

BRB No. 89-1662 BLA

WILLIE J. BROWN)
)
 Claimant-Petitioner)
)
 v.)
)
 PENN CENTRAL TRANSPORTATION)
 COMPANY)
)
 Employer-Respondent) Date Issued:
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Ben L. O'Brien, Administrative Law Judge, United States Department of Labor.

Willie J. Brown, Beckley, West Virginia, pro se.

John T. Pion (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

Before: STAGE, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals, pro se, the Decision and Order (87-BLA-1264) of Administrative Law Judge Ben L. O'Brien, on a 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). Based on the date of filing, May 16, 1986, the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act, as amended in 1984, 33 U.S.C. §921(b)(5) (Supp. V 1987).

administrative law judge adjudicated the claim pursuant to the permanent regulations found at 20 C.F.R. Part 718. The administrative law judge determined that the evidence of record was insufficient to establish that claimant was a miner as defined in 20 C.F.R. §725.101(a)(26). Accordingly, benefits were denied. The employer, Penn Central Transportation Company, responds seeking affirmance of the decision below.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the decision 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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §932(a); O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The administrative law judge found that claimant was employed as a trackman with the Penn Central Transportation Company from 1948 to 1982. See Decision and Order at 3. In order to establish that claimant was a miner within the meaning of the Act and regulations, the Board has held that he must satisfy a three-prong test, viz., it must be established that the "miner" worked with coal that was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); that the "miner" performed a function integral to the extraction or preparation of coal, and not one merely ancillary to the delivery and commercial use of processed coal (function test); and that the "miner's" work occurred in or around a coal mine or coal preparation facility (situs test). Whisman v. Director, OWCP, 8 BLR 1-96 (1985); see also 30 U.S.C. §902(d); 20 C.F.R. §725.101(a)(26).

Claimant testified that his employment as a trackman brought him into contact with coal that was being transported in freight trains. He stated also that he cleaned up coal that spilled onto the tracks, that he cleaned up train wrecks, and that daily he unloaded coal from cars and put it into a pit at a heating plant. See Hearing Transcript at 21-24, 29, 30, 34-35. Claimant stated further that he did not know the difference between raw and prepared coal. See Hearing Transcript at 30. In determining whether claimant satisfied the "status" test, the administrative law judge considered the deposition testimony of Frederick Day and William Worthington, two Conrail employees. Mr. Day testified that the coal hauled in the New York division, claimant's division, was all directly consumed. See Employer's Exhibit 8 at 7-8. Mr. Worthington testified that all of the coal hauled through the New York division was prepared coal. See Employer's Exhibit 9 at 16. Based on this testimony, the administrative law judge found that claimant failed to meet the "status" test because the coal around which he worked was processed coal. This finding is within the discretion of the administrative law judge, see Shaw v. Director, OWCP, 7 BLR 1-652 (1985), is supported by substantial evidence, and is therefore affirmed.

The administrative law judge next determined that claimant failed to meet the "function" test. The administrative law judge stated that claimant's work as a trackman was ancillary to the delivery and commercial use of processed coal, rather than an integral function in the extraction or preparation of coal. See Decision and Order at 4. As the administrative law judge considered the witnesses' testimony and permissibly determined that claimant worked around trains that hauled processed coal, it does not appear that claimant's work was an integral function in the extraction or preparation of coal. See Richardson v. Denver Rio Grande Western Railroad Co., 7 BLR 1-700 (1985). Thus, the administrative law judge's determination that claimant failed to meet the "function" test is affirmed as it is supported by substantial evidence.

The administrative law judge then addressed the "situs" test. The administrative law judge considered claimant's statements that he had never worked in or around a coal mine and that he could not identify a tippel, colliery, or a breaker, as well as the testimony of Mr. Day and Mr. Worthington that there were no mines in the area where claimant worked. See Hearing Transcript at 33-34, Employer's Exhibits 8 at 12, 9 at 13. Based on his consideration of this testimony, the administrative law judge permissibly found that claimant failed to establish that he worked in or around a coal mine or preparation site. See Decision and Order at 4; see generally Musick v. Norfolk and Western Railway Co., 6 BLR 1-862 (1984). Therefore, the administrative law judge's determination that claimant failed to meet the "situs" test is affirmed as it is supported by substantial evidence. As the administrative law judge's determination that claimant is not a miner as defined in the Act is supported by substantial evidence this finding is affirmed.

Accordingly, the Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge