U.S. Department of Labor

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

BRB No. 22-0408 BLA

DEWAYNE A. SHUMATE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAXUM PETROLEUM OPERATING COMPANY	)	
	)	
	)	DATE ISSUED: 9/06/2023
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order Awarding Benefits of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

T. Jonathan Cook (Cipriani & Werner, PC), Charleston, West Virginia, for Employer.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Jennifer Stocker (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Scott R. Morris's Decision and Order Awarding Benefits (2021-BLA-05353) rendered on a claim filed on March 13, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Employer is the responsible operator. He also found Claimant established 12.08 years of coal mine employment and complicated pneumoconiosis, thereby invoking the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Further, he determined Claimant's complicated pneumoconiosis arose out of his coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer asserts the ALJ erred in finding it is the responsible operator.[1] Claimant and the Director urge rejection of Employer's assertions.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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 (1965).

The responsible operator is the potentially liable operator that most recently employed the miner for a cumulative period of not less than one year.[3] 20 C.F.R.

[1] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 18-19.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 10; Hearing Transcript at 23.

[3] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) the miner's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed the miner for a cumulative period of not less than one year; d) at least one day of the employment must have occurred after December 31, 1969; and e) the operator must

§725.495(a)(1). The district director is initially charged with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is the responsible operator. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or that another "potentially liable operator" that is financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

Employer argues the ALJ erred in finding it is the responsible operator, contending Claimant's work for it does not constitute the work of a miner. Employer's Brief at 4-7 (unpaginated). We disagree.

A "miner" is "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). The Act's implementing regulations provide "a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." 20 C.F.R. §725.202(a); *see also* 20 C.F.R. §725.101(a)(19). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held duties that meet both situs and function requirements constitute the work of a miner as defined in the Act. *See Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 41 (4th Cir. 1991); *Collins v. Director, OWCP*, 795 F.2d 368, 372-73 (4th Cir. 1986); *Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 70 (4th Cir. 1981). Under the situs requirement, the work must take place "in or around" a coal mine or coal preparation facility; under the function requirement, the work must be integral or necessary to the extraction or preparation of coal. *Krushansky*, 923 F.2d at 41-42.

The ALJ summarized Claimant's testimony with respect to the nature and location of his employment. Decision and Order at 3-4, 10. Claimant described his work as a "fuel pumper" for Rogers Petroleum Services, and stated he did the same job under the same conditions for Employer. Hearing Transcript at 14-18, 22. He indicated this job required him to refuel the equipment at a surface mine. *Id*. at 14-18. The equipment he refueled included loaders and bulldozers. *Id*. at 25.

Claimant testified he would go into the "pit" to refuel equipment and explained the "pit" was the location of the mine where coal was extracted. Hearing Transcript at 14-15. He explained he would "pull [the] fuel hose out" from his truck, "kick on [the] pump for

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be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

fueling," "hook it up to the equipment[,] and stand there and watch [until] it fills." *Id*. at 16. Further, he stated he had to exit his vehicle to perform refueling and sometimes active mining was occurring when he performed his job. *Id*. at 15-16.

He specified the conditions were "always dusty," and he would breath in dust while in the pit. Hearing Transcript at 15-16, 20. In addition, he testified he worked twelve-hour shifts for Employer and spent three to four hours a day refueling equipment in the pit, with about one hour taking place during active mining. *Id*. at 18-19. Specifically, he estimated he would be in the "pit" when active mining was occurring at least once a day. *Id*. at 27. Moreover, he indicated the shop and storage fuel tanks, where he spent the remainder of his time, were on the mine site, and when he worked for Employer, the "pit" was right behind the shop or close enough that he could see it but "no more than a mile and a half." *Id*. at 18-19, 23, 28-30.

The ALJ found Claimant's testimony credible and sufficient to satisfy both the situs and function prongs. Decision and Order at 4-5. We first reject Employer's argument that the ALJ erred in finding Claimant's work meets the situs prong. Employer's Brief at 4-7 (unpaginated).

As discussed above, Claimant stated that he was in the "pit" on a daily basis, including when active mining was occurring, in order to perform his duties. Hearing Transcript at 14-16, 18-19, 27. He approximated that three to four hours of his work-day involved refueling equipment in the pit, with one hour of that work taking place while coal was being mined. *Id*. Further, he characterized the shop where he waited to perform his duties as being on the mine property and no more than one and one-half mile from the pit. *Id*. at 18-19, 23, 28-30. Thus, substantial evidence supports the ALJ's finding that Claimant's work took place "in or around" a coal mine or coal preparation facility. *See Krushansky*, 923 F.2d at 41-42; *Consol. Coal Co. v. Graham*, 725 F.2d 674 (4th Cir.1983) (unpub.) (affirming ALJ's finding that a central repair facility located from one and one-half to twenty miles from the coal mines it serviced was a covered situs); *Baker v. U.S. Steel Corp.*, 867 F.2d 1297 (11th Cir. 1989) (holding a miner's work met the situs test because he worked at a "centrally located repair shop maintained for the company's convenience."); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 931-35 (6th Cir. 1989) (in instances "where a mine operator maintains a repair shop in the general vicinity of one or more extraction sites in order to avail itself of the economies of an on-site repair facility, the shop should be presumed to be 'around a coal mine'" under the Act).

Further, the ALJ rationally found the function prong is satisfied because "[w]ithout the workers who perform [the] refueling and maintenance duties, [the] trucks and other coal mining equipment vehicles would not be able to operate, and the coal would not be

able to be transported from the extraction site." Decision and Order at 5; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997); *Krushansky*, 923 F.2d at 41-42; *see also Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 645-46 (6th Cir. 2014) (those "who perform tasks necessary to keep the mine operational and in repair" are generally classified as miners); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38, 1-41 (1992) (en banc) ("The repair of mining equipment . . . contributes to the extraction of coal and is integral to the coal production process."); *Pinkham v. Director, OWCP*, 7 BLR 1-55, 1-57 (1984) (employment by subsidiary of the operator loading, recharging, and delivering carbon dioxide cylinders on mine premises is integral to the extraction of coal).[4]

Employer also argues the record does not establish Claimant had 125 working days with it because he only refueled equipment for one hour daily when active coal mining was occurring and spent the remainder of his day waiting for another task.[5] Employer's Brief at 6-7 (unpaginated). Thus it disputes that Claimant worked for a cumulative period of not less than one year for it when the portion of his employment that involved him waiting in the shop is deducted. *Id.* This argument has no merit as a miner need not engage in coal

[4] Employer's reliance on two cases to support its argument that Claimant's work does not meet the function prong is misplaced. In *Rose v. Director, OWCP*, 10 BLR 1-63, 1-65 (1987), the Board held an individual who worked for an oil company and delivered gas, oil, and mining lubricants was not a coal miner because he did not enter the mine and merely dropped the product off before returning to his truck and driving back to the oil company. In contrast, Claimant's entire job kept him at the mine site, and he entered the pit where coal was extracted to refuel equipment, sometimes during active mining. Decision and Order at 5. Unlike the miner in *Rose*, Claimant did not merely drop off a delivery – he refueled equipment that was necessary to the extraction of coal and was at the mine site at all pertinent times. *Id.* It also cites a decision from the United States Court of Appeals for the Sixth Circuit where the court held an individual that delivered lunches to miners did not perform a task that was integral to the extraction or preparation of coal, but rather a task that was convenient and "not necessary" to the mining process. Employer's Brief at 7 (unpaginated), *citing Frost v. Director, OWCP*, 821 F.2d 649 (6th Cir. 1987) (unpub.). As the Director correctly argues, in contrast to a food delivery service, "mining operations cannot proceed without fuel to run the equipment used to extract the coal and transport it for processing." Director's Brief at 7.

[5] The regulations define "year" as "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" 20 C.F.R. §725.101(a)(32).

mine employment for an entire day in order to be credited with a full day of mining work.[6] *See* 20 C.F.R. §725.101(a)(32) ("A 'working day' means any day or part of a day for which a miner received pay for work as a miner."); *see also Bower*, 642 F.2d at 69-71 (refusing to hold that any minimum amount of time was required to be spent in coal mine employment activities despite acknowledging the claimant spent eighty-five percent of his time in covered employment activities).

As Employer raises no further argument, we affirm the ALJ's finding that Claimant's work for Employer constitutes coal mine employment. 20 C.F.R. §725.101(a)(19); Decision and Order at 5. We also affirm the ALJ's finding Employer is the properly designated responsible operator. Decision and Order at 11.

[6] Employer does not dispute that coal was mined on a daily basis from the mine site where Claimant worked. While Employer focuses on Claimant's testimony that coal was actively mined in his presence for one hour per day, he also testified he visited the pit, where the coal was extracted on a daily basis, for three to four hours per day and it was always dusty. Hearing Transcript at 15-16, 20. And although he "wasn't always in the pits when they [were] mining," he sometimes went into the pit right after the blasting crew had finished blasting. Hearing Transcript at 25-26. Thus, Employer's attempt to distinguish between Claimant's time in the pit during those hours of the day when mining was actively occurring, and his hours in the pit each day when mining was not ongoing, is unavailing both legally and factually.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge