BRB No. 06-0288 BLA

JOHN W. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	DATE ISSUED: 09/26/2006
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 Denial of Claim on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (03-BLA-5994) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

[1]Claimant filed his claim for benefits on August 29, 2001. Director's Exhibit 2.

amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. Initially, the administrative law judge found that claimant was not a "miner" within the meaning of the Act. Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *Turner v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA (May 5, 2005)(unpub.). Specifically, the Board held that the administrative law judge improperly shifted the burden of proof to claimant to establish that his work constituted that of a "miner." The Board instructed the administrative law judge on remand to consider whether employer has put forth affirmative proof sufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §725.202(a). Additionally, the Board instructed the administrative law judge to address whether claimant's work operating heavy equipment early in his career constituted that of a "miner."[2] The Board summarily denied employer's Motion for Reconsideration on August 10, 2005. On remand, the administrative law judge found that employer established rebuttal of the presumption pursuant to Section 725.202(a). Therefore, the administrative law judge found that claimant was not a "miner" within the meaning of the Act. Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant contends that the administrative law judge erred in finding that employer established rebuttal of the presumption that he was a "miner" within the meaning of the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, requesting that the Board reverse the administrative law judge's determination that claimant was not a "miner" within the meaning of the Act.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Claimant argues that the administrative law judge erred in finding that employer presented sufficient evidence to establish rebuttal of the presumption that he was a "miner" within the meaning of the Act. Specifically, claimant contends that the administrative law judge erred in finding that claimant's work was not integral to the processing of coal. Section 725.202(a) provides that:

---

[2]The Board affirmed the administrative law judge's finding that the portion of claimant's work spent traveling to and from warehouses to various coal mine sites was not that of a "miner" because it did not occur in or around a coal mine or coal preparation facility. *Turner v. Mountain Clay, Inc.*, BRB No. 04-0573 BLA (May 5, 2005)(unpub.).

> [a] "miner" for the purposes of this part is 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, or any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be 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 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. §725.202(a) (emphasis added).[3]

The administrative law judge considered, on remand, whether employer established rebuttal of the presumption that claimant was a "miner" by showing that claimant 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. In determining whether employer established rebuttal by showing that claimant was not engaged in the extraction, preparation or transportation of coal, the administrative law judge considered the case law of the United States Court of Appeals for the Sixth Circuit[4]

---

[3]In published comments regarding the implementation of the revised regulations, the Department of Labor stated that the 20 C.F.R. §725.202(a) presumption:

> reflects the rational assumption that an individual working in and around a coal mine is involved in the extraction, preparation or transportation of coal, or in the construction of a mine site; these functions are enumerated by the statutory definition of a "miner." The operator may rebut the presumption by disproving either the required nexus between the worker's duties and coal mining, or any regular employment at a coal mine facility. This burden is not onerous given the operator's access to information about the use and duties of the workers at its facilities.

See 65 Fed. Reg. 79,961 (2000).

[4]The instant 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. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

and the Board. The administrative law judge referred to *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984), as requiring that he "assess whether the particular activities the worker performed assisted in functions that were actually part of coal production and, therefore, covered by the Act, or whether the activities were ancillary to some other function aside from extracting or producing coal." 2005 Decision and Order at 2. The administrative law judge noted that *Southard* and *Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989) state that "[i]f a worker's task is merely convenient, but not vital or essential to the production or extraction of coal, he is generally not classified as a 'miner.'" *Id.*

In determining whether claimant's work was "actually part of coal production" or "merely convenient," the administrative law judge considered claimant's testimony regarding the significance of the repair and maintenance of mining equipment portion of claimant's job. The administrative law judge noted that at one point during his hearing testimony, claimant testified that his "first priority" was assisting in the repair work and that, at another point, he testified that his "first priority was to make pick ups and deliveries." *Id.* The administrative law judge accorded less weight to claimant's testimony that the primary portion of his job was spent repairing and maintaining the mining equipment because it was an answer elicited by a leading question.[5] *Id.* at 3.

---

[5]The administrative law judge noted claimant's testimony as follows:

> [Claimant's Counsel]: Okay. When you would take a part to the mine site and you would be there helping the repairman put the part on and retrieve the old part once it was taken off to return either to the supply house or to the company where it was picked up for exchange, were you exposed to dust?
>
> [Claimant]: Yes. Yes, in the pits where we were loading the coal. If we had a loader broke down and the pit was loading coal, that was the first priority because the coal had to roll and that was the first priority. You stayed there until it was fixed.
>
> ***
>
> [Claimant's Counsel]: Okay. So if I'm understanding you correctly, unless they radioed you and said we've got a break down at another site, you need to go to the warehouse or to some supply house and pick up another part for another site, you would stay there and help the repairman put the part on?
>
> [Claimant]: Until the machine was going, yeah.

The administrative law judge erred in discrediting claimant's testimony that the primary portion of his job was spent repairing and maintaining mining equipment because it was given in response to an allegedly leading question. As the Director points out, because hearings regarding black lung benefits are informal proceedings, an administrative law judge is not bound by common law or statutory rules of evidence, except as provided by the Administrative Procedure Act (APA). *See* 20 C.F.R. §725.455(b).[6] Further, in according less weight to claimant's testimony that fifty percent of his job was spent repairing and maintaining mining equipment because it was given in response to a leading question, the administrative law judge has not provided a rationale as to why claimant's answer to an allegedly leading question would merit less weight. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984). Moreover, claimant's first testimony that he assisted in installing and repairing parts came from claimant's response to a question from employer's counsel during his deposition, which was held prior to the hearing. *See* Director's Exhibit 7 at 6. At his deposition, in response to questions asked by employer's attorney on direct examination, claimant stated that in his last year of employment, he delivered and helped install parts. Director's Exhibit 7 at 6. Thus, claimant provided other evidence in the record that the administrative law judge has not discredited relevant to claimant's job duties.

In his further consideration of whether claimant's work was "actually part of coal production" or "merely convenient," the administrative law judge stated that while claimant admitted on cross examination "that he spent fifty percent (50%) of his time traveling between job sites and the warehouse, or Whayne Supply," he also stated that he spent half of his duties on mining job sites. 2005 Decision and Order at 3. The administrative law judge "discounted" this testimony from claimant because he did "not explain how much time was spent at the warehouse," by reasoning that claimant "could not be at the job site, at the warehouse and enroute [sic] to and from those locations more than one hundred per cent of the time." *Id.* The administrative law judge further stated that:

Hearing Transcript at 10-12. Additionally, the administrative law judge noted that on cross examination, "[c]laimant admitted that the installation of the part was not his primary job" but that his primary job was to make deliveries. 2005 Decision and Order at 3.

[6]While 20 C.F.R. §725.455(b) provides that an "administrative law judge may entertain the objections of any party to the evidence submitted," employer's counsel, who was present at the hearing, did not object to the questions asked by claimant's counsel.

> When [claimant] was present at mines, there is no indication of the frequency of installation or repair of an item in the chain of production. Despite the argument that he had to wait for installation, it is more reasonable that, in fact, replacement of parts and repair on site was quite infrequent. Moreover, he also tacitly admitted that delivery was his job and he was not a mechanic who did installations of parts. His allegation is that he merely waited to see whether the part was installed.

Id. Therefore, the administrative law judge stated that "[a]lthough the Claimant characterizes the work as 'maintenance' and 'repair,' I reject that position. I find that as a delivery person, at best, his work was incidental to or merely convenient, but not vital or essential to the production or extraction of coal." *Id.* Accordingly, the administrative law judge found that "employer has put forth affirmative proof sufficient to establish rebuttal of the presumption" that claimant was a "miner."[7] *Id.* The administrative law judge, alternatively, found that because claimant's "actual contact with mining operations was admittedly a minor aspect of his work," claimant "was not regularly employed in or around a coal mine or coal preparation facility."[8] *Id.*

---

[7]Additionally, the administrative law judge dismissed as incredible "any speculation regarding whether the Claimant operated a bulldozer in mining." 2005 Decision and Order at 3. The administrative law judge referred to claimant's testimony that he operated a bulldozer during the time that the company was building an office and stated that the record contains no probative evidence "to conclude that the Claimant or Employer was engaged in mining at any time during the construction of that building." *Id.* Claimant asserts that because the administrative law judge found that claimant's testimony regarding his work as a heavy equipment operator was not credible, the Board should remand this case "so that the claimant can be provided with the opportunity to clarify his employment history." Claimant's Brief at 3. However, other than asserting that the record should be reopened on remand, claimant has not specified any alleged error made by the administrative law judge in his consideration of the evidence regarding claimant's work as a heavy equipment operator. Since claimant has failed to provide a basis upon which the Board may review the administrative law judge's consideration of the evidence regarding claimant's work as a heavy equipment operator, we affirm the administrative law judge's findings on this issue. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We note, however, that it is within the administrative law judge's discretion to reopen the record on remand. *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989)(*en banc*).

[8]Conversely, in his April 2, 2004 Decision and Order, the administrative law judge stated that "there is no evidence to rebut the testimony that [claimant] was at situs fifty percent (50%) of the time." 2004 Decision and Order at 4.

We hold that the administrative law judge erred in finding that employer has established rebuttal of the presumption that claimant was a "miner" by showing that claimant was not engaged in the extraction, preparation or transportation of coal while working at the mine site or was not regularly employed in or around a coal mine or coal preparation facility for the following reasons. First, the administrative law judge failed to provide a rationale or refer to any evidence that would support his finding that "it is more reasonable" to assume that claimant's replacement of parts and repair on site was quite infrequent." Similarly, the administrative law judge failed to provide an explanation or point to specific evidence to support his rejection of claimant's characterization of his work as that of "maintenance" and "repair." As the Board held in its May 5, 2005 Decision and Order, "because the evidence is uncontradicted that claimant worked in or around coal mines and coal preparation facilities for some part of his work day, claimant is entitled to a rebuttable presumption that he was a 'miner' during these periods of employment." *See Turner*, slip op. at 4-5. The Board also stated, therefore, it is employer's burden to "put forth affirmative proof sufficient to establish rebuttal of this presumption." *Id.* at 5. However, without a more detailed discussion from the administrative law judge as to what evidence he relied on from employer to support his finding that claimant's replacement of parts and repair on site were "quite infrequent" and to support his rejection of claimant's characterization of his work, we cannot assess whether the administrative law judge's determinations are proper. *See Wojtowicz*, 12 BLR at 1-165; *Tenney*, 7 BLR at 1-591. We, therefore, vacate the administrative law judge's finding that employer has established rebuttal of the presumption that claimant was a "miner" by showing that claimant was not engaged in the extraction, preparation or transportation of coal while working at the mine site. Additionally, we vacate the administrative law judge's finding that employer has established rebuttal of the presumption that claimant was a "miner" by showing that claimant "was not regularly employed in or around a coal mine or coal preparation facility," because the administrative law judge failed to provide a basis or refer to evidence in the record that would support this finding as well.

Accordingly, we remand this case for the administrative law judge to reconsider whether employer can establish rebuttal by affirmative evidence showing that claimant (1) 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) was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a). In doing so, we again instruct the administrative law judge that whether or not claimant's work at employer's coal mine sites and coal preparation facilities constitutes the work of a "miner" is unaffected by the fact that other segments of claimant's work day did not occur in or around a coal mine. Specifically, as we stated in our 2005 Decision and Order, whether claimant performed the work of a "miner" and the length of time to which claimant is entitled for his coal mine work are two separate

factual issues. Therefore, on remand, should the administrative law judge determine that claimant was a "miner," he must then render a separate determination regarding the length of claimant's coal mine employment. Additionally, should the administrative law judge find that claimant was a "miner" within the meaning of the Act on remand, he is instructed to address whether claimant has established the applicable elements of entitlement. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge