BRB No. 04-0573 BLA

JOHN W. TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MOUNTAIN CLAY, INCORPORATED	)	
	)	DATE ISSUED: 05/05/2005
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (03-BLA-5994) of Administrative Law Judge Daniel F. Solomon denying benefits on 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). This case involves a claim filed on August 29, 2001. The

administrative law judge found that claimant was not a "miner" within the meaning of the Act. Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that he was not a "miner" within the meaning of the Act. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a response brief, requesting that the Board reverse the administrative law judge's determination that claimant was not a "miner" within the meaning of the Act.

The Board 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).

Claimant argues that the administrative law judge erred in finding that he was not a "miner" within the meaning of the Act. Revised 20 C.F.R. §725.202(a) provides that "[t]here shall be a rebuttal presumption that any person working in or around a coal mine or coal preparation facility is a miner."[1] It specifically provides that:

> A "miner" for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, or any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttal presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in the maintenance or construction of the mine site; or
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

[1]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, had previously held that a worker was required to meet a two prong test of situs and function in order to establish that his work was that of a "miner" as defined by the Act. *See Director, OWCP v. Consolidation Coal Co., [Petracca]*, 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989). The situs prong of the test was satisfied when the work was performed in or around a coal mine. *Id.* In order to satisfy the function prong of the test, the worker was required to establish that the work performed a function integral to the extraction or preparation of coal. *Id.*

20 C.F.R. §725.202(a) (emphasis added).[2]

At the hearing, claimant testified that he worked for employer as a "parts runner."[3] Transcript at 9. Claimant indicated that when there was a breakdown at a mine site, he would get the needed part (from a warehouse or supply company) and deliver it to the mine site. *Id.* at 9-10. The following exchange at the hearing further delineates claimant's job responsibilities:

> [Claimant's Counsel]: Okay, now when you would take the part to the mine site, what did you do there?
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> [Claimant]: Well, a lot of the times I helped them put it on unless they hollered for me to come somewhere else, you know.
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> ***
>
> [Claimant's Counsel]: Okay. So if I'm understanding you correctly, unless they radioed you and said we've got a break down at another site, you need to go to the warehouse or to some supply house and pick up another part for another site, you would stay there and help the repairman put the part on?
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> [Claimant]: Until the machine was going, yeah.
>
> [Claimant's Counsel]: Okay. And was that true if it was….if the break down

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[2]In published comments regarding the implementation of the revised regulations, the Department of Labor stated that the Section 725.202(a) presumption:

> reflects the rational assumption that an individual working in and around a coal mine is involved in the extraction, preparation or transportation of coal, or in the construction of a mine site; these functions are enumerated by the statutory definition of a "miner." The operator may rebut the presumption by disproving either the required nexus between the worker's duties and coal mining, or any regular employment at a coal mine facility. This burden is not onerous given the operator's access to information about the use and duties of the workers at its facilities.

See 65 Fed. Reg. 79,961 (2000).

[3]On cross-examination, claimant stated that his job classification was that of a "delivery man." Transcript at 20.

was on a surface job or it was under ground?

[Claimant]: Either one.

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[Claimant's Counsel]: Okay. When you would take a part to the mine site and you would be there helping the repairman put the part on and retrieve the old part once it was taken off to return either to the supply house or to the company where it was picked up for exchange, were you exposed to dust?

[Claimant]: Yes. Yes, in the pits where we were loading the coal. If we had a loader broke down and the pit was loading coal, that was the first priority because the coal had to roll and that was the first priority. You stayed there until it was fixed.

Transcript at 10-12.

Claimant also testified that when he had to take a part to a tipple or processing plant, he would also stay there and help the repairman "unless they would call [him] for another break down somewhere." Transcript at 14. Claimant testified that fifty percent of his time was spent "going to and from a job site picking up and delivering parts" while the other fifty percent of his time was spent "on the job." *Id.* at 21.

The administrative law judge initially found that the time that claimant spent transporting parts to and from warehouses to the various coal mine sites did not constitute the work of a miner. Decision and Order at 4. Because the time that claimant spent traveling to and from warehouses to various coal mine sites did not occur in or around a coal mine or coal preparation facility, we affirm the administrative law judge's finding that this portion of claimant's work was not that of a "miner." 20 C.F.R. §725.202(a).

The administrative law judge further found that, because the time that claimant spent traveling between the warehouses and coal mine sites did not constitute the work of a "miner," employer had met his burden of rebuttal. *See* Decision and Order at 5. Consequently, the administrative law judge found that the burden shifted back to claimant to show that he was a "miner" when he was present at the coal mine sites and coal preparation facilities. *See* Decision and Order at 5. Whether or not claimant's work at employer's coal mine sites and coal preparation facilities constitutes the work of a "miner" is not affected by the fact that other segments of claimant's work day did not occur in or around a coal mine. Because the evidence is uncontradicted that claimant worked in or around coal mines and coal preparation facilities for some part of his work day, claimant is entitled to a rebuttable presumption that he was a "miner" during these

periods of employment. *See* 20 C.F.R. §725.202(a). Thus, we hold that the administrative law judge improperly shifted the burden of proof to claimant to establish that his work constituted that of a "miner." On remand, the administrative law judge is instructed to address whether employer has put forth affirmative proof sufficient to establish rebuttal of the presumption. As previously noted, employer can establish rebuttal of the presumption only by establishing that claimant (1) was not engaged in the extraction, preparation or transportation of coal while working at the mine site, or in the maintenance or construction of the mine site; or (2) was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a). Consequently, we vacate the administrative law judge's finding that claimant's work at employer's coal mine sites and coal preparation facilities does not constitute the work of a "miner" and remand the case for further consideration pursuant to 20 C.F.R. §725.202(a).[4]

Claimant also contends that the administrative law judge did not address whether his work as a heavy equipment operator was that of a "miner." At the hearing, claimant testified that before becoming a "parts runner," he operated a dozer and a loader. Transcript at 21. Claimant testified that some of this work was spent preparing the site for coal mining. *Id.* Although the administrative law judge noted that claimant operated some heavy equipment early in his career, he did not address whether this work was that of a "miner." Consequently, on remand, the administrative law judge is instructed to also address whether this work constitutes that of a "miner." On remand, should the administrative law judge find that claimant was a "miner" within the meaning of the Act,

[4]We note that claimant testified that upon delivering a needed part, he would assist the repairman in replacing the part "unless" he was informed that he was needed to pick up another part for another site. Transcript at 10-12. Claimant testified that he assisted the repairmen in this manner "a lot of the times." *Id.* at 10. The administrative law judge noted that claimant did not testify that he spent "most" or a "high proportion" of his time assisting repairmen in replacing parts. *See* Decision and Order at 5. On remand, the administrative law judge is instructed to address whether employer can establish the rebuttal requirements of 20 C.F.R. §725.202(a). We note that whether claimant performed the work of a "miner" and the length of time to which claimant is entitled for his coal mine work are factual issues. On remand, should the administrative law judge determine that claimant is a "miner," he must then render a separate determination regarding the length of claimant's coal mine employment.

The administrative law judge found that claimant, like the miner in *Elliot Coal Mining Co. v. Director, OWCP [Kovalchick]*, 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994), was "present at the mines on only limited occasions." Decision and Order at 6. The administrative law judge, however, failed to reconcile his finding with claimant's testimony that he spent half of his work day at employer's coal mine sites and coal preparation facilities.

he is instructed to address whether claimant has establish all of the applicable elements of entitlement. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge