

BRB No. 12-0044 BLA

GLORIANNA HANSEN (o/b/o)
ELDON HANSEN))
)
Claimant-Respondent)
)
v.)
)
THE WACKENHUT CORPORATION) DATE ISSUED: 10/24/2012
)
Employer-Petitioner)
)
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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Stephenson D. Emery (Williams, Porter, Day & Neville, P.C.), Casper, Wyoming, for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2003-BLA-5945) of Administrative Law Judge William S. Colwell, awarding benefits with respect to a claim filed on July 16, 2001, pursuant to the provisions of the Black Lung Benefits Act, 30

U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for a second time. In its previous Decision and Order, the Board vacated the administrative law judge's determination that claimant's work as a security guard did not satisfy the definition of a miner, as the administrative law judge did not properly resolve a conflict in the evidence regarding the nature of claimant's employment.¹ *Hansen v. The Wackenhut Corp.*, BRB No. 09-0179 BLA (Nov. 27, 2009)(unpub.).

On remand, the administrative law judge determined that, because a number of the duties that claimant performed as a security guard were similar to those of a mine inspector, claimant met the definition of a miner, as set forth in 20 C.F.R. §725.202(a). The administrative law judge then found that employer was properly identified as the responsible operator and that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Therefore, the administrative law judge awarded benefits.

On appeal, employer argues, in its brief and reply brief, that the administrative law judge erred in finding that claimant met the definition of a miner pursuant to 20 C.F.R. §725.202. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's determination that claimant's duties as a security guard qualified as the work of a miner and affirmance of the award of benefits.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the miner, Eldon Hansen, who died on July 9, 2009. In its Memorandum of Law in Support of Petition for Review, employer asserted that, because claimant had died, any decision on his claim is moot. Claimant's surviving spouse subsequently filed a motion asking the Board to make her a party to the case, based upon her status as personal representative of the miner's estate. The Board granted the motion, holding that the case was not moot as, pursuant to 20 C.F.R. §725.545(c), there are individuals eligible to receive payments on an award of benefits in a claim filed by a miner who dies before the adjudication of his or her claim is complete. *Hansen v. The Wackenhut Corp.*, BRB No. 12-0044 BLA (July 18, 2012)(unpub. Order).

² The record indicates that claimant worked for employer in Wyoming. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

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

The definition of a miner includes “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 preparation facility.” 30 U.S.C. §902(d), as implemented by 20 C.F.R. §725.202(a). In *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985), the Board set forth a three-prong test of status, function and situs, for determining whether the definition of a miner has been satisfied. In the present case, the issue before the administrative law judge on remand was whether claimant’s work as a security supervisor satisfied the function test, which requires that the work be integral to the extraction or preparation of coal, and not merely ancillary to the delivery and use of processed coal. *Whisman*, 8 BLR at 1-97.

The administrative law judge initially noted the Board’s statement that “the administrative law judge has failed to properly explain why certain aspects of claimant’s job duties . . . which appear similar to that of a mine safety inspector, do not qualify claimant as a miner.” Decision and Order on Remand at 3, *quoting Hansen*, slip op. at 5. Accordingly, the administrative law judge indicated that, relying upon the definitions set forth in the Dictionary of Occupational Titles (DOT), he would compare the duties of a security guard to those of a mine inspector. The administrative law judge determined that claimant’s description of these duties was entitled to greater weight than the hearing testimony provided by the branch manager, who began working for employer twelve years after claimant’s tenure ended. *Id.* at 7-8. The administrative law judge found:

. . . Mr. Hansen performed some duties similar to those of a mine inspector, *i.e.* inspecting the mine site (including “the pit”) for health and safety hazards, inspecting areas of the mine site for dangerously placed or defective electrical and mechanical equipment, and other hazardous conditions, and directing emergency procedures. The Board has held that a mine inspector may be a “miner” under the Act because s/he performs duties that are “an integral part of the preparation or extraction of coal.” *Bartley v. Director, OWCP*, 12 BLR 1-89 (1988); *Uhl v. Consolidation Coal Co.*, 10 BLR 1-72 (1987); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981). Based on the similarities between duties performed by [c]laimant and the DOT listing of duties performed by a “mine inspector,” it is determined that [c]laimant is a “miner” within the meaning of the Act and implementing regulations.

Id. at 8. The administrative law judge also acknowledged employer’s contention that several of claimant’s duties were more similar to the DOT classification of a security

guard, but adopted the Director's position that a person's entire employment constitutes the work of a miner if any part of his or her duties satisfies the definition of a miner. *Id.* Thus, the administrative law judge concluded that claimant was a miner pursuant to 20 C.F.R. §725.202(a).

Employer alleges that, in rendering his finding, the administrative law judge did not comply with the Board's remand instructions and did not explain his findings in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a). Employer further argues that the administrative law judge erred in determining that claimant performed the work of a miner, as his duties were not related to the extraction of coal and he did not have the authority to enforce compliance with health and safety rules. In support of its contention, employer states that, under similar facts, the United States Court of Appeals for the Sixth Circuit held that a security guard was not a miner because his duties did not involve the production or extraction of coal. Employer's Brief at 3, *citing Falcon Coal Co., Inc. v. Clemons*, 873 F.2d 916, 12 BLR 2-271 (6th Cir. 1989). Employer also notes the court's statement that individuals who perform tasks that are merely convenient, but not vital or essential to extraction or preparation of coal, are generally not classified as miners. *Clemons*, 873 F.2d at 922-923, 12 BLR at 2-279. Although employer acknowledges that the Sixth Circuit held in a subsequent case that a night watchman was a miner, it maintains that the current case is distinguishable and that the Sixth's Circuit's ruling has no precedential value in the Tenth Circuit. Employer's Brief at 5, *citing Sammons v. EAS Coal Company*, 1992 WL 348976 at *2 (6th Cir. Nov. 24, 1992). Finally, employer contends that claimant performed duties that conformed more closely to the definition of a security guard, than to the definition of a mine inspector, as claimant did not perform inspections to maintain compliance with health and safety laws or contractual agreements.

Upon reviewing the administrative law judge's Decision and Order on Remand and the parties' arguments on appeal, we hold that the administrative law judge's finding, that claimant's work as a security guard qualified as the work of a miner, is rational and supported by substantial evidence. An administrative law judge is granted broad discretion in assessing the evidence, making credibility determinations, and rendering findings of fact. *See Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 24 BLR 2-155 (10th Cir. 2009); *Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-334 (10th Cir. 1996); *Hansen v. Director, OWCP*, 984 F.2d 364, 17 BLR 2-48 (10th Cir. 1993). In the present case, the administrative law judge acted within his discretion in determining that claimant performed tasks that, like those of a mine inspector, were integral to the extraction or preparation of coal, as they ensured the safety of mining operations. *See Whisman*, 8 BLR 1-97. Contrary to employer's assertion, the fact that claimant did not have the authority to enforce compliance with health and safety rules does not conflict with the administrative law judge's finding. *Id.*

We also reject employer's contention that the administrative law judge did not comply with the Board's instructions on remand, or the APA. The administrative law judge correctly identified the relevant evidence, rendered findings on the issues of fact and law before him, and set forth the underlying rationales. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 2-8. We affirm, therefore, the administrative law judge's determination that claimant's work constituted the work of a miner pursuant to 20 C.F.R. §725.202(a). *See Oliver*, 555 F.3d at 1217, 24 BLR at 2-164; *Hansen*, 984 F.2d at 368, 17 BLR at 2-54.

Regarding the merits of the claim, employer has not challenged the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal employment at 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Consequently, we affirm these findings and further affirm the award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order on Remand, awarding benefits, is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge