No. 17-4058

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENWEST TERMINALS, LLC,

Petitioner

v.

VICKIE S. SALYERS

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that oral argument is unnecessary in this case, because "the facts and legal arguments are adequately presented in the briefs and record." Fed. R. App. P. 34(a)(2)(C).

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 17-4058

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v.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of a Final Order of the Benefits Review Board, United States Department of Labor

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944, filed by Lowell

Salyers and, since his death in 2013, prosecuted by his widow, Vickie S. Salyers. On June 14, 2016, Administrative Law Judge Peter B. Silvain, Jr. (ALJ) issued a decision awarding benefits. Joint Appendix, page (JA) 19. KenWest Terminals, LLC (KenWest or Employer), Mr. Salyers's former employer, appealed this decision to the United States Department of Labor Benefits Review Board (Board) on July 14, 2016, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision under 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The Board affirmed the award on July 18, 2017, JA 5, and KenWest petitioned this Court for review on September 8, 2017, JA 1. The Court has jurisdiction over this petition because 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury arose in Kentucky, within this Court's territorial jurisdiction. The Court therefore has jurisdiction over KenWest's petition for review.

STATEMENT OF THE ISSUE[1]

To qualify as a "miner" potentially eligible for disability benefits under the BLBA, a claimant must work "in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. § 902(d). "Coal preparation" includes the "crushing," "sizing," "mixing," and "loading" of coal. 20 C.F.R. § 725.101(a)(13). Mr. Salyers worked for KenWest at a coal loading dock from 1984 to 2007. His duties included crushing, sizing, and mixing coal that was then loaded onto barges for delivery to customers. The ALJ found that Mr. Salyers's work for KenWest constituted employment as a miner under the Act.

The issue presented is whether this finding is supported by substantial evidence and in accordance with law.

[1] KenWest also argues that the ALJ's evaluation of the medical evidence and ultimate decision awarding benefits to Mr. Salyers was not supported by substantial evidence. Petitioner's Opening Brief (OB) 17-28. The Director does not address these arguments in this brief.

STATEMENT OF THE CASE

A. Statement of the Facts[2]

KenWest submitted no evidence regarding the work Mr. Salyers performed for it. *See* JA 26. The only evidence about this key issue is Mr. Salyers's unrebutted testimony, which is summarized below.

From 1984 to 2007, Lowell Salyers worked for KenWest at a riverside coal loading dock near Catlettsburg, Kentucky. JA 101, 123, 174, 190. At the facility, he sometimes handled coal that had already been processed and was ready to be used by the ultimate consumers. JA 124. But he also worked with raw coal, "straight out of the mines," that was transported on trucks to the coal loading dock from various mines. JA 124, 136.

Once the raw coal arrived at the dock site, Mr. Salyers loaded it into a machine that crushed the coal to particular sizes needed for various customers. JA 133, 134. He was required to "bust up"

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[2] Because this brief only addressed KenWest's argument that Mr. Salyers's work was not covered by the BLBA, the medical evidence regarding whether Mr. Salyers suffered from totally disabling pneumoconiosis arising out of his coal mine employment, and the ALJ's evaluation of that evidence, is not summarized here.

coal "lumps" to facilitate processing coal through a feeder. JA 124-125. He also mixed the coal into various blends for different barges. JA 125-126.

Mr. Salyers testified that he crushed and sized raw coal "everyday." JA 136. After he loaded coal into the crusher, the coal went into a hopper and then onto a belt line to the barge. JA 103, 134. He also shoveled coal when the belt malfunctioned. JA 123, 135. Sometimes, he loaded the processed coal directly onto the barges with a front-end loader. JA 134.

B. Procedural History

Mr. Salyers filed this claim for BLBA disability benefits in 2009. JA 20. A hearing by telephone was held on October 4, 2012, before Administrative Law Judge Peter B. Silvain, Jr. JA 20, 79. Mr. Salyers was not represented by counsel. *Id.* He passed away in 2013, and Mrs. Salyers was substituted as the claimant. JA 20.

1. The 2016 ALJ Decision

The ALJ found that Mr. Salyers was a "miner" within the meaning of the BLBA and awarded the claim. JA 26, 43. The ALJ's discussion of the issue began with a detailed summary of Mr. Salyers's testimony about his work at the KenWest dock facility.

JA 22-24. The ALJ explained that this Court applies a two-pronged situs/function analysis to determine whether an individual is a miner covered by the BLBA. JA 25 (citing *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926 (6th Cir. 1989)). The situs test is satisfied if the claimant worked in or around a coal mine or coal preparation facility, and the function test is met if the claimant's work was integral to the extraction or preparation of coal. *Id.* (citing 20 C.F.R. § 725.101(a)(23)).

The ALJ had little difficulty finding that Mr. Salyers qualified as a miner under this test. The ALJ cited the regulatory definition of "coal preparation," which includes crushing, sizing, mixing, and loading coal. JA 25 (citing 20 C.F.R. § 725.101(a)(13)). Based on this regulatory definition and Mr. Salyers's "credible testimony," the ALJ found that (1) coal preparation was one of the functions of the KenWest dock facility where Mr. Salyers worked, and (2) Mr. Salyers's work satisfied the function test. JA 26. [3] In view of these

[3] The ALJ also noted that there is a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. JA 26. *See* 20 C.F.R. § 725.202(a). The presumption may be rebutted by proving that the person was either (1) not engaged in coal extraction, preparation or transportation, or

findings, the ALJ concluded that Mr. Salyers was a miner under the Act. JA 25-26. The ALJ then turned to the medical merits of the case, and determined that Mr. Salyers was entitled to BLBA disability benefits. JA 43. KenWest appealed to the Benefits Review Board.

2. The 2017 Board Decision

On appeal to the Board, the Employer argued that the ALJ erred by finding that the Miner's work for KenWest constituted covered coal mine employment. Specifically, KenWest argued that Mr. Salyers was not covered by the BLBA because he did not work in or around a coal mine and was not involved in extracting coal from a mine. JA 7. The Board rejected these arguments, noting that the BLBA's definition of "miner" includes employees who work in coal preparation facilities in the preparation of coal as well as those who extract coal from actual mines. JA 7-9. The Board held that Mr. Salyers's duties were consistent with the regulatory definition of "coal preparation" and that the ALJ had rationally

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(2) not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. § 725.202(a)(1), (2). The ALJ found that the Employer had offered "no such proof." JA 26.

concluded that his work was an integral or necessary part of the coal preparation process. JA 8. The Board also held that the ALJ reasonably found that the coal loading dock where Mr. Salyers performed his duties constituted a coal preparation facility. JA 9. The Board also affirmed Mr. Salyers's award on its medical merits. JA 9, 15. KenWest then petitioned this Court for review. JA 1.

SUMMARY OF THE ARGUMENT

The ALJ correctly concluded that Mr. Salyers is covered by the BLBA. Anyone who works "in or around a coal mine or coal preparation facility in the extraction or preparation of coal" is a "miner" for BLBA purposes. 30 U.S.C. § 902(d). "Coal preparation" is defined as explicitly including the crushing, sizing, mixing, and loading of coal. 20 C.F.R. § 725.101(a)(13). Mr. Salyers's unrebutted testimony establishes that he regularly performed those tasks at KenWest's dock facility. He is therefore a "miner" under the plain language of the BLBA and its implementing regulations.

KenWest argues that the case law mandates a different result. Not so. The authorities cited by the company stand only for the proposition that workers who handle coal *after* it is prepared are not miners under the BLBA. The Director does not disagree with

this proposition. But it is not relevant to this case because Mr. Salyers worked with raw coal and performed work on that coal that explicitly falls within the definition of coal processing. Accordingly, the Court should affirm the ALJ's ruling that Mr. Salyers is a miner covered by the BLBA.

ARGUMENT

A. Standard of Review

This case presents both factual and legal questions. On factual issues, the ALJ's "findings are conclusive if they are supported by substantial evidence and accord with the applicable law." *Central Ohio Coal Co. v. Director, OWCP*, 762 F.3d 483, 488 (6th Cir. 2014) (internal quotations and citations omitted). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support" the decision. *Id.* "Where the substantial evidence requirement is satisfied, the court may not set aside the ALJ's findings, even if the court would have taken a different view of the evidence were we the trier of facts." *Id.* at 489 (quotations and alterations omitted).

In contrast, the Court gives no deference to the ALJ's or Board's construction of the BLBA. *Island Creek Kentucky Mining v.*

Ramage, 737 F.3d 1050, 1056 (6th Cir. 2013). The Director's interpretation of the BLBA as expressed in its implementing regulations is entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Ramage*, 737 F.3d at 1058. The Director's interpretation of those implementing regulations "is deserving of substantial deference unless it is plainly erroneous or inconsistent with the regulation," *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted), even if they are expressed in a brief, *see Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The plain language of the BLBA and its implementing regulations establish that Mr. Salyers worked for KenWest as a "miner."

The BLBA defines "miner" as, *inter alia*, "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); *see also* 20 C.F.R. § 725.202(a). Courts have interpreted this definition as establishing a two-part test. First, the worker must work in or around a coal mine or preparation facility (the "situs" requirement). Second, their duties must involve the extraction or

preparation of coal (the "function" requirement). *See, e.g.*, *Petracca*, 884 F.2d at 929. The ALJ concluded that Mr. Salyers was a "miner" because he (1) worked at a coal preparation facility and (2) performed duties that included coal preparation work. These findings are supported by substantial evidence and in accord with governing law. Indeed, his conclusion was mandated by the plain language of the BLBA and its implementing regulations.

The situs test is satisfied here. The BLBA's definition of "coal mine" includes not only traditional mines where coal is extracted, but also facilities where "the work of preparing the coal so extracted" is performed, "includ[ing] custom coal preparation facilities." 30 U.S.C. § 802(h)(2). The regulations define "coal preparation" as including "the crushing, sizing, . . . mixing, . . . and loading" of coal. 20 C.F.R. § 725.101(a)(13) (implementing 30 U.S.C. § 802(i)).[4] KenWest does not seriously contest the ALJ's

[4] The BLBA is codified in Title 30, Chapter 22, Subchapter IV of the United States Code. 30 U.S.C. § 901(b). The definitions in 30 U.S.C. § 802 apply to all of Chapter 22, including the BLBA, unless otherwise provided for. Relevant to this case are section 802's definitions of coal mine and coal preparation. 30 U.S.C. § 802(h)(2), (i). The BLBA contains its own definition of "miner." *See* 30 U.S.C. § 902(d).

findings that all of these activities were performed at the dock where Mr. Salyers worked. Indeed, it candidly admits that coal was "crushed and mixed" at the facility in its opening brief. OB 14. KenWest's dock is therefore a coal preparation facility as defined by the regulations.

Mr. Salyers's work also satisfies the function test. As an initial matter, anyone who works at a covered situs is rebuttably presumed to be a miner. 20 C.F.R. § 725.202(a). KenWest could have rebutted the presumption by showing that Mr. Salyers was not engaged in the preparation of coal. *Id.* But, as the ALJ pointed out, the company "offered no such proof." JA 26. In any event, Mr. Salyers's own testimony affirmatively establishes that he prepared coal at the KenWest dock. Mr. Salyers testified that he crushed, sized, and mixed raw coal that was then loaded onto barges for delivery to consumers. JA 125-125, 133, 134, 136. The ALJ found this testimony to be credible, and the listed activities fall directly within the regulatory definition of "coal preparation." 20 C.F.R.

§ 725.101(a)(13).[5] Nor was this work merely occasional. Mr. Salyers testified that he crushed and sized raw coal "everyday." JA 136.[6] Because his work satisfies the function test as well as the situs test, Mr. Salyers is a "miner" for BLBA purposes under the plain language of the statute and its implementing regulations.

None of KenWest's arguments to the contrary are convincing. The company makes much of the fact that Mr. Salyers "never worked in or around an underground or above ground coal mine." OB 14-15, 16. This reflects a fundamental misunderstanding of the statute. For purposes of the BLBA, coal preparation is work as a

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[5] In addition to covering employees who directly work in coal preparation or extraction, workers who perform activities that are integral or indispensable to those core duties also satisfy the function test. *See, e.g., Amigo Smokeless Coal v. Director, OWCP*, 642 F.2d 68, 70-71 (4th Cir. 1981) (laboratory technician was a "miner" because "knowledge of the chemical composition and energy content of the coal was a necessary step" in the "preparation of the coal for sale."). There is no need to consider this case law, however, because Mr. Salyers's duties include functions explicitly defined as "coal preparation" by the regulations.

[6] The fact that Mr. Salyers testified that "some of" the coal he handled at KenWest had already been processed is irrelevant because he also prepared raw coal every day. JA 124, 136. *See Sexton v. Mathews*, 538 F.2d 88, 89 (4th Cir. 1976) (fact that some of claimant's work fell within the definition of coal preparation sufficient to confer "miner" status despite the fact that much of his time was spent in non-mining activities).

"miner" and coal preparation facilities are "coal mines." 30 U.S.C. §§ 902(d), 802(h)(2); 20 C.F.R. § 725.101(a)(2). The employer also points out that the loading dock where Mr. Salyers worked was "far removed from any mine site[.]" OB 16. But this fact is irrelevant. "[P]reparation facilities are still defined as 'coal mines' even though they may be geographically remote from the site where coal is physically mined." *Petracca*, 884 F.2d at 932.

KenWest also argues that the work Mr. Salyers performed at its dock is not covered because it involved "transporting coal that was delivered from an off-site coal mine and then loaded onto coal barges for delivery to the ultimate purchaser and consumer." OB 15. The first problem with this argument is that it ignores all the crushing, sizing, and mixing duties Mr. Salyers performed before the coal was loaded, which clearly constitute coal preparation. Moreover, it overlooks the fact that the regulation specifically includes "loading" coal as part of the coal preparation process. 20 C.F.R. § 725.101(a)(12); *see also* 30 U.S.C. § 802(i). As the Third Circuit has explained, loading freshly processed coal onto barges is "a necessary part of the 'work' of 'preparing the coal' for delivery." *Hanna v. Director, OWCP*, 860 F.2d 88, 93 (3d Cir. 1988)

(holding that loading coal from a tipple onto barges "was a step, if only the very last step, in the preparation of the coal"). And that is the exactly kind of loading that happened at KenWest's dock.

Finally, KenWest claims that *Southard v. Director, OWCP,* 732 F.2d 66 (6th Cir. 1984), and *Eplion v. Director, OWCP*, 794 F.2d 935 (4th Cir. 1986), support its argument that Mr. Salyers is not covered by the BLBA. Unfortunately for the company, these cases are inapposite, and their reasoning is entirely consistent with the ALJ's finding that Mr. Salyers's work for KenWest was covered by the BLBA.

The claimant in *Southard* worked for coal retailers in Detroit. 732 F.2d at 68. His job was to unload coal from railroad cars and deliver it to individual consumer homes. *Id.* Importantly, "the coal was already prepared and in commerce upon its arrival at the retailers' facilities." *Id.* at 69. For that reason, this Court rejected Southard's claim that he was involved in coal preparation. *Id.*

The facts of *Southard* are readily distinguishable from the instant case. Southard did not crush, size, or mix raw coal, as Mr. Salyers did. Nor did he load coal at a preparation facility, as Mr. Salyers also did. Instead, he *unloaded* already-prepared coal

for delivery to customers. To the extent *Southard* is relevant to this case, it undermines KenWest's position. During its analysis, the Court explained that BLBA coverage "extends 'at least to the point where the coal is processed and loaded for further shipment.'" *Southard*, 732 F.3d at 69 (quoting *Roberts v. Weinberger*, 527 F.2d 600, 602 (4th Cir. 1975)). The point where coal was processed and loaded for further shipment in this case was the KenWest dock where Mr. Salyers worked.

Eplion is inapposite for the same reason. Like Mr. Salyers, Eplion worked at a dock where coal was loaded onto barges. *Eplion*, 794 F.3d at 936. But the similarities end there. Eplion was denied coverage because he "was not involved in transporting the coal before it was prepared. The coal was already processed and prepared for market before Eplion had any contact with it." *Id.* at 937. This was not true of the KenWest dock where Mr. Salyers worked. Thus, like *Southard*, *Eplion* provides no license to ignore the plain text of BLBA and its implementing regulations, which support the ALJ's ruling that Mr. Salyers worked as a miner.

In its discussion of *Southard* and *Eplion*, KenWest also cites *Ray v. Brushy Creek Trucking Co.*, 50 Fed. Appx. 659 (6th Cir. 2002)

as supporting its view. As an initial matter, *Ray's* precedential value is limited. Not only is the decision unpublished, the Court expressly disclaimed any intention of "establish[ing] a firm line where the preparation of coal ends[.]" 50 Fed. Appx. at 662. In any event, it is no more relevant than *Southard* and *Eplion.* Ray worked as a deckhand "on a barge that transported coal from the processing plant to power companies." *Ray*, 50 Fed. Appx. at 661. His duties included "tying together barges, and cleaning excess coal spillage from the barges." *Id.* at 660. Mr. Salyers was not a barge deckhand. Unlike Ray, who only handled coal that had already been at least partially processed, Mr. Salyers worked with raw coal "straight out of the mines." JA 136. Moreover, he actually crushed, sized, and mixed that raw coal before it was loaded onto barges for shipment. As explained above, those activities are covered as "coal preparation" under the BLBA and its implementing regulations. *Ray*, like *Southard* and *Eplion,* therefore provides no support for KenWest's appeal.

In sum, the ALJ's conclusion that Mr. Salyers is covered by the BLBA is correct. KenWest's dock facility was used to prepare coal for shipment to consumers. And Mr. Salyers's work there

included duties that are specifically identified as "coal preparation" by the regulations implementing the BLBA's definition of "miner." By accurately analyzing the facts and the controlling law, the ALJ properly determined that Mr. Salyers's job satisfied both the situs and function tests. His resulting conclusion that Mr. Salyers worked as a miner for BLBA purposes should be affirmed.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court affirm the ALJ's ruling that Mr. Salyers was a miner covered by the Black Lung Benefits Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contain contains 3667 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in fourteen-point Bookman Old Style font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, an electronic copy of this brief was served through the CM/ECF system on the following:

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