BRB No. 04-0522 BLA

BILL D. GERMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VALLEY CAMP OF UTAH, INCORPORATED	)	DATE ISSUED: 03/16/2005
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer No. 1/Carrier-Petitioners	)	
	)	
SOLDIER CREEK COAL COMPANY	)	
	)	
Employer No. 2-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Martin J. Linnet (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer Valley Camp of Utah, Inc. and carrier.

Catherine MacPherson (MacPherson, Kelly & Thompson, LLC), Rawlins, Wyoming, for employer Soldier Creek Coal Company.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer, Valley Camp of Utah, Inc. (VCU), appeals the Decision and Order (2003-BLA-21) of Administrative Law Judge Thomas F. Phalen, Jr., awarding 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 determined that this case involved a request for modification of the denial of a duplicate claim, and adjudicated the claim, filed on February 23, 1998, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge credited claimant with eight years of qualifying coal mine employment and found that employer was properly designated the responsible operator herein because claimant's subsequent work with Soldier Creek Coal Company (SCCC) did not constitute covered coal mine employment. The administrative law judge then found that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as the weight of the evidence at 20 C.F.R. §718.202(a)(1)-(4) established that claimant suffered from complicated pneumoconiosis. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant's duties with SCCC did not constitute covered coal mine employment and that employer was properly designated the responsible operator in this case. Alternatively, employer asserts that this case must be remanded for the administrative law judge to determine whether the evidence is sufficient to establish that claimant's complicated pneumoconiosis arose out of covered coal mine employment pursuant to 20 C.F.R. §718.203(c). Claimant responds, urging affirmance of the award of benefits but agreeing with employer's argument that claimant had fifteen years of qualifying coal mine employment. SCCC responds, urging affirmance of the administrative law judge's designation of employer as the responsible operator, to which employer has filed a combined reply in support of its position. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's finding that claimant's work for SCCC was not covered coal mine employment, to which employer responds in support of its position.[1]

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit as the miner was last employed in the coal mine industry in the State of Utah.

The Board's scope of review is defined by statute. 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. §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).

Employer initially contends that the administrative law judge erred in finding that claimant's duties as a security guard and janitor with SCCC were not integral to the coal production process and thus did not qualify as the work of a "miner" under the Act. We disagree. The administrative law judge determined that claimant's job with SCCC did not involve coal extraction, preparation, coal mine construction or the transportation of coal, and properly noted that a worker does not have to be engaged in the actual extraction or preparation of coal, so long as the work he performs is essential to coal mining. Decision and Order at 7; *see Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(*en banc*). The administrative law judge then reviewed claimant's duties to ascertain whether claimant performed a function integral or necessary to the coal production process (the function test) in order for his work with SCCC to constitute qualifying coal mine employment. Decision and Order at 5-7; *see Whisman v. Director, OWCP*, 8 BLR 1-96 (1985). The administrative law judge accurately determined that claimant worked, on average, three days per week, mostly on weekends and holidays when the mine usually was not in operation, and that claimant's duties included: sweeping and mopping coal dust from the warehouse and bath house; performing security checks; opening and closing the main gate and checking employees and vendors into the property; receiving mail and deliveries, including parts; resetting the electrical substation following power outages; issuing parts to mechanics at the warehouse; answering phones; checking ventilation fans; and watching the mine monitoring system. Decision and Order at 5-6. Although employer maintains that similar duties or related functions have been found to constitute the work of a miner, the administrative law judge acted within his discretion in concluding that claimant's duties were not integral to the coal production process, but were primarily related to protecting SCCC's economic interests. In so finding, the administrative law judge noted that the duties of a night watchman, such as answering the telephone, patrolling, and checking tickets and outgoing trucks, have been held not to be integral to the coal production process because the worker is protecting only the commercial interests of the mine. Decision and Order at 7; *see Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989); *Slone v. Director, OWCP*, 12 BLR 1-92 (1988). Further, while it has been held that the repair of mining equipment contributes to the extraction of coal and thus, is integral to the coal production process, *see Etzweiler v. Cleveland Bros. Equipment Co.*, 16 BLR 1-38 (1992)(*en banc*), the administrative law judge determined that claimant did not repair any equipment, but merely noted power outages and reset the system, or checked ventilation fans and noted whether they were operating.

See Shupe v. Director, OWCP, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 40, 41.

Decision and Order at 7. Similarly, although inventory work can satisfy the function test because levels of inventory inherently affect the level of coal production, *see Settlemoir v. Old Ben Coal Co.*, 9 BLR 1-109 (1986), the administrative law judge determined that claimant provided no evidence that he ordered parts or was responsible for maintaining inventory levels; rather, claimant merely accepted delivery of parts and documented his issuance of parts in the warehouse to the mechanics who repaired equipment in the mine when the mine was not in operation. Decision and Order at 8. As claimant testified that the majority of the work he performed was janitorial, *i.e.*, sweeping and mopping the warehouse and bathhouse, Hearing Transcript at 54, the administrative law judge reasonably concluded that claimant's janitorial and security guard duties were not necessary to keep the mine operational or in repair, but were essentially related to protecting SCCC's economic interests; and that claimant's duties of resetting the system following power outages and issuing parts assisted the mine mechanics but were of insufficient quality or frequency to be considered integral to coal production. Decision and Order at 6-8; *see Clemons*, 873 F.2d 916, 12 BLR 2-271. The administrative law judge's findings and inferences are supported by substantial evidence, and we may not substitute our judgment. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's findings that claimant's employment with SCCC did not constitute the work of a miner, and that employer was properly designated as the responsible operator herein.

Turning to the merits, employer contends that the administrative law judge's failure to determine the etiology of claimant's complicated pneumoconiosis requires remand. We agree. While Section 718.304 presumes that a miner with complicated pneumoconiosis is totally disabled due to pneumoconiosis, the regulation does not address the issue of the etiology of the disease, a requisite element of entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204, 718.304; *Anderson*, 12 BLR at 1-112; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Because claimant established less than ten years of qualifying coal mine employment, claimant must prove by competent medical evidence that his pneumoconiosis arose out covered employment, without the benefit of any presumption.[2] 20 C.F.R. §718.203(c). Further, where there is evidence of occupational exposure to dust or fumes in other than qualifying coal mine employment, which could account for the respiratory condition, it is proper to consider that employment history in determining whether claimant has carried the burden of proof necessary to establish that his pneumoconiosis arose

[2] Although claimant argues that employer should be bound by its stipulation that claimant engaged in 15 years of coal mine employment, the administrative law judge found that this stipulation was not supported by substantial evidence. Decision and Order at 8. Since employer contested the issue of the etiology of claimant's pneumoconiosis, and the administrative law judge credited claimant with only eight years of qualifying coal mine employment, the administrative law judge must render findings of fact pursuant to 20 C.F.R. §718.203(c).

out of covered employment. *See generally Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Foster v. Director, OWCP*, 8 BLR 1-188 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709 (1983); *Howell v. Director, OWCP*, 6 BLR 1-504 (1983); *Collura v. Director, OWCP*, 6 BLR 1-100 (1983). In the present case, the administrative law judge determined that in addition to claimant's exposure to coal dust during eight years of covered coal mine employment with VCU, claimant worked for fourteen years as a uranium miner, six years as a potash miner, and seven years for SCCC. Decision and Order at 6-8. Consequently, we vacate the award of benefits and remand this case to the administrative law judge to determine whether the evidence is sufficient to establish that claimant's complicated pneumoconiosis arose out of his covered coal mine employment pursuant to 20 C.F.R. §718.203(c).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge