BRB No. 00-0241 BLA

JAMES H. REASOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORFOLK & WESTERN RAILWAY COMPANY	)	
	)	DATE ISSUED:
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

James H. Reasor, Dryden, Virginia, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

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[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (99-BLA-0006) of Administrative Law Judge Linda S. Chapman denying benefits 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). The administrative law judge found that claimant was not a coal miner within the meaning of the Act. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, requesting that the case be remanded to the administrative law judge for reconsideration of whether claimant was a miner within the meaning of the Act. In a reply brief, employer contends that the administrative law judge properly found that claimant was not a miner within the meaning of the Act.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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. 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 Director contends that the administrative law judge erred in finding that claimant was not a "miner" under the Act. At issue is whether any of claimant's railroad bridge repair work from 1969 to 1996 as an employee of Norfolk & Western Railway Company (employer) is covered coal mine employment.

Claimant bears the burden of establishing all elements of entitlement. *See White v. Director, OWCP*, 6 BLR 1-368 (1983). The issue of whether a worker is a miner is a factual finding to be made by the administrative law judge. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985).

In *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985), the Board set out a three-prong test by which to define a miner under the Act and regulations. In order to be a miner under the Act, it must be established that (1) the coal with which the miner worked was still in the

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[2]Employer also contends that the arguments of the Director, Office of Workers' Compensation Programs (the Director), are not properly before the Board because they should have been raised in the form of a cross-appeal. Because the Director's brief responds to claimant's general allegation that the administrative law judge erred in failing to award benefits, we hold that the Director's contentions are properly before the Board. *See generally Barnes v. Director, OWCP*, 19 BLR 1-73 (1995).

course of being processed, and was not yet a finished product in the stream of commerce (status of the coal test); (2) 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 (3) the miner's work occurred in or around a coal mine or coal preparation facility (situs test).

The United States Court of Appeals for the Fourth Circuit applies a two-prong situs-function test. *See Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986). Both the situs and function tests must be met. *Id.*

In *Clifford v. Director, OWCP*, 7 BLR 1-817 (1985), the Board recognized that not all individuals involved in the transportation of coal at the situs and exposed to coal dust are covered under the Act. Rather, coverage of transportation workers employed in and around a coal mine is further dependent on whether their activities at the situs are integral to the coal production process.

The Fourth Circuit has recognized that a railroad employee may, under appropriate circumstances, qualify for benefits under the Act. In *Norfolk and Western Railway Co. v. Roberson*, 918 F.2d 1144 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991), the Fourth

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[3]The Director notes that:

> Nothing in the record indicates the state in which claimant's work on bridges adjacent to coal tipples took place. According to [a bridge and building supervisor for employer], the territory claimant covered included parts of Virginia, Tennessee, North Carolina and Kentucky. HT at 21. He testified that the bridges adjacent to coal tipples were located at St. Charles, Andover and Purcell. HT at 39. According to Rand McNally's Commercial Atlas & Marketing Guide (1995) (whose maps include railroad lines) at 236, these sites are located in Virginia. Therefore, Fourth Circuit law applies to this case.

Director's Brief at 5 n.4.

Although we agree with the Director that it appears that claimant's work occurred within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge, on remand, is instructed to render a specific finding regarding this issue.

[4]The Fourth Circuit has indicated that the "status of the coal" test is usually included in the function part of its two-step test. *Glem Co. v. McKinney*, 33 F.3d 340, 342 n.1, 18 BLR 2-368, 2-371 n.1 (4th Cir. 1994).

Circuit held that:

> In the ordinary case a railroad employee engaged in the transportation of coal may well not qualify for benefits under the Act. The demanding tests of function and situs must be met, as they were in this case. After the coal is prepared and reloaded for shipment, a railroad employee would not satisfy the function test. And the possibility of satisfying the situs requirement diminishes as the distance traveled on the rails increases, rendering the employment other than "in or around a coal mine." If a claimant fulfills all the statutory requirements, however, as [the claimant] has here, we decline to hold that his status as a railroad employee negates his recovery of benefits under the Act to which he would otherwise be entitled.

918 F.2d at 1150.

In regard to whether claimant's work occurred in or around a coal mine or coal preparation facility (the situs test), the administrative law judge properly noted that an individual must spend a "significant portion" of his time at a coal mine site in order to meet the test. Decision and Order at 4. The administrative law judge found that, at most, claimant spent approximately two months of the year working within one hundred feet of a coal tipple. *Id.* at 6. The administrative law judge subsequently noted that she found that the evidence was insufficient to support a finding that claimant "worked in or around a coal preparation facility." *Id.* at 7.

