U.S. Department of Labor

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

BRB Nos. 23-0237 BLA
and 23-0237 BLA-A

GERALD TATUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 07/17/2024
Employer-Respondent/	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner/	)	
Cross-Respondent	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order Awarding Benefits and Finding that Dominion Coal Corporation is Not the Responsible Operator rendered by Theodore W. Annos, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Charity A. Barger (Street Law Firm, LLP), Grundy, Virginia, for Employer.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman Jones, Deputy Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C.,

for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and Employer cross-appeals Administrative Law Judge (ALJ) Theodore W. Annos's Decision and Order Awarding Benefits and Finding that Dominion Coal Corporation is Not the Responsible Operator (2019-BLA-05564) rendered on an initial claim[1] filed on July 20, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found that Claimant's most recent employment with Abby Contractors (Abby) constituted qualifying coal mine employment and that Abby employed Claimant for at least one year after he ceased working for Employer. 20 C.F.R. §725.202(a). He therefore determined the district director should have designated Abby, not Employer, as the responsible operator in this case. Thus, the ALJ transferred liability for the payment of benefits to the Black Lung Disability Trust Fund (Trust Fund).

On the merits of entitlement, the ALJ credited Claimant with thirty-eight years of qualifying coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018). He further found the presumption unrebutted and awarded benefits.

On appeal, the Director argues the ALJ erred in finding Claimant's work for Abby qualifies as coal mine employment and therefore erred in concluding Employer is not the properly designated responsible operator. Employer responds in support of the ALJ's responsible operator determination. Claimant responds in support of the award of benefits.

[1] Claimant filed a prior claim that he subsequently withdrew. Director's Exhibit 1. A withdrawn claim is considered not to have been filed. 20 C.F.R. §725.306(b).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

On cross-appeal, Employer argues that if the Board does not affirm the ALJ's determination that it is not liable for benefits, we should vacate the decision in its entirety because the ALJ was not appointed in a manner consistent with the Appointments Clause of the Constitution,[3] and thus lacked authority to decide the case. It also argues the removal provisions applicable to ALJs rendered his appointment unconstitutional.

On the merits of entitlement to benefits, Employer contends the ALJ erred in finding Claimant is totally disabled and that it did not rebut the Section 411(c)(4) presumption.[4] The Director filed a response to Employer's cross-appeal, urging rejection of Employer's Appointments Clause challenges.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[3] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[4] We affirm, as unchallenged on appeal, the ALJ's acceptance of the parties' stipulation that Claimant has clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 23. While the Director challenges the ALJ's finding that Claimant's work with Abby Contractors between 2011 and 2015 is coal mine employment under the Act, no party challenges the ALJ's finding that Claimant's remaining work between 1974 and 2010, totaling at least 33 years, is coal mine employment. We thus affirm that finding. *Skrack*, 6 BLR at 1-711; Decision and Order at 11-12.

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in Virginia. *See Shupe*

Responsible Operator

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[6] 20 C.F.R. §725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it shows either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c)(2); *RB&F Coal, Inc. v. Mullins*, 842 F.3d 279, 282 (4th Cir. 2016).

The ALJ found Claimant worked as a superintendent with Abby for at least one year after working for Employer and that this work constitutes coal mine employment. Decision and Order at 7-9. Thus, he found another potentially liable operator employed Claimant more recently than Employer and the district director therefore should have named Abby the responsible operator. *Id.* at 9. The Director alleges the ALJ erred in finding Claimant's work with Abby constituted coal mine employment and thus erred in relieving Employer of liability and transferring responsibility for payment of benefits to the Trust Fund.[7] Director's Brief at 11-20. We affirm the ALJ's decision.

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case

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v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17; Director's Exhibits 4, 6-13.

[6] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[7] We affirm, as unchallenged on appeal, the ALJ's finding that Abby satisfies the requirements to be a potentially liable operator. *See* 20 C.F.R. §725.494(a)-(e); *see also Skrack*, 6 BLR 7-111; Decision and Order at 6.

arises, has held that work duties satisfying situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985).

Under the situs requirement, the work must take place in or around a coal mine, which the Act defines 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); *see Krushansky*, 923 F.2d at 41-42. To satisfy the function requirement, the work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Krushansky*, 923 F.2d at 42; *Whisman*, 8 BLR at 1-97. There is "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see* 20 C.F.R. §725.101(a)(19).

Claimant testified he spent around seventy-five percent of his time with Abby, out of a forty-hour workweek, monitoring and maintaining three underground "idle" coal mines, which he identified as Dominion 16, Dominion 26, and Dominion 30. Hearing Transcript at 21-24; Director's Exhibit 39 at 6-11. His duties involved entering the idle underground mines to check airways, including air intakes and returns. He also monitored electrical systems, such as power systems and pumps, and recorded their status on a weekly basis. Director's Exhibit 39 at 6-7, 10. Although he was not quite sure why Abby had been contracted to monitor the idled mines, he assumed the coal mine operator "kept the mines open" to later "reopen" them. Hearing Transcript at 24. He testified all three mines were "under permit" but not being actively mined. While Dominion 16 and 26 were not in a condition where mining activity could have easily been reactivated,[8] the coal operator had discussed reopening Dominion 16 but ultimately decided against it. Dominion 30, on the other hand, retained its equipment and was later reactivated and serving as an active underground mine. Director's Exhibit 39 at 8.

Claimant testified he spent the remainder of his time taking care of Abby's employees contracted to work at Employer's active underground mines. Hearing Transcript at 21-26; Director's Exhibit 39 at 10-12. These duties included interviewing prospective employees, escorting new employees to their job sites at Employer's mines, some of which were actively producing coal during his visits, showing them the belt drives,

[8] Claimant testified Dominion 16 would have required "a lot of rehabilitation" and that while Employer "talked about reopening" it, the cost was too high so it was shut down. Director's Exhibit 39 at 8. He likewise testified Employer removed its equipment from Dominion 26. *Id.*

and demonstrating their job duties to them, including spreading rock dust on and around the belt. Hearing Transcript at 24-27; Director's Exhibit 39 at 10-12. He testified these employees were assigned to perform "outby" work, meaning they maintained and shoveled belts, laid track, and performed other work away from the mine face, but these job sites were in low coal, required him to enter underground mines, and exposed him to coal dust. Hearing Transcript at 22; Director's Exhibit 39 at 11-12.

The ALJ determined Claimant's work both in monitoring and maintaining the idle mines as well as orienting new employees to the mine sites and their job duties met the situs and function prongs, and that Claimant's work with Abby subsequent to his work for Employer therefore constituted the work of a miner. Decision and Order at 8-9; *see Krushansky*, 923 F.2d at 41-42.

Situs

The Director initially contends the ALJ erred in finding Claimant's work monitoring and maintaining Dominion 16, Dominion 26, and Dominion 30 met the situs requirement because the mines were idle and not extracting or preparing coal. Director's Brief at 14-17. We disagree.

The regulation 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); *see Krushansky*, 923 F.2d at 41-42. As noted above, Claimant testified that, although the mines were idle while Abby employed Claimant, they were still under permit, he assumed they were kept under permit because mining operations would later resume, and mining did in fact resume at Dominion 30. Director's Exhibit 39 at 8-10; Hearing Transcript at 24. Further, contrary to the Director's assertion, there is no conflict in the evidence as to whether the idled mines were "sealed up." Director's Brief at 17. As the Director acknowledges, Claimant testified he both "took care of idle mines . . . *and* sealed up mines" that had been shut down. Director's Exhibit 39 at 4. Thus, while Claimant testified part of his duties was to seal mines that had been shut down, Director's Exhibit 39 at 6, he also monitored and maintained idle mines, which involved entering the three idled mines on a regular basis, and inherently implies the mines were not sealed.[9] Hearing Transcript at 21-24; Director's Exhibit 39 at 6-11. We thus affirm, as supported by substantial evidence, the ALJ's finding that Claimant's work with Abby monitoring and maintaining idle mines met the situs requirement. *See*

[9] Because the evidence does not support the Director's assertion that the idled mines had been sealed, we reject his attempts to distinguish this case from *Cline v. Hanover Resources, LLC*, BRB No. 20-0260 BLA (Nov. 21, 2022) (unpub.). *See* Director's Brief at 11, 16-17; Director's Exhibit 39 at 8.

Krushansky, 923 F.2d at 41-42; 20 C.F.R. §725.101(a)(12); Decision and Order at 7-8; *see also Director, OWCP v. Consol. Coal Co.* [*Petracca*], 884 F.2d 926, 935-36 (6th Cir. 1989) (situs determinations "may be difficult" but "must necessarily be left to the reasoned decision making of the [ALJ]"); *Baker v. U.S. Steel Corp.*, 867 F.2d 1297, 1300 (11th Cir. 1989) (situs requirement is necessarily dependent on the circumstances underlying each particular claim); *Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729, 1-736 (1979) (miner met situs requirement despite spending fifteen percent of his time at a laboratory), *aff'd*, 642 F.2d 68 (4th Cir. 1981).

We likewise reject the Director's assertion that Claimant's work training new employees did not meet the situs requirement because it was "outby" work rather than at the face. *See* Director's Brief at 15. As the ALJ observed, Claimant testified he escorted new employees to the belt drives at active mines. Decision and Order at 8; Hearing Transcript at 22; Director's Exhibit 39 at 11-12. He further testified this work was performed in low coal in underground mines where coal was actually being extracted and on belts that transported the coal. Hearing Transcript at 22; Director's Exhibit 39 at 12. Contrary to the Director's inference, the definition of "coal mine" does not restrict the job site to the face of the mine but includes all structures, facilities, machinery, equipment, shafts, and tunnels used or to be used in the work of extracting or preparing coal. 20 C.F.R. §725.101(a)(12); *see* Director's Brief at 15. Thus, we affirm the ALJ's finding that Claimant's work training new employees met the situs requirement. *See Krushansky*, 923 F.2d at 41-42; 20 C.F.R. §725.101(a)(12); Decision and Order at 8; *see also Petracca*, 884 F.2d at 935-36; *Baker*, 867 F.2d at 1300; *Bower*, 2 BLR at 1-736.

Function

The Director also asserts the ALJ erred in finding Claimant's work monitoring and maintaining Dominion 16, 26, and 30 met the function requirement. Director's Brief at 15-20. We disagree.

Claimant testified he spent around seventy-five percent of his time with Abby monitoring and maintaining Dominion 16, 26, and 30. Hearing Transcript at 21-24; Director's Exhibit 39 at 6-11. As the ALJ observed, his duties involved regularly entering the idle underground mines to check airways, including air intakes and returns, as well as to monitor electrical systems, such as power systems and pumps, and record their status. Decision and Order at 7-9; Director's Exhibit 39 at 6-7, 10. The ALJ thus permissibly found Claimant's work monitoring and maintaining the idle mines met the function requirement. *See Krushansky*, 923 F.2d at 41-42; *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38, 1-41 (1992) (en banc) ("The repair of mining equipment . . . contributes to the extraction of coal and is integral to the coal production process."); *Pinkham v. Director, OWCP*, 7 BLR 1-55, 1-57 (1984) (employment by subsidiary of the

operator loading, recharging, and delivering carbon dioxide cylinders on mine premises constitutes coal mine work); Decision and Order at 8.

We further disagree with the Director's assertion that the portion of Claimant's work escorting new employees to the mine site and training them in their duties did not meet the function requirements. Director's Brief at 15. 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 integral to those functions.[10] *Krushansky*, 923 F.2d at 41; *see Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989). The ALJ permissibly found Claimant's responsibilities integral to the production of coal because they were required by law before those employees could begin work in an underground mine and the belt drives most of those employees would be working on are necessary to transport coal within the mine. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949 (4th Cir. 1997); *Krushansky*, 923 F.2d at 41-42; *Clemons*, 873 F.2d at 922; *see also Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014) (those "who perform tasks necessary to keep the mine operational and in repair" are generally classified as miners); *Tobin v. Director, OWCP*, 8 BLR 1-115, 1-117 (1985) (contractor demonstrating mining equipment at a mine "clearly contributed to the extraction of coal and was integral to the coal production process"); Decision and Order at 9 (citing Hearing Transcript at 21, 25).

The Director's arguments amount to a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, as it is supported by substantial evidence and consistent with law, we affirm the ALJ's finding that Claimant's work at Abby constituted coal mine employment because it satisfies both the situs and function requirements. *See Compton v. Island Creek Coal Co*., 211 F.3d 203, 207-08 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998); *Krushansky*, 923 F.2d at 41-42; Decision and Order at 9. We therefore affirm the ALJ's determination that the district director

[10] We further reject the Director's suggestion that Claimant indisputably "was not exposed to coal dust" and "did not go underground regularly." Director's Brief at 11, 17-18. The function requirement does not specifically rely on a finding of coal mine dust exposure but instead asks whether the work was integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 42 (4th Cir. 1991); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). Moreover, the Director's assertion is contrary to the evidentiary record and Claimant's testimony, which the ALJ credited, indicating he was regularly exposed to coal mine dust and frequently went underground. Director's Brief at 11; Director's Exhibits 4, 5, 39 at 10-11; Hearing Transcript at 22, 34-37.

improperly named Employer as the responsible operator and that liability for the payment of benefits should shift to the Trust Fund.[11] Decision and Order at 9.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits and Finding that Dominion Coal Corporation is Not the Responsible Operator.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[11] Because we affirm the ALJ's determination that Employer was improperly designated as the responsible operator, we need not address Employer's alternate contentions raised on cross-appeal regarding the ALJ's authority to decide this case and his finding Claimant is entitled to benefits. Because the Director, on behalf of the Trust Fund, does not challenge Claimant's entitlement, we affirm that finding. *Skrack*, 6 BLR at 7-111.