U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 19-0376 BLA
and 19-0494 BLA

JAMES L. MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELMO GREER & SONS, LLC	)	DATE ISSUED: 08/27/2020
	)	
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 Awarding Benefits and Attorney Fee Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for Claimant.

Oliver B. Rutherford (Smith & Smith Attorneys), Louisville, Kentucky, for Employer.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

ROLFE, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2018-BLA-05402) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals the administrative law judge's July 18, 2019 Attorney Fee Order (2018-BLA-05402) granting an attorney's fee and expenses.[1] This case involves a miner's subsequent claim filed on January 12, 2017.[2]

The administrative law judge determined Claimant established 18.42 years of coal mine employment working in conditions substantially similar to those in an underground coal mine and Employer is the responsible operator. He also found Claimant established complicated pneumoconiosis arising out of his coal mine employment[3] and therefore invoked the irrebuttable presumption he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[4] 20 C.F.R. §§718.203(b), 718.304.

[1] Employer's appeal of the administrative law judge's Decision and Order awarding benefits was assigned BRB No. 19-0376 and its appeal of the administrative law judge's Attorney Fee Order was assigned BRB No. 19-0494. The Board has consolidated these appeals for purposes of decision only.

[2] The district director denied Claimant's December 13, 2013 initial claim because Claimant did not establish disability causation. Director's Exhibit 1. Claimant filed a second claim on September 3, 2015 and withdrew it on March 15, 2016; it is considered a nullity per 20 C.F.R. §725.306. Director's Exhibits 2, 23. Claimant took no further action until filing the current claim. Director's Exhibit 4.

[3] The regulation at 20 C.F.R. §718.203(b) provides: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment."

[4] There is an irrebuttable presumption a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). 20 C.F.R. §718.304.

Thus, he found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[5] and awarded benefits. In his Attorney Fee Order, he granted Claimant's counsel a fee of $6,808.75 and $326.50 in expenses.

Employer argues the administrative law judge erred in finding Claimant did the work of a miner as a drill operator on road construction projects, and therefore erred in finding Employer to be the responsible operator. It also asserts Claimant cannot establish he worked for it as a miner for at least a year. Employer further contests the award of attorney's fees, based on its objections to the Decision and Order. Claimant responds, urging affirmance of the award of benefits and attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Benefits Review Board to affirm the administrative law judge's finding Claimant worked as a miner for Employer for at least one year and Employer is the responsible operator.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[5] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The district director denied Claimant's prior claim because he failed to establish his total disability was due to pneumoconiosis. Director's Exhibit 1. Thus, he had to submit new evidence establishing this element of entitlement to obtain a review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

[6] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as Claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 6, 8; Hearing Transcript at 14.

Work as a Miner

Employer argues the administrative law judge erred in finding Claimant's job as a drill operator on road construction projects meets the definition of "miner" under the Act. Employer's argument is without merit.

Whether a worker is a miner is a finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985). The Act's definition of a miner is comprised of a "situs" requirement (claimant must have worked in or around a coal mine or coal preparation facility) and a "function" requirement (claimant must have worked in the extraction or preparation of coal). 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19), 725.202(a); *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989).

The Act defines a coal mine as "an area of land . . . used in, or to be used in . . . the work of extracting" coal. 20 C.F.R. §725.101(a)(12). Additionally, 20 C.F.R. §725.202(a) provides "there shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal, not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989).

Contrary to Employer's contention, the statutory definition of a "coal mine" does not require coal mining to be the "intended" use of the land but rather the land must be "used in . . . the work of extracting" coal. 30 U.S.C. §802(h)(2); 20 C.F.R. §725.101(a)(12); *see* Employer's Brief at 4, 8. As the administrative law judge observed, and Employer concedes, coal was extracted at the road construction sites where Claimant worked. Hearing Transcript at 18-19; Decision and Order at 4-5; Employer's Brief at 4-5 (describing coal being extracted from site where Claimant worked). Thus, Claimant worked at a coal mine. 30 U.S.C. §802(h)(2); 20 C.F.R. §725.101(a)(12).

In addition, as the administrative law judge noted, the United States Court of Appeals for the Sixth Circuit recently held where an employer's primary business is not coal mining, the situs requirement is met if employer had a "considerable economic interest" in the coal generated from the road construction projects such that coal mining was a substantial part of claimant's work.[7] *Bizzack Constr., LLC v. Fannin*, 764 Fed. App'x

[7] In *Fannin*, the Sixth Circuit held although employer's primary business was building roads, it had a "considerable economic interest" in mining the coal it encountered during road construction, and coal mining was a substantial part of claimant's work as a

486, 492 (6th Cir. 2019); *see Montel v. Weinberger*, 546 F.2d 679, 680 (6th Cir. 1976); Decision and Order at 6. Despite Employer's allegation to the contrary, in the current case, similar to *Fannin*, coal mining did not occur "by happenstance" at Employer's road construction sites. Employer's Brief at 4. The administrative law judge stated Claimant testified when he hit a seam of coal, which was "about every day," he would drill into or through it, causing him to be exposed to coal mine dust and rock dust. Hearing Transcript at 19-20, 26, 37; Decision and Order at 6. The administrative law judge indicated "Claimant drill[ing] for coal nearly every day is sufficient evidence to show that recovering coal was not merely incidental to [Employer's] road construction projects." Decision and Order at 6 n.2. He further observed Employer would then save the coal and sell it, and would sell "enough coal off a job to pay for the fuel." Hearing Transcript at 18-19; 24-25; Decision and Order at 6. Based on these factors, the administrative law judge's permissibly found Employer had a significant economic interest in coal mining. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); Decision and Order at 6. We therefore affirm Claimant's employment with Employer satisfies the situs requirement. *See* 20 C.F.R. §725.101(a)(12); *Fannin*, 764 Fed. App'x at 492; *Montel*, 546 F.2d at 680; Decision and Order at 6.

Employer also argues Claimant's work did not satisfy the function requirement because he did not have any involvement in the extraction and preparation of coal. Employer's Brief at 4. Contrary to its contention, however, the function requirement "does not require that an individual be engaged in the actual extraction or preparation of coal" but only that his work "be essential to coal mining." *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105, 1-110 (1990) (en banc); *see also Krushansky*, 923 F.2d at 42. Claimant drilled down to the coal seam almost every day and would assist with loading shots into drilled holes – both of these jobs are "an 'integral' or 'necessary' part of the coal mining process." *Clemons*, 873 F.2d at 922; *Fannin*, 764 Fed. App'x at 493 ("drilling down to the coal seam, assisting in the removal of the overburden, and cleaning the coal" was an integral part of extracting and preparing coal); *Skewes v. Consolidation Coal Co.*, 2 BLR 1-705, 1-709 (1979) (core drilling to identify potential mining sites held to be integral part in extraction of coal); Hearing Transcript at 24, 37.

We further reject Employer's contention Claimant did not believe he was engaged in coal mine employment because he classified his work with it in layman's terms as a "road job." Employer's Brief at 6; *see* Hearing Transcript at 29. As the administrative law judge determined, Claimant worked in road construction but, based on his detailed testimony of his job requirements, the administrative law judge permissibly found he

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driller operator because he spent a significant amount of time extracting and cleaning the coal. *Bizzack Constr., LLC v. Fannin*, 764 Fed. App'x 486, 492 (6th Cir. 2019).

engaged in coal mining and therefore qualifies as a "miner" under the Act. *See Sheren v. Lakeshore Eng'g Servs. Inc.*, __ BRBS __, BRB No. 19-0373, slip op. at 8 (Aug. 20, 2020) (job classification is a determination of law not a matter of employee's perception); Decision and Order at 6-7. Consequently, we affirm the administrative law judge's conclusion Claimant was employed as a miner for Employer.

Responsible Operator

Employer also challenges its designation as the responsible operator, contending it did not employ Claimant for the requisite number of working days. Employer's Brief at 9-10. The regulations impose liability for the payment of benefits on the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[8] 20 C.F.R. §§725.494(c), 725.495(a)(1). A "year" is defined as "one calendar year . . . or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'"[9] 20 C.F.R. §725.101(a)(32). Where the evidence establishes the miner's employment lasted for at least one year, "it shall be presumed, in the absence of evidence to the contrary, that the miner spent at least 125 working days in such employment." 20 C.F.R. §725.101(a)(32)(ii).

Employer does not contest it most recently employed Claimant. Rather, it points to Claimant's testimony his employment with it was not continuous and he did not "mine" coal on each job he worked for it. Employer's Brief at 9. It also states Claimant's testimony regarding dates of employment "are vague at best." *Id*. Further, Employer points to Claimant's contradictory statements about his employment with Miller Brothers Construction and Miller Brothers Coal to support its assertion that his testimony is not reliable. *Id*.