The administrative law judge's analysis does not comply with the requirements of the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge erred in not rendering a specific finding as to the length of time claimant worked in or around a coal mine or coal preparation facility.

We further note that the administrative law judge appears to have been under the mistaken impression that six to eight weeks per year is not a significant portion of time spent at a mine site. Decision and Order at 4. The administrative law judge cited the case of *Musick v. Norfolk and Western Railway Co.*, 6 BLR 1-862 (1984) in support of this statement. Contrary to the administrative law judge's characterization, the Board held in *Musick* that six to eight **weekends** per year, not six to eight **weeks,** was not a significant portion of the claimant's work time. We, therefore, remand the case to the administrative law

[5]In *Musick v. Norfolk and Western Railway Co.*, 6 BLR 1-862 (1984), a claimant had worked as a maintenance man for a railroad company from May 1949 until his retirement in

judge with instructions to render a specific finding as to the amount of time that claimant spent on bridges adjacent to the tipples and to determine whether this time constitutes a significant portion of claimant's work time, thereby satisfying the situs test.

The administrative law judge also found that claimant failed to produce any evidence that he was involved in the extraction or preparation of coal. The administrative law judge found that the railroad bridges that claimant inspected and maintained were not integral to the extraction or preparation of coal, but merely "provided a route for the prepared coal to be transported from the tipple into the stream of commerce." Decision and Order at 7. The administrative law judge further noted that when the coal was loaded on the railroad cars, the extraction and preparation process was complete and the coal was a finished product being sent on its way to the consumer. *Id.* Hence, the administrative law judge found that the function requirement was not satisfied.

The Director urges the Board to hold that claimant's work repairing railroad bridges adjacent to coal tipples satisfies the function test. The Director notes that the "same bridges which carried train cars loaded with processed coal to consumers...also carried empty cars to

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October 1970. Three aspects of his employment involved coal dust exposure. Primarily, the claimant cleaned and swept out coal cars at railroad yards after coal was dumped from the cars. When the weather prevented this, he swept, shoveled and scraped coal and sand from ditches beside a tunnel through which trains ran. A few times each year, he worked near a coal mine tipple site repairing railroad tracks and repairing rail tracks and removing spilled coal from the tracks.

The Board held that the only portion of claimant's duties which were performed "in or around a coal mine or coal preparation facility" were the six to eight weekends per year that he spent cleaning up spilled coal and repairing tracks beneath three tipples belonging to a coal company. The Board held that to the extent that the administrative law judge determined that the claimant's work beneath the tipple was not performed in or around a coal preparation facility, he erred. However, the Board found that this error was harmless. Citing *Bower v. Amigo Smokeless Coal Co.*, 2 BLR 1-729 (1979), the Board noted that the situs test is not met unless a significant portion of a claimant's work time is spent at a coal excavation or preparation site. The Board held that six to eight weekends or twelve to sixteen days per year was not a significant portion of the claimant's work time. The Board, therefore, held that the claimant was neither a miner nor a coal transportation worker within the meaning of the Act.

[6]In determining whether claimant was a miner within the meaning of the Act, the administrative law judge mistakenly included the "status of the coal" test in the situs part of the Fourth Circuit's two step "situs-function" test. As previously noted, the "status of the coal" test is usually included in the function part of the two-step test. *McKinney*, *supra*.

the tipple for loading." Director's Brief at 7. The Director further notes that the "bridges adjacent to tipples which claimant ...repaired not only carried empty cars to the tipple for loading, but also carried the trains while they were being loaded." *Id.* at 8.

In support of his argument, the Director cites *Norfolk and Western Railway Co. v. Director, OWCP [Shrader]*, 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993). In *Shrader*, the employer argued that the claimant's delivery of empty cars to coal preparation facilities should not be counted as coal mine employment. *Id.* The Fourth Circuit disagreed, holding that the delivery of coal cars to a preparation facility was integral to the process of loading coal at a preparation facility and was, therefore, part of coal preparation. *Id.*

Inasmuch as the administrative law judge has not specifically addressed whether claimant's role as a bridge repairman was integral to the delivery of empty coal cars to the mines, we remand the case to the administrative law judge for further consideration of whether claimant's railroad bridge repair work satisfies the function test.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge