

BRB No. 03-0460 BLA

THELMA D. WYANT)
(Widow of LEONARD E. WYANT))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY)
)
Employer-Petitioner)
)
and) DATE ISSUED: 03/30/2004
)
)
S.K. GROSE/STEVE & SON,)
INCORPORATED)
)
Employer)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand--Denying Motion to Dismiss of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for Peabody Coal Company.

Barry H. Joyner (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer Peabody Coal Company (Peabody), appeals the Decision and Order on Remand--Denying Motion to Dismiss (2001-BLA-0385) of Administrative Law Judge Daniel L. Leland rendered 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).¹ This case is before the Board for the second time. Claimant filed her application for survivor's benefits on August 17, 1998. Director's Exhibit 1. In a Decision and Order issued on January 24, 2002, the administrative law judge found that the decedent died due to complicated pneumoconiosis and, accordingly, the administrative law judge awarded benefits. *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §§718.205(c)(3), 718.304(c). The administrative law judge additionally found that Peabody was the coal mine operator responsible for the payment of benefits because the decedent's most recent employer, S.K. Grose/Steve & Son, Inc. (Grose), a coal trucking company, did not employ him as a miner.

Upon consideration of Peabody's appeal and a Motion to Remand filed by the Director, Office of Workers' Compensation Programs (the Director), the Board affirmed the unchallenged award of benefits but vacated the administrative law judge's finding that Peabody was the responsible operator. *Wyant v. Peabody Coal Co.*, BRB No. 02-0424 BLA (Oct. 31, 2002)(unpub.). The Board held that the administrative law judge did not consider the decedent's job duties for Grose or the status of the coal that he worked with in accordance with the law of the United States Court of Appeals for the Fourth Circuit.²

Specifically, the Board instructed the administrative law judge to consider testimony that some of the coal which the decedent hauled from the mine to a river load-out facility was unprocessed, and to determine whether that coal was prepared for market before the decedent worked with it. *Wyant*, slip op. at 4-6; *see Director, OWCP v. Consolidation Coal Co. [Krushansky]*, 923 F.2d 38, 41, 14 BLR 2-139, 2-143 (4th Cir.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² The record indicates that the decedent's coal mine employment occurred in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

1991). Additionally, the Board instructed the administrative law judge to determine whether the decedent performed a function integral to the process of loading coal at the preparation plant. *Wyant*, slip op. at 5-6, citing *Sexton v. Mathews*, 538 F.2d 88 (4th Cir. 1976), and *Norfolk & Western Ry. Co. v. Director, OWCP [Shrader]*, 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993).

On remand, the administrative law judge found that the decedent's work for Grose was not the work of a miner, and denied Peabody's motion to be dismissed as the responsible operator. The administrative law judge found that the coal which one witness described as unprocessed was coal that had been crushed and sized before the decedent hauled it to the load-out. The administrative law judge therefore found "that the miner was solely hauling processed coal from the tipple [sic]."³ Decision and Order on Remand at 3. The administrative law judge therefore concluded that the trucking runs to the load-out did not constitute coal mine employment. *Id.* The administrative law judge additionally found that the evidence did not establish that the decedent personally loaded coal at the preparation facility. *Id.* Finally, the administrative law judge found that the decedent did not perform a function integral to the process of loading coal at the preparation facility because he did not personally load coal, did not drop off empty trucks at the preparation plant to be loaded with processed coal, and, at best, was engaged in loading "ancillary to the commercial delivery and use of the processed coal." *Id.* Accordingly, the administrative law judge found that Peabody, not Grose, is the responsible operator.

On appeal, Peabody contends that the administrative law judge erred in finding that the decedent did not work as a miner for Grose and that Peabody is therefore the responsible operator. Grose has not responded to Peabody's appeal. The Director has filed a Motion to Remand, contending that the administrative law judge erred in finding that Peabody is the responsible operator. Peabody responds to the Director's Motion to Remand, urging the Board to reverse the finding that Peabody is the responsible operator rather than remand the case for further consideration.⁴

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

³ According to the witness, Stephen K. Grose, this particular coal did not go through the tipple. It had been through a crusher only. Hearing Transcript (Tr.) at 33.

⁴ The administrative law judge's finding that another employer, Triple J. Trucking, is not the responsible operator, is unchallenged on appeal. The finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations at 20 C.F.R. §§725.491(2000)-725.495(2000) establish certain criteria an employer must meet in order to be considered a responsible operator.⁵ One of these criteria is that the employer must have employed an individual as a miner. 20 C.F.R. §725.491(a)(2000)(providing that “any employer of a miner as defined in §725.202(a) shall, to the extent appropriate, be considered an operator for the purposes of this part”); 20 C.F.R. §725.202(a)(2000)(defining “miner” in relevant part as “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”).

To meet the definition of a miner while employed by Grose, the decedent must have performed job duties satisfying a two-step, situs-function test. *Glem Co. v. McKinney*, 33 F.3d 340, 341, 18 BLR 2-368, 2-371-72 (4th Cir. 1994). It is undisputed that the decedent worked in or around a coal mine or coal preparation facility, thus satisfying the situs requirement. *See Norfolk & Western Ry. Co. v. Roberson*, 918 F.2d 1144, 1148, 14 BLR 2-106, 2-112 (4th Cir. 1990). To satisfy the function requirement, the decedent “must have been employed in the extraction or preparation of coal” *Krushansky*, 923 F.2d at 41, 14 BLR at 2-143. In applying the function test, it is “critical” to determine “whether the coal [was] prepared for market,” *Id.*, before decedent came into contact with it.

Peabody contends that the administrative law judge erred in determining that all the coal the decedent picked up and hauled had completed the preparation stage. Stephen K. Grose, the trucking company owner, testified that the decedent hauled two types of coal from the mine’s preparation plant to a river load-out facility. Tr. at 29. According to Mr. Grose, the decedent hauled “processed” coal from the tipple, and “unprocessed” coal from “the yard” or “prep plant.” Tr. at 29-30, 33. The particular coal that Mr. Grose described as “unprocessed” was coal that had been put through a crusher and “sized” and “graded” and “put out in the yard” Tr. 30, 33. The administrative law judge found that since crushing and sizing are included in the definition of preparing coal, 30 U.S.C. §802(i); 20 C.F.R. §725.101(a)(25)(2000), “the miner hauled only processed coal” Decision and Order on Remand at 3. Thus, the administrative law judge found that this

⁵ The revised regulations governing the identification of the responsible operator, 20 C.F.R. §§725.491-725.495, apply prospectively only and thus do not apply to this claim. *See* 20 C.F.R. §725.2(c). Consequently, the prior responsible operator regulations apply to this case. *Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280 n.4 (2003)(McGranery, J., concurring).

particular coal was fully prepared for market before the decedent came into contact with it.

Upon review of this record, we are unable to determine whether the administrative law judge's finding is rational and supported by substantial evidence. Although the record supports a finding that this particular coal was partially prepared to the extent of crushing and sizing, the record does not reflect whether the work of preparing the coal for market was complete. See *Krushansky*, 923 F.2d at 41, 14 BLR at 2-143. Coal preparation includes "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine." 30 U.S.C. §802(i); 20 C.F.R. §725.101(a)(25)(2000). As the Board noted in its prior decision, it is not clear "whether the [crushed and sized] coal that the miner hauled was going to another preparation plant or was put into the stream of commerce." *Wyant*, slip op. at 5. Because the character of the coal handled by a worker is a "critical inquiry" in the function test, *Krushansky*, 923 F.2d at 41, 14 BLR at 2-143, we must vacate the administrative law judge's finding and remand the case to him for further consideration of whether the coal was prepared for market before the decedent worked with it. As the Director notes, the administrative law judge has the discretion on remand to reopen the record for the development of additional evidence on any issue that must be adjudicated where the record is incomplete. Director's Brief at 6; 20 C.F.R. §725.456(e)(2000); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146, 1-148 (1989)(McGranery, J., concurring).

Employer and Director contend that the administrative law judge did not properly consider the evidence under applicable law when he found that the decedent did not personally load coal, or perform a function integral to the process of loading coal, at the preparation facility. Upon review, we conclude that substantial evidence in the record as currently constituted supports the finding that the decedent did not actively participate in loading coal into his truck. Tr. at 20-21, 33. However, we agree that the administrative law judge did not consider correctly whether the decedent nevertheless performed work integral to the process of loading coal at the preparation facility.

In remanding this case previously, the Board noted that the delivery of empty rail cars to a preparation facility to be loaded with processed coal was held to satisfy the function test because it was a task integral to the process of loading coal at the preparation facility and therefore part of coal preparation. *Wyant*, slip op. at 5-6, discussing *Shrader*, 5 F.3d at 780, 18 BLR at 2-39. In the case at bar, it is undisputed that the decedent drove an empty truck to the preparation facility to be loaded with coal destined for the load-out. On remand, however, the administrative law judge stated summarily that "the miner did not drop off empty trucks at the preparation plant to be loaded with processed coal" Decision and Order on Remand at 3. Additionally, the administrative law judge stated that the decedent's work was distinguishable from that

involved in *Shrader* because decedent “did not aid in the loading” *Id.* In *Shrader*, however, the miner did not assist in loading; he delivered empty cars to the preparation plant to be loaded with processed coal by other workers, then returned to pick up the loaded cars. *Shrader*, 5 F.3d at 778, 780; 18 BLR at 2-36, 2-38. Finally, the administrative law judge distinguished *Shrader* on the ground that the decedent hauled processed coal from the preparation plant to the load-out for transport to its ultimate destination. Decision and Order on Remand at 3. In *Shrader*, however, the particular coal was processed as well; the relevant issue was not its transport to market but rather, its loading at the preparation facility.⁶ *Shrader*, 5 F.3d at 778, 780; 18 BLR at 2-36, 2-38. Because the administrative law judge did not supply a valid reason for declining to apply *Shrader* in the function test, we again instruct the administrative law judge on remand to reconsider whether the decedent performed a task “integral to the process of loading coal at the preparation facility” *Shrader*, 5 F.3d at 780; 18 BLR at 2-39.

Accordingly, the administrative law judge’s Decision and Order on Remand--Denying Motion to Dismiss is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁶ Moreover, we have vacated the administrative law judge’s finding that all of the coal handled by the decedent had completed the preparation stage.