U.S. Department of Labor

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

BRB No. 16-0572 BLA

CHARLES W. CONLEY Claimant-Respondent v. TURNER BROTHERS, INCORPORATED and KENTUCKY CENTRAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/27/2017 DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

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

Tighe A. Estes and Brian W. Davidson (Fogler Keller and Purdy, PLLC), Lexington, Kentucky.

Emily Goldberg-Kraft (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, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (11-BLA-5417) of Administrative Law Judge Clement J. Kennington awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on May 7, 2010.[1]

Initially, the administrative law judge noted that the parties stipulated that claimant had 5.31 years of coal mine employment as a blast hole driller. The administrative law judge credited claimant with an additional ten years of coal mine employment based on claimant's work as a core driller. The administrative law judge therefore credited claimant with a total of 15.31 years of coal mine employment.[2]

Addressing the merits of entitlement, the administrative law judge found that claimant's 15.31 years of surface coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge also found that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the Section 411(c)(4) presumption.[3] 30 U.S.C. §921(c)(4) (2012). The administrative law judge further

[1] Claimant initially filed a claim for benefits on October 10, 1985. Director's Exhibit 1. In a Decision and Order dated October 6, 1988, an administrative law judge denied the claim because he found that the evidence did not establish the existence of pneumoconiosis. *Id.*

[2] The record reflects that claimant's last coal mine employment was in Oklahoma. Director's Exhibits 1, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions

determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.[4]

On appeal, employer contends that the administrative law judge erred in finding that claimant's employment as a core driller constituted the work of a miner, as defined by the Act. Employer also argues that the administrative law judge erred in crediting claimant with fifteen years of qualifying coal mine employment. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to affirm the administrative law judge's determination that claimant's work as a core driller constituted the work of a miner under the Act.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Definition of a Miner

Employer contends that the administrative law judge erred in finding that claimant's ten years of work as a core driller satisfied the function prong of the test required to show that claimant was a "miner" under the Act.[6] The Director responds, urging affirmance of the administrative law judge's determination that claimant's employment as a core driller was that of a miner under the Act.

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substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[4] Because claimant invoked the Section 411(c)(4) presumption, the administrative law judge found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] Because employer does not challenge the administrative law judge's finding that the evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant's 5.31 years of work as a blast hole driller was that of a miner. *Skrack*, 6 BLR at 1-711.

Under the Act, 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. Such term also includes 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); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41-42, 14 BLR 2-139, 2-143 (4th Cir. 1991); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70, 2 BLR 2-68, 2-72-73 (4th Cir. 1981); *Whisman v. Director, OWCP*, 8 BLR 1-96, 1-97 (1985). To satisfy the function requirement, 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, 14 BLR at 2-145; *Whisman*, 8 BLR at 1-97.

Because employer does not contest the administrative law judge's finding that claimant satisfied the situs test, this determination is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). However, employer contends that the administrative law judge erred in finding that claimant's work as a core driller satisfied the function test. Employer specifically argues that claimant's work as a core driller does not satisfy the function test because claimant "did not obtain samples of coal intended for sale in the near future," and because "there is no indication that [c]laimant's drilling was influential, much less determinative, in the decision to actually mine a seam." Employer's Brief at 5-6.

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 considering whether claimant's work as a core driller was necessary and integral to the extraction or preparation of coal, the administrative law judge considered claimant's 1988 hearing testimony from his prior claim.[7] The administrative law judge summarized claimant's 1988 testimony regarding his ten years of work as a core driller:

> Claimant elaborated that his drilling company was an independent company that would contract with coal mines to determine the presence of coal. He stated that "a lot" of his drilling was close to a coal mine, and the coal mine engineers would have an idea where the coal seam ran and wanted to know how deep and thick the seam was. He added that the coal mine engineers mapped out the areas to be drilled beforehand. He stated that he drilled

[7] The parties agreed to cancel the scheduled hearing in this case due to claimant's Alzheimer's disease. Decision and Order at 2.

> with a three inch drill to determine the presence of coal, the width and depth of the coal seam, and the sulfur content of the coal. He recalled that the depth of the drilling could be up to 2200 feet deep before striking coal, but more commonly was about 15 to 100 feet deep. He confirmed that he drilled holes in pits that were already being mined for coal, and he stated that he has drilled in the presence of coal hauling, about 100 feet from strip mining operations. He was exposed to coal dust while working for this drilling company.

Decision and Order at 5 (citations omitted). The administrative law judge found that claimant's "core drilling for the purpose of determining the depth, width, and purity of coal seams" was necessary and integral to the extraction or preparation of coal, and therefore satisfied the function test.[8] Decision and Order at 8. Because this finding is supported by substantial evidence,[9] it is affirmed. 20 C.F.R. §725.202(a); *see Bower*, 642 F.2d at 70, 2 BLR at 2-72-73; *see also Canonico v. Director, OWCP*, 7 BLR 1-547, 1-549-50 (1984) (coal prospecting held necessary to the extraction of coal); *Skewes v. Consolidation Coal Co.*, 2 BLR 1-705, 1-709 (1979) (core drilling held to be an integral part in the extraction of coal). Consequently, we affirm the administrative law judge's finding that claimant's ten years of work as a core driller was that of miner.

Invocation of the Section 411(c)(4) Presumption

Employer next argues that the administrative law judge erred in determining that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption. To invoke the presumption, claimant must establish that he had at least fifteen years of employment "in one or more underground coal mines," or coal mine employment in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4).

[8] As the Director, Office of Workers' Compensation Programs (the Director), notes, "it is certainly reasonable to conclude that identifying the depth, width and quality of a coal seam is a necessary first step in the extraction of coal." Director's Brief at 4. In fact, employer acknowledges that "the mines undoubtedly received some benefit from [c]laimant's services [as a core driller]." Employer's Brief at 6.

[9] Employer argues that there is no evidence establishing that claimant's work as a core driller exposed him to a significant level of coal mine dust. Employer's Brief at 7. However, as pointed out by the Director, with the exception of transportation and construction workers, an individual need not prove coal mine dust exposure to establish coal mine employment under the Act. Director's Brief at 4, *citing* 20 C.F.R. §725.202(a), (b).

Employer argues that "there is nothing in the record indicating that [c]laimant was exposed to coal dust at [a] rate substantially similar to that of an underground miner." Employer's Brief at 7-8. Contrary to employer's understanding, claimant was not required to establish that the dust conditions of his surface coal mine work exposed him to coal dust at *a rate* substantially similar to that of an underground coal miner to establish that the conditions of his surface coal mine work were substantially similar to those in an underground mine. Rather, the "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1343-44, 25 BLR 2-549, 2-564-66 (10th Cir. 2014) (holding that "substantial similarity" is established if claimant proves that the miner was regularly exposed to coal-mine dust).

Claimant testified that he was exposed to dust every day during the 5.31 years that he worked as a blast hole driller.[10] Hearing Transcript (Tr.) at 19 (Director's Exhibit 1). As for claimant's ten years of work as a core driller, the administrative law judge noted that claimant "confirmed that he drilled holes in pits that were already being mined for coal," and "drilled in the presence of coal hauling, about 100 feet from strip mining operations." Decision and Order at 5; Tr. at 32-33 (Director's Exhibit 1). The administrative law judge further noted that claimant testified that he was exposed to coal dust while working as a core driller. *Id.*

In this case, the administrative law judge credited claimant's testimony "that he was exposed to coal dust during the fifteen years he worked in strip mine employment, both as a core driller and as a [blast hole driller]." Decision and Order at 8-9. It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that claimant's surface coal mine employment took place in conditions substantially similar to those in an underground mine. Decision and Order at 9; *see Goodin*, 743 F.3d at 1344, 25 BLR at 2-566. Consequently, we affirm the administrative law judge's finding that claimant established 15.31 years of qualifying coal mine employment.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence

[10] The administrative law judge noted that claimant testified that, although he was in an enclosed cab, the cab did not keep out the dust. Decision and Order at 6, 9.

of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4). Because employer does not challenge the administrative law judge's finding that it did not rebut the Section 411(c)(4) presumption, this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's determination that claimant's work as a core driller for an independent contractor constituted the work of a miner under the Act.[11] However, I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that claimant's ten years of surface mining work as a core driller took place in conditions substantially

[11] Employer does not challenge the statutory and regulatory standards employed by the administrative law judge to determine whether claimant qualified as a miner for purposes of coverage under the Act. I note this aspect of the case because the record reflects that some of the time during which claimant was employed as a core driller for an independent contractor was before the Act's definition of "miner" was expanded to include workers who were not employed in a coal mine. *See Montel v. Weinberger*, 546 F.2d 679, 680-81, 1 BLR 2-16, 2-19 (6th Cir. 1976). Because employer has not raised the issue, however, we do not address it here.

similar to those in an underground coal mine for purposes of invoking the Section 411(c)(4) presumption.

Under the Department's implementing regulations, the "conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2). The administrative law judge did not make a finding that claimant was regularly exposed to coal mine dust as a core driller. Further, the evidence the administrative law judge specifically cited in support of his finding of "equivalency," Decision and Order at 8, was claimant's testimony regarding the dust conditions he experienced in his five years working as a blast driller for coal mine companies. *Id*. at 9. That evidence did not pertain to claimant's work as a core driller.

There is evidence which, if credited, runs counter to a finding that claimant was regularly exposed to coal mine dust while working as a core driller. At the 1988 hearing before Administrative Law Judge Aaron Silverman, claimant testified that he was "[s]ometimes" exposed to dust while core drilling. Tr. at 12. Moreover, the miner's statements must be considered in context. In response to questioning by Judge Silverman as to whether he had ever drilled holes in a pit where they were mining coal, he responded in the affirmative, and when asked how far away they would be, answered "about a hundred feet." Tr. at 32. When asked by the judge whether he was exposed to coal dust while "drilling the hole for the company that was strip mining," claimant responded affirmatively. Tr. at 33. Since the administrative law judge did not analyze all of the relevant evidence and make the requisite finding of regular exposure to coal mine dust, I would vacate his finding that claimant invoked the Section 411(c)(4) presumption, and remand this case for him to make a specific finding as to whether claimant's core drilling work took place in conditions substantially similar to those in an underground coal mine, under the standard set forth in the implementing regulation, accompanied by an explanation for the finding, as required by the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1022-24, 24 BLR 2-297, 2-310-15 (10th Cir. 2010); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); 20 C.F.R. §718.305(b)(2).

I concur in all other respects with the majority's decision.

JUDITH S. BOGGS
Administrative Appeals Judge