U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 23-0091 BLA
and 23-0259 BLA

ROSEMARY M. STEPHEN (o/b/o and Widow of DAVID E. STEPHEN)	)	
Claimant-Petitioner	)	**PUBLISHED**
v.	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 03/20/2025
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decisions and Orders Denying Benefits on Remand of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long and Matthew A. Gribler (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for Claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for Employer.[1]

[1] Employer was previously represented by Kara L. Jones, of Feirich/Mager/Green/Ryan, in Carbondale, Illinois, who filed Employer's response brief. After briefing, but prior to a decision in this case, Feirich/Mager/Green/Ryan moved to withdraw as Employer's counsel. William S. Mattingly, of Jackson Kelly PLLC,

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant[2] appeals Administrative Law Judge (ALJ) Drew A. Swank's Decisions and Orders Denying Benefits on Remand (2020-BLA-05727 and 2020-BLA-05787) rendered on a miner's claim filed on May 9, 2017, and a survivor's claim filed on March 3, 2020, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Both claims are before the Board for the second time.

In his June 4, 2021 Decisions and Orders Denying Benefits, the ALJ found the Miner's work for Employer, which constituted the entirety of his alleged coal mine work, did not constitute coal mine employment because his duties did not satisfy the Act's definition of a miner. Thus, he denied benefits in both the miner's and the survivor's claims.

In consideration of Claimant's appeals, the Board affirmed the ALJ's finding that the Miner's work as a watchman did not constitute coal mine employment as it did not meet the Act's definition of a "miner." *Stephen v. Consolidation Coal Co.*, BRB Nos. 21-0474 BLA and 21-0476 BLA, slip op. at 4 (Sept. 27, 2022) (unpub.). However, the Board held the ALJ erred in finding the Miner's work as a weighmaster and shipping clerk did not constitute coal mine employment because he did not properly consider whether the Miner's specific duties were integral to coal preparation before the coal entered the stream of commerce to satisfy the function requirement of the Act's definition of a "miner." *Id.* at 4-5. The Board therefore vacated his finding that the Miner's duties fail to satisfy the function requirement and remanded the cases for further consideration. *Id.*

On remand, the ALJ again found the Miner's duties as a weighmaster and shipping clerk did not satisfy the function requirement and thus he did not qualify as a coal miner. 20 C.F.R. §725.202(a); MC Decision and Order on Remand at 6; SC Decision and Order [on Remand] at 6. The ALJ therefore denied benefits in both the miner's and the survivor's

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subsequently filed an Attorney Notice of Appearance on behalf of Employer. The Benefits Review Board grants Feirich/Mager/Green/Ryan's request to withdraw.

[2] Claimant is the widow of the Miner, who died on January 8, 2018, while his claim was pending before the district director. Miner's Claim (MC) Director's Exhibit 14; Survivor's Claim (SC) Director's Exhibit 3. She is pursuing the miner's claim on his behalf as well as her own survivor's claim. SC Director's Exhibits 1, 3-5.

claims. MC Decision and Order on Remand at 7; SC Decision and Order [on Remand] at 7.

On appeal, Claimant argues the ALJ erred in finding the Miner's work as a weighmaster and shipping clerk did not satisfy the function requirement and, thus, erred in determining he did not work as a coal miner. Claimant's Brief at 5-13. Employer responds in support of the denial of benefits. The Acting Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decisions and Orders if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965).

Definition of a Miner

A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility [the "situs" requirement] in the extraction or preparation of coal [the "function" requirement]." 30 U.S.C. §902(d); *see Navistar, Inc. v. Forester*, 767 F.3d 638, 641 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30 (6th Cir. 1989). To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal and not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922 (6th Cir. 1989).

Section 725.202(a) defines the term "miner" for purposes of Part 725, establishes "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner," and provides the method for rebutting this presumption:

> 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, and 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 rebuttable 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:

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 17; MC Director's Exhibit 4.

(1) The person was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site, or in 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.

20 C.F.R. §725.202(a) (emphasis added); *see also* 20 C.F.R. §725.101(a)(19) (defining the terms "miner" and "coal miner").[4] Thus, when an individual is found to have worked "in or around a coal mine or coal preparation facility," the person is entitled to a rebuttable presumption that he is, in fact, a miner. 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The burden then shifts to the employer to disprove that fact by establishing "[t]he person was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site" or "[t]he individual was not regularly employed in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a)(1)-(2).

The Miner worked for Employer as a weighmaster from July 12, 1965 to June 30, 1980, and as a shipping clerk from July 1, 1980 to August 30, 1984. MC Director's Exhibits 4, 5, 10. The ALJ found this work satisfies the situs requirement because it was performed in the vicinity of an operating strip mine. MC Decision and Order on Remand at 5; SC Decision and Order [on Remand] at 5. However, he found the Miner's duties were not integral to the extraction or preparation of coal and thus did not satisfy the function requirement. MC Decision and Order on Remand at 6; SC Decision and Order [on Remand] at 6.

[4] 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 or 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.

65 Fed. Reg. 79,920, 79,961 (Dec. 20, 2000).

Claimant argues the ALJ erred in finding the Miner's work as a weighmaster and shipping clerk did not satisfy the function requirement. Claimant's Brief at 10-12. We agree.

The regulations define "[c]oal preparation" as "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine." 20 C.F.R. §725.101(a)(13). However, working with processed coal that is already in the stream of commerce does not satisfy the function requirement. *Southard v. Director, OWCP*, 732 F.2d 66, 69-70 (6th Cir. 1984).

On his Form CM-913, Description of Coal Mine Work and Other Employment, the Miner indicated that when working as a weighmaster and shipping clerk, his office "was beside the prep plant" and he "weighed the coal cars and separated them," as well as "built up the train numbers on the computer." MC Director's Exhibit 5. Mr. Ewedosh, Employer's Manager of Occupational Health and Wellness, stated in an affidavit that the Miner worked as a weighmaster "in a shack down by the railroad tracks" weighing "the trains and trucks carrying processed coal" and worked as a shipping clerk "in an enclosed business office" doing "billing work." MC Director's Exhibit 7. At the hearing, Claimant testified she was not sure whether the coal was processed before the Miner weighed it, Hearing Transcript at 19-20, 27, but further indicated that when her husband was a weighmaster, the "coal was washed before being loaded into train cars to be weighed." MC Director's Exhibit 8.

Based on the evidence provided, the ALJ concluded the Miner's work weighing the rail cars occurred after they had already been loaded with processed coal and were some unknown distance from the tipple. MC Decision and Order on Remand at 6; SC Decision and Order [on Remand] at 6. Relying on the United States Court of Appeals for the Sixth Circuit's unpublished decisions in *Ray v. Brushy Creek Trucking Co.*, 50 F. App'x 659 (6th Cir. 2002),[5] and *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891 (6th

[5] *Ray v. Brushy Creek Trucking Co.*, 50 F. App'x 659, 661-62 (6th Cir. 2002), involved a claimant working on barges that transported coal to power plants. While the Sixth Circuit was careful to note it did not "establish a firm line where the preparation of coal ends and the entry into the stream of commerce begins," it held, under the specific facts of that case—where coal was delivered some distance by train from the mines to transfer stations where it was loaded by a conveyer onto barges—substantial evidence supported the ALJ's conclusion that the claimant's work on the barge did not involve the extraction or preparation of coal. *Id.* at 662.

Cir. July 18, 1994),[6] the ALJ found the coal had already entered the stream of commerce before it became part of the Miner's duties, and his duties could thus not be considered necessary for the preparation of coal. MC Decision and Order on Remand at 5-6; SC Decision and Order [on Remand] at 5-6.

The ALJ's finding that the Miner's work as a weighmaster and shipping clerk does not meet the definition of a coal miner is contrary to law and therefore cannot be affirmed. As the Board explained in its prior decision, the definition of "miner" comprises a "situs" requirement and a "function" requirement. *Forester*, 767 F.3d at 641; *Petracca*, 884 F.2d at 929-30. The Board also noted that when an individual is found to have worked "in or around a coal mine or coal preparation facility" (the situs requirement), he is entitled to a rebuttable presumption that he is, in fact, a miner. *Stephen*, BRB Nos. 21-0474 BLA and 21-0476 BLA, slip op. at 2-3 (quoting 20 C.F.R. §725.202(a)); *see also* 20 C.F.R. §725.101(a)(19). Thus, when the situs requirement is satisfied, the burden shifts to the employer to prove the person working in or around a coal mine or coal preparation facility is not a miner by establishing he "was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site" (the function requirement) or he "was not regularly employed in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a)(1)-(2).

As the Board observed in its prior decision, the ALJ determined the Miner's work satisfies the situs requirement because he performed it in the proximity of an operating strip mine. *Stephen*, BRB Nos. 21-0474 BLA and 21-0476 BLA, slip op. at 3 (citing MC Decision and Order at 5; SC Decision and Order at 5). However, it vacated his finding that the Miner's work did not meet the function requirement, holding the ALJ "applied the wrong legal standard because he focused on the condition of the coal — whether the Miner worked with raw or processed coal — and not whether the Miner's specific job duties were integral to coal preparation before the coal entered the stream of commerce." *Id.* at 5.

On remand, the ALJ again found the Miner's work "took place at an operating strip mine in satisfaction of the situs requirement." MC Decision and Order on Remand at 5;

[6] In *Ratliff v. Chessie System Railroad*, No. 93-3535, 1994 WL 376891 at *3 (6th Cir. July 18, 1994) (unpub.), a case involving a railway worker who maintained spur lines near tipples, the Sixth Circuit held "in the circumstances of [that] case, the final step of processing the coal (or 'preparation') ended when the coal was loaded into the railroad cars at the tipple; after that, the coal entered the stream of commerce and was no longer being 'prepared.'" Because the claimant in *Ratliff* was involved with maintaining the rail spurs on which the railroad cars were brought to the tipple for loading, his work was held to be integral to the processing of coal and, therefore, to be the work of a miner. *Id.*

SC Decision and Order [on Remand] at 5. Thus, Claimant is entitled to a rebuttable presumption that the Miner's work meets the definition of a miner. 20 C.F.R. §725.202(a). The burden therefore shifted to Employer to prove otherwise by establishing he "was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site" or he was "not *regularly* employed in or around a coal mine or coal preparation facility." 20 C.F.R. §725.202(a)(1)-(2) (emphasis added).

The ALJ, however, failed to shift the burden to Employer. Instead, he placed the burden on Claimant, stating "Claimant bears the burden" but "failed to prove that [the Miner's] work was necessary to coal preparation" because the evidence is "unclear" as to whether the coal he handled had already entered the stream of commerce. MC Decision and Order on Remand at 6; SC Decision and Order [on Remand] at 6. Thus, we hold the ALJ improperly shifted the burden of proof to Claimant to establish the Miner's work satisfies the function requirement under the definition of a "miner." Consequently, we vacate the ALJ's finding and remand the case for the ALJ to apply the proper burden of proof. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 277-78 (1994) (party with the burden of persuasion must prove its case by a preponderance of the evidence).

Nor can we affirm the ALJ's decision on the basis that he found "the evidence indicates that the coal was processed and loaded into coal cars before [the Miner] weighed" it. MC Decision and Order on Remand at 6; SC Decision and Order [on Remand] at 6. That finding simply repeats the error we identified in our first decision, as it focuses on whether the coal was processed (the factor we previously said was not controlling), not whether the Miner's work was integral to coal preparation before it entered the stream of commerce or the coal was already in the stream of commerce by the time the Miner weighed it.[7] *See Edd Potter Coal Co. v. Director, OWCP* [*Salmons*], 39 F.4th 202, 210 (4th Cir. 2022) (when the Board remands a case, the ALJ must comply with its instructions and implement both the letter and spirit of the mandate).

[7] Although the ALJ relied on *Ray* and *Ratliff*, neither case supports the conclusion that the degree to which the coal had been processed is controlling. In both cases, the court expressly limited its conclusions to the specific facts of the case before it and whether those facts, in combination, established that the miners' work was related to the preparation of coal before it entered the stream of commerce. *Ray*, 50 F. App'x at 662; *Ratliff*, No. 93-3535, 1994 WL 376891 at *3. Rather, the ALJ must consider and weigh the totality of the evidence to determine whether, under the facts of this specific case, Employer can prove the Miner "was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site." 20 C.F.R. §725.202(a)(1).

Because the ALJ did not properly consider whether Employer rebutted the presumption that the Miner's work as a weighmaster and shipping clerk constitutes that of a miner, we vacate his finding that the Miner's duties fail to establish the function requirement. *Stephen*, BRB Nos. 21-0474 BLA and 21-0476 BLA, slip op. at 3 (quoting 20 C.F.R. §725.202(a)); MC Decision and Order on Remand at 5-6; SC Decision and Order [on Remand] at 5-6; *see also* 20 C.F.R. §725.101(a)(19). Consequently, we vacate the ALJ's denial of benefits in the miner's and survivor's claims.

Remand Instructions

On remand, the ALJ must reconsider the relevant evidence and testimony to determine whether Employer put forth affirmative proof sufficient to rebut the presumption that the Miner's work as a weighmaster and shipping clerk constitutes that of a miner by establishing he "was not engaged in the extraction, preparation[,] or transportation of coal while working at the mine site" or was not "regularly" employed in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(a)(1)-(2). If the ALJ finds Employer has rebutted the presumption, he may reinstate the denial of benefits as Claimant will have failed to establish the Miner was engaged in the work of a miner. 30 U.S.C. §902(d); *Forester*, 767 F.3d at 641; *Petracca*, 884 F.2d at 929-30; 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). However, if he finds Employer has failed to rebut the presumption, he must then consider Claimant's entitlement to benefits in both the miner's and survivor's claims.[8] In reaching his conclusions on remand, the ALJ must set forth his findings in detail and explain his determinations, findings of fact, and conclusions of law in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).[9]

[8] If the ALJ awards benefits in the miner's claim on remand, Claimant would be automatically entitled to survivor's benefits under Section 422(*l*) of the Act. 30 U.S.C. §932(*l*) (2018).

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, requires every adjudicatory decision include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, we vacate the ALJ's Decisions and Orders on Remand and remand the case for further consideration consistent with this opinion.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge