BRB No. 09-0859 BLA

HOMER SMITH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/30/2010
	)	
JAMES RIVER COAL COMPANY	)	
	)	
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 Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

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

Ann Marie Scarpino (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (2003-BLA-05861) of Administrative Law Judge Robert B. Rae on a subsequent claim filed on March 5,

2001,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] In his Decision and Order issued on August 28, 2009, the administrative law judge found that claimant did not meet the statutory definition of a miner under the Act, as his duties as an administrative assistant were not integral or essential to the actual extraction, preparation or transportation of coal. The administrative law judge also determined that employer successfully rebutted the presumption, set forth in 20 C.F.R. §725.202, that any person working in or around a coal mine or coal preparation facility is a miner.[3] Accordingly, the administrative law judge denied benefits without reaching the merits of the claim.

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[1] Claimant filed an application for benefits on July 9, 1993. Director's Exhibit 1. The district director denied the claim on the ground that claimant failed to establish any element of entitlement. *Id*. Claimant filed a request for modification on May 27, 1994, which was denied by the district director on September 6, 1994 and January 9, 1995. *Id.* In his January 9, 1995 Proposed Decision and Order, the district director found that the evidence established that claimant was a coal miner pursuant to 20 C.F.R. §725.202, but denied the claim on the ground that claimant did not establish a change in conditions or mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *Id.* The claim was transferred to the Office of Administrative Law Judges. Upon claimant's request, Administrative Law Judge Frank D. Marden issued a decision on the record. *Id.* Judge Marden acknowledged that employer disputed claimant's status as a miner, but did not resolve the issue. Instead, Judge Marden found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.204(a)(1)-(4). *Id.* The Board affirmed the denial of benefits in a Decision and Order issued on February 28, 1996. *H.S.* [*Smith*] *v. Interstate Coal, Inc.*, BRB No. 96-0770 BLA (Feb. 28, 1996)(unpub.). Claimant took no further action until he filed this subsequent claim on March 5, 2001. Director's Exhibit 2.

[2] The Director, Office of Workers' Compensation Programs, and employer correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as claimant's original and subsequent claims were both filed before January 1, 2005. Director's Exhibit 2.

[3] Pursuant to 20 C.F.R. §725.202(a):

> 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, and 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

On appeal, claimant 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, has declined to file a brief addressing the merits of claimant's entitlement.

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. 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).

In determining whether claimant is a miner under the Act, the administrative law judge considered the deposition testimonies of claimant and his former supervisor, Mr. Felix Farmer, Jr. Decision and Order at 13-16; Director's Exhibits 1, 26. Claimant testified on May 14, 1993, that he worked as a mine engineer, licensed foreman, and administrative assistant under the direction of Mr. Farmer for fifteen years. Director's Exhibit 1 at 211. Claimant indicated that his duties included getting permits, surveying property, and standing in as a foreman when needed and that he spent approximately fifty percent of his time on site at various surface mines. *Id*. at 216. On June 18, 2001, claimant testified that he worked as an engineer and as an assistant foreman responsible for performing core drilling and time studies. Director's Exhibit 26 at 14. Claimant estimated that "65% to 85% of his work was outside" with "some" underground mining, but he never operated equipment. *Id*. at 16-17. He reiterated that he worked for Mr. Farmer. *Id*. at 28.

Mr. Farmer testified that claimant worked directly for him and that he has known claimant for over twenty years. Director's Exhibit 1 at 254. He testified that claimant assisted with obtaining permits, met with state mining officials to "walk" the permits and, at times, was involved in designing silt dams, assisting in reclamation, and consulting with lawyers regarding leases of property. *Id*. at 255-59. Mr. Farmer also noted that claimant's job did not require him to visit active coal mines and that his offices were no closer than a thousand yards to a tipple or mine. *Id*. at 259-63. Mr. Farmer further testified that he would see claimant almost every day, sometimes spending all day with him in an air conditioned office. *Id*. at 262. Mr. Farmer indicated that claimant was required to be present at core drilling once a week, at most, but was never involved in the actual drilling process. *Id*. at 264-65. He did not recall claimant ever filling in for a

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> that any person working in or around a coal mine or coal preparation facility is a miner.
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> 20 C.F.R. §725.202(a).

foreman and stated that he never sent claimant to a production area because he was not a "production man" and the company had a production engineer and superintendent. *Id*. at 266.

The administrative law judge found that claimant's testimony, that he worked near and around an active mine, was contradicted by Mr. Farmer's testimony, that claimant's duties as an administrative assistant did not involve any coal production activity. Decision and Order at 16. The administrative law judge further indicated that he was persuaded by Mr. Farmer's testimony, that he did not give claimant foreman duties and that claimant was not qualified to be a production foreman. *Id.* The administrative law judge also determined that claimant's testimony concerning his presence at core drilling sites alone does not qualify him as a miner. *Id.* The administrative law judge stated that, although claimant's job duties were important to securing permits and leases, surveying potential sites, designing silt damns and reclaiming the land after coal extraction and production had ceased, his duties were not integral or essential to the actual extraction, production, or transportation of coal. *Id*.

Based on these findings, the administrative law judge determined that claimant's duties served an essential administrative component of the interests of the mine operator, but were incidental, or merely convenient, to the extraction, preparation, and transportation of raw coal. Decision and Order at 16. The administrative law judge concluded, therefore, that claimant does not satisfy either the "function" or "situs" tests for determining that an individual is a miner, and that employer provided ample evidence supporting rebuttal of the presumption set forth in Section 725.202(a).[4] *Id.*, *citing Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989).

Claimant alleges that the administrative law judge erred in finding that claimant was not a miner as defined in Section 725.202(a). Claimant states:

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[4] In relevant part, Section 725.202(a) provides:

> 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 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).

> In reaching his conclusion, the [administrative law judge] relied upon the deposition of [] Felix Farmer, president of the coal company for which the claimant worked. It should be noted, however, that the claimant was employed [by] Mr. Farmer for the entirety of his time in or around the coal mining industry. By the [administrative law judge's] own admission, the claimant worked for Mr. Farmer "essentially the entire time period under question." Clearly, a portion of the claimant's time in or around coal occurred elsewhere. The [administrative law judge], however, did not examine this separate time period in order to ascertain whether or not the claimant might have met the requirements of being a coal miner . . .

Claimant's Memorandum Brief at 2-3 (citation omitted). We hold that claimant has failed to adequately raise or brief any issues regarding the administrative law judge's finding that he is not a miner under the Act. As far as we can discern, claimant's argument is that he did the work of a miner somewhere other than with employer and that the administrative law judge ignored this fact. Claimant does no more than make this bare assertion, however, as he has not identified any evidence in support of his contention. Consequently, the Board has no basis upon which to review the administrative law judge's findings under Section 725.202(a). *See Cox v. Benefits Review Board*, 791 F. 2d 445, 446-47, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Thus, we must affirm the denial of benefits. *Id*.

Accordingly, the administrative law judge's Decision and Order - Denying 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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REGINA C. McGRANERY
Administrative Appeals Judge