BRB No. 08-0173 BLA

Y. R. (Widow of G. R.)	)	
Claimant-Respondent	)	
v.	)	
R & F COAL COMPANY	)	
	)	DATE ISSUED: 10/16/2008
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 – Award of Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Thomas McK. Hazlett (Harper & Hazlett), St. Clairsville, Ohio, for claimant.

Erik A. Schramm (Hanlon, Duff, Estadt, McCormick & Schramm Co., LPA), St. Clairsville, Ohio, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Award of Benefits (2006-BLA-5322 and 2004-BLA-5020) of Administrative Law Judge Michael P. Lesniak rendered on a miner's claim and a survivor's 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). The administrative law judge credited the miner with twenty-six and three-quarter years of coal mine employment and adjudicated this miner's claim[1] and survivor's claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated the responsible operator pursuant to 20 C.F.R. §§725.491, 725.493, 725.494, and that the miner met the statutory definition of a miner under the Act pursuant to 20 C.F.R. §§725.101, 725.202. The administrative law judge further found the evidence sufficient to establish that the miner was totally disabled from pneumoconiosis pursuant to 20 C.F.R. §§718.203(b), 718.204(b), (c); that the miner's death was due to pneumoconiosis; and that the evidence was sufficient to establish the existence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.304, 718.205(c)(3).[3] Accordingly, benefits were awarded on both the miner's and the survivor's claims.

On appeal, employer challenges its designation as the responsible operator, and the administrative law judge's determination that the miner met the statutory definition of a miner under the Act.[4] Claimant urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, contending that employer is liable for benefits in this case.

---

[1] The miner filed his claim on May 31, 2002. Miner's Director's Exhibit 2.

[2] Claimant is the widow of the miner who died on March 16, 2004. Survivor's Director's Exhibit 5. Claimant filed her survivor's claim on April 30, 2004. Survivor's Director's Exhibit 2.

[3] In its Post-Hearing Brief, employer withdrew the issue of pneumoconiosis in the miner's claim, and withdrew the issue of whether the miner's pneumoconiosis contributed to his death in the survivor's claim. Employer's Post-Hearing Brief at 3.

[4] In its Petition for Review, employer also challenged the administrative law judge's findings of disability and disability causation pursuant to Section 718.204(b), (c). Employer's brief alleges error, however, only with respect to its designation as the responsible operator and the miner's status as a miner. Employer's Brief at 4. Accordingly, because no party challenges the administrative law judge's findings regarding the length of claimant's coal mine employment, or that the miner and claimant have established the elements of entitlement to benefits in both the miner's and the survivor's claims, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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 first contends that the administrative law judge erred in finding that the miner, a contract welder, qualified as a "miner" pursuant to Section 725.202(a). Employer's Brief at 12-13. We disagree. The regulatory 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," as well as "any person who works or has worked in coal mine construction or maintenance in or around a coal mine." 20 C.F.R. §725.202(a). The administrative law judge found, and the record supports the finding, that the miner repaired bulldozers, high lifts, trucks, and back hoes; that such activity constitutes "maintenance" under the regulations; and that it contributes to the extraction of coal and is integral to the coal production process. *See* 20 C.F.R. §725.202(a); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Etzweiler v. Cleveland Bros. Equipment Co.*, 16 BLR 1-38 (1992)(*en banc*). Furthermore, we find no error with the administrative law judge's determination that the "situs-function" test had been satisfied, based on his finding that a substantial portion of the miner's work occurred at or near employer's coal mine, given the size of the equipment that the miner was repairing. Decision and Order at 4, 7; 20 C.F.R. §725.202(a); *Petracca*, 884 F.2d 926, 13 BLR 2-38.

Employer next contends that the administrative law judge erred in failing to find the evidence sufficient to establish rebuttal pursuant to Section 725.202(a),[6] arguing that the miner's work as a welder did not involve the extraction, preparation, or transportation of coal, and that, as an independent contractor, the miner was not "regularly employed." Employer contends that the miner was not an employee, and as an independent contractor, the miner was hired on a purchase order basis "as needed." Employer's Brief at 12-14. Employer's arguments lack merit. The regulations specifically provide that a

[5] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Miner's Director's Exhibit 3.

[6] There is a rebuttable 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: 1) the person was not engaged in the extraction, preparation, transportation of coal or in maintenance or construction of the mine site; or 2) the person was not regularly employed in or around a coal mine. *See* 20 C.F.R. §725.202(a).

person who is or was a self-employed miner or independent contractor shall be considered a miner under the Act, and the record supports the administrative law judge's finding that the miner was a self-employed welder, working 260 to 310 days per year during most of the 1980's and early 1990's, repairing machinery around employer's coal mines, and therefore was "employed" pursuant to the Act.[7] 20 C.F.R. §725.202(c); Decision and Order at 4-5; Miner's Director's Exhibits 3, 4. Accordingly, we affirm the administrative law judge's findings pursuant to Section 725.202(a), as supported by substantial evidence.

Employer next contends that it is not the responsible operator liable for the payment of benefits, because it has rebutted the presumption at Section 725.491(d),[8] arguing that the miner was not exposed to coal dust for significant periods during his employment.[9] Employer's Brief at 7, 9-10. In support of rebuttal, employer submitted affidavits from Mr. Taylor and Mr. Safell. Mr. Taylor was, at times, in charge of maintenance for employer, and stated that he knew the miner for twenty to thirty years and that exposure to coal dust was minimal because 95% or more of the miner's time would have been spent repairing equipment from the coal face. Survivor's Employer's Exhibits 2, 22. Mr. Saffell, the supervisor on the drag line from 1984 to 1994, stated that he knew the miner and that the miner did not provide welding services in areas of significantly high concentrations of coal dust. Survivor's Employer's Exhibit 1. After weighing the information provided by the miner in his application for benefits with the affidavits of Mr. Taylor and Mr. Saffell, the administrative law judge permissibly found that employer failed to overcome the presumption that the miner was exposed to coal dust, as neither of the affiants established that they witnessed the miner's work during the entire time he performed work for employer. Decision and Order at 9. Accordingly, we

[7] The administrative law judge also noted 20 C.F.R. §725.493(a)(1), which provides, in part, that in determining the identity of a responsible operator under this part, the terms "employ" and "employment" shall be construed as broadly as possible, and shall include any relationship under which an operator retains the right to direct, control, or supervise the work performed by a miner, or any other relationship under which an operator derives a benefit from the work performed by a miner.

[8] Employer mistakenly cited 20 C.F.R. §725.492(c). Employer's Brief at 10.

[9] The applicable regulation provides, in part, that there shall be a rebuttable presumption that during the course of an individual's employment with such employer, such individual was regularly and continuously exposed to coal mine dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal mine dust for significant periods during such employment. 20 C.F.R. §725.491(d).

affirm the administrative law judge's finding that the evidence was insufficient to rebut the presumption of coal dust exposure pursuant to Section 725.491(d).

Lastly, employer argues[10] that Consolidation Coal Company is the responsible operator "by virtue of the evidence of [the miner's] employment and exposure," or alternatively, that the miner's "own company" should be designated as the responsible operator because the miner was self-employed during the time he provided welding services to employer. Employer's Brief at 15. As the Director correctly points out, the miner's Social Security Administration records indicate that the miner last worked for Consolidation Coal Company in 1983, while he worked for employer from 1965 to 1966, and again from 1980 until 1994, Miner's Director's Exhibits 4, 5, and the administrative law judge determined that, while self-employed, the miner was under the direct control and supervision of employer. 20 C.F.R. §725.493(a)(1); Decision and Order at 7, 9; Director's Brief at 3-4. Accordingly, we affirm the administrative law judge's finding that employer is the operator responsible for the payment of benefits.

[10] Employer also "seeks clarification of the correct responsible operator," arguing that Capstone Holding Company was not formed until 1999, and that therefore a prior holding company should be designated the responsible operator. Employer's Brief at 16. This issue is not properly before the Board, as employer failed to raise the issue before the district director or the administrative law judge, and accordingly, we decline to address it.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge