coal. In addition, he contends that it "makes sense" to conclude that claimant is a miner and explains:

> An individual employed by a coal mine operator to monitor the health and safety environment at its coal mines is involved in an activity founded not only on a concern for the health and safety of the coal mines but also on concern for maximizing the industrial process. Increased industrial production is a necessary by-product of a coal mine's safe environment. Because of this a mine inspector employed by a coal mine operator is engaged in a function that is necessarily related to the extraction or preparation of coal. In the instant case, [c]laimant performed many of the duties of a mine inspector; consequently, those duties satisfy the function test.

Director's Brief at 4.

Based on our review of the administrative law judge's Decision and Order, the arguments of the parties, and the evidence of record, we conclude that the administrative law judge has failed to properly explain why certain aspects of claimant's job duties at Black Thunder mine, which appear similar to that of a mine safety inspector, do not qualify claimant as a miner. *See Bartley v. Director, OWCP*, 12 BLR 1-89, 1-90-91 (1988) (Tait, J., concurring); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2, 1-43-44

(1981). Furthermore, because the administrative law judge did not have the benefit of the Director's revised position, that claimant's duties qualify him as a miner, we vacate the administrative law judge's findings pursuant to Section 725.202(a).

Moreover, in addition to his fire inspection duties, claimant indicated that he was required to weigh, load and unload train cars, while employed as a security guard at the Belle Ayr mine site for six months.[7] Although the administrative law judge noted that claimant weighed train cars, he summarily stated that this work "does not qualify [claimant] as a miner [as] . . . [m]erely checking the weight of coal cars does not constitute a basis for finding that the miner engaged in the extraction, preparation or transportation of coal." Decision and Order at 8-9. The administrative law judge's summary conclusion does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge independently evaluate the evidence and provide an explanation for all of his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Additionally, the administrative law judge has not resolved the conflict in the hearing testimony between claimant and employer's branch manager as to the nature of the work performed by a security guard working at Black Thunder mine. *Id*. Therefore, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §725.202(a) and the denial of benefits.

On remand, the administrative law judge must resolve the conflict in the hearing testimony and make a determination, in accordance with the APA, as to whether claimant's job duties at either the Black Thunder or the Belle Ayr mine site were sufficient to satisfy the function requirement at 20 C.F.R. §725.202(a) and, therefore, qualify claimant as a miner under the Act. In reaching this determination, the administrative law judge should consider the Director's assertion that if claimant performed at least some qualifying duties during his entire career with employer then "that *entire period* must be considered coal mine employment." Director's Brief at 4 n.4 (emphasis added). If the administrative law judge finds that claimant is a miner pursuant to 20 C.F.R. §725.202(a), he must then proceed to consider the merits of claimant's entitlement to benefits.

[7] It is the Director's position that claimant's work duties at the Belle Ayr mine are sufficient to qualify claimant as a miner, in addition to his subsequent work requirements at Black Thunder mine. Director's Brief at 4 n.4, *citing* 20 C.F.R. §725.101(a)(32).

Accordingly, the administrative law judge's Decision and Order Denying Miner's Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, J., concurring and dissenting:

I concur in the majority's decision to vacate the administrative law judge's denial of benefits. However, I respectfully dissent from the majority's decision to remand the case for the administrative law judge to further consider whether claimant's duties satisfy the definition of a miner pursuant to 20 C.F.R. §725.202(a). I agree with the Director's revised opinion in this case, expressed in his letter on appeal, that claimant's duties as a site supervisor of security exceeded the ordinary duties of a security guard or night watchman, and entailed many of the duties of a mine inspector. Consequently those duties satisfy the function test. This position is consistent with that taken by the United States Court of Appeals for the Sixth Circuit in *Sammons v. EAS Coal Co*., 1992 WL 348976, at *2 (6th Cir. Nov. 24, 1992). Moreover, as the Director observed, it is irrelevant that not all of claimant's duties would satisfy the function test. *See* 20 C.F.R. §725.101(a)(32). Hence, I would hold, as a matter of law, that claimant qualifies as a miner under the Act. Therefore, I would remand this case for consideration on the merits only.

REGINA C. McGRANERY
Administrative Appeals Judge