Contrary to Employer's contention, the evidence supports the administrative law judge's determination Claimant worked for Employer as a miner for a cumulative period of at least one year, or 125 working days. *See Shepherd v. Incoal, Inc*., 915 F.3d 392, 401-02 (6th Cir. 2019); Decision and Order at 11. Claimant's Social Security Administration (SSA) earnings records show earnings from Employer in each of twenty-one years between 1980 and 2007. Director's Brief at 7-8; Director's Exhibit 8. Dividing Claimant's annual earnings from Elmo Greer by the industry average earnings for 125 working days supports

[8] The remaining criteria for a potentially liable operator, set forth at 20 C.F.R. §725.494(a), (b), (d), and (e), are not at issue.

[9] A working day is "any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave." 20 C.F.R. §725.101(a)(32).

a finding of at least thirteen years of coal mine employment for Employer. *See Shepherd*, 915 F.3d at 401-02; Director's Brief at 7-8; Director's Exhibit 8. In addition, Employer submitted a record of wages paid to Claimant from February 11, 2006 to March 10, 2007. Director's Exhibit 7. Thus, while Claimant's work with Employer was not continuous, as the administrative law judge permissibly found, it amounted to more than a year. *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305 (6th Cir. 2005); Decision and Order at 11. We therefore affirm the administrative law judge's permissible determination Claimant worked as a miner for Employer for at least one year.[10] *Martin*, 400 F.3d 305; Decision and Order at 11.

We further reject Employer's argument it is not a responsible operator because it did not own, control, or supervise an area of land intended to be used for the extraction of coal, as "the intended use of the land over which it performed services was for roadways and not the extraction of coal." Employer's Brief at 8. Under the Act, "operator" includes a person "who operates, controls, or supervises a coal mine, or any independent contractor performing services or construction at such mine" or who pays "wages or a salary . . . to an individual in exchange for work as a miner." 20 C.F.R. §725.491(a)(1), (2)(iii). We have affirmed the administrative law judge's finding Claimant worked as a miner. Employer does not contest it operated, controlled, and supervised the area where Claimant worked and submitted evidence it paid Claimant's wages. *See* Employer's Brief at 8; Director's Exhibit 7. Consequently, we affirm the administrative law judge's conclusion Employer is the responsible operator in this case. *Martin*, 400 F.3d 305; Decision and Order at 11.

Employer has not challenged the administrative law judge's determination Claimant established complicated pneumoconiosis arising out of his coal mine employment and therefore invoked the irrebuttable presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement. *See Skrack v. Island*

[10] We also reject Employer's assertions concerning minor inconsistencies in Claimant's testimony about when he stopped working for Employer and how many times he worked for Miller Brothers Construction or Coal. *See* Employer's Brief at 9. The administrative law judge permissibly relied on Claimant's earnings records and Employer's payroll records to calculate Claimant's length of employment with Employer. *See Mills v. Director, OWCP*, 348 F.3d 133, 136 (6th Cir. 2003) (crediting of Social Security Administration records over the miner's statements is permissible); Decision and Order at 11. Moreover, the exact year Claimant's employment with Employer ended is irrelevant based on the facts of this case, as Employer employed Claimant for more than a year and was Claimant's most recent employer. *See Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Creek Coal Co., 6 BLR 1-710, 1-711 (1983); Decision and Order at 16. Consequently, we further affirm the award of benefits.

Attorney's Fees

Claimant's counsel submitted an itemized fee petition to the administrative law judge requesting fees and expenses totaling $7,135.25 for work performed before him in this case. Attorney Fee Order at 1-2. After considering the criteria set forth at 20 C.F.R. §725.366, the administrative law judge awarded the requested fee and expenses in full. *Id.*

On appeal, Employer argues Claimant is not entitled to an award of attorney's fees because he should not have been awarded benefits. Employer's Petition for Review at 1-2. Employer reiterates its arguments that Claimant is not a "miner" under the Act and that it is not the responsible operator, which we have addressed. *Id.* at 2-10; *see supra*. Because we affirm the award of benefits, and Employer does not otherwise challenge the administrative law judge's Attorney Fee Order, it is affirmed. *Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

I concur:

MELISSA LIN JONES
Administrative Appeals Judge

I concur in the result only:

JUDITH S. BOGGS, Chief
Administrative Appeals Judge