U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 17-0093 BLA

LEROY E. PRESTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/21/2017
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leroy E. Preston, Langeloth, Pennsylvania.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2016-BLA-5301) of Administrative Law Judge Thomas M. Burke, rendered on a miner's subsequent claim filed pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that claimant was not employed as a miner as defined under the Act. Accordingly, the administrative law judge denied benefits.

On appeal, claimant alleges that his work was that of a miner because he regularly worked with coal used in the steel mill owned by his employer. The Director, Office of Workers' Compensation Programs (the Director) responds, asserting that the administrative law judge failed to fully and correctly address whether claimant's activities constituted the work of a miner. The Director therefore contends that the administrative law judge's decision must be vacated and remanded.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We 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.[2] 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).

The Act defines a miner as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal," including "an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that this definition contains a situs element and a function element, both of which must be satisfied. *Hanna v. Director, OWCP*, 860 F.2d 88, 91, 12 BLR 2-15, 2-20 (3d Cir. 1988). The "situs" test requires work in or around a coal mine or coal preparation facility, while the "function" test requires performance of coal extraction or

[1] Claimant's initial claim was filed on March 21, 1988, and was dismissed in an order issued on June 2, 1989. Director's Exhibit 1. Claimant filed a second claim on March 6, 2002, which was denied by the district director on June 21, 2002, because claimant did not establish that he was employed as a miner under the Act. Director's Exhibit 2. Claimant did not take any further action until he filed his current claim on January 30, 2015. Director's Exhibit 4.

[2] Because claimant's alleged coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

preparation work. *Stroh v. Director, OWCP*, 810 F.2d 61, 63, 9 BLR 2-212, 2-217 (3d Cir. 1987); *Wisor v. Director, OWCP*, 748 F.2d 176, 178-79, 7 BLR 2-46, 48 (3d Cir. 1984).

The administrative law judge partially analyzed claimant's work history in determining that he did not qualify as a miner under the Act. The administrative law judge observed, "claimant's social security records show employment for [Jones & Laughlin Steel (J&L)] from 1965 to 1984 and for [successor corporation, LTV Steel] from 1984 to 1996. His jobs at J&L included work on coke oven batteries, [the] blast furnace and the coal handling dock where he was exposed to coal dust." Decision and Order at 2, *citing* Director's Exhibit 2; Hearing Transcript at 10, 11, 17- 19. The administrative law judge also noted, "[c]laimant was never employed as a coal miner or at a coal mine." Decision and Order at 2, *citing* Hearing Transcript at 14, 16, 19, 26. The administrative law judge further indicated that claimant picked coal from a coal mine site with his father for use in a home stove and for a family friend at a Burgettstown, Pennsylvania coal mine "a couple of times" when he was thirteen or fourteen. Decision and Order at 2, *quoting* Hearing Transcript at 44, 46.

Based on this understanding of the location and nature of claimant's work, the administrative law judge found that although claimant might have been exposed to coal dust while at the coal handling dock, that exposure alone did not establish eligibility for benefits under the Act. Decision and Order at 2. In addition, the administrative law judge determined that claimant's work at the dock did not qualify as "transportation of coal" because "the coal handling dock was at the steel mill site and thus the coal had left the coal mine site and had entered the stream of commerce." *Id*. The administrative law judge further determined that claimant's childhood coal-picking did not qualify as coal mine employment. *Id*. at 3. The administrative law judge therefore concluded that claimant was not entitled to benefits because he did not perform the work of a miner. *Id*.

We affirm the administrative law judge's finding that coal dust exposure, by itself, is insufficient to establish that claimant was engaged in the work of a miner, as the presence of coal dust does not establish that claimant's activities met the situs and function tests. *See Stroh*, 810 F.2d at 63, 9 BLR at 2-217. We also affirm the administrative law judge's finding that claimant's work on the coal handling dock is not covered employment because it involved the delivery of processed coal to boilers and, therefore, did not satisfy the function test. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); Hearing Transcript at 8 (claimant testified that at the docks, "they pile[d] [coal] up for the boilers."). However, we agree with the Director that the administrative law judge's finding that the remainder of claimant's duties did not constitute the work of a miner cannot be affirmed.

As the Director maintains, the administrative law judge failed to address claimant's testimony that he worked in plants where coal crushing occurred. Hearing Transcript at 10, 12, 17-18, 20. Because the definition of "coal preparation" set forth in 20 C.F.R. §725.101(a)(13) includes crushing coal, claimant's duties at the crushing plants may meet both the situs and function tests. *See Hanna*, 860 F.2d at 91, 12 BLR at 2-20. In addition, although individuals employed as coke oven workers are generally not covered by the Act, the Department of Labor has recognized that individuals who perform coal preparation work in the coke industry may be covered. *See* 65 Fed. Reg. 79,920, 79,957 (Dec. 20, 2000) ("coke industry employees may be otherwise employed in activities which amount to custom coal preparation or come within the types of activities enumerated in § 725.101(a)(13)").

We also agree with the Director that the administrative law judge erred in summarily determining that picking coal does not constitute coal mine employment. Decision and Order at 3. The Board has held that such activity can constitute the work of a miner. *See Smith v. Director, OWCP*, 8 BLR 1-258, 1-260 (1985). Accordingly, the administrative law judge should have considered claimant's full testimony regarding picking coal as a child and explained his determination as to whether it qualified as the work of a miner.[3]

In light of these errors, we must vacate the administrative law judge's finding that claimant was not employed as a miner. We further vacate the denial of benefits and remand this case to the administrative law judge for reconsideration of whether claimant was a miner under the Act.[4] On remand, the administrative law judge must apply the situs-function requirements and determine whether the evidence, including claimant's

[3] Claimant testified that he picked coal around coal mine sites "because we had a coal stove." Hearing Transcript at 38. Claimant stated that he was "probably in about the third and fourth grade" when this occurred and that he would "go all year round." *Id*. at 39. Claimant estimated that he did this for "five or six years," for approximately one or two hours per week. *Id*. at 41. Claimant also testified that he picked coal for a family friend at the Burgettstown mine "way less than" a dozen times prior to his graduation from high school. *Id*. at 45-46.

[4] The Director, Office of Workers' Compensation Programs (the Director), asserts that he believes that claimant's testimony, and the record as a whole, does not clearly establish that claimant's duties at the coke plant and picking coal constituted the work of a miner. The Director further maintains, and we agree, that the determination of whether the evidence is sufficient to satisfy claimant's burden is for the administrative law judge to make in his role as fact-finder. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

testimony, is sufficient to establish that claimant performed the work of a miner at the coke plant and when picking coal. *See Hanna*, 860 F.2d at 91, 12 BLR at 2-20. When rendering his findings, the administrative law judge must set forth the underlying rationale in accordance with the Administrative Procedure Act, 5 U.S.C. §500-599, as incorporated into the Act by 30 U.S.C. §932(a).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

[5] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).