

BRB Nos. 06-0792 BLA  
and 06-0792 BLA-A

LILLIAN MILAM	)	
(On Behalf of ALVIN W. MILAM)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BRAZIER MINE CONSTRUCTION,	)	
INCORPORATED	)	DATE ISSUED: 07/31/2007
	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent/Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Administrative Law Judge Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Sandra Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Denying Benefits (04-BLA-0112) of Administrative Law Judge Jeffrey Tureck 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). Claimant is pursuing benefits on behalf of her deceased husband. The decedent filed a claim on May 3, 1999 and subsequently died on May, 2002, while the case was pending before the Office of Administrative Law Judges. Director's Exhibits 1, 32. The district director identified employer as the responsible operator. A hearing was held at claimant's request, at which time employer argued that it should be dismissed as the responsible operator on the grounds that decedent was not a miner while he worked as a crane operator for employer. In his Decision and Order Denying Benefits (Decision and Order) issued on June 27, 2006, the administrative law judge determined that claimant's work as a crane operator did not occur in or around a coal mine, and thus, that the decedent had not worked as a miner for employer. Based on his determination that decedent did not qualify as a miner, the administrative law judge dismissed employer as the responsible operator and found that the Black Lung Disability Trust Fund (the Trust Fund) was liable for benefits. However, reviewing the claim on the merits of entitlement, the administrative law judge found that the medical evidence was insufficient to establish that the decedent suffered from coal workers' pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Claimant appeals, alleging, that the administrative law judge erred in finding that decedent was not a miner, that he erred in dismissing employer as the responsible operator, that he erred in determining the length of decedent's smoking history, and that he erred in finding that decedent did not have coal workers' pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a cross-appeal, requesting that, in the event the Board decides to vacate or reverse the administrative law judge's finding that decedent was not a miner, the Board should also vacate or reverse the administrative law judge's dismissal of employer as the responsible operator. Employer responds, asserting that the administrative law judge's responsible operator determination is not properly before the Board on appeal because claimant lacks standing to contest employer's dismissal as the responsible operator, and because the Director has failed to state his position on the responsible operator issue in this appeal. Employer contends that the administrative law judge's denial of benefits is supported by substantial evidence, although employer notes that it has no interest in the outcome on the merits so long as it is not held to be the responsible operator.

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

After consideration of the administrative law judge's Decision and Order, the evidence of record, and the briefs of the parties, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. We first address claimant's allegation that the administrative law judge erred in not finding that decedent was a miner under the Act.

The Act defines a miner as "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."<sup>1</sup> 30 U.S.C. §902(d); 20 C.F.R. §§725.101(a)(19),

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<sup>1</sup> The term "miner" is defined as the following:

[A]ny person who . . . worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who . . . 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.

20 C.F.R. §725.202(a). The term "coal mine" is defined as the following:

[A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. §725.101(a)(12). The focus of the situs inquiry is whether the intended use of the area of land on which the claimant worked was for the extraction or preparation of coal. *McKee v. Director, OWCP*, 2 BLR 1-804 (1980).

The phrase "coal preparation" is defined as the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of . . . coal, 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). An individual need not be engaged in the actual extracting or preparing of coal to meet the function test so long as the work performed is integral to the coal production process. *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990) (*en banc*).

725.202(a). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that this definition contains two elements, each of which must be satisfied.<sup>2</sup> *Director, OWCP v. Zeigler Coal Co. [Wheeler]*, 853 F.2d 529 (7th Cir. 1988); *Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988). First, the “situs” test requires work in or around a coal mine or coal preparation facility. Second, the “function” test requires performance of coal extraction or preparation work. *Wheeler*, 853 F.2d at 535. Thus, in order to satisfy both prongs, a claimant must have performed work in or around a coal mine or coal preparation facility and have been exposed to coal dust as a result thereof, and, the work must have been integral to the extraction or preparation of coal, and not merely ancillary to the delivery and use of prepared coal. *Id.*

The regulation at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), includes special provisions for coal mine construction workers. 20 C.F.R. §725.202(b). Construction workers are considered to be “miners” under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b). Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. 20 C.F.R. §725.202(b)(1). The presumption may be rebutted 1) by evidence which demonstrates that the individual was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility; or 2) by evidence which demonstrates that the individual did not work regularly in or around a coal mine or coal mine preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

Contrary to claimant’s assertion, the administrative law judge fully addressed all the documentary and oral evidence in considering whether decedent’s work qualified him as a miner under the Act. Decision and Order at 3-4. He also properly considered whether decedent’s work satisfied the situs prong of the situs/function test, as described in *Wheeler*. The Seventh Circuit held in *Wheeler* that the geographical distance from an extraction site is a proper factor to be considered in determining whether the situs requirement has been satisfied. *Wheeler*, 853 F.2d at 535. The court determined that the miner’s work at a central repair shop, located over one and one-half miles from the employer’s nearest mine, where equipment used in the employer’s coal mines was repaired, did not constitute work “around a coal mine;”<sup>3</sup> and therefore, that claimant had failed to satisfy the situs test.

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<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as decedent’s most recent, alleged coal mine employment occurred in Illinois. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

<sup>3</sup> The United States Court of Appeals for the Seventh Circuit also recognized the difficulty in determining what constitutes “around” a coal mine and “caution[ed] against

Applying the facts of *Wheeler* to the instant case, the administrative law judge, in a proper exercise of his discretion, concluded that the testimony of the witnesses in this case established that decedent's work did not occur in or around a coal mine, as required under the situs test. He thoroughly described decedent's alleged coal mine work as a crane operator, noting that the job involved the "building, disassembling and repairing" of draglines on sites that were located at least two miles, if not more, from the coal mine/extraction site. Decision and Order at 3. Based on relevant hearing testimony by the former owner of BMC (employer), in conjunction with the testimony of decedent's son, the administrative law judge found that: "while decedent was working for [employer], he never worked at or adjacent to the actual extraction site" and that decedent worked on "only one project which *might* have been situated closer than [one and one-half] miles from an extraction site and that lasted all of one month (emphasis added)." Decision and Order at 7. Additionally, the administrative law judge determined that decedent was not required to go to the extraction/mine site to perform any of his duties as a crane operator: "[Employer] was not responsible for transporting the dragline it had constructed to the actual coal extraction site; nor was it responsible for retrieving from the mine a dragline which was to be taken apart or repaired." Decision and Order Denying Benefits at 3; Hearing Transcript at 56-57, 62, 69. The administrative law judge also noted that during the majority of decedent's work, the mines were not in operation because employer was typically hired to assemble a dragline prior to when the surface mining was to begin, or they would disassemble a dragline in the process of reclamation of the surface mine. Decision and Order at 4. Furthermore, the administrative law judge found that "[v]irtually all the jobs [decedent] worked at were at least two miles from the coal extraction site: the job closest to the coal extraction site was still at least one-half mile, and perhaps as far as two miles from it." *Id.* Thus, because he considered the facts of the instant case to be consistent with the facts of *Wheeler*, that decedent's work as a crane operator did not occur in or around a coal mine or coal preparation facility, the administrative law judge found that decedent's work failed to satisfy the situs test, and that, therefore, he was not a miner for purposes of the Act. *Id.*

Although claimant asserts that the administrative law judge's description of decedent's work ignores that he was involved in "construction work," this argument has no merit, since a construction worker must still show that his work was performed "in or around a coal mine." See 20 C.F.R. §725.202(b)(2)(ii). Because the administrative law judge rationally determined that decedent was not a miner under the Act and regulations,

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an inflexible fixed-distance rule" that would deny coverage to claimants who worked in facilities that were adjacent to the actual extraction site and whose normal duties brought them into frequent contact with coal dust. *Director, OWCP v. Zeigler Coal Co. [Wheeler]*, 853 F.2d 529 (7th Cir. 1988).

and substantial evidence supports his conclusion, we affirm his finding pursuant to 20 C.F.R. §725.202. Furthermore, we affirm the administrative law judge's determination that employer is not the responsible operator, based on his finding that decedent was not a miner under the Act.<sup>4</sup> See 20 C.F.R. §725.493(a)(1).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Because the administrative law judge permissibly concluded that the evidence of record does not establish that decedent was a miner, claimant has not met her initial burden of proof under the Act and regulations. See 20 C.F.R. §§725.101(a)(19), 725.202(a). The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's determination that the evidence of record is insufficient to establish that decedent was a miner under the Act and regulations as it is supported by substantial evidence and is in accordance with law.

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<sup>4</sup> Because we affirm the administrative law judge's determination that decedent was not a miner, we need not consider the issues raised in the Director's cross-appeal.

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is hereby affirmed.

